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Casenotes and Comments

VARSLTY BLUES: STUDENT ATHLETE UNIONIZATION IS THE WRONG WAY FORWARD TO REFORM COLLEGIATE ATHLETICS

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The National Collegiate Athletic Association (“NCAA”) and American collegiate athletics model are under intense scrutiny, both in the court of law and public opinion. While the end goals to reform the lackluster education standards and to cease the exploitation of student athletes are necessary and legitimate, the same cannot be said of the means by which some groups and commentators seek to do so. For example, the recent decision by a Regional Director (“RD”) of the National Labor Relations Board (“the Board”) in the *Northwestern University*¹ (“NWU”) case finding scholarship football student athletes to be “employees” within the meaning of Section 2(3) of the National Labor Relations Act (“the Act”) violates established precedent and inappropriately thrusts labor union norms into the realm of higher education.² Board precedent and statutory interpretation of the Act demonstrate that student athletes on scholarship at a university are not—and were never intended to be—employees of their university within the meaning of the Act.³ On review, the Board should therefore reverse the RD’s

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Varsity Blues is a reference to the 2011 song by the artist known as Wale, in which he, as a former student athlete, describes the problems he sees in the collegiate athletic model. WALE, VARSITY BLUES (The Board Administration 2011).

1. Nw. Univ. Emp’r & Coll. Athletes Players Ass’n (CAPA), Case 13-RC-121359, at *2 (N.L.R.B. Region 13 Mar. 26, 2014), available at <http://www.nlr.gov/case/13-RC-121359> [hereinafter *NWU*].

2. See *infra* Part II.A.2. One of thirty-two different regional directors first hears a petitioner’s case before it is appealed to the five-member Board panel.

3. See *infra* Part II.A. Note that the members of the Board are not Article III judges and are thus not bound to the doctrine of stare decisis in the same way that Article III judges are. *Interstate Tel. Co-op., Inc. v. Pub. Utils. Comm’n*, 518 N.W.2d 749, 752 (S.D. 1994) (citing *Motor*

decision or, in the alternative, vacate the RD's decision and decline jurisdiction.

By involving itself in this issue, the Board risks creating severe unintended consequences⁴ and further complicating the matter due to its limited jurisdiction.⁵ Instead, this Comment recommends the NCAA should drive efforts to remedy the exploitative collegiate athletics model and focus on what is best for the student athlete in the long term—obtaining an education and degree.⁶ The NCAA, more than the Board or a state legislature, is best positioned to enact equitable, uniform, and effective reforms. These reforms should include allowing student athletes to profit from the use of their image and likeness,⁷ and reemphasizing the “student” in student athlete by ensuring that student athletes have the opportunity to succeed in the classroom.⁸

The *NWU* case places the fate of student athletes across the country at a crossroads: the cold economics of an employment relationship in one direction and a warm and strong educational environment in the other. This Comment strongly supports the latter, recognizing that universities are a place where all those pursuing degrees are primarily students and must be treated as such, with the goal of providing the knowledge and skills necessary for a successful career—not temporary employment. Although universities provide student athletes with full-ride scholarships, one must ask whether these “free educations” are also free of educational value. Instead of shortsightedly changing collegiate athletics to make student athletes athletic employees of their university, a renewed emphasis on education would be the wiser reform, fulfilling the university mission of preparing its students for a long and prosperous career.

I. BACKGROUND

Since Congress passed the Act in 1935 as a remedy to industrial workplace tensions and inequalities, the Board has applied it to universities in conflicting ways. Initially loath to find the Act applicable to an academic setting, the Board later interpreted the definition of “employee” under Section 2(3) to preclude graduate assistants (“GAs”) and similar students who received financial aid in return for duties from statutory coverage.⁹ The

Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 57 (1983)) (“Both federal and state courts have repeatedly noted, however, that administrative agencies are not bound by stare decisis as it applies to previous agency decisions.”).

4. See *infra* Part II.B.

5. See *infra* Part II.C.

6. See *infra* Part II.D.

7. See *infra* Part II.D.1.

8. See *infra* Part II.D.2.

9. E.g., *Adelphi Univ.*, 195 N.L.R.B. 639 (1972) (finding graduate assistants were not university employees under the Act).

Board departed from that precedent in *New York University*,¹⁰ where it used the common law employee test to find that the Act did cover such students.¹¹ Shortly after, however, the Board overturned that decision in *Brown University*¹² and returned to precedent finding that GAs were not university employees under the Act.¹³ Recently, scholarship football players at NWU awakened the debate over the employment status of students receiving financial aid after a RD granted their petition to be labeled employees under the Act.¹⁴

A. *Congress Enacted the National Labor Relations Act to Cure Industrial Workplace Strife*

In 1935, Congress enacted the Act to encourage collective bargaining as a means of addressing industrial strife and inequality in bargaining power between private sector employees and employers, with the end goal of improving wages and working conditions.¹⁵ Congress declared that the denial of basic rights to organize, to collectively bargain, and to work under safe conditions not only harmed the general welfare of employees but also of the national economy as a whole.¹⁶ The Act established the right for workers to self-organize and choose their own representative to negotiate their employment terms and conditions.¹⁷ To further this objective, the Act created the Board as the enforcing agency.¹⁸

If workers wish to organize as a union with collective bargaining rights, they must petition the Board to grant them those rights. As a prerequisite, the employer must be an “employer” as defined by the Act, and, as follows, the employees must meet the Act’s definition of “employee.”¹⁹ Section 2(3) of the Act reads “The term ‘employee’ shall include any employee”²⁰ and then lists employees exempted from statutory coverage.²¹ With little guidance from the ambiguous statute as to what groups

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

11. *Id.* at 1205.

12. *Brown Univ. & Int’l Union*, 342 N.L.R.B. 483 (2004).

13. *Id.* at 483.

14. *NWU*, Case 13-RC-121359, at *13 (N.L.R.B. Region 13 Mar. 26, 2014), available at <http://www.nlr.gov/case/13-RC-121359>.

15. 29 U.S.C. § 151 (2012).

16. *Id.*

17. *Id.*

18. *Id.* § 153.

19. *Id.* § 152(2)–(3). For the full statutory definition of § 152(3) (on employees) see *infra* note 21.

20. *Id.* § 152(3).

21. *Id.* § 152(3) (“The term ‘employee’ . . . shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employ-

constitute statutory employees, the Board, as the delegated expert agency, has been instrumental in forming the governing law.²²

B. The Majority of Board Precedent Determined That Students Working Part-Time for Their University Are Primarily Students, Not Employees

This Section traces the Board's involvement in decisions regarding whether students providing part-time services to their university while also receiving financial aid are employees under the Act. As the student-athlete-employee issue in *NWU* is one of first impression, analogous cases involve GAs or medical interns.²³ GAs, along with their related peers, like scholarship student athletes, are enrolled as degree-seeking students at a university and are expected to partake in certain activities in order to receive their financial aid.²⁴ Therefore, an understanding of the treatment of GAs with respect to Section 2(3) of the Act provides important context for the student athlete issue.

The majority of the Board's cases on GA petitions exclude students from statutory coverage on the basis that being "primarily a student" precluded them from being an "employee" under the Act.²⁵ The Board often justifies these decisions by stating collective bargaining rights would infringe upon traditional academic freedoms and that students, as degree-seeking individuals, are at their respective university in an educational and not an economic or employment relationship.²⁶

1. 1970–1999: The First Phase of Board Cases Denied Student-Petitions for Employee Status

It was not until 1970 that the Board first recognized *private* nonprofit universities as employers under the Act, giving it the prerequisite jurisdic-

er subject to the Railway Labor Act as amended from time to time, or by any other person who is not an employer as herein defined.").

22. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984) ("[T]he task of defining the term 'employee' is one that 'has been assigned primarily to the agency created by Congress to administer the Act.'" (quoting *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 130 (1944))).

23. Graduate Assistants, when used in this article, includes research assistants, teaching assistants, and fellows. For a full explanation of medical interns, see *infra* note 35.

24. *Compare Adelphi Univ.*, 195 N.L.R.B. 639, 640 (1972) (noting that to maintain their financial aid, the GAs must: (1) be enrolled as degree-seeking students, (2) maintain a full-time student credit load, and (3) spend a mandatory amount of time in their duties), *with NWU*, Case 13-RC-121359, at *9 (N.L.R.B. Region 13 Mar. 26, 2014), available at <http://www.nlr.gov/case/13-RC-121359> (imposing the same three requirements on the student athletes).

25. *E.g.*, *Brown Univ. & Int'l Union*, 342 N.L.R.B. 483, 487 (2004) (finding GAs are primarily students, not employees).

26. *Id.* at 490 (citing *St. Clare's Hosp. & Health Ctr.*, 229 N.L.R.B. 1000, 1003 (1977)) ("[T]he Board concluded that collective bargaining would unduly infringe upon traditional academic freedoms.").

tion to rule on whether students were employees of their university.²⁷ Shortly after, the Board denied petitions from GAs at Adelphi University²⁸ and at Stanford University²⁹ by determining that the petitioners were primarily students and thus not employees under the Act.³⁰ The Board in both cases reasoned that the GAs were only at the university performing their duties because of their enrollment in pursuing a degree.³¹ The fact that the GAs performed services (grading, teaching, or research) in order to receive their financial aid packages did not make them employees under the Act.³² To the contrary, in *Stanford*, the Board stressed the fact that the GAs received the same amount of financial aid regardless of their tasks, hours worked, or work quality as supporting the conclusion that the purpose of their duties was to further academic growth and was not employee-based.³³ The Board distinguished the Stanford GAs from the employee-designated research associates, since the latter had already received their degree, were no longer enrolled as students, and could be fired.³⁴

Shortly after *Stanford*, the Board denied employee designation petitions from medical interns and residents in *Cedars-Sinai Medical Center*³⁵ and *St. Clare's Hospital*³⁶ on the basis that they were each primarily students and not employees under the Act.³⁷ The Board in *Cedars-Sinai* used the justification from *Stanford* in reasoning that the fact that the financial aid the petitioners received was not dependent on the nature, the quality, or the amount of time spent on their work showed that no employment rela-

27. Cornell Univ., 183 N.L.R.B. 329, 331 (1970). The emphasis on *private* universities is because the Act excludes federal or state institutions (e.g., public universities) from coverage. 29 U.S.C. § 152(2) (2012) (“The term “employer” . . . shall not include the United States . . . or any State of political subdivision thereof . . .”). Collective bargaining rights for public state employees are governed by their respective state’s labor laws. MILLA SANES & JOHN SCHMITT, CENTER FOR ECONOMIC AND POLICY RESEARCH, REGULATION OF PUBLIC SECTOR COLLECTIVE BARGAINING IN THE STATES 3 (Mar. 2014), available at <http://www.cepr.net/documents/state-public-cb-2014-03.pdf>.

28. *Adelphi*, 195 N.L.R.B. at 639.

29. The Leland Stanford Junior Univ., 214 N.L.R.B. 621 (1974).

30. *Adelphi*, 195 N.L.R.B. at 640; *Stanford*, 214 N.L.R.B. at 623.

31. *Adelphi*, 195 N.L.R.B. at 640.

32. *Id.*; *Stanford*, 214 N.L.R.B. at 622.

33. *Stanford*, 214 N.L.R.B. at 621–22.

34. *Id.* at 623. In contrast, Stanford could not fire the GAs since they were students seeking a degree; therefore even if they failed to perform their duties in a satisfactory manner, the only repercussion would be a non-passing grade. *Id.*

35. *Cedars-Sinai Med. Ctr.*, 223 N.L.R.B. 251 (1976). The term “intern” is specific to its medical context: “An intern is a medical school graduate serving his first period of graduate medical training in a hospital. Most states, including California, require an internship of 1 year to qualify for the examination to practice medicine. A resident is a physician who has completed an internship and serves a period of more advanced training, lasting from 1 to 5 years, in a specialty.” *Id.* at 251.

36. *St. Clare's Hosp. & Health Ctr.*, 229 N.L.R.B. 1000 (1977).

37. *Cedars-Sinai*, 223 N.L.R.B. at 251; *St. Clare's*, 229 N.L.R.B. at 1003.

tionship existed.³⁸ Although the petitioning students in *Cedars-Sinai* spent more time on direct patient care duties than in a traditional classroom setting, the Board noted that these duties were required aspects of the student-training program, making them a necessary component of their education.³⁹ The petitioning students therefore were at Cedars-Sinai as part of an educational—not employment—relationship.⁴⁰

In *St. Clare's*, the Board explained why a student-employment relationship would be inappropriate for an educational setting. The Board emphasized that a student and university share a mutual interest in educational development, a mutual relationship interest foreign to collective bargaining and a true employment environment.⁴¹ The process of collective bargaining, the Board explained, would harm the personal academic nature of the student-university relationship.⁴² The Board cautioned that, “From the standpoint of national labor policy, subjecting academic decisionmaking to collective bargaining is at best of dubious value because academic concerns are largely irrelevant to wages, hours, and terms and conditions of employment.”⁴³ The egalitarian goals of collective bargaining run contrary to the hierarchical structure of higher education where professors and officials, with their superior experience and knowledge, know what is best for a student’s academic growth.⁴⁴ Lastly, the Board stated that collective bargaining would impose on traditional values of academic freedom, like the rights of faculty to determine course requirements (materials, length, GPA standards, and exam rules) and of school officials to determine academic progression and dismissal standards.⁴⁵

2. 1999–2000: The Board Briefly Diverged from Precedent and Granted Employee Status to Student Petitioners

In deciding the current NWU student athlete case, the RD used the common law master-servant test to find employee status under the Act.⁴⁶ The common law test is the only means by which the Board has found student petitioners to be employees within this issue; however, the Board has only used this test in dissenting opinions and outlier cases.⁴⁷

38. *Cedars-Sinai*, 223 N.L.R.B. at 252.

39. *Id.* at 253.

40. *Id.*

41. *St. Clare's*, 229 N.L.R.B. at 1002.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 1003.

46. *NWU*, Case 13-RC-121359, at *13 (N.L.R.B. Region 13 Mar. 26, 2014), available at <http://www.nlr.gov/case/13-RC-121359>.

47. See, e.g., *Cedars-Sinai Med. Ctr.*, 223 N.L.R.B. 251, 254 (1976) (Fanning, Member, dissenting).

The first time the common law master-servant test appeared in a Board decision concerning this issue was in a dissenting opinion by Member Fanning in *Cedars-Sinai*.⁴⁸ Fanning referred to the circular definition of Section 2(3) as indicative of Congressional intent to invoke the ordinary meaning of the term “employee,” that is, the common law “master-servant” meaning.⁴⁹ Fanning quoted the common law definition of a servant as a “person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other’s control or right of control.”⁵⁰ Using this definition, Fanning concluded that the interns and residents were employees.⁵¹ Fanning similarly dissented in *St. Clare’s*.⁵²

The first time a majority of the Board accepted the common law test and found petitioning students to be employees under the Act occurred in *Boston Medical Center*.⁵³ There, the Board overturned the RD and concluded that although the petitioning medical interns and residents were there to learn, they were also employees under the Act.⁵⁴ The petitioning students, like those in *Cedars-Sinai* and *St. Clare’s*, had graduated medical school and were in the mandatory residency program to practice their desired medical specialty.⁵⁵ Similar to how GAs split time between the classroom and their duties, residency programs consist of both classroom lectures by faculty and clinical training with patients.⁵⁶ Unlike the GAs, however, the petitioners received compensation for their duties with salaries and benefits akin to hospital employees.⁵⁷

The Board in *Boston Medical* used the common law master-servant test to conclude that the petitioners were employees under Section 2(3).⁵⁸

48. *Id.*

49. *Id.* Recall the circular 29 U.S.C. § 152(3) (“The term “employee” shall include any employee . . .”).

50. *Cedars-Sinai*, 223 N.L.R.B. at 254–55 (citing RESTATEMENT (SECOND) OF AGENCY § 2 (1957) (“A servant is an agent employed by a master to perform services in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master.”)).

51. *Id.*

52. *St. Clare’s Hosp. & Health Ctr.*, 229 N.L.R.B. 1000, 1009 (1977) (Fanning, Chairman, dissenting).

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

54. *Id.* at 168.

55. *Id.* at 153. The Board therefore purported to overrule *Cedars-Sinai* and *St. Clare’s* in this decision. *Id.* at 152.

56. *Id.* at 153.

57. *Id.* at 156.

58. *Id.* at 160. The Supreme Court, regarding the interpretation of “employee” under Section 2(3), stated: “In the past, when Congress has used the term “employee” without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine.” At the same time, when reviewing the Board’s interpretation of the term ‘employee’ as it is used in the Act, we have repeatedly said

By citing to Member Fanning's dissent in *Cedars-Sinai*, the Board argued that when Congress uses "employee" as broadly as it did in Section 2(3), the common law test for its plain meaning is appropriate.⁵⁹ The plain meaning of "employee," the Board stated, is any person who works for another, under their control, in return for compensation.⁶⁰ Therefore, since the petitioners worked for Boston Medical, under its control, and received compensation, they were employees.⁶¹ The Board distinguished the petitioners from traditional students by noting that they do not take classroom exams or receive grades; instead, their entire educational experience at Boston Medical is to gain sufficient clinical experience and knowledge to become medical board-certified.⁶²

One year later, with *Boston Medical* as its support, the Board ruled that GAs at New York University ("NYU") were employees under the Act.⁶³ The Board, as it did in *Boston Medical*, stressed that being primarily a student does not preclude also being an employee under the Act.⁶⁴ The Board cited to Supreme Court precedent in broadly interpreting the term "employee" in Section 2(3).⁶⁵ By accepting the Supreme Court's holding in *Sure-Tan*, the Board opened statutory inclusion to anyone not explicitly listed in the exceptions to Section 2(3).⁶⁶

Consistent with *Boston Medical* and Member Fanning's dissents, the Board employed the common law test to find that the GAs were employees.⁶⁷ The Board reasoned that since the GAs performed duties under

that "[s]ince the task of defining the term "employee" is one that "has been assigned primarily to the agency created by Congress to administer the Act," . . . the Board's construction of that term is entitled to considerable deference.'" *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 94 (1995) (citations omitted).

59. *Boston Medical*, 330 N.L.R.B. at 160.

60. *Id.*

61. *Id.*

62. *Id.* at 161.

63. *N. Y. Univ.*, 332 N.L.R.B. 1205, 1218 (2000).

64. *Id.* at 1206; *Boston Medical*, 330 N.L.R.B. at 161.

65. *N. Y. Univ.*, 332 N.L.R.B. at 1205 (citing *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 91–92 (1995) (upholding the Board's broad and literal interpretation of "employee" in Section 2(3) to include a worker who was also a paid union organizer); and *Sure-Tan Inc. v. NLRB*, 467 U.S. 883, 891–92 (1984) (finding that only groups specifically exempted in Section 2(3) are excluded from coverage, therefore petitioning undocumented aliens are employees under the Act)). *But see Int'l Org. of Masters, Mates & Pilots of Am., Inc. v. NLRB*, 351 F.2d 771, 777 (D.C. Cir. 1965) (finding that petitioning ship masters, mates, and pilots, who were not specifically exempted in Section 2(3), were nevertheless not employees). In contrast with the student athlete issue, there was no dispute in *Town & Country* or *Sure-Tan* on whether the petitioners were in an employment relationship with their employer.

66. *N. Y. Univ.*, 332 N.L.R.B. at 1205.

67. *Id.* at 1205–06 (citing *Town & Country Elec.*, 516 U.S. at 93–95 (holding that an individual is an employee under the common law master-servant test when there is a relationship in which a servant performs services for another, under the other's control, and in return for payment)).

NYU's supervision for pay (financial aid), they were in a master-servant relationship.⁶⁸ The Board dismissed NYU's contention that allowing the GAs to gain collective bargaining rights would infringe on academic freedoms, since it was simply giving the parties an opportunity to negotiate.⁶⁹ The Board implied that there would be no negative effects from extending collective bargaining rights to *students* by stating that in the thirty years since it first allowed *faculty* to form collective bargaining units, there had been no adverse effects on academic freedoms.⁷⁰

3. 2004–Present: The Board Quickly Returned to Its Precedent and Overruled NYU

Four years later, the Board explicitly overruled NYU in *Brown University*.⁷¹ In doing so, the Board returned to the twenty-five years of case law preceding *Boston Medical* and found that GAs are primarily students in an educational relationship with their universities and not statutory employees in an economic relationship.⁷² The Board considered four factors in finding that the GAs were not employees: (1) the GAs' status as students, (2) the role of their GA duties in graduate education, (3) the GAs' relationship with the faculty, and (4) the financial aid the GAs received to attend Brown.⁷³ As to the first and second factors, unlike in NYU, the Board explained that most departments at Brown required graduate students to be a GA to obtain a degree.⁷⁴ Third, faculty played an integral role in the GAs' educational development.⁷⁵ Lastly, all GAs generally received equal financial aid regardless of the department, nature, quality, or amount of their work.⁷⁶

The Board conceded that *Boston Medical* claimed to overrule the decisions in *St. Clare's* and *Cedars-Sinai*, but it distinguished *Boston Medical* from its case at hand by the fact that the interns and residents in *Boston Medical*—unlike the GAs at Brown—had already graduated medical school

68. *Id.* at 1206.

69. *Id.* at 1208. The Board stated that the long history of the Act demonstrates that collective bargaining has been able to adjust to all sectors of the evolving economy. *Id.*

70. *Id.* (citing *Boston Medical*, 330 N.L.R.B. at 164–65 (finding no evidence that collective bargaining would make the employees demand concessions that would interfere with the employer's educational mission)).

71. *Brown Univ. & Int'l Union*, 342 N.L.R.B. 483 (2004).

72. *Id.* at 483, 489. This longstanding precedent, the Board noted, was never overturned in court or Congress. *Id.* at 483.

73. *Id.* at 489.

74. *Id.* at 484–85, 488.

75. *Id.* at 489.

76. *Id.* at 484. The GA tasks varied widely by department and did not influence the stipend amount. The fellows did not partake in “services” under faculty guidance to receive their stipend, they simply completed a dissertation. *Id.*

and were not degree-seeking students.⁷⁷ Indeed, enrollment as a degree-seeking Brown student was a prerequisite for the GAs' financial aid consideration.⁷⁸

The Board justified its return to pre-*NYU* precedent by reviewing the original intent of the Act and concluded that the fundamental premise of the Act was to cover economic—not educational—relationships.⁷⁹ The Board cited to Congress's failure to enact legislation contrary to its pre-*NYU* precedent as evidence that Congress approved of GAs not being employees.⁸⁰ The Board thus analyzed Section 2(3) under the principle that "a reviewing court should not confine itself to examining a particular statutory provision in isolation."⁸¹ With these principles in mind, the Board rejected jurisdiction over relationships that are primarily educational.⁸² The Board also re-suscitated the *St. Clare's* concerns over the detrimental effects that collective bargaining would have in an educational environment.⁸³

Brown, for the moment, resolved the issue that students performing traditional academic duties, like those of a GA, in return for financial aid packages are not employees of their university.⁸⁴ Another group of students who perform duties in return for financial aid are student athletes. Individuals within this group, just as the GAs did before them, now seek the Board to approve their petition granting them employee status under the Act. Distinct from the GA issue, however, disagreement exists regarding whether the student athletes' duties are similarly intertwined with academics or are instead employment-based work.

77. *Id.* at 483 n.4, 487. Although the Board in *Brown* overruled *NYU* (which had relied on *Boston* in support of its conclusion), the Board decided to "express no opinion regarding the Board's decision in *Boston Medical Center*," likely because of how distinguishable the facts are from this one (degree seeking students vs. graduated students). *Id.* at 483 n.4.

78. *Id.* at 488.

79. *Id.* at 487–89 ("[T]he mutual interests of the students and the educational institution . . . are predominantly academic rather than economic in nature. Such interests are completely foreign to the normal employment relationship and . . . are not readily adaptable to the collective-bargaining process." (quoting *St. Clare's Hosp. and Health Ctr.*, 229 N.L.R.B. 1000, 1002 (1977) (internal quotation marks omitted))).

80. *Id.* at 493.

81. *Id.* at 488 n.23 ("The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme. A court must therefore interpret the statute as a symmetrical and coherent regulatory scheme." (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132–33 (2000) (internal quotation marks omitted))).

82. *Id.* at 487.

83. *Id.* at 490 ("These decisions would include broad academic issues involving class size, time, length, and location, as well as issues over graduate assistants' duties, hours, and stipends. In addition, collective bargaining would intrude upon decisions over who, what, and where to teach or research—the principal prerogatives of an educational institution like *Brown*.").

84. *Id.* at 483.

C. The Regional Director in NWU Found Scholarship Football Student Athletes to be Employees under the Act

In March 2014, the RD ruled on a first of its kind petition from a group of scholarship football student athletes (“SAs”)⁸⁵ at Northwestern University.⁸⁶ The SAs sought employee status under Section 2(3) of the Act for the opportunity to vote on whether to unionize and obtain collective bargaining rights.⁸⁷ The RD granted their petition, determining that the SAs were employees within the meaning of the Act and directed them to vote on unionization.⁸⁸ The Board granted review of the RD’s decision, halting the vote results until final resolution.⁸⁹

1. Background to the Regional Director’s NWU Decision

NWU, like Brown, NYU, Adelphi, and Stanford, is a private nonprofit university.⁹⁰ It has nineteen varsity sports teams that participate in Division 1 (“D1”) athletic competition in the Big-10 subdivision of the NCAA.⁹¹ NWU recruits student athletes to its football team by offering financial aid scholarships that cover tuition, fees, room, board, and books.⁹² NWU gives these scholarships, referred to as “grant-in-aid” financial aid packages, to 85 of the team’s 112 players, and each are valued at \$61,000 per year.⁹³ Each grant-in-aid recipient receives the same scholarship value, regardless of his position, skillset, or playing time.⁹⁴ Unlike other universities that only provide yearly scholarships, NWU guarantees four-year scholarships.⁹⁵

85. Throughout this Comment, the term “SAs” refers uniquely to scholarship football players at NWU whereas the broader term “student athletes” references that general category of student athletes at all universities.

86. *NWU*, Case 13-RC-121359, at *2 (N.L.R.B. Region 13 Mar. 26, 2014), available at <http://www.nlr.gov/case/13-RC-121359>.

87. *Id.*

88. *Id.*

89. *Nw. Univ. Emp’r & Coll. Athletics Players Ass’n (Capa) Petitioner*, at *1 (Apr. 24, 2014), available at <http://www.nlr.gov/case/13-RC-121359>. The Board had not yet released its appeals decision at the time this Comment went to publication.

90. *NWU*, Case 13-RC-121359, at *2 (N.L.R.B. Region 13 Mar. 26, 2014), available at <http://www.nlr.gov/case/13-RC-121359>.

91. *Id.* NWU has eight varsity sports teams for men and eleven for women. Of the universities 8,400 overall students, 500 participate on these 19 teams. *Id.*

92. *Id.* at 3.

93. *Id.*

94. *Id.* The only exception is that upperclassmen can elect to live off campus, in which case they are provided an additional monthly stipend to cover their living expenses valued between \$1,200–\$1,600. *Id.*

95. *Id.* at 3–4.

2. *The Regional Director Found the Student Athletes to be Employees Under the Act Using the Common Law Test*

The RD found that the SAs were employees under the Act by using the common law master-servant test.⁹⁶ The RD asserted that since the SAs provide a service to NWU, for which they receive payment (financial aid), while subject to NWU's control, they are employees.⁹⁷ As proof that the SAs provide a service of value to NWU, the RD pointed to the fact that the football program generated \$235 million in revenue and prestige from 2003–2012.⁹⁸ Regarding compensation, the RD declared that the scholarships were compensation for the SAs' athletic services.⁹⁹ The RD stated that since the scholarship contracts do not permit the SAs to profit from their athletic abilities, the SAs are dependent on the scholarships for basic necessities. This crucial fact, the RD noted, transformed the scholarship contracts into employment contracts, especially since the Head Coach can, with the Athletic Director's approval, cancel a scholarship with cause.¹⁰⁰ He also stated, without explanation, that since each SA receives the same scholarship amount, the scholarship tender is an employment contract.¹⁰¹

Concluding the common law test, the RD determined that the SAs were subject to extensive control by NWU in performance of their services.¹⁰² There are numerous restrictions and responsibilities imposed on a SA, some imposed by the NCAA and others imposed by NWU.¹⁰³ For ex-

96. *Id.* at 13 (“[A]n employee is a person who performs services for another under a contract of hire, subject to the other’s control or right of control, and in return for payment.”).

97. *Id.* at 14. The RD maintained that walk-on (that is, non-scholarship) players were not employees since they do not sign a scholarship tender, thus entering into an employment contract with the university. Despite participating in the same activities as the scholarship players and being subject to the same rules, the RD distinguished that the walk-ons “have nothing tying them to the football team except their ‘love of the game’ and the strong camaraderie that exists among the players.” *Id.* at 17.

98. *Id.* at 13.

99. *Id.* The RD did not find the fact that the scholarships were not taxable relevant to the inquiry. *Id.* at 14.

100. *Id.* at 15. Causes for cancelling an SA’s scholarship include if the SA:

(1) renders himself ineligible from intercollegiate competition; (2) engages in serious misconduct warranting substantial disciplinary action; (3) engages in conduct resulting in criminal charges; (4) abuses team rules as determined by the coach or athletic administration; (5) voluntarily withdraws from the sport at any time for any reason; (6) accepts compensation for participating in an athletic contest in his sport; or (7) agrees to be represented by an agent.

Id. at 4. In the past five years, only two SA scholarships have been cancelled at NWU (shooting a BB gun inside a university dormitory; repeated failure to comply with drug and alcohol policies). *Id.*

101. *Id.* at 15.

102. *Id.*

103. *Id.* at 4–9. Many of these restrictive rules are NCAA policy that the university must enforce and abide by, but the RD maintained that, “The fact that some of these rules are . . . NCAA

ample, SAs must maintain a minimum GPA, make adequate degree progress, and receive their head coach's permission to live off campus.¹⁰⁴ Further, by accepting a scholarship, SAs relinquish the right to profit from their name, image, or likeness while a student, and agree not to give interviews, not to gamble on sports, and to submit to drug and alcohol tests, among other rules.¹⁰⁵ The RD also cited the academic-based mandatory participation in study halls and career development programs as evidence of the university's control over their lives.¹⁰⁶

The RD also referred to the strict schedules the SAs must adhere to during training camp, while traveling to games, and on game days as further proof of NWU's extensive control over their lives.¹⁰⁷ For example, the time commitment to football-related activities can fluctuate to as many as sixty hours per week and averages twenty-eight hours per week over the year.¹⁰⁸

Next, the RD explained that *Brown* did not apply, because the SAs are not primarily students, their football services are unrelated to educational requirements, faculty does not supervise them, and they do not receive financial aid.¹⁰⁹ The RD said the SAs are not primarily students since they spend more time on football-related activities than they do on their studies.¹¹⁰ This fact led to the RD's second conclusion, that—unlike the GAs—the SA services to the university are not a core element of their degree requirements.¹¹¹ In *Brown*, the GA duties garnered academic credit and were a prerequisite to receiving a graduate degree, but here, the RD explained, the SAs' football services produce no academic credit and are not a degree requirement.¹¹²

rules does not detract from the amount of control the coaches exert over the players' daily lives." *Id.* at 16.

104. *Id.* at 11, 16. The GPA minimum raises from 1.8 as a second year to 2.0 by their fourth year. For regular (non-athlete) students to continue to receive their financial aid package, they must have a 2.0 GPA by the end of their second year and thereafter. NORTHWESTERN UNDERGRADUATE CATALOG 2014–15, at 15, available at http://www.registrar.northwestern.edu/courses/archive/nucat_2014_15/2014-15_Undergraduate_Catalog.pdf.

105. *NWU*, Case 13-RC-121359, at *5 (N.L.R.B. Region 13 Mar. 26, 2014), available at <http://www.nlr.gov/case/13-RC-121359>. Other restrictions deserving mention are that the players must accept Facebook friend requests from their coach, attend study halls under certain conditions, wear team-issued outfits on game days, and live on campus during their first two years. *Id.*

106. *Id.* at 16.

107. *Id.* at 15–16.

108. *Id.* at 5–9. Twenty-eight is the average based on testimony; there are times of the year where it is much higher and much lower. Transcript of Record at 345, Nw. Univ. Emp'r & Coll. Athletes Players Ass'n (CAPA) (2014) (Case 13-RC-121359).

109. *NWU*, Case 13-RC-121359, at *18–20 (N.L.R.B. Region 13 Mar. 26, 2014), available at <http://www.nlr.gov/case/13-RC-121359>.

110. *Id.* at 18. Compare with *Brown*, where the GAs spent only a limited time on their GA duties and were primarily focused on obtaining their graduate degree. *Id.*

111. *Id.* at 19.

112. *Id.*

The RD further distinguished *Brown* by noting that coaches, not faculty, supervise the SAs in their services.¹¹³ Lastly, the RD distinguished financial aid (like in *Brown*, which did not always require services), from scholarship compensation (like here, which does require ongoing athletic services to continue to receive the scholarship).¹¹⁴ The RD concluded his findings by ordering the SAs to vote on whether to form a union.¹¹⁵ On April 24, 2014, the Board accepted the university's petition to grant review, to which twenty-four amicus briefs were filed.¹¹⁶

II. ANALYSIS

The Board should reverse the RD's decision that the SAs are employees under the Act because it departs from precedent and would adversely affect education quality. In so ruling, the Board should hold that student athletes are not employees under Section 2(3), or, in the alternative, vacate the RD's ruling and decline jurisdiction over the matter. Analogous Board precedent shows that students like the SAs are not employees under the Act, but are instead primarily students.¹¹⁷ What is more, collective bargaining would infringe on academic freedoms to the detriment of the university's educational mission.¹¹⁸ If affirmed, the RD's decision would create negative unintended consequences, by creating separate classes of players and students with different rights within the same university, and by creating noncompliance with Title IX regulations—all while leading to a financially ruinous slippery slope of potentially labeling numerous other groups of students “employees” with collective bargaining rights.¹¹⁹ For these reasons, and because the Board has limited jurisdiction over private universities, the Board should reverse the RD or decline jurisdiction so as to allow the NCAA to unilaterally enact change.¹²⁰

By declining jurisdiction, the Board will avoid fractured reforms that would upset competitive balance on the field and allow the NCAA to create reform in two areas.¹²¹ First, regarding licensing rights, the NCAA should allow student athletes to profit from the use of their image and likeness as prescribed in *O'Bannon v. NCAA*.¹²² Second, the NCAA should reempha-

113. *Id.*

114. *Id.* at 20.

115. *Id.* at 23.

116. Nw. Univ. Emp'r & Coll. Athletics Players Ass'n (CAPA) Petitioner, Case 13-RC-121359, at *1 (Apr. 24, 2014), available at <http://www.nlr.gov/case/13-RC-121359>.

117. *See infra* Part II.A.1.

118. *See infra* Part II.A.2.

119. *See infra* Part II.B.

120. *See infra* Part II.C.

121. *See infra* Part II.D.

122. *O'Bannon v. NCAA*, 7 F. Supp. 3d 955 (N.D. Cal. 2014), appeal docketed, No. 14-17068 (9th Cir. Oct. 21, 2014).

size the “student” in student athlete by enacting rules that promote educational development in accordance with a university’s fundamental mission—to prepare the student for a successful career.

A. *Governing Board Precedent Demonstrates That Student Athletes Are Not—and Were Never Meant to be—Employees of Their University*

Board precedent on this issue reveals that degree-seeking students who perform part-time duties for their university in order to receive financial aid are not employees because they are primarily students. This precedent, which the RD in *NWU* mistakenly failed to follow, is what *Brown* reasserted by overruling *NYU* and citing to *Adelphi*, *Stanford*, *St. Clare’s*, and *Cedars-Sinai*.¹²³

1. *The Brown Four-Factor Test Demonstrates That the NWU Student Athletes Are Primarily Students*

An analysis of the four factors from *Brown* reveals that the SAs are not employees under the statutory test because (1) the SAs are primarily students, (2) the scholarships the SAs receive are financial aid and not compensation for services rendered, (3) the SAs’ participation in football has an educational element, and (4) the SAs participate in football under faculty supervision.

a. *Student Athletes Are Primarily Students and Not Employees of Their University*

The SAs’ relationship with the university is primarily educational and not economic because their status as student athletes is contingent on being a degree-seeking student. Perhaps the best indication of the fact that student athletes are primarily there to obtain an education is that only 1.6% of college football players go on to play professionally.¹²⁴ The statistics are even lower for men’s and women’s basketball.¹²⁵ This statistic demonstrates that students are in college to obtain a degree to use post-graduation, and are thus primarily students. Since the SAs’ financial aid and eligibility to compete depends entirely on their status as degree-seeking students, they are primarily students.¹²⁶ If the SAs were just employees there to provide

123. *Brown Univ. & Int’l Union*, 342 N.L.R.B. 483, 487, 491 (2004).

124. NCAA RESEARCH, ESTIMATED PROBABILITY OF COMPETING IN ATHLETICS BEYOND THE HIGH SCHOOL INTERSCHOLASTIC LEVEL (last updated Sept. 24, 2013), available at https://www.ncaa.org/sites/default/files/Probability-of-going-pro-methodology_Update2013.pdf.

125. *Id.* Men’s basketball is 1.2% while women’s basketball is 0.9%. *Id.*

126. *See Adelphi Univ.*, 195 N.L.R.B. 639, 640 (1972) (“The graduate assistants are graduate students working toward their own advanced academic degrees, and their employment depends entirely on their continued status as such.”).

athletic services, then it would not matter how many (if any) credits they took in furtherance of a degree.

The extent of NWU's control over the SAs also indicates that they are primarily students, not employees. The RD in *NWU* alleged that the university and coaches subject the SAs to an enormous amount of control, indicating an employment relationship.¹²⁷ This characterization is misleading because all college students are subject to special rules imposed by their university.¹²⁸ Moreover, it is the NCAA, not NWU, that imposes many of the rules cited by the RD.¹²⁹ The fact that the RD found the SAs to spend more hours per week on football-related activities than traditional classroom academic activities is not dispositive of them being employees.¹³⁰ In fact, of the four NWU football players who testified in the *NWU* case, only one stated that he spent more time on football than on his studies.¹³¹ Nevertheless, in his decision, the RD chose to rely solely on that one player's testimony in concluding that all SAs spent more time on football.¹³² Moreover, testimony revealed that many of the rules are just paper tigers that are not actually enforced, which demonstrates that the extent of subjugation is not as draconian as some commentators allege.¹³³

The manner in which the university treats the SAs also indicates that they are primarily students. The SAs do not enjoy employee benefits like vacation time, promotions, or benefit plans; instead, they are eligible for resources limited to students, like running for student government positions, living in student housing, and accessing the student health center.¹³⁴ As

127. *NWU*, Case 13-RC-121359, at *15–16 (N.L.R.B. Region 13 Mar. 26, 2014), available at <http://www.nlr.gov/case/13-RC-121359>.

128. See, e.g., CONSOLIDATED USM AND UMD POLICIES AND PROCEDURES, SECTION VI-8.10A, UNIV. OF MD. (last updated May 2, 2013), <http://www.president.umd.edu/policies/docs/VI-810A.pdf> (prohibiting smoking on campus at the University of Maryland, College Park); see also ALCOHOL AND OTHER DRUG POLICIES, AM. UNIV., available at <http://www.american.edu/ocl/dos/upload/Alcohol-and-Other-Drugs-Policies.pdf> (last visited Dec. 16, 2014) (prohibiting alcohol consumption on campus regardless of age).

129. NCAA DIVISION I MANUAL Art. 10.3 (regulating gambling), Art. 12.5.2 (mandating that student athletes cannot profit of their image or likeness), Art. 14.5 (regulating transfer eligibility), Art. 31.2.2 (regulating drug use and testing) (2009–2010). These regulations are imposed by the NCAA, not NWU (the alleged employer).

130. See *Cedars-Sinai Med. Ctr.*, 223 N.L.R.B. 251, 253 (1976) (“While the [petitioners] spend[] a greater percentage of their time in direct patient care [instead of in the classroom], this is simply the means by which the learning process is carried out.”). See *infra* Part II.D.2 for further discussion of remedies to reform collegiate athletics.

131. Transcript of Record at 177, *supra* note 108 (testimony of former NWU SA Theodis Colter).

132. *NWU*, Case 13-RC-121359 at *18.

133. Transcript of Record, *supra* note 108, at 1309–10 (testimony of former NWU SA Patrick Ward discussing that cell phone prohibitions on bus were not enforced, nor was the lights out rule in hotels when traveling).

134. See *Adelphi Univ.*, 195 N.L.R.B. 639, 640 (1972) (holding that GAs were primarily students because they were ineligible for promotion, faculty tenure, or employee fringe benefits but

former SA John Pace testified in *NWU*, “we had a plaque in the team meeting room with our team goals. And the number one goal is to earn a Northwestern degree.”¹³⁵

b. The Student Athletes Receive Financial Aid to Attend NWU

That SAs receive financial aid packages—not compensation for services rendered—is further proof that they are primarily students and not employees. Each SA receives the same value financial aid package, regardless of his team position, productivity, starter status, football skills, seniority, or the amount of time he devotes to the team.¹³⁶ Since the amount of financial aid the SAs receive is unrelated to the nature, duration, or quality of their work, it is unlike compensation for services in a true employment relationship and thus is financial aid.¹³⁷ The value of a SA’s scholarship is fixed to the value of tuition, not his economic value as an employee.¹³⁸ The Board in *Brown* resolved this issue in finding that the GAs received financial aid and not “consideration for work,” since all GAs received the same amount despite disparate obligations.¹³⁹ Contrary to what pro-employee critics argue, the scholarship’s condition on athletic participation does not make it compensation. Nearly all university scholarships are conditional on participation in an activity, academic performance, or remaining in good standing, and those scholarship recipients are not alleged to be employees.¹⁴⁰

c. The Student Athletes’ Participation in Football Has an Educational Element

The third element from *Brown* assessed the relationship between the students’ duties and their education. The RD overlooked the important ed-

were eligible for student government positions); *see also* The Leland Stanford Junior Univ., 214 N.L.R.B. 621, 622 (1974) (holding that GAs were primarily students because they did not get employee benefits but instead could access student health center and live in student dorms).

135. Transcript of Record, *supra* note 108, at 1278.

136. *NWU*, Case 13-RC-121359 at *3. Nor are their scholarships treated as taxable income as compensation is. *Id.*

137. *See Stanford*, 214 N.L.R.B. at 622 (finding that since there was no correlation between the work done and the amount received, the GAs were primarily students and not employees); *see also* Cedars-Sinai Med. Ctr., 223 N.L.R.B. 251, 252 (1976) (finding that since “[t]he amount of the stipend is not determined by the nature of the services rendered or by the number of hours spent in patient care,” the GAs were primarily students and not employees).

138. *NWU*, Case 13-RC-121359 at *3.

139. *Brown Univ. & Int’l Union*, 342 N.L.R.B. 483, 488 (2004) (“We also emphasize that the money received by the [GAs] is the same as that received by fellows [who provide no services in return for their financial aid]. Thus, the money is not ‘consideration for work.’ It is financial aid to a student.”).

140. *See, e.g., General Scholarships*, THOMAS MORE COLLEGE, http://www.thomasmore.edu/financial_aid/scholarships_freshman.cfm (last visited Dec. 16, 2014) (receiving a band scholarship is conditioned on actively participating in marching band).

educational value of participating in collegiate athletics, which makes SAs primarily students. The current U.S. Secretary of Education, Arne Duncan, a former student athlete himself, recognized the educational value of collegiate athletics when he stated, “Student athletes learn lessons on courts and playing fields that are difficult to pick up in chemistry lab. Resilience in the face of adversity, selflessness, teamwork, and finding your passion are all values that sports can uniquely transmit.”¹⁴¹ Supreme Court Justice Byron White, also a former student athlete, likewise stated, “Sports and other forms of vigorous physical activity provide educational experience which cannot be duplicated in the classroom.”¹⁴² Courts and scholarly commentators agree with Secretary Duncan and Justice White in recognizing the strong educational value of participating in collegiate athletics.¹⁴³ Some commentators may swiftly dismiss this assertion, but in doing so they overlook the premise that underlies the important value of experiential out-of-class learning.¹⁴⁴ Former NWU quarterback Theodis Colter, testifying *in favor* of unionization in the *NWU* case, alluded to the educational nature of sports and stated that football is more than just physical and is like “learning a new subject” and “a lot more mental than what people think.”¹⁴⁵

d. The Student Athletes Participate in Football Under Faculty Supervision

The remaining factor from *Brown* emphasized faculty and academic involvement in the GAs’ duties, an involvement that is also present in the case of the SAs at NWU. On the record in *NWU*, former NWU SAs Douglas Bartels and Patrick Ward each testified that Head Coach Fitzgerald was equivalent to their other teachers at NWU in teaching life and academic skills.¹⁴⁶ The athletic department at NWU also provides the SAs an aca-

141. Arne Duncan, *Let’s Clean up College Basketball and Football*, HOME ROOM: THE OFFICIAL BLOG OF THE U.S. DEP’T OF EDUC. (Jan. 2010), <http://www.ed.gov/blog/2010/01/lets-clean-up-college-basketball-and-football/>.

142. Matthew J. Mitten & Timothy Davis, *Athlete Eligibility Requirements and Legal Protection of Sports Participation Opportunities*, 8 VA. SPORTS & ENT. L.J. 71, 112 (2008).

143. See *Mansourian v. Bd. of Regents of Univ. of California at Davis*, 816 F. Supp. 2d 869, 874 (E.D. Cal. 2011) (“The opportunity for students to participate in intercollegiate athletics is a vital component of educational development.”); see also, Steve Chen et al., *The Effect of Sport Participation on Student-Athletes’ and Non Athlete Students’ Social Life and Identity*, 3 J. ISSUES IN INTERCOLLEGIATE ATHLETICS 176, 176 (2010) (“Physical educators and sports experts would agree that athletic participation brings numerous physiological, psychological, educational, and social benefits to the participants.”).

144. See generally David A. Kolb, EXPERIENTIAL LEARNING: EXPERIENCE AS THE SOURCE OF LEARNING AND DEVELOPMENT (2014).

145. Transcript of Record, *supra* note 108, at 106–07.

146. *Id.* at 1233, 1310, 1311 (“Q: Would you characterize Coach Fitzgerald or your other coaches as being among your teachers at Northwestern University? A: Most definitely, yeah. Q: [W]ould you say that you learned any lessons through the football program that helped you in your studies or helped you prepare for medical schools? A: Definitely [then discusses acquired

ademic advisor to ensure their academic progress, further evincing the faculty involvement in their football life.¹⁴⁷ Some commentators might assert a false dichotomy where Coach Fitzgerald can be either a faculty professor or a boss, and since he is not the former, he must be the latter. Reality, however, requires a more nuanced assessment. Although Coach Fitzgerald's supervision of the SAs' football activities is not as traditionally faculty-oriented as the relationship in *Brown*, it nevertheless provides an element of faculty supervision distinct from that of an employment relationship, since Coach Fitzgerald is not an adversarial boss, but an invested mentor.

The SAs satisfy the four-factor test from *Brown* because they are primarily students, who do not receive compensation for services rendered, who participate in an activity with an educational element, and who do so under faculty supervision.

2. *Collective Bargaining Would Infringe on Areas of Traditional Academic Freedoms*

As discussed in the Board's jurisprudence on this issue in decisions like *Brown* and *St. Clare's*, collective bargaining is not appropriate for the academic nature of a student's education.¹⁴⁸ The personal relationship that a student has with his university is one with the mutual interest of educational success, foreign to that of a labor-employment relationship where conflicting economic interests exist.¹⁴⁹ In a Supreme Court case involving the Board, the Court correctly discerned that "principles developed for use in the industrial setting cannot be 'imposed blindly on the academic world.'"¹⁵⁰ As discussed above, Congress enacted the Act to cure industrial workplace tension and it is inappropriate in an educational environment.¹⁵¹ Higher education is set up to be hierarchical, where learned professors and officials, with their superior knowledge and experience, decide what is best

skills such as time management, respecting other's views, and working under pressure]"). *Id.* at 1233–34.

147. *Id.* at 1300.

148. *Brown Univ. & Int'l Union*, 342 N.L.R.B. 483, 490 (2004) (noting that the concerns raised in *St. Clare's* twenty-five years prior about the "deleterious impact" of collective bargaining on education were still just as relevant).

149. *See St. Clare's Hosp. & Health Ctr.*, 229 N.L.R.B. 1000, 1002 (1977) ("In our view this is a very fundamental distinction for it means that the mutual interests of the students and the educational institution in the services being rendered are predominantly academic rather than economic in nature. Such interests are completely foreign to the normal employment relationship and, in our judgment, are not readily adaptable to the collective-bargaining process.").

150. *N.L.R.B. v Yeshiva Univ.*, 444 US 671, 680–81 (1980) (quoting *Syracuse Univ.*, 204 N.L.R.B. 641, 643 (1973)).

151. 29 U.S.C. § 151 (2012).

for the students' educational development.¹⁵² This system directly conflicts with the equity-driven goals of collective bargaining.¹⁵³

Collective bargaining would impair education quality by intruding upon decisions reserved for professional university officials. Union representatives should not be able to interfere with or influence how a university or its professors facilitate the higher learning process. The Supreme Court has recognized a university's fundamental right to "determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."¹⁵⁴ Essential university decisions upon which collective bargaining could infringe are numerous, including: GPA eligible minimums; grading standards; course content, length, and materials; attendance policies; graduation requirements; and dismissal standards.¹⁵⁵ The rejection of union representatives as a mediator between the SAs and the university is not a rejection of student input in university affairs. Students naturally deserve a voice in university operations, but those channels already exist in the likes of student government councils, where *all* students have a voice in their education. It would certainly be adverse to a meritocratic learning environment if a regular student sitting next to a student athlete in lecture were governed by different grading, attendance, GPA, or credit hour standards. Notwithstanding the extent to which this double standard may already exist in some universities, codifying it is not a proper solution.¹⁵⁶

Further, if permitted, collective bargaining would lead to an endless list of bargaining activities. Athletics-related areas on this list include drug testing policies, punishments for breaking rules (such as underage drinking or missing practice), practice lengths, the ability to strike, or playing time. Not only would this create inherent unfairness among the non-scholarship players and regular students (who are devolved into a separate class of standards), but this would also create unfairness for opposing teams and it would usurp the NCAA's role as the governing body to ensure uniformi-

152. *St. Clare's*, 229 N.L.R.B. at 1002.

153. *See id.* ("In addition to being 'collective,' the bargaining process is also designed to promote equality of bargaining power, another concept largely foreign to higher education.").

154. *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 312 (1978) (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in result) (discussing how the First Amendment has a special concern for a university's freedom to make its own educational judgments)).

155. *See St. Clare's*, 229 N.L.R.B. at 1003 ("Such freedoms [that could be infringed upon] encompass . . . such fundamental matters as the right to determine course length and content; to establish standards for advancement and graduation . . .").

156. David Whitley, *NCAA Shows Double Standard in Treatment of North Carolina Basketball*, SPORTING NEWS (Sept. 27, 2012), <http://www.sportingnews.com/ncaa-basketball/story/2012-09-24/north-carolina-academic-scandal-roy-williams-uconn> (discussing the double standard in the "classic Keep-Jocks-Eligible Sham" that allowed football and basketball athletes to take sham courses without any disciplinary reaction).

ty.¹⁵⁷ This type of collective bargaining would also infringe on the coaching staff's ability to use their collective superior experience and knowledge to create a positive football experience.

Therefore, labeling SAs as employees with collective bargaining rights would be detrimental to the educational process in that it would remove power from the traditional and superior decision-making authorities and transfer it to labor union representatives who are concerned about economics, not educational development. What is more, it could lead to unfair outcomes where SAs are subject to different de jure academic standards than those of regular students. Allowing SAs to collectively bargain would lead to the further degradation of their role as students and push them towards being purely economic employees, ultimately harming their learning process, degree, and career.

For the above reasons, the RD's analysis is unsound and the Board should reverse it and hold that the SAs are primarily students and not employees. In relying on the common law test, he deviated from Board precedent clearly articulated in the *Brown* four-factor test for statutory analysis of Section 2(3). A proper statutory analysis, as discussed above, demonstrates that the SAs are primarily students and that the educational environment for degree-seeking students is not appropriate for economic and employment policies accompanying collective bargaining.¹⁵⁸ Despite the RD's insistence that the common law test determines the SAs to be employees, state courts employing a codified version of the common law for worker's compensation claims have rejected this conclusion.¹⁵⁹ Courts resolving similar issues concerning fair labor and employment suits have likewise rejected student athletes being university employees.¹⁶⁰ What is more, respondeat

157. For more discussion of infringement of collective bargaining on uniformity and fair play, see Part II.C.

158. Nor should the RD have relied on the findings in the overturned *Boston Medical* decision, as that case is easily distinguishable from the SAs at NWU. See *Brown Univ. & Int'l Union*, 342 N.L.R.B. 483, 487 (2004) ("Although the Board later overruled *St. Clare's Hospital* and *Cedars-Sinai* in *Boston Medical Center*, and asserted jurisdiction over the individuals there, those individuals were interns, residents, and fellows who had already completed and received their academic degrees. The Board in *Boston Medical* did not address the status of graduate assistants who *have not received their academic degrees*. In the instant case, the graduate assistants are seeking their academic degrees and, thus, are clearly students." (emphasis added)).

159. *E.g.*, *State Comp. Ins. Fund v. Indus. Comm'n*, 314 P.2d 288, 289-90 (Colo. 1957) (en banc) (denying worker's compensation funds to a student athlete who was injured during athletic activities at his university because he was not an employee); *Rensing v. Ind. State Univ. Bd. of Trustees*, 444 N.E.2d 1170, 1175 (Ind. 1983) (same); *Coleman v. W. Mich. Univ.*, 336 N.W.2d 224, 228 (Mich. Ct. App. 1983) (same); *Waldrep v. Tex. Emp'rs Ins. Ass'n*, 21 S.W.3d 692, 702, 707 (Tex. App. 2000) (same).

160. *E.g.*, *Marshall v. Regis Educ. Corp.*, 666 F.2d 1324, 1328 (10th Cir. 1981) (comparing residence hall assistants to student athletes in concluding they are not employees of the university under federal Fair Labor and Standards Act); *Kemether v. Pa. Interscholastic Athletic Ass'n, Inc.*, 15 F. Supp. 2d 740, 759 n.11 (E.D. Pa. 1998) ("No federal court has defied common sense by holding student athletes to be Title VII [of the 1964 Civil Rights Act] employees of their schools

superior tort claims against universities alleging liability for the actions of scholarship student athletes as “employees” have also failed.¹⁶¹

B. Adverse Unintended Consequences Would Result from Affirming the Regional Director’s Decision

If scholarship football players were employees of their university, severe unintended consequences would ensue, demonstrating how the undeveloped, rash, and imprudent nature of this course of action would result in unfairness, infeasibility, and potential illegality. These adverse consequences include the creation of two separate classes of players within the same team, the creation of a slippery slope for allowing nearly any group of students to become employees, and the potential for Title IX noncompliance.

1. The Regional Director’s Decision Draws Arbitrary Lines and Creates a Slippery Slope for Designating Numerous Students as Employees

In *NWU*, the fact that the SAs receive a scholarship as “compensation” for their services was crucial to satisfying the common law test.¹⁶² This finding, however, exposes the inherent unfairness in this decision—that the non-scholarship “walk-ons” cannot be eligible as employees since they receive no compensation. The walk-on players do the same activities, for the same duration, under the same rules as the scholarship players, yet the RD’s ruling would relegate them to second-class status.¹⁶³ The RD tried to remedy a situation in which a group had no voice, but he exacerbated the problem. An inadvisable reaction would be to label walk-ons as employees, despite their lack of compensation, bringing apparent fairness to the equation. However, this position wanders further down the path of unintended consequences that fatally flaw the decision to include SAs as employees. If the walk-ons—who receive no compensation and participate voluntarily in a profitable activity—could be employees of the university, then many oth-

or an athletic association.”); *Shephard v. Loyola Marymount Univ.*, 201 Cal. App. 4th 837 (Cal. Ct. App. 2002) (denying a race discrimination claim under the Fair Employment and Housing Authority Act because the student athlete was not an employee of the university).

161. *E.g.*, *Kavanagh v. Trustees of Boston Univ.*, 795 N.E.2d 1170, 1173 (Mass. 2003) (finding that a Boston University scholarship basketball player who punched an opponent was not an employee of the university for vicarious liability purposes); *Korellas v. Ohio State Univ.*, 779 N.E.2d 1112, 1114 (Ohio Misc. 2d 2002) (finding that an Ohio State University scholarship football player who punched a deliveryman was not an employee of the university).

162. *NWU*, Case 13-RC-121359, at *14 (N.L.R.B. Region 13 Mar. 26, 2014), available at <http://www.nlr.gov/case/13-RC-121359>.

163. Transcript of Record, *supra* note 108, at 1269, 1270 (testimony of former NWU SA John Pace discussing how although his status changed from a walk-on to a scholarship player, he was subject to the same rules, practice schedules, standards and expectations during each phase).

er eligible students appear as potential employees. Many university students can fit into the RD's common law category of employees, such as non-football student athletes, members of the band or debate team, and cheerleaders, raising the question of where this slippery slope drops off. Many of these students receive a scholarship in return for dedicating a substantial amount of time to particular activities that can generate revenue. Should these students thus become employees?

The inherent unfairness in excluding the above students or walk-ons becomes even clearer with respect to non-football student athletes. Many universities have other revenue generating sports (assuming that is the test, as the RD curiously seemed to suggest).¹⁶⁴ Moreover, all scholarship student athletes could be employees under the common law test, since they all receive compensation for services and are all subject to NCAA and university rules. The RD offers no guidance regarding where the line is drawn, if one even exists. This runaway problem should be nipped in the bud by precluding all student athletes from becoming employees.

Allowing all scholarship student athletes (or walk-ons too) to be employees would also be devastating to the educational environment. Disconcertingly, it would create two de jure classes of students—employee students and normal students. What is more, the total amount of benefits, including potential wages, that could be bargained for by so many student athletes would quickly bankrupt a university or force it to abandon academic priorities to stabilize its athletic department's bloating budget. In fact, last year, only 23 of the 1,200 NCAA member universities¹⁶⁵ generated a profit within their athletic department.¹⁶⁶ Indeed, universities are not overflowing with cash from college sports, and the average college loses four million dollars per year on athletics.¹⁶⁷ This model would be unsustainable

164. *NWU*, Case 13-RC-121359 at *14 (emphasizing that the SAs provide a service of value that generates revenue as an important factor in the common law master-servant test). For example, the University of Denver men's lacrosse team generated a *profit* last year. Is it fair to not let them become employees, since they meet the RD's common law test? Is that fair to other NCAA lacrosse teams? See Eben Noby-Williams, *Notre Dame Brings Lacrosse's Lowest Revenue into NCAA Semifinals*, BLOOMBERG NEWS (May 24, 2014), <http://www.bloomberg.com/news/articles/2014-05-23/notre-dame-brings-lacrosse-s-lowest-revenue-into-ncaa-semifinals>.

165. *NCAA Members* by *Division*, NCAA, <http://web1.ncaa.org/onlineDir/exec2/divisionListing> (last visited Nov. 20, 2014).

166. Louanna Simon & Nathan Hatch, *Why Unionizing College Sports is a Bad Call*, WALL ST. J. (Apr. 7, 2014), <http://www.wsj.com/articles/SB10001424052702304441304579480013097853156>.

167. See David Biderman, *One Bowl Game Buys Many Lacrosse Sticks*, WALL ST. J. (Oct. 23, 2009), <http://www.wsj.com/news/articles/SB10001424052748704224004574489281301154084?mg=ren o64-wsj&url=http%3A%2F%2Fonline.wsj.com%2Farticle%2FSB10001424052748704224004574489281301154084.html> ("If you take the median profits of every sport the NCAA documented, the typical athletic program lost almost \$4 million [in 2009].").

and have terribly adverse effects on the academic priorities of a university. An attempt to make all student athletes employees could lead to the financial collapse of collegiate athletics.

2. *The Regional Director's Decision Could Create Illegal Noncompliance with Title IX Regulations*

The statute commonly referred to as Title IX¹⁶⁸ mandates equal treatment of both sexes in educational institutions, and with respect to collegiate athletics, requires delineated equal expenditures and opportunities on factors such as equipment, travel per diems, medical services, and housing facilities.¹⁶⁹ Labeling student athletes on a men's team as employees without doing so for a women's team could lead to Title IX violations.¹⁷⁰ In addition, a unionized football team could eventually bargain for so many benefits that the result would be only two male sports teams (football and basketball) and enough women's sports teams necessary to maintain Title IX compliance, eliminating all other male sports teams.¹⁷¹ Raising benefits for all men and women's teams altogether, although ensuring aggregate equality, would also lead to runaway financial budgets.

C. *If the Board Does Not Reverse the Regional Director, It Should Alternatively Decline Jurisdiction over the Issue and Allow the NCAA to Resolve It*

Collective bargaining and its adversarial union process is not the proper vehicle in which to reform collegiate athletics—the NCAA is.¹⁷² The Act allows the Board to exercise discretion and decline jurisdiction over matters where the labor dispute's effect on commerce is not substantial enough to warrant jurisdiction.¹⁷³ This issue requires such discretion for

168. 20 U.S.C. § 1681 (2012).

169. 34 C.F.R. §§ 106.41(c)(1)–(10) (2008).

170. For example, if the SAs at NWU bargained for particular terms and conditions such as increased travel per diems, newer equipment, or expanded medical coverage, then the university would have to decrease its spending on other male sports to maintain equal aggregate expenditures with women's sports to avoid violating Title IX.

171. See Kristin Rozum, *Staying Inbounds: Reforming Title IX in Collegiate Athletics*, 18 WIS. WOMEN'S L.J. 155, 156 (2003) ("The most significant unintended consequence [of Title IX] has been the creation of a quota system, which has caused male sports to be eliminated from collegiate athletic programs."); see also Michael Rosen, *Constitutional Implications of Title IX Compliance in Colleges and Universities*, 18 CARDOZO J.L. & GENDER 503, 504 (2012) (discussing how Title IX compliance disproportionately eliminated men's sports at James Madison University).

172. See *infra* Part II.D.

173. 29 U.S.C. § 164(c)(1) (2012) ("The Board, in its discretion, may . . . decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction . . ."); see also *New York Racing Ass'n Inc. v. NLRB*, 708 F.2d 46, 47–48 (2d Cir. 1983) (affirming the Board's decision to decline jurisdiction over horse

two reasons: first, the Board does not wield enough legal influence to truly remedy this issue, and second, trying to do so would only further complicate the matter.

1. *The Board Does Not Wield Enough Influence to Successfully Remedy This Issue*

The Board only retains jurisdiction over private universities, which comprise 17 of the 125 total D1 Football Bowl Subdivision¹⁷⁴ (“FBS”) universities.¹⁷⁵ Even if the Board were to label all football student athletes as employees with collective bargaining rights, seventy-six percent of teams would remain unaffected. The Board would benefit from exercising the cardinal maxim of judicial restraint that “if it is not necessary to decide more, it is necessary not to decide more.”¹⁷⁶ Given the Board’s limited scope of authority, the NCAA is more able to achieve comprehensive reform.

There is strong evidence that the NCAA and its member universities are the most effective bodies to enact reform. Recently, each Pacific-12 and Big-10 conference university president agreed to guarantee four-year scholarships to all student athletes, to allow former student athletes to return and finish their degrees later in life, to improve medical coverage, and to increase the value of scholarships.¹⁷⁷ If the Board had mandated any of these changes, only three of those twenty-six universities would have been bound.¹⁷⁸ Similarly, the NCAA itself recently modified its rules to guarantee unlimited meals and snacks to all student athletes instead of only three meals per day, demonstrating its willingness for unilateral reform.¹⁷⁹ By punting on this issue, the Board will appropriately heed to the bodies that can actually effect broad change on the issue.

racing despite that the racing activities “affect interstate commerce and generate hundreds of millions of dollars in gross income.”).

174. FBS universities make up the top level division of NCAA college football.

175. See 29 U.S.C. § 152(2) (2012) (federal and state entities are not subject to the Board’s jurisdiction). Courts have also found religious schools exempt from the Board’s jurisdiction. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 504–07 (1979); *Carroll Coll., Inc. v. NLRB*, 558 F.3d 568, 570 (D.C. Cir. 2009).

176. *Morse v. Frederick*, 551 U.S. 393, 431 (2007) (Breyer, J., concurring in judgment in part and dissenting in part).

177. Ben Strauss, *Big Ten Joins Pac-12 in Pressing the N.C.A.A. to Make Changes*, N. Y. TIMES (June 24, 2014), http://www.nytimes.com/2014/06/25/sports/ncaafotball/big-ten-joins-pacific-12-in-pressing-ncaa-for-changes.html?_r=2.

178. The only private universities in those conferences are Northwestern University, University of Southern California, and Stanford University. See PAC-12 Conference, www.pac-12.com (last visited Mar. 2, 2015); Big-10 Conference, www.bigten.org (last visited Mar. 2, 2015).

179. Michelle Hosick, *Council approves meals, other student-athlete well-being rules*, NCAA (Apr. 15, 2014), <http://www.ncaa.org/about/resources/media-center/news/council-approves-meals-other-student-athlete-well-being-rules>.

2. *Any Change the Board Can Create Would Further Complicate the Issue and Disrupt Competitive Balance Within Athletic Competition*

The Board should decline jurisdiction over this issue because, as it cannot bind public universities to its decisions, any Board rulings will have the effect of creating a multi-tiered system where not all universities are subject to the same rules. The situation would create an unfair disparity between the rules by which opposing teams abided, breaking the fundamental NCAA tenet of competitive balance.¹⁸⁰ If private university football players could bargain with their universities for different standards, rights, and rules, but their opponents from a public university could not, the former would gain an unfair advantage.

a. *Maintaining Competitive Balance Is Fundamental to Collegiate Athletics*

Ensuring uniform rules and compliance is fundamental to the popularity and legitimacy of collegiate athletics. Fans are drawn to college football because of the parity, but this equilibrium would be destroyed if the Board allowed some teams to be subject to different rules than the other.¹⁸¹ The Supreme Court has recognized that “most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics.”¹⁸² Fair competition is stifled if certain unionized teams can write their own rules to which other teams are not subject. Collective bargaining is appropriate for traditional labor competition but is unsuitable for collegiate athletics where every team is supposed to operate under uniform rules.

The possibility of unfair circumstances arising is easy to foresee. Perhaps private university players bargain with their university to reduce the number of credit hours needed for eligibility, giving them more free time than their public university opponents to train and prepare for games. Perhaps they bargain for more free tickets, wages, or a lower minimum GPA standard, unfairly enticing top recruits to their school to the disadvantage of a public university that is tied to its state’s labor laws. Moreover, if private university players unionize and go on strike until the university pays them

180. NCAA DIVISION I MANUAL Art. 2.10 (2009–2010).

181. See Jeffrey P. Gleason, *From Russia with Love: The Legal Repercussions of the Recruitment and Contracting of Foreign Players in the National Hockey League*, 56 BUFF. L. REV. 599, 617 (2008) (“[T]he establishment of a uniform set of rules and policies promotes parity among teams and thereby creates a better product for sports fans . . .”).

182. NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 117 (1984) (discussing television rights regulations); see also *Chicago Prof’l Sports Ltd. P’ship v. NBA*, 961 F.2d 667, 672 (7th Cir. 1992) (“All agree that cooperation off the field is essential to produce intense rivalry on it—rivalry that is essential to the sport’s attractiveness . . .”).

wages as employees, the university would be confronted with a Hobson's choice. If the university acted and gave into the union demands, they would face sanctions for breaching NCAA policies on amateurism, but if the university took no action and refused to negotiate, they would face Board sanctions for unfair labor practices. These examples show that the NCAA, with its comprehensive control, is the appropriate body for reform—not the Board.

b. Many States Prohibit Public Employees from Collective Bargaining

Many state legislatures prohibit public employees from collective bargaining. This fact demonstrates that even if all fifty states were to recognize student athletes as employees, many student athletes would still be unable to collectively bargain, putting them at an unfair disadvantage to those who can. This fact underscores how the NCAA would be the ideal body to enact reform since it can enforce change binding on all D1 FBS universities. State legislatures are limited to controlling labor practices only for public employees within their own state—a problem similar to why the Board is unfit to address this issue. Ohio and Michigan, in response to the *NWU* decision, preempted the final Board decision and passed legislation specifying that student athletes at state universities are not employees under state law.¹⁸³ Many other states prohibit state employees from collective bargaining and unionization.¹⁸⁴ The Board has no power to tell state legislatures which public employees can collectively bargain, meaning that its decision could create an unwieldy situation wherein student athletes are thrust into the disarray of state labor laws as employees.

In contrast to Ohio and Michigan, the Connecticut State Legislature proposed a bill in January 2015 that would designate revenue-generating student athletes at public universities as employees with collectively bargaining rights.¹⁸⁵ Aside from the reasons set forth in Part II.B against this type of fragmented and unfair reform, this bill perturbingly codifies a revenue-generating quota requirement for purposes of employment determination.

183. OHIO REV. CODE ANN. § 3345.56 (2014), available at <http://codes.ohio.gov/orc/3345> (effective Sept. 15, 2014); MICH. COMP. LAWS ANN. § 423.201 (2014), available at <http://www.legislature.mi.gov/documents/2013-2014/publicact/pdf/2014-PA-0414.pdf> (effective Dec. 30, 2014).

184. *E.g.*, N.C. Gen. Stat. Ann. § 95-98 (Lexis 2013) (state public employees cannot collectively bargain); Va. Code Ann. § 40.1-57.2 (Lexis 2013) (same); Tex. Gov't Code Ann § 617.002 (West 2011) (same).

185. H.B. 5485, Jan. Sess. (Conn. 2015). The bill would only allow employee status to student athletes who receive a scholarship that covers at least 90% of tuition and is materially related to the student's participation in collegiate sports, and if the revenue generated by the student's sport exceeds 400% of the student's scholarship value. *Id.*

The RD's efforts, although perhaps noble, would simply create chaos. If, however, the NCAA unilaterally enacted change and the Board declined jurisdiction over the employee issue, no university would face the dilemma of possible sanctions for violating NCAA policy or breaching state labor laws. Intercollegiate athletics requires all teams to operate under uniform terms and conditions to maintain a competitive balance, and neither the Board nor state legislatures can achieve this result because of their limited authority. The Board should decline jurisdiction because, as Justice Brennan once stated, "the Board has recognized that principles developed for use in the industrial setting cannot be 'imposed blindly on the academic world.'"¹⁸⁶

D. Proposed Remedies for Reforming Collegiate Athletics

Given the imprudence of any Board involvement, there is little question that the NCAA is the best candidate to reform collegiate athletics and tackle this issue. Although instances of universities exploiting student athletes and providing sham educations are unacceptable, as the RD failed to see in *NWU*, one must remember that the shortest line to a more desirable outcome is not necessarily the most legitimate or effective means of achieving that outcome. For an issue as large and complex as reforming collegiate athletics, a more thoughtful, deliberate, and comprehensive plan is needed—not a knee-jerk reaction that will cause more harm than good. In its core values, the NCAA purports to strive for "excellence in both academics and athletics" and commitment to the "supporting role that intercollegiate athletics plays in the higher education mission."¹⁸⁷ The game plan is sound, now the NCAA must execute it.

Colleges Exploit Student Athletes, run the sad-but-true headlines.¹⁸⁸ The main contentions are: (1) colleges coerce student athletes into waiving their rights to profit from their own image, and (2) colleges fail to provide student athletes with a true higher education. In some cases, these allegations are disturbingly true. Indeed, to comply with NCAA rules, universities force recruits to sign away the right to profit from their name, image, or likeness while enrolled at the university in order to receive their scholarship.¹⁸⁹ Further, recent reports about the University of North Carolina

186. *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 681 (1980) (quoting *Syracuse Univ.*, 204 N.L.R.B. 641, 643 (1973)).

187. *NCAA Core Values*, NCAA, <http://www.ncaa.org/about/ncaa-core-values> (last visited Nov. 19, 2014).

188. *E.g.*, Ellen Staurowsky, *How Colleges Exploit Student-Athletes*, ATLANTIC (Sept. 14, 2011), <http://www.theatlantic.com/entertainment/archive/2011/09/how-colleges-exploit-student-athletes/244945/>; Sally Kohn, *How college sports cheat student athletes*, CNN (Oct. 27, 2014), <http://www.cnn.com/2014/10/27/opinion/kohn-college-sports-cheat-student-athletes/>.

189. *O'Bannon v. NCAA*, 7 F. Supp. 3d 955, 988 (N.D. Cal. 2014), *appeal docketed*, No. 14-17068 (9th Cir. Oct. 21, 2014).

(“UNC”) failing to truly educate its student athletes reveal that an insufficient emphasis on education is becoming all too common.¹⁹⁰

The plan for reform should: (1) allow student athletes the right to profit from their own likeness, and (2) reemphasize the academic purpose of being a student athlete. The NCAA and universities can bolster the assertion that student athletes are primarily students in several important ways. The NCAA should expand its authority to regulate the hours student athletes devote to their sport, guarantee scholarships until graduation, improve medical care coverage for injured players, improve academic support programs and standards, and reform admissions standards to ensure that student athletes are being properly educated at the right place.

1. Student Athletes Deserve the Right to Profit from Their Name, Image, or Likeness

The federal district court ruling in *O’Bannon v. NCAA* presents a fair remedy to the issue of unfair profiteering by universities.¹⁹¹ *O’Bannon* is a class action lawsuit on behalf of former D1 and FBS college men’s basketball and football players against the NCAA.¹⁹² The court ruled for the plaintiffs, finding that the NCAA and universities unlawfully restrained trade in violation of antitrust laws in fixing the amount of compensation student athletes can receive at the value of a grant-in-aid scholarship.¹⁹³ This restrictive rule forced recruits to waive their likeness rights to get a scholarship, thus barring compensation from exceeding that of a grant-in-aid scholarship.¹⁹⁴

The court prescribed two remedies for the antitrust violation that, if upheld on appeal, will properly reform collegiate athletics. First, it enjoined the NCAA from enforcing its rule that prohibited universities from offering recruits shares of licensing revenue in excess of the value of a grant-in-aid scholarship.¹⁹⁵ Ideally, the procompetitive effect of this reme-

190. Philip Victor, *UNC Scandal Illuminates Collegiate Fumbles on Student-Athlete Education*, AL JAZEERA AMERICA (Oct. 23, 2014), <http://america.aljazeera.com/articles/2014/10/23/unc-scandal-athletes.html>.

191. *O’Bannon*, 7 F. Supp. 3d at 955. Oral arguments for the appeals case are scheduled for March 17, 2015. *Oral Argument Dates & Locations*, UNITED STATES COURTS FOR THE NINTH CIRCUIT, <http://www.ca9.uscourts.gov/calendar/> (last visited Feb. 28, 2015).

192. *Id.* at 965.

193. *Id.* at 988. A full grant-in-aid scholarship includes tuition, fees, books, room, and board. *Id.* at 965.

194. *Id.* at 988.

195. *Id.* at 1007–08. Since the court *enjoined the NCAA from prohibiting* universities from offering recruits licensing revenue shares, this simply means that universities are not compelled to do anything at all. Although the NCAA can cap the excess amount that universities offer, that cap cannot be below the cost-of-attendance, which is typically a few thousand dollars higher than the grant-in-aid bar and covers other school-related expenses like school supplies and transportation.

dy would increase the overall value of scholarships, because as one university increases scholarship values, other universities will follow suit in order to remain competitive contenders for top recruits.¹⁹⁶

The court's second remedy enjoined the NCAA from prohibiting universities from establishing trust funds containing a share of licensing revenue for the use of a student athlete's name, image, or likeness, payable once the student athlete leaves the university.¹⁹⁷ The trust fund would compensate the student athlete for the university's profits off their likeness in television game broadcasts and merchandise sales.¹⁹⁸ The trusts must be for a minimum of \$5,000 per year of each student athlete's eligibility.¹⁹⁹ To preserve amateurism, the NCAA can still prohibit the student athlete from using those trust funds while in school.²⁰⁰

The court, citing the need for the NCAA to protect its student athletes from commercial exploitation, denied the plaintiff's proposed remedy of allowing them to receive money for endorsements while students.²⁰¹ NCAA bylaws prohibit players from product endorsement compensation,²⁰² but it would be wise to remove this restriction for two reasons. First, the money paid to the student athletes would flow from third parties instead of the university, thus relieving the university of any financial burden, and second, it would eliminate Title IX issues.

The two *O'Bannon* remedies satisfactorily balance the troubling notion of colleges unjustly profiting off a student athlete's likeness to their exclusion while also limiting runaway spending. Although the *O'Bannon* remedies are limited to college men's football and basketball student athletes, those are the only two revenue-generating programs at most universities.²⁰³

Id. at 971–72, 1008. Essentially, this remedy allows universities to provide stipends to “top off” the difference between grant-in-aid scholarships and the true cost of attendance. *Id.* at 982–83.

196. Keeping in mind the NCAA's sacred goal of competitive balance, the court allowed the NCAA to cap the scholarship compensation amount under this scheme, as long as the cap is above that university's cost of attendance. *Id.* at 1008. This cap would prevent the smaller schools from losing a financial arms race to bigger and richer universities in attracting recruits.

197. *Id.* Note that the fund is payable upon leaving the university and does not necessarily require graduation. *Id.* at 982.

198. *Id.*

199. *Id.* Moreover, each player on the same team must receive the same amount each year. *Id.*

200. *Id.* Note that the *O'Bannon* remedies apply to all D1 FBS men's basketball and football student athletes, whereas the *NWU* Board case narrowly involved scholarship football student athletes at Northwestern University.

201. *Id.* at 984.

202. NCAA DIVISION I MANUAL Art. 12.5.2.1 (2009–2010).

203. See Kristi A. Dosh, *Latest NCAA Report Shows Gap Between Haves and Have-Nots*, FOX SPORTS (Aug. 20, 2014), <http://www.foxsports.com/college-football/outkick-the-coverage/latest-ncaa-report-shows-gap-between-haves-and-have-nots-082014#fb-root> (“Football and men's basketball continue to be the two sports athletic departments have to rely upon to drive the department's revenue.”).

The revenue producing programs subsidize the dozens of other expensive sports programs that D1 universities offer.²⁰⁴ What is more, only 7 of the 230 public D1 universities did not subsidize their athletic department's budget with student fees, institutional, and state support in 2013.²⁰⁵

Early signs indicate that the *O'Bannon* remedies are receiving support. University of Texas Athletic Director Steve Patterson has already embraced the *O'Bannon* ruling.²⁰⁶ Patterson announced that if *O'Bannon* is upheld on appeal, the university would spend six million dollars per year investing in both the cost-of-attendance stipend and trust fund remedy.²⁰⁷ This announcement encouragingly shows that universities are willing to implement the voluntary *O'Bannon* remedies to more student athlete teams than were even involved in the case.²⁰⁸ As universities like Texas offer recruits these incentives, other universities will likely follow suit to remain competitive, thus increasing overall benefits.

Indeed, *O'Bannon's* cost-of-attendance goal saw progress before the case reached the court of appeals. At an annual meeting in January 2015,²⁰⁹

204. *NWU*, Case 13-RC-121359, at *13 (N.L.R.B. Region 13 Mar. 26, 2014), available at <http://www.nlr.gov/case/13-RC-121359> (“In addition, the profit realized from the football team’s annual revenue is utilized to subsidize the Employer’s non-revenue generating sports (that is, all the other varsity sports with the exception of men’s basketball).”).

205. *College Sports Finances Chart*, USA TODAY (June 4, 2014), <http://www.usatoday.com/story/sports/college/2013/05/10/college-athletic-department-revenue-database-methodology/2150123/>. Since the NCAA does not release this type of data, the only data available is for public universities. Nor is the NCAA retaining an exorbitant amount of revenue, as it redistributes over ninety percent of revenue back to the universities. Simon & Hatch, *supra* note 166. Recall that universities already provide scholarship student athletes with an immensely valuable free education. See, e.g., *NWU*, Case 13-RC-121359 at *3 (SA’s four-year scholarship value is \$244,000). Any time a call is made for increased student athlete benefits, one should cautiously consider how much the athletic-related expenses would siphon funds from academic expenses, harming the university’s primary purpose.

206. Michael A. Lindenberger, *Texas Athletic Director: With New Rules, Longhorns Would Pay Each Player \$10,000*, DALLAS MORNING NEWS (Oct. 21, 2014), <http://www.dallasnews.com/sports/college-sports/headlines/20141021-texas-athletic-director-with-new-rules-longhorns-will-pay-each-player-10000.ece>.

207. *Id.* The university would provide \$10,000 total to each male and female student athlete, \$5,000 to cover expenses not covered by the traditional grant-in-aid scholarships and \$5,000 for the likeness trust fund. John Taylor, *Texas Could Pay Student-Athletes 10K Annually*, NBC SPORTS (Oct. 22, 2014), <http://collegefootballtalk.nbcsports.com/2014/10/22/texas-to-pay-student-athletes-10k-annually/>.

208. Recall that *O'Bannon* was a class action lawsuit only on behalf of former men’s basketball and football players.

209. The NCAA D1 Board of Directors recently voted 16–2 to allow the Power Five conferences greater autonomy in dealing with student athlete “welfare” issues so that they can change rules without NCAA approval or involving the 75 non-Power Five member universities. Brian Bennett, *NCAA Board Votes to Allow Autonomy*, ESPN (Aug. 8, 2014), http://espn.go.com/college-sports/story/_/id/11321551/ncaa-board-votes-allow-autonomy-five-power-conferences.

the “Power Five”²¹⁰ conferences voted 79–1²¹¹ in favor of allowing Power Five member universities to voluntarily expand scholarship maximums from grant-in-aid to that of the cost-of-attendance.²¹² The Power Five also narrowly voted in favor of legislation that precludes universities from not renewing a student athlete’s scholarship for athletic reasons.²¹³ Encouraging signals from the University of Texas and Power Five conferences hint that the *O’Bannon* appeals court may end up codifying the status quo more than it initially foresaw.

2. *Universities Should Put the Student Back in Student Athlete (Emphasis Needed)*

Second, the NCAA needs to enact reform to give student athletes the proper educational focus that a university student expects and deserves. Front and center on the NCAA homepage, a textbox reads, “Student-athlete success on the field, in the classroom, and in life is at the heart of our mission.”²¹⁴ If the NCAA and its members truly believe that, they need to do more to show that the label “student athlete” is more than an empty catchphrase. Unlike the Board or any state legislature, the NCAA has exclusive authority to efficiently and effectively institute the type of reforms that would reaffirm education as the primary goal of each NCAA member university. Contrary to the website’s claim, a cursory glance of news headlines reveals that the problem of universities failing to satisfactorily educate student athletes is widespread and long-standing.²¹⁵ To fix this problem, the

210. The Power Five conferences consist of the ACC, Big-10, Big-12, Pac-12, and SEC (plus the University of Notre Dame). *Id.*

211. The 65 Power Five member universities each get one vote and each of the five conferences gets three votes. Boston College cast the lone dissenting vote and released a statement expressing concern at increasing expenses spent on student athletes at the detriment of allocating resources for need-based students in the general student body. Michael Sullivan, *BC Athletics Votes Alone in Dissent of Full Cost of Attendance Scholarship Measure*, BC HEIGHTS (Jan. 18, 2015), <http://bcheights.com/news/2015/bc-athletics-votes-alone-dissent-full-cost-attendance-scholarship-measure/>.

212. Steve Berkowitz, *NCAA Increases Value of Scholarship in Historic Vote*, USA TODAY (Jan. 17, 2005), <http://www.usatoday.com/story/sports/college/2015/01/17/ncaa-convention-cost-of-attendance-student-athletes-scholarships/21921073/>. The new rules resulting from the vote go into effect August 1, 2015. *Id.* For discussion of the “cost-of-attendance” vs. “grant-in-aid” scholarship value see *supra* note 195.

213. Berkowitz, *supra* note 212.

214. NCAA HOMEPAGE, <http://www.ncaa.org> (last visited Nov. 19, 2014).

215. In the decade of the 2000s alone, the NCAA punished 15 of the 120 FBS universities for “serious” academic fraud violations. Doug Lederman, *Half of Big-Time NCAA Programs Had Major Violations*, USA TODAY (Feb. 7, 2011), http://usatoday30.usatoday.com/sports/college/2011-02-07-ncaa-infractions_N.htm. As a more specific example, only forty-four percent of men’s basketball players at leading programs graduate within six years. *Justice for Jocks*, ECONOMIST, Aug. 16, 2014, at 12, available at <http://www.economist.com/news/leaders/21612156-americas-exploitative-college-sports-system-can-be-mended-not-ended-justice-jocks>.

NCAA should expand its authority to regulate the time student athletes expend on sports, guarantee scholarships until graduation, improve medical care coverage, and reform education and admissions standards to ensure that student athletes are being properly educated at the right institution.

The NCAA should expand its authority to regulate the amount of time that student athletes can devote to athletic-related activities.²¹⁶ By expanding the definition of regulated athletic activities, the NCAA could reduce the maximum weekly hours spent on sports and provide student athletes more time to focus on their studies. The NCAA would then have increased powers to sanction offending universities that stretch the rules and over-work players. Notably, this change would have no adverse effect on competitive balance among the teams, because each team would equally spend less time practicing.

There are two simple but demonstrative financial steps the NCAA and its member universities should take to reinforce their commitment to academics over athletics. The first step is to guarantee each student athlete their scholarship until they graduate,²¹⁷ like some conferences and universities have already done.²¹⁸ This action would prevent a student from losing his scholarship due to an athletic injury.²¹⁹ Second, the NCAA should compel universities to pay for all sports-related medical bills.²²⁰ The NCAA can prove it is serious about academics by implementing these steps so that student athletes can focus on what is important in the classroom

216. Current NCAA bylaws mandate that when student athletes are “in-season,” they cannot engage in countable athletically related activities (“CARAs,” defined as “any required activity with an athletics purpose involving student-athletes and at the direction of, or supervised by one or more of an institution’s coaching staff”) exceeding four hours per day and twenty hours per week. NCAA DIVISION I MANUAL Art. 17.02.1, 17.1.6.1 (2009–2010). Testimony from the *NWU* case revealed SAs spent forty to fifty hours per week on football during the season, since they did not all count as CARAs. *NWU*, Case 13-RC-121359, at *6 (N.L.R.B. Region 13 Mar. 26, 2014), available at <http://www.nlr.gov/case/13-RC-121359>. These activities include “voluntary” (in name only) drills nominally organized by the quarterback, time spent traveling to games, medical check-ins, and mandatory training meetings. *Id.* at 6 n.11. If the NCAA expanded § 17.02.1 to include all of these activities and actually enforced the twenty hour per week limit, or better yet lowered it, student athletes would have sufficient time to focus on their studies like their non-athlete peers. By encompassing more activities under CARA, the competitive balance would likely become more fair, since teams could no longer easily engage in activities outside CARA.

217. Any scholarship guarantee should still be subject to violating NCAA/university rules of conduct or voluntary withdrawal.

218. See Strauss, *supra* note 177 (discussing reforms to the PAC-12 and Big-10 Conferences); see also *NWU*, Case 13-RC-121359 at *15 (discussing *NWU*’s guarantee of four-year scholarships). Many universities, however, still renew scholarships for student athletes on a yearly basis. *Id.*

219. E.g., Brian Montopoli, *Kevin Ware Injury Could Put Scholarship at Risk*, CBS NEWS (Apr. 1, 2013), <http://www.cbsnews.com/news/kevin-ware-injury-could-put-scholarship-at-risk/>.

220. The NCAA insurance deductible for catastrophic injuries is \$90,000, leaving many student athletes unable to pay their medical bills for injuries sustained in the course of athletic play. E.g., Kristina Peterson, *College Athletes Stuck with the Bill After Injuries*, N.Y. TIMES (July 15, 2009), http://www.nytimes.com/2009/07/16/sports/16athletes.html?_r=0.

without being burdened by financial risks stemming from their athletic participation.

Perhaps the biggest challenge in overhauling the current system is to make universities treat academic progression as a reality and not just an obstacle. A recent report detailed a troublingly apathetic academic system at UNC where professors, advisors, coaches, associate deans, and other officials conspired to cheat thousands of student athletes out of a true education by skating them through fake classes and allowing artificial grades for over two decades, just to keep them eligible for competition.²²¹ The amount of university officials complicit in academic fraud scandals violates the pillars of intellectual growth and integrity on which institutions of higher learning stand. Scholars maintain that a university has a fiduciary duty to its students, a duty of care and loyalty to use good faith in selflessly providing them an exceptional education.²²² Unfortunately, universities often fail to make good on this duty to student athletes.

To remedy this systemic corruption, NCAA sanctions need to be severe enough to make offending universities never contemplate fraud again while deterring other universities from speculating about the probable value of skirting rules to maintain player eligibility. The NCAA also must create an independent oversight body to monitor academic fraud and abandon its current practice of allowing the universities themselves to self-report aca-

221. Sara Ganim & Devon M. Sayers, *UNC Report Finds 18 Years of Academic Fraud to Keep Athletes Playing*, CNN (Oct. 25, 2014), <http://www.cnn.com/2014/10/22/us/unc-report-academic-fraud>. A similar scandal recently occurred at Florida State University. Lynn Zinser, *N.C.A.A. Penalizes Florida State for Academic Fraud*, N. Y. TIMES (Mar. 6, 2009), http://www.nytimes.com/2009/03/07/sports/ncaaf/07ncaa.html?_r=0 (involving a situation where academic advisors, tutors, and learning specialists provided sixty student athletes with exam answers, typed portions of papers, and took tests in their place). These examples are just the recently emerged tip of the iceberg. See Lederman, *supra* note 215 (discussing that serious violations of academic rules at FBS universities doubled from the 1990s to the 2000s). Universities face serious pressure to win and serious consequences for losing, so when one college engages in academic fraud to keep its players eligible, other schools feel pressured to do the same. ANDREW A. ZIMBALIST, UNPAID PROFESSIONALS: COMMERCIALISM AND CONFLICT IN BIG-TIME COLLEGE SPORTS 4 (1999) (“And when one [NCAA] school cheats, others feel compelled to do the same.”).

222. See, e.g., Richard Salgado, *Educating Someone Who Can't or Doesn't Want to Be Educated: The Shifting Fiduciary Duty Continuum of Big-Time College Sports*, 3 WILLAMETTE SPORTS L.J. 27, 29 (2006) (noting that some commentators have recently suggested a fiduciary duty exists in a university setting); Brett G. Scharffs & John W. Welch, *An Analytic Framework for Understanding and Evaluating the Fiduciary Duties of Educators*, 2005 B.Y.U. EDUC. & L.J. 159, 160, 163 (2005) (stating that historically, the student-teacher relationship has been viewed as a fiduciary one); Kent Weeks and Rich Hagland, *Fiduciary Duties of College and University Faculty and Administrators*, 29 J.C. & U.L. 153, 154–55 (2002) (discussing the applicability of fiduciary relationships to the student-teacher relationship). *But see* Ross v. Creighton Univ., 957 F.2d 410, 415 (7th Cir. 1992) (rejecting student athlete's claim that the university committed educational malpractice by failing to provide a meaningful education).

demetic fraud,²²³ which merely leads to obvious conflicting interests and facilitates underreporting.²²⁴

The NCAA can address one root of the academic fraud problem by being tougher on admission standards for student athletes. The NCAA should reform admissions standards by enforcing SAT percentile ranges that all admitted student athletes must fall between, consistent with that university's student body. The effect of this policy would be that students unqualified to meet the rigors of a particular university would not be set up to fail by being in over their head in their studies.²²⁵ If a student athlete cannot keep up with his or her studies, it would be wiser to quit the voluntary sport and focus on education. Need-based and merit scholarships are available to all students; athletics is not the only means of obtaining a scholarship. Ninety-eight percent of the student athletes discussed in this Comment will not play sports professionally, so it might benefit more students-athletes in the long-term if they realized they should not be playing sports collegiately either—and instead focus on earning a degree that will carry them to a successful career.

In the long term, student athletes would be worse off by drifting even further toward the economic and employment dimension; instead, they would benefit from being reined back toward the academic and educational aspect of attending university. A degree and a quality education will take them much further in life than a few years of enjoying the benefits of being an “employee” while playing a sport that 98.5% of them will never play professionally. These individuals are not employees, they are students, and they need to be treated primarily as such. A scholarship saxophone player at a university is unlikely to become a professional in an orchestra and therefore needs a strong education so she can succeed at becoming an engineer, a lawyer, or a teacher—and student athletes deserve the same.

Some might criticize the above remedies and argue that the NCAA would never unilaterally impose these degrees of sanctions and reforms. The recent Power Five rule changes provide a strong example of why this criticism is misguided. Just last year, one student athlete complained on national television of having to go hungry certain days because he could not

223. NCAA DIVISION I MANUAL Art. 2.8.1 (2009–2010).

224. Stephan A. Miller, *The NCAA Needs to Let Someone Else Enforce Its Rules*, ATLANTIC (Oct. 23, 2012), http://www.theatlantic.com/entertainment/archive/2012/10/the-ncaa-needs-to-let-someone-else-enforce-its-rules/264012/?single_page=true.

225. If a student is not qualified to attend the particular university, it will do more harm than good to force him through for eligibility reasons. Professors, advisors, deans, and tutors should all have the ultimate goal of furthering the student athletes' educational development. That is the core purpose of a university.

afford food.²²⁶ Within a month, the NCAA released new rules guaranteeing unlimited meals and snacks to all student athletes.²²⁷ The recent *O'Bannon* and *NWU* cases prompted the aforementioned conferences and universities to guarantee four-year scholarships to all athletes, and other universities may follow suit by paying for all sports-related medical costs.²²⁸ Early in the 2014 season, the NFL (also an oft-criticized body) unilaterally changed its suspension policies, both for drugs and for domestic violence, due to public pressure.²²⁹ With the continuing pressure mounted against the NCAA and member universities through court cases, scandals, the media, and public outcry, these types of reforms are realistic.²³⁰

E. Future Outlook for Collegiate Athletics

There are several student athlete related cases to watch with significant implications on the current model of intercollegiate athletics, including in the state of Maryland.²³¹

1. The NWU Unionization NLRB Case

Decisions that will be made in the immediate future may have potentially game changing effects on collegiate athletics reform and the power held by student athletes. Whether the Board affirms or reverses the RD's decision,²³² its decision may be appealed to the Seventh Circuit Court of Appeals, where the *Chevron* judicial standard of review for administrative decisions becomes an important factor.

There are two steps to *Chevron* judicial review: (1) whether Congress in the statute has directly spoken to the issue (if so, that is the end of the

226. Soraya Nadia McDonald, *National Champ U-Conn.'s Napier Says He Goes to Bed Starving*, WASH. POST (Apr. 8, 2014), <http://www.washingtonpost.com/news/morning-mix/wp/2014/04/08/national-champ-uconn-napier-says-he-goes-to-bed-starving/>.

227. Hosick, *supra* note 179.

228. See Jessica Bartlett, *City Council Weighs Mandating Insurance for Life for Injured College Athletes*, BOSTON BUS. J. (Oct. 10, 2014), <http://www.bizjournals.com/boston/blog/health-care/2014/10/city-council-weighs-mandating-insurance-for-life.html?page=all> (proposed city council ordinance would require all universities in the city of Boston to cover student athlete injuries sustained during play for life).

229. Ben Volin, *NFL Makes Changes to Rules and Procedures*, BOSTON GLOBE (Sept. 21, 2014), <http://www.bostonglobe.com/sports/2014/09/20/nfl-makes-changes-rules-and-procedures/buxXKk5iDGf0VybJRbuzdL/story.html>.

230. Frank Fear, *Public Pressure Ignites NCAA Sports Reform*, SPORTS COLUMN (July 16, 2014), <http://www.thesportscol.com/2014/07/public-pressure-ignites-ncaa-sports-reform/>.

231. Student athlete unionization and reforming collegiate athletics are important both nationally and in Maryland, home to the University of Maryland, College Park, a new member of the Big-10, of which NWU is a member. As a regular opponent, any changes to the standards and rules that a unionized NWU team achieves would directly affect the competitive balance in competing against Maryland, a public university outside the Board's jurisdiction.

232. *NWU*, Case 13-RC-121359, (N.L.R.B. Region 13 Mar. 26, 2014), available at <http://www.nlr.gov/case/13-RC-121359> (finding the SAs were employees under the Act).

matter), and if not, (2) whether the agency's interpretation is a permissible construction of the relevant statute.²³³ The first "plain meaning" step can be surpassed if the statute is ambiguous or if Congress implicitly or explicitly left a gap for the agency to fill using its expertise.²³⁴ The second *Chevron* step assesses whether the agency's interpretation was reasonable, which is a highly deferential review standard rooted in the idea that Congress entrusted the agencies to resolve these types of issues with their expertise and knowledge.²³⁵

As long as the agency interpretation is reasonable, it is likely that the Board's decision on appeal would stand. Typically, if the agency can get to step two, "the agency almost always wins."²³⁶ If the Board upholds the RD's decision that the student athletes are employees however, the enormous (and adverse) impact of such a decision may make a reviewing court take pause at this traditionally deferential second step.

2. *The O'Bannon v. NCAA Antitrust Case*

The second important development going forward will be the resolution of *O'Bannon*. If the remedies raising the value of scholarships and creating trust funds are upheld, they will greatly benefit college men's football and basketball players, but perhaps (due to Title IX financial obligations) at the expense of the vast majority of other male student athletes. Regardless, allowing some student athletes to benefit financially from their image or likeness through a trust fund will remedy the discomforting sense of unfairness while also maintaining their amateur status while enrolled.

III. CONCLUSION

The fairness of collegiate athletics is deservedly under scrutiny and the NCAA and its member universities are under legal and public pressure to reform the broken system. The SAs' unwise strategy of seeking reform through unionization and collective bargaining rights conflicts with governing precedent²³⁷ and ultimately harms the long-term goals of universities and their students: to receive a valuable education.²³⁸ By wrongfully ap-

233. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

234. *Id.* at 843–44. It is permissible for courts to look at legislative history and intent at this step, so there is a possibility the court could find the statute's purpose did not intend for student athletes to be employees. See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132–33 (2000) (using statutory construction (including legislative history) to halt *Chevron* review at step one). More likely, a reviewing court would read Section 2(3)'s definition of "employee" to be either an intentional definition gap or sufficiently ambiguous to proceed to step two.

235. *Chevron*, 467 U.S. at 843–45.

236. Richard M. Cooper, *Challenging Food and Drug Administration Interpretations of the Federal Food, Drug, and Cosmetic Act*, 58 FOOD & DRUG L.J. 1, 3 (2003).

237. See *supra* Part II.A

238. See *supra* Part II.B.

proving the SAs' petition, the RD thrust the Board into a no-win situation where its limited jurisdiction to create reform will further complicate the matter and exacerbate the unfairness in collegiate athletics.²³⁹ On appeal, the Board should reverse the RD's decision and rule that student athletes are not employees of their universities, or should alternatively exercise its discretion to decline jurisdiction and vacate the RD's decision.

Instead of unions or the Board inserting themselves into the issue, the NCAA is the proper body to remedy the current situation.²⁴⁰ With the influence of courts, public opinion, and universities themselves, the NCAA should initiate reforms to address student athlete exploitation and the disdainful college "education" through which some student athletes are shepherded. Keeping in mind that hardly any student athletes will play professionally, the NCAA should rein back athletic time commitments so that students can appropriately focus on success in the classroom that will benefit them for the remainder of their lives. Rediscovering the *student* in student athlete will realize the true purpose for which institutions of higher learning exist.

The future of collegiate athletics looks more uncertain than ever.²⁴¹ If the Board mistakenly upholds the RD's *NWU* decision, collegiate athletics will evolve into a two-tiered hierarchy, with unionized-employee student athletes who increasingly receive benefits that pull them away from education into the economic realm of employment at the top level. Below that, a second tier of all other student athletes will emerge whose existence will be increasingly eroded as financial resources transition to the employed athletes due to collective bargaining. *O'Bannon*, if upheld, will only affect revenue-generating athletes at the top schools, but if more fully embraced, will provide student athletes with a valuable trust fund upon graduation with which to begin their careers and invest in their future.

Those that see collegiate sports purely as a "moneybag" (a category that must include some university, NCAA, and now union officials) have stretched the rubber band encircling higher education to its breaking point. If student athletes are deemed employees, the band will snap, releasing them into the land of labor and employment, destined to become just a line on a balance sheet. The tension must be relaxed, allowing student athletes to return their focus to education, lest we forget the true meaning and purpose of being a university student.

239. *See supra* Part II.C.

240. *See supra* Part II.D.

241. *See supra* Part II.E.