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The Myth of the Student-Athlete: The College Athlete as Employee

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THE MYTH OF THE STUDENT-ATHLETE: THE COLLEGE ATHLETE AS EMPLOYEE

Robert A. McCormick & Amy Christian McCormick*

Abstract: Grant-in-aid athletes in revenue-generating sports at Division I National Collegiate Athletic Association (NCAA) institutions are not “student-athletes” as the NCAA asserts, but are, instead, “employees” under the National Labor Relations Act (NLRA). To be an employee under that Act, these athletes must meet both the common law test and a statutory test applicable to university students. In applying the common law test to athletes, we describe their daily lives through interviews with current and former Division I grant-in-aid athletes. These interviews demonstrate that their daily burdens and obligations not only meet the legal standard of employee, but far exceed the burdens and obligations of most university employees. In addressing the statutory definition of the term employee, we demonstrate that the relationship between these athletes and their universities is not primarily academic, but is, instead, undeniably commercial. As employees under the NLRA, these athletes are entitled “to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” Consequently, they will be able to acquire bargaining power through collective association and to negotiate their terms and conditions of employment, including wages not arbitrarily limited to the level of athletic scholarships.

INTRODUCTION	72
I. THE NCAA CREATED THE TERM “STUDENT-ATHLETE” TO DENY ATHLETES EMPLOYEE STATUS	83
II. A COMMON LAW AND A STATUTORY TEST ESTABLISH THE “EMPLOYEE” STATUS OF STUDENTS	86
A. The Standard for “Employee” Under the NLRA Is Based upon Its Common Law Meaning	89
B. In <i>Brown University</i> the NLRB Reestablished a Statutory Test for Students Seeking Status as Employees.....	92
III. UNDER THE NLRA’S LEGAL STANDARDS, CERTAIN	

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UNIVERSITY ATHLETES ARE EMPLOYEES96

 A. Certain College Athletes Meet the Common Law Standard
 for “Employee”97

 1. Right of Control: The Daily Lives of Employee-
 Athletes Demonstrate that They Are Controlled by the
 University97

 2. The Athletic Grant-in-Aid Functions as Compensation
 for Athletic Services and Illustrates Additional
 Control by Coaches over Athletes 108

 3. Athletes Are Economically Dependent upon Their
 Universities 117

 B. College Athletes Are Employees Under the NLRB’s
 Statutory Test from *Brown*..... 119

 1. *Brown* Identifies Four Factors in Assessing Students’
 Employee Status 120

 2. Employee-Athletes Are Not Primarily Students and
 Their Relationship with Their Universities Is an
 Economic One..... 130

CONCLUSION 155

The *Labour* of his Body, and the *Work* of his Hands . . . are properly his. Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his *Labour* with, and joyned to it something that is his own, and thereby makes it his *Property*. It being by him removed from the common state Nature placed it in, it hath by this *labour* something annexed to it, that excludes the common right of other Men.¹

* * *

Every time I try and call it a business you say it’s a game and every time I say it should be a game you call it a business.²

INTRODUCTION

The National Collegiate Athletic Association (NCAA), a voluntary

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

2. PETER GENT, NORTH DALLAS FORTY 276 (1973) (E.W. Meadows, the fictional defensive tackle, injured and high on dexamyl spansules, violently confronting his defensive line coach after his team’s defeat).

association of approximately 1,200 colleges and universities,³ has among its stated purposes promoting amateur athletics.⁴ Towards that end, the first stated purpose in its Division I Manual is “[t]o initiate . . . and improve intercollegiate athletics programs for student-athletes and to promote . . . athletics participation as a recreational pursuit.”⁵ Despite the prominence of this assertion, the NCAA has failed to realize this ideal for athletes in the most commercially lucrative college sports.

For fifty years, the NCAA has used the term “student-athlete” to describe the young men and women who are athletes at its member schools.⁶ Of late, its insistence that college athletes be so characterized has reached a fevered pitch. One need only consider the recent NCAA men’s basketball tournaments—the self-styled “March Madness”—when for several years the NCAA’s constant and insistent media message has been that these young men and women are learning important life lessons by engaging in intercollegiate athletics and are, therefore, *student-athletes*, not mere athletes.⁷ The shrill urgency of the

3. See NCAA, What Is the NCAA?, http://www.ncaa.org/about/what_is_the_ncaa.html (last visited Feb. 5, 2006); NCAA, 2004 NCAA MEMBERSHIP REPORT 18 (2004), available at http://www.ncaa.org/library/membership/membership_report/2004/2004_ncaa_membership_report.pdf [hereinafter MEMBERSHIP REPORT]. Member colleges and universities establish NCAA policies and rules at annual NCAA Conventions. See Christopher L. Chin, Comment, *Illegal Procedures: The NCAA’s Unlawful Restraint of the Student-Athlete*, 26 LOY. L.A. L. REV. 1213, 1215 (1993); NCAA, 2004–05 NCAA DIVISION I MANUAL art. 5.01.1 (2004), available at http://www.ncaa.org/library/membership/division_i_manual/2004-05/2004-05_d1_manual.pdf [hereinafter DIV. I MANUAL].

4. See DIV. I MANUAL, *supra* note 3, art. 1.2(a), (c), (g). The NCAA has three separate divisions, each with its own rules. Division I includes universities with the most aggressive athletic programs, the largest athletic budgets, and the greatest revenues. See Chin, *supra* note 3, at 1216 n.25. For football, Division I is divided into two groups, Divisions I-A and I-AA. Division II colleges have less costly athletic programs. Division I and II universities consider an applicant’s athletic ability when deciding whether to offer aid. See DIV. I MANUAL, *supra* note 3, art. 15.1; NCAA, 2004–05 NCAA DIVISION II MANUAL art. 15.01.5 (2004). Division III schools, by contrast, place the least emphasis on athletic programs, and, as a group, have elected not to grant scholarships on the basis of athletic ability. See NCAA, 2004–05 NCAA DIVISION III MANUAL art. 15.01.3 (2004).

5. DIV. I MANUAL, *supra* note 3, art. 1.2(a).

6. See WALTER BYERS WITH CHARLES HAMMER, UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES 69–70 (1995).

7. See *NCAA Public Service Announcement* (CBS television broadcast Mar. 2005) [hereinafter *NCAA PSA 2005*]; *NCAA Public Service Announcement* (CBS television broadcast Mar. 2004) [hereinafter *NCAA PSA 2004*]; *NCAA Public Service Announcement* (CBS television broadcast Mar. 2003) [hereinafter *NCAA PSA 2003*]. Typical of the NCAA advertising campaign is an ad with a young man practicing the shot put while he describes his thoughts:

I have to focus, gather everything I’ve learned, all my successes, all my sacrifices, all my pain, and concentrate that energy into one moment. That’s a moment I’ll use every single day of my life. There are 360,000 NCAA student-athletes, and just about all of us will be “going pro” in

NCAA's "student-athlete" media campaign evokes Queen Gertrude's damning observation to Hamlet: "The lady doth protest too much, methinks."⁸

Why, a half century after adopting this term, should the NCAA unceasingly intone to millions of viewers that these young men and women are "student-athletes"? The NCAA's purpose in this message is to shore up a crumbling façade, a myth in America, that these young athletes in NCAA-member sports programs are properly characterized only as "student-athletes." This characterization—that athletes at NCAA-member schools are student-athletes—is essential to the NCAA because it obscures the legal reality that some of these athletes, in fact, are also employees.⁹ By creating and fostering the myth that football and men's basketball players at Division I universities are something other than employees, the NCAA and its member institutions obtain the astonishing pecuniary gain and related benefits of the athletes' talents, time, and energy—that is, their labor—while severely curtailing the costs associated with such labor.¹⁰ The advantages to these institutions from fixing and suppressing labor costs in this manner have enabled them to reap a fantastic surfeit of riches.¹¹

The NCAA's characterization of these athletes as student-athletes, and not employees, lies at the core of another, broader, fallacy: that

something other than sports.

Id. Additional ads featuring a basketball player, a swimmer, and others, aired constantly throughout the 2003, 2004, and 2005 three-week NCAA Division I men's basketball tournaments. *See NCAA PSA 2005, supra; NCAA PSA 2004, supra, NCAA PSA 2003, supra; see also* NCAA, NCAA Television and Print Campaign for 2005, available at http://www2.ncaa.org/portal/flash_content/sniffer.html [hereinafter NCAA, Public Service Campaign] (last visited Jan. 27, 2006).

8. WILLIAM SHAKESPEARE, *HAMLET* act 3, sc. 2.

9. As discussed below and for reasons described throughout this Article, our thesis is limited to those athletes in Division I revenue-generating sports, that is, to football and men's basketball players.

10. The real cost to the university-employer of extending a tuition waiver for an athlete is substantially less than tuition. It is, instead, only the cost to the university of another seat in the classroom. *See* Alfred D. Mathewson, *The Eligibility Paradox*, 7 VILL. SPORTS & ENT. L.J. 83, 84 & n.5 (2000).

11. College sports is a multi-billion-dollar industry. *See infra* Part III.B.2.a. By way of one example, CBS is paying the NCAA \$6 billion for the right to broadcast the annual men's basketball tournament, March Madness, over an eleven-year period, 2003 through 2013. *See* MEMBERSHIP REPORT, *supra* note 3, at 22; Tim Martin, *Cash Up for Grabs: MSU Likely Will Receive at Least \$2 Million from the Tourney Plus Increased Donations and Publicity*, LANSING ST. J., Mar. 9, 2003, available at http://www.greenandwhite.com/mens_basketball/p_030309_ncaa_1-8a.html; Welch Suggs, *Big Money in College Sports Flows to the Few*, CHRON. HIGHER EDUC., Oct. 29, 2004, at A46.

NCAA Division I football and men's basketball are, in fact, amateur. On the contrary, these sports are not amateur except in the pernicious sense that the "employee-athletes"¹² who produce the product receive no market wage. In fact, these major college sports have not been truly amateur for many years, if ever.¹³

By virtue of this camouflage, the NCAA and its members are permitted, like no other association of institutions or businesses in this country, to employ one type of labor without paying a competitive wage for it.¹⁴ At least some of these athletes, however—specifically those who receive athletic grants-in-aid in revenue-generating sports at Division I NCAA institutions¹⁵—are employees under the law, and their relationship with the colleges and universities for which they labor is an employer-employee relationship.

A broad array of participants in college sports harvests a wealth of riches. Colleges and universities, of course, enjoy enormous revenues and other important indirect benefits from their athletics programs.¹⁶ Corporations that sponsor and underwrite the athletic contests gain

12. We define the term "employee-athlete" to be those students in NCAA Division I schools in revenue-generating sports who receive athletic grants-in-aid, i.e., compensation for athletic services. We use that term rather than the NCAA-mandated term "student-athlete" to label these athletes accurately and to highlight the persuasive effect of NCAA propaganda. See *infra* Part I.

13. As early as 1915, William Foster wrote:

Only childlike innocence or willful blindness need prevent American colleges from seeing that the rules which aim to maintain athletics on what is called an 'amateur' basis, by forbidding players to receive pay in money, are worse than useless because, while failing to prevent men from playing for pay, they breed deceit and hypocrisy.

William T. Foster, *An Indictment of Intercollegiate Athletics*, 116 ATLANTIC MONTHLY 577, 579 (1915). Scholarships awarded solely on the basis of athletic ability were technically banned by the NCAA only from 1948 through 1951. This ban, however, was never successfully enforced, and athletic scholarships flourished both before and after that period. See BYERS, *supra* note 6, at 53–55, 67.

14. See ALLEN L. SACK & ELLEN J. STAUROWSKY, COLLEGE ATHLETES FOR HIRE: THE EVOLUTION AND LEGACY OF THE NCAA'S AMATEUR MYTH ix–x, xii–xiii, 4, 6–8 (1998); ANDREW ZIMBALIST, UNPAID PROFESSIONALS: COMMERCIALISM AND CONFLICT IN BIG-TIME COLLEGE SPORTS 6 (1999) ("Big-time intercollegiate athletics is a unique industry. No other industry in the United States manages not to pay its principal producers a wage or salary."); Kenneth L. Shropshire, *The Erosion of the NCAA Amateurism Model*, ANTITRUST, Spring 2000, at 46.

15. Football and men's basketball at Division I institutions are the significant revenue-generating sports. These are the sports that have become by far the most commercialized. See *infra* Part III.B.2.a. "Men's basketball and football generate 97 percent of [Big Ten college athletics revenues]." Lori Hayes, *College Sports Need Big Business*, *Delany Says*, LANSING ST. J., Jan. 24, 2003, at 3C.

16. See *infra* Part III.B.2.a.

unparalleled exposure for their products and services.¹⁷ The NCAA supports itself entirely by the revenues generated from the sports activities of its member institutions.¹⁸ Coaches are paid lavishly for recruiting and training winning teams.¹⁹ Media corporations like CBS and ESPN generate huge advertising revenues by airing college athletic events.²⁰ Even high school coaches have found illicit ways to profit from the enterprise of college sports.²¹ College athletics has been estimated to be a \$60 billion industry.²²

Only one group of persons is denied the full financial fruit of the bountiful enterprise known as college sports—the players themselves. Ironically, these are the very individuals who create the product and its attendant riches.²³ In fact, it could fairly be said that these persons often *are* the product.²⁴ They labor in the demanding, and often brutal,²⁵

17. High Nielsen ratings for athletic events are evidence of their popularity. Such ratings guarantee corporate sponsors a large audience for their heavily advertised products. *See, e.g.*, Bowl Championship Series, 2004–05 Bowl Game TV Ratings, <http://www.bcsfootball.org/index.cfm?page=tvratings> (last visited Feb. 5, 2006) [hereinafter BCS, TV Ratings] (providing Nielsen ratings for various post-season college football bowl games); *see also* Martin, *supra* note 11 (describing the increasing popularity of revenue-generating college sports).

18. *See* MEMBERSHIP REPORT, *supra* note 3, at 22–23.

19. Annual compensation for top football coaches will soon exceed \$3 million. *See* Dennis Dodd, *Notebook: Price Tags for Top Coaches Reaching Stratosphere*, CBS SPORTSLINE.COM, Jan. 25, 2005, <http://www.sportsline.com/collegefootball/story/8133032/1>; *see also* Mike Fish, *Sign of the Times: College Football Coaching Contracts Filled with Lucrative Incentives*, SI.COM, Dec. 23, 2003, http://sportsillustrated.cnn.com/2003/writers/mike_fish/12/19/coaching.contracts/index.html [hereinafter Fish, *Sign of the Times*] (describing lucrative college football coaching contracts); Mike Fish, *Sweet Deals: More and More College Coaches are Making CEO Money*, SI.COM, June 2, 2003, <http://sportsillustrated.cnn.com/basketball/college/news/2003/06/02/contracts/#kentucky> [hereinafter Fish, *Sweet Deals*] (describing lucrative college basketball coaching contracts).

20. Coca-Cola alone will pay CBS at least a half-billion dollars over the eleven-year period from 2003 through 2013 for the right to advertise its beverages during the NCAA men's basketball tournament. Scott Graham, *Call Me Mad, But NCAA Bandwagon is Running Out of Room for Businesses*, BALT. BUS. J., Mar. 26, 2004, available at <http://baltimore.bizjournals.com/baltimore/stories/2004/03/29/editorial3.html>.

21. Memphis-area high school football coach Lynn Lang recently pled guilty to racketeering conspiracy after it was revealed that he accepted \$150,000 from a University of Alabama booster to convince his star player, Albert Means, to sign with the Crimson Tide. *See* Mark Schlabach, *Alabama Booster Convicted: Guilty Verdict Sets Precedent in Wake of \$150K in Improper Payments*, WASH. POST, Feb. 3, 2005, at D1.

22. *The News Hour: Dollars, Dunks and Diplomas* (PBS television broadcast July 9, 2001), available at http://www.pbs.org/newshour/bb/education/july-dec01/ncaa_07-09.html (discussing the prospect of reforming college athletics).

23. *See, e.g.*, Chin, *supra* note 3, at 1214 (characterizing student-athletes as “the main producer[s] of revenues in intercollegiate athletics”).

24. In 2001, the University of Oregon paid \$250,000 to purchase a seven-story billboard in New

college sports vineyard, sometimes risking life²⁶ and limb, and are

York City's Times Square, featuring star quarterback Joey Harrington, to promote its football program and Harrington's candidacy for the Heisman Trophy. See Jodi Wilgoren, *Spiraling Sports Budgets Draw Fire from Faculties*, N.Y. TIMES, July 29, 2001, at 12; *60 Minutes: Here's Ours?* (CBS television broadcast Jan. 6, 2002), transcript at 14. The following year it paid \$300,000 for a similar ad, featuring football player Keenan Howry, at 47th and Broadway. See William C. Rhoden, *Oregon Likes the Visibility of Broadway*, N.Y. TIMES, July 25, 2002, at D1.

The athlete himself, as much as the games, has become the product. The "college athlete . . . becomes . . . a promotional tool for the university." Stephen M. Schott, *Give Them What They Deserve: Compensating the Student-Athlete for Participation in Intercollegiate Athletics*, 3 SPORTS LAW. J. 25, 27 (1996); see also JAMES J. DUDERSTADT, INTERCOLLEGIATE ATHLETICS AND THE AMERICAN UNIVERSITY: A UNIVERSITY PRESIDENT'S PERSPECTIVE 76, 152 (2000) (the media have "repackaged athletic events, coaches, and players as entertainment products" and universities have "willing[ly] . . . oblige[d]"); Tanyon T. Lynch, *Quid Pro Quo: Restoring Educational Primacy to College Basketball*, 12 MARQ. SPORTS L. REV. 595, 605 (2002) (noting that athletes and coaches "are viewed as entertainment products"); Tim Wendel, *Pay the Players*, USA TODAY, Mar. 21, 2005, at 23A (noting that the "game is nothing without the players"). As the athlete becomes the product, the college game looks more and more like a professional event adopting the trappings of the professional leagues.

25. Participation in college football often impairs an athlete's long-term physical health. "They're giving a big chunk of their life for this education. They're giving up a big chunk of their health." *60 Minutes*, *supra* note 24, transcript at 16 (statement of Leo Gerard, President, United Steelworkers of America). From 1977 through 2004, thirty-one college football players received cervical cord injuries, and from 1984 through 2004, ten received cerebral injuries from which they never completely recovered. Nat'l Ctr. for Catastrophic Sport Injury Research, Data Tables, Annual Survey of Catastrophic Football Injuries 1977-2004, <http://www.unc.edu/depts/nccsi/CataFootballData.htm> (last visited Feb. 5, 2006).

In one stunning example, University of Miami tailback and Heisman Trophy finalist Willis McGahee suffered a severe knee injury in the fourth quarter of the last football game in his college career, the national championship Fiesta Bowl. See Kelly Whiteside, Status of Miami's McGahee Uncertain After Surgery, USA Today, Jan. 6, 2003, at 1C. In another graphic instance, San Jose State University football player Neil Parry's lower right leg was amputated after a 1999 compound fracture and twenty surgeries. See Mike Lopresti, Season to Have its High Points, Lansing St. J., Aug. 23, 2002, at C1.

26. In 2001, Eraste Autin, an 18-year-old freshman at the University of Florida, collapsed during a pre-season workout and died after lying comatose for a week. See Jamal Thalji, *Six Schools Will Start Playing it Cool*, ST. PETERSBURG TIMES (Pasco Times ed.), Apr. 13, 2004, at 4; *60 Minutes*, *supra* note 24, transcript at 17. Northwestern University player Rashidi Wheeler died in August 2001 during a pre-season conditioning workout. See Skip Myslenski, *Football Player Dies at NU: Wheeler, 22, Collapses During Conditioning Test*, CHI. TRIB., Aug. 4, 2001, at 1.

From 1931 through 2004, eighty-six college football players died from direct injuries sustained from playing or practicing football and another 102 died from indirect injuries. Nat'l Ctr. for Catastrophic Sport Injury Research, Data Tables, Annual Survey of Football Injury Research: 1931-2004, <http://www.unc.edu/depts/nccsi/FootballInjuryData.htm#TABLE%201> (last visited Feb. 5, 2006); see also Nat'l Ctr. for Catastrophic Sport Injury Research, Glossary of Injury Terms, <http://www.unc.edu/depts/nccsi/InjuryTerms.htm> (last visited Feb. 5, 2006) (defining direct injuries as those resulting directly from participation in the skills of the sport and indirect ones as those caused by systemic failure resulting from exertion or by a complication secondary to a non-fatal injury).

entitled, as a matter of right and law, to a just portion of the fruits of their toil. Indeed, in that the athletes alone do not profit from this fabulously rich enterprise, their status plainly carries vestiges of servitude where men labor for enterprises that conspire, under sanction of law, to limit their wages.

Emblematic of the regime under which these employee-athletes currently labor, the college and university employers have also agreed among themselves to require these particular employees to spend their artificially limited wages only at the “company store”²⁷—the institutions themselves.²⁸ By this last arrangement, then, these athletes, unlike any other working people, are not free to spend their limited wages where they choose, but must spend them on college tuition, books, and other institutionally related expenses, regardless of their real needs or those of their families.²⁹ Indeed, many full-scholarship athletes live below the

27. The “company store,” vividly recalled in Tennessee Ernie Ford’s ballad, “Sixteen Tons,” was an infamous part of nineteenth- and early twentieth-century American labor history. See TENNESSEE ERNIE FORD, *Sixteen Tons*, on 16 TONS OF BOOGIE: THE BEST OF TENNESSEE ERNIE FORD (Rhino Records 1990) (1955). It was usually part of a “company town”—a “feudal domain,” FOSTER R. DULLES, *LABOR IN AMERICA: A HISTORY* 172 (3d ed. 1966)—where employees were required as a condition of employment to live in company-owned housing and to purchase company-provided goods and services at grossly inflated prices. See THOMAS R. BROOKS, *TOIL AND TROUBLE: A HISTORY OF AMERICAN LABOR* 92–93 (1964); DULLES, *supra*. A classic form of exploitation, the company store was often “[b]ound up with . . . the scrip or truck system: payment of wages in the form of scrip or draft redeemable only at the company outlets.” GEORGE S. MCGOVERN & LEONARD F. GUTTRIDGE, *THE GREAT COALFIELD WAR* 23 (1972).

28. No Division I rule explicitly requires players to use their limited compensation to purchase goods and services from their educational employers, but the requirement that compensation be provided only in the form of “financial aid” to offset the player’s educational and living expenses effectively mandates this result. See DIV. I MANUAL, *supra* note 3, art. 15.02.4.

29. A common reason basketball and football players offer for leaving college before their eligibility expires, and instead attempting to play professionally, is the desire to support themselves and their families. See Malcolm Moran, *League, Colleges Fret as Players Go Pro Early: Multimillion-dollar Deals, Peer Pressure Lure Youths*, USA TODAY, May 17, 2001, at 1A; Matt Myftiu, *Money Draws Athletes Away from Degree*, ST. NEWS (Mich. St. Univ.), Dec. 8, 1999, available at http://www.statenews.com/editions/120899/p1_sport.html (noting that many players’ families desperately need money, a significant consideration for players debating whether to turn professional early).

Although athletes are not compensated in a form that permits them to support their families, they are commonly thought to receive a valuable degree or education in exchange for their athletic services. A variety of factors, however—including the admission of athletes who are academically unprepared to do college-level work, the coach’s plenary authority not to renew annual scholarships, inadequate progress requirements under NCAA rules, and the unending demands on the athlete’s time and energy—frequently combine to prevent many athletes from having any real chance of completing their degrees. See *infra* Parts III.A.1–2, III.B.2.b.(1), (7). The abundance of educationally empty curricula for athletes, even at otherwise elite institutions, often renders worthless the education received by those athletes who do graduate. See *infra* Part III.B.2.b.(4).

poverty line.³⁰

Our thesis is straightforward: grant-in-aid athletes in revenue-generating sports at Division I NCAA schools are “employee-athletes,” not merely “student-athletes.”³¹ Under the foundational pillar of U.S. labor policy—the National Labor Relations Act (NLRA or the Act)³²—the relationship between scholarship athletes and their colleges and universities can no longer be fairly characterized as anything other than an employment relationship in which the athletes serve as employees and the institutions for which they labor as their employers. By this basic measure,³³ the relationship between these athletes and their institutions is plainly one of employer and employee.

We understand that legal recognition of some of these young men as “employees” would carry profound implications for the NCAA, its member schools, and the future of major college sports.³⁴ College

30. For example, in the year 2000, full-scholarship athletes at UCLA received \$7,380, nearly \$1,000 less than the \$8,350 designated by the U.S. Department of Health & Human Services as the poverty line for a single person household for that year. Collegiate Athletes Coal., *Living Below the Poverty Line . . .*, <http://www.cacnow.org/living.htm> (last visited Feb. 5, 2006). For a scholarship athlete at UCLA, *financial aid leaves the athlete approximately “\$2,250 short of what is [sic] actually costs to live as an undergraduate student at UCLA.”* *Id.*; see also *60 Minutes*, *supra* note 24, transcript at 15 (former football player Ramogi Huma asserting that “the vast majority [of players] live under the poverty line”); *id.*, transcript at 16 (discussing the NCAA concession “that a scholarship falls \$2,000 a year short of what it really costs to get by”).

It is commonly believed that college athletes need not be treated as employees and paid a competitive market wage because soon enough they will be wealthy professional athletes, and therefore their economic injury is merely one of compensation delayed, not denied. In reality, the vast majority of college athletes do not become professional athletes. Only 2% of NCAA football players and 1.3% of men’s basketball players join professional leagues. NCAA, *Estimated Probability of Competing in Athletics Beyond the High School Interscholastic Level*, http://www.ncaa.org/research/prob_of_competing/ (last visited Feb. 5, 2006) [hereinafter NCAA, *Estimated Probability*]. Some will never become professionals because of injuries sustained in college.

31. Our thesis extends only to football and men’s basketball scholarship athletes at Division I institutions because only their relationships with their universities can be said to be plainly commercial and not primarily academic—a necessary showing under the law. See *infra* Parts II.B, III.B. Athletes in the non-revenue-generating sports and those at Division II and III institutions have relationships with their universities that are characterized less by commercial incentives.

32. 29 U.S.C. §§ 151–169 (2000); see also *infra* Part II.

33. The NLRA standard for “employee” has two components—a common law test and a special statutory standard for students in the university setting. See *infra* Part II.A–B.

34. As employees, these athletes may be entitled to the panoply of rights accorded employees under the many federal and state laws that govern the employment relationship. For example, “employees” have the right to earn a minimum wage under the Fair Labor Standards Act, 29 U.S.C. §§ 201–219, the right to a safe workplace under the Occupational Safety and Health Act (OSHA), *id.* §§ 651–678, and the right to freedom from discrimination on the basis of race, sex, religion, and

football and basketball, however, will not perish as a result of an insistence upon justice for the people who produce these great sources of pleasure and profit. The importance of these sports in America is too great. They provide fantastic entertainment and constitute a source of interest, pride, identity, and deep loyalty³⁵ for millions of Americans,³⁶ ourselves included.

While some outcomes of this revolution cannot be fully known, many can. Among other things, these employee-athletes would earn a negotiated wage, like other employees.³⁷ They would also be entitled to

national origin under Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e to 2000e-15. Indeed, “[t]he United States Department of Labor, alone, is charged with administering some 180 federal statutes governing the employment relationship.” ARCHIBALD COX ET AL., *LABOR LAW: CASES AND MATERIALS* 1 (13th ed. 2001). Many state laws also regulate the employment relationship. See *infra* note 66. Determining the applicability of legislation such as Title VII, the Age Discrimination in Employment Act of 1967 (ADEA), the Americans with Disabilities Act (ADA), OSHA, and state workers’ compensation statutes would require an analysis of each federal, state, and local statute that grants benefits based upon status as an “employee” and is beyond the scope of this Article. At the same time, however, many employment statutes are modeled upon the NLRA. Accordingly, the proper recognition of the status of employee-athletes under the NLRA would likely eventually alter their status under other legal regimes as well.

Acceptance of our thesis would also have important practical implications. For example, given the dependence of all other collegiate sports upon the revenue generated by football and men’s basketball, how would these other sports be funded? How would universities comply with other laws, such as Title IX, 20 U.S.C. §§ 1681–1688 (2000), requiring equal treatment of women’s sports? The practical reverberations of our thesis are many, and plainly beyond the scope of this Article. It seems fair to say, however, that most involve a reslicing of the rich pie of college athletics.

35. It has been observed that sport “is infused with themes consistent with the American Dream.” HOWARD L. NIXON, II & JAMES H. FREY, *A SOCIOLOGY OF SPORT* 41 (1996). Among these values are “competition, individualism, [and] achievement.” D. STANLEY EITZEN & GEORGE H. SAGE, *SOCIOLOGY OF NORTH AMERICAN SPORT* 13 (5th ed. 1993).

36. Total attendance at NCAA football and men’s basketball games in 2003–04 exceeded 76.9 million. NCAA, *OFFICIAL 2005 NCAA MEN’S BASKETBALL RECORDS* 262 (2004), available at http://www.ncaa.org/library/records/m_basketball_records_book/2005/2005_m_basketball_records.pdf [hereinafter *BASKETBALL RECORDS*] (showing that total attendance in 2004 for NCAA basketball games was 30,760,510); NCAA, *2003 NCAA COLLEGE FOOTBALL ATTENDANCE* 2, <http://www.ncaa.org/stats/football/attendance/2003/2003footballattendance.pdf> (last visited Feb. 5, 2006) [hereinafter *FOOTBALL ATTENDANCE*] (reporting 46,144,539 total football attendees in 2003). Of these, 25,548,468 individuals attended Division I men’s basketball games, *BASKETBALL RECORDS*, *supra*, and 35,085,646 attended Division I-A football games. *FOOTBALL ATTENDANCE*, *supra*, at 1.

37. Currently, under the aegis of the NCAA, colleges and universities violate U.S. antitrust law by agreeing to limit the maximum compensation these employee-athletes may earn to the level of “tuition and fees, room and board, books and supplies, [and necessary] transportation.” *DIV. I MANUAL*, *supra* note 3, arts. 15.01.7, .02.2; see Lee Goldman, *Sports and Antitrust: Should College Students be Paid to Play?*, 65 *NOTRE DAME L. REV.* 206 (1990); Chad W. Pekron, *The Professional Student-Athlete: Undermining Amateurism as an Antitrust Defense in NCAA Compensation*

form themselves into unions to bargain collectively with their employers through representatives of their own choosing, and their right to strike would be federally protected.³⁸ And while the challenges of reforming college sports to meet the commands of the law would necessarily be great, they are by no means insurmountable. In fact, wisely applying the law and properly characterizing the labor that produces this uniquely American product would place college athletics upon a more just,

Challenges, 24 *HAMLIN L. REV.* 24 (2000); Note, *Antitrust and Nonprofit Entities*, 94 *HARV. L. REV.* 802, 817–18 (1981); Nelson O. Fitts, Note, *A Critique of Noncommercial Justifications for Sherman Act Violations*, 99 *COLUM. L. REV.* 478 (1999) (arguing that the purported non-commercial nature of nonprofit institutions should not render them exempt from antitrust laws); Note, *Tackling Intercollegiate Athletics: An Antitrust Analysis*, 87 *YALE L.J.* 655, 659–60 (1978); Robert D. Tollison, *Understanding the Antitrust Economics of Sports Leagues*, *ANTITRUST*, Spring 2000, at 21, 22–24; Murray Sperber, *In Praise of 'Student-Athletes': The NCAA Is Haunted by Its Past*, *CHRON. HIGHER EDUC.*, Jan. 8, 1999, at A76. NCAA Division I members engage in classic, illegal price-fixing by agreeing among themselves to limit the wages of employee-athletes. See *DIV. I MANUAL*, *supra* note 3, arts. 15.01.1–2, .7, 15.02.2, .5. Ultimately, it is through this naked price-fixing arrangement that colleges and universities have conspired to suppress the wages of their employee-athletes and thereby to maximize the financial fruits of college sports for themselves.

Technically, establishing players as “employees” would not be required to prevail in a price-fixing antitrust claim against the NCAA and its member institutions. Such employee-athletes have antitrust standing because they suffer antitrust injury, not because they are employees. As the U.S. Supreme Court has explained, the antitrust injury requirement “ensures that the harm claimed by the plaintiff,” in this case, price-fixing, “corresponds to the rationale for finding a violation of the antitrust laws in the first place,” that is, “if the loss stems from a competition-reducing aspect or effect of the defendant’s behavior.” *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 342–44 (1990) (emphasis in original). Naturally, the NCAA’s limitation of compensation to tuition, room, board, and books reduces competition among universities in the market for player services. Nevertheless, a showing that athletes are employees under the law would be useful to convince a reluctant public and judiciary that the compensation paid to these young men ought to be a market-based wage, not an artificial one limited to the cost of tuition, room, board, and books. See *DIV. I MANUAL*, *supra* note 3, arts. 15.01.7, 15.02.2, .5 (limiting compensation to that level of support needed for tuition, fees, room, board, transportation, and required course-related books and supplies).

This Article does not seek to establish antitrust violations, but rather to demonstrate that so-called student-athletes are actually employees of their universities and colleges and, therefore, are entitled to the benefits that this legal characterization affords.

38. It should be noted that the ability of employee-athletes to form a union may well provide a perfect opportunity for the NCAA, its member schools, and the union representing the employee-athletes to regulate the “wages, hours and other terms and conditions of employment,” 29 U.S.C. § 158(d), of the employee-athletes in a collective bargaining agreement. By so doing, the NCAA and an athlete union could shelter otherwise anticompetitive practices through the non-statutory labor exemption to the antitrust laws, as do all major professional sports leagues in the United States and the player associations representing their employees. See *Brown v. Pro Football, Inc.*, 518 U.S. 231, 235–36 (1996); *Clarett v. Nat’l Football League*, 369 F.3d 124, 130 (2d Cir. 2004); *Wood v. Nat’l Basketball Ass’n*, 809 F.2d 954, 959–61 (2d Cir. 1987); *McCourt v. Cal. Sports, Inc.*, 600 F.2d 1193, 1197–98 (6th Cir. 1979); *Mackey v. Nat’l Football League*, 543 F.2d 606, 611–12 (8th Cir. 1976).

honest, and ultimately sane path than the one it is currently taking.³⁹

Part I of this Article reviews the history of the “student-athlete” concept as an unabashed mechanism for the NCAA to avoid an employment relationship between its members and their athletes. Part II describes the legal standards for “employee” under the NLRA, setting forth two legal tests required for that status. First, Part II.A identifies the common law test for “employee” while Part II.B identifies the NLRA’s special statutory test for “employee” as it applies to students in the university setting. Part III applies these tests to employee-athletes.

Part III.A applies the common law test to college athletes. First, Part III.A.1 recounts the pervasive control exercised by universities over athletes’ daily lives to demonstrate the control element of the common law test. Second, Part III.A.2 analyzes the athletic grant-in-aid to demonstrate that the compensation element of the common law test is satisfied and to further reveal the employer’s control over these athletes. Finally, Part III.A.3 addresses the last element of the common law test, showing athletes’ economic dependence upon their university-employers.

Part III.B then applies the National Labor Relations Board’s (NLRB or the Board) statutory test for “employee” to college athletes. Part III.B.1 illustrates that the four criteria announced by the NLRB in *Brown University*⁴⁰ (*Brown*) strongly support the classification of these athletes as “employees.” Finally, as required by *Brown*, Part III.B.2 establishes that the relationship between the university and these athletes is not primarily academic but is deeply commercial and that, as a consequence, a fair-minded judiciary can no longer deny these athletes their employee status.

39. See Rick Telander, *Something Must Be Done*, SPORTS ILLUSTRATED, Oct. 2, 1989, at 94, 94, reprinted from RICK TELANDER, *THE HUNDRED YARD LIE: THE CORRUPTION OF COLLEGE FOOTBALL AND WHAT WE CAN DO TO STOP IT* (1989).

The criminal behavior of the players, the rampant pursuit of money, the tunnel vision of the coaches, the complacency of the fans, the sliminess of the boosters, the sanctimonious platitudes of the NCAA pooh-bahs, the exploitation of the players, the desire to expand the season and to televise everything, the brutality on the field, . . . the lack of anything remotely resembling an ethical anchor holding big-time football programs and their patrons to the ground. . . . And the ugliest part was that these sins were being committed in a world—our universities—that Americans have always assumed to be a realm of virtue and idealism.

Id.

40. 342 N.L.R.B. No. 42, 2004 WL 1588744 (July 13, 2004).

I. THE NCAA CREATED THE TERM “STUDENT-ATHLETE” TO DENY ATHLETES EMPLOYEE STATUS

The NCAA’s fevered insistence on the use of the term “student-athlete” begs the question: what led it to adopt this term in the first place? The history of the NCAA’s extraordinary and continuing effort to mask the true nature of the university-athlete relationship bears exquisite witness to its purpose in inventing the term “student-athlete.”⁴¹ From the beginning, more than a half-century ago, the NCAA utilized the term “student-athlete” to cloak the actual relationship between the parties.⁴² Indeed, the term itself was born of the NCAA’s swift and alarmed reaction to a judicial determination in 1953 that, consistent with our thesis, certain college athletes were employees and entitled to statutory benefits under state law.

In 1953, in *University of Denver v. Nemeth*,⁴³ the Colorado Supreme Court upheld a determination by the state Industrial Commission that Ernest Nemeth, a football player at the University of Denver, was an “employee” within the meaning of the Colorado workers’ compensation statute.⁴⁴ Thus, the university was obligated to provide workers’ compensation for his football injuries.⁴⁵ Stunned by the *Nemeth* decision,

41. This Part of the Article explains how two workers’ compensation cases, both holding football players to be “employees,” motivated the NCAA a half-century ago to undertake their ongoing, vigorous public-relations campaign to convince the judiciary and the community at large otherwise. We recount these cases only to demonstrate the NCAA’s motive in adopting the term “student-athlete,” not as support for our thesis that such athletes are “employees” under the NLRA. Indeed, most recent workers’ compensation cases hold to the contrary. See, e.g., *Rensing v. Ind. State Univ.*, 444 N.E.2d 1170, 1175 (Ind. 1983) (holding that college athletes are not employees under state workers’ compensation laws and, therefore, are not entitled to workers’ compensation for athletically related injuries); *Coleman v. W. Mich. Univ.*, 336 N.W.2d 224, 228 (Mich. Ct. App. 1983) (same).

42. As such, the use of the term “student-athlete” is classic propaganda, defined as “doctrines, ideas, arguments, facts, or allegations spread by deliberate effort through any medium of communication in order to further one’s cause or to damage an opposing cause.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1817 (3d ed. 1986). For a thorough chronicle of the genesis of the term “student-athlete,” see BYERS, *supra* note 6, at 69–76; MURRAY SPERBER, *ONWARD TO VICTORY: THE CRISES THAT SHAPED COLLEGE SPORTS* 445–57 (1998); Sperber, *supra* note 37, at A76.

43. 257 P.2d 423 (Colo. 1953).

44. See *id.* at 429–30.

45. Also apropos to our thesis here, more than a half-century ago the Colorado Supreme Court noted that

[h]igher education in this day is a business, and a big one. The University of Denver with its ten thousand students has, as the record discloses, hundreds of jobs for students and non-students. A student employed by the University to discharge certain duties, not a part of his education program, is no different than the employee who is taking no course of instruction so

the NCAA responded by coining the term “student-athlete” and requiring its exclusive use thereafter.⁴⁶ By emphasizing the identity of athletes as “students,” the NCAA endeavored to diminish any tendency to characterize them as “employees.”⁴⁷ As then-NCAA Executive Director Walter Byers later wrote:

[The] threat was the dreaded notion that NCAA athletes could be identified as *employees* by state industrial commissions and the courts.

[To address that threat, w]e crafted the term *student-athlete*, and soon it was embedded in all NCAA rules and interpretations as a mandated substitute for such words as players and athletes. We told college publicists to speak of “college teams,” not football or basketball “clubs,” a word common to the pros.⁴⁸

The NCAA adopted and mandated the term “student-athlete” purposely to buttress the notion that such individuals should be considered students rather than employees.

At the same time, however, universities were widely endorsing full athletic grants-in-aid to recruit the best athletes, formally sanctioning such grants in 1956.⁴⁹ Allowing full scholarships as compensation for athletic services, however, could reveal the employer-employee-like nature of the university-athlete relationship at a time when doing so would more likely expose these universities to liability for workers’ compensation.⁵⁰ Given this trend, it became even more important for the NCAA to obscure the actual nature of the relationship, and thereafter it

far as the Workmen’s Compensation Act is concerned.

Id. at 425–26.

46. BYERS, *supra* note 6, at 69–76, 371–72; SPERBER, *supra* note 42, at 445–46.

47. See Tom Farrey, *Pay-for-Play: Not Yet, But Soon?*, ESPN.COM, Mar. 28, 2003, <http://espn.go.com/ncb/ncaatourney01/s/2001/0326/1162258.html> (quoting Professor Andrew Zimbalist’s assertion that if athletes were treated as employees, athletic department costs would increase by some \$2 million annually for such items as extra insurance, taxes, and workers’ compensation); accord Allen L. Sack & Ellen J. Staurowsky, *A Rejoinder to Timothy Davis, Intercollegiate Athletics in the Next Millennium: A Framework for Evaluating Proposals*, 9 *Marq. Sports L.J.* 253, 10 *MARQ. SPORTS L.J.* 117, 117–18 (1999) (suggesting that the historical record demonstrates that the NCAA fashioned and maintained the illusion of amateurism to avoid taxation, antitrust scrutiny, workers’ compensation laws, and player demands for a share in revenues).

48. BYERS, *supra* note 6, at 69 (emphasis in original); see Farrey, *supra* note 47.

49. See BYERS, *supra* note 6, at 10, 72.

50. See *id.* at 69 (“It was [when more and more colleges offered full athletic grants-in-aid] . . . that they came face to face with a serious, external threat that prompted most of the colleges to unite and insist with one voice that, grant-in-aid or not, college sports still were only for ‘amateurs.’”).

embarked on its long, fervent public relations campaign to persuade the public that these athletes are students, not employees.⁵¹

In 1963, a California workers' compensation case again heightened NCAA concerns that courts might view athletes as employees.⁵² Edward Gary Van Horn, an athletic grant-in-aid football player at California State Polytechnic College, was killed in a 1960 plane crash while returning home with his team from a game. The California Industrial Accident Commission subsequently ruled that Van Horn had not been an employee of the college, and so his widow and minor dependent children were ineligible for death benefits under the state's workers' compensation law.⁵³ In *Van Horn v. Industrial Accident Commission*,⁵⁴ however, the California Court of Appeals reversed, stating that "[t]he only inference to be drawn from the evidence is that decedent received the 'scholarship' because of his athletic prowess and participation. The form of remuneration is immaterial."⁵⁵ The case established that a college football player could have a contract of employment with a university in which a scholarship served as compensation for athletic services.⁵⁶

Coincidentally, this case emerged during a period when NCAA universities were moving away from four-year guaranteed athletic scholarships and towards one-year scholarships, renewable at the coach's option.⁵⁷ And, given the likely inference that such one-year, renewable scholarships constituted pay for services, the NCAA member institutions were "deeply concerned" about the *Van Horn* case.⁵⁸ Instead of eliminating athletic scholarships altogether or requiring full, four-year scholarships, however, the NCAA responded by encouraging its members to use the following language in their athletic grant-in-aid forms:

"This award is made in accordance with the provisions of the

51. See Farrey, *supra* note 47.

52. See *Van Horn v. Indus. Accident Comm'n*, 33 Cal. Rptr. 169, 172-73 (Cal. Ct. App. 1963) (finding a contract of employment between a football player and a state college).

53. See *id.* at 172.

54. 33 Cal. Rptr. 169 (Cal. Ct. App. 1963).

55. *Id.* at 174.

56. See *id.* at 172-74.

57. See BYERS, *supra* note 6, at 75. The initial grant-in-aid commonly guaranteed the athlete four full years of scholarship, regardless of whether he was successful as a player or even whether he remained with the team. See *infra* Part III.A.2.

58. BYERS, *supra* note 6, at 75.

Constitution of the [NCAA] pertaining to the *principles of amateurism*, sound academic standards, and financial aid to student athletes. . . . Your acceptance of the award means that you agree with these principles and are bound by them.”⁵⁹

Setting aside the irony that athletes would receive compensation only by renouncing the commercial, pecuniary nature of their relationship with their universities, this insistence on characterizing athletes as amateurs was again used to mask the reality of the NCAA members’ activities—employing players to provide athletic services in exchange for compensation.

The NCAA purposely created the term “student-athlete” as propaganda, solely to obscure the reality of the university-athlete employment relationship and to avoid universities’ legal responsibilities as employers.⁶⁰ In the ensuing fifty years, the NCAA, colleges, and universities have profited immensely from the vigorous defense and preservation of this myth.

II. A COMMON LAW AND A STATUTORY TEST ESTABLISH THE “EMPLOYEE” STATUS OF STUDENTS

Our thesis is that Division I athletic grant-in-aid students in revenue-generating sports are employees under both the NLRA—the foundational labor relations statute in the United States—and under numerous applicable state laws. The characterization of an individual as an employee under the law, as distinct from some other status, is essential in drawing necessary delineations throughout American industry. Such a characterization confers many rights upon that person

59. *Id.* (emphasis and alteration in original) (quoting Memorandum from Robert L. Ray, NCAA President, and Everett D. Barnes, NCAA Secretary-Treasurer, to NCAA membership (Dec. 21, 1964)).

60. *See id.*; *see also* Telander, *supra* note 39, at 107 (noting generally the NCAA’s role “as a public relations outlet”); Farrey, *supra* note 47; *cf.* Telander, *supra* note 39, at 94 (noting the “absurdity of the ‘student-athlete’ notion” and that amateurism is “the rottenest block in the foundation of big-time college football”). Former University of Alabama head football coach Paul “Bear” Bryant laid bare the “student-athlete” myth:

I used to go along with the idea that football players on scholarship were “student-athletes,” which is what the NCAA calls them. Meaning a student first, an athlete second. We were kidding ourselves, trying to make it more palatable to the academicians. We don’t have to say that and we shouldn’t. At the level we play, the boy is really an athlete first and a student second.

DONALD CHU, *THE CHARACTER OF AMERICAN HIGHER EDUCATION AND INTERCOLLEGIATE SPORT* 190 (1989).

under federal and state law.⁶¹ And because the question of whether an individual is an employee has been elemental in the development of American labor law,⁶² ample guideposts have evolved by which to assess whether the scholarship athletes in revenue-generating NCAA programs are employees.

For seventy years the NLRA has served as the cornerstone of U.S. labor policy. It provides the best template for distinguishing between labor and capital and for determining the circumstances under which a person should be characterized as an employee. The Act's purpose is to regulate the inherent conflict between capital and labor in America.⁶³ For this reason, drawing appropriate lines between those two adversaries was an early and essential task under the statute.⁶⁴

Given the primacy of the NLRA in defining the employment relation under federal law,⁶⁵ any analysis of the status of college athletes as

61. See *supra* note 34 for a description of some employee rights under federal law. Under numerous state laws, employee status confers similar rights. For example, Michigan's Elliott-Larsen Civil Rights Act protects employees in Michigan from discrimination on the basis of "religion, race, color, national origin, age, sex, height, weight, familial status, or marital status." MICH. COMP. LAWS § 37.2102 (2001); see generally *id.* §§ 37.2101–2804.

62. See *infra* Part II.A (discussing the development of the common law test for "employee" in the context of differentiating employees from independent contractors).

63. See generally 29 U.S.C. § 151 (2000) (providing findings and policies in the preamble to the NLRA).

64. See ROBERT A. GORMAN & MATTHEW W. FINKIN, BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING 37–38 (2d ed. 2004) (describing courts' early efforts to distinguish between employees under the Act and other persons). Compare *Field Packing Co.*, 48 N.L.R.B. 850, 852–53 (1943) (demonstrating the Board's early adoption of the common law test for employee), with *NLRB v. Hearst Publ'ns Inc.*, 322 U.S. 111, 128–29 (1944) (illustrating the Supreme Court's acceptance of additional considerations, including the economic realities of the employer-employee relationship).

65. For example, "Section 7 rights to form and join labor organizations and to engage in collective bargaining and concerted activities are given to statutorily defined 'employees.'" GORMAN & FINKIN, *supra* note 64, at 32. The meaning of the term "employee" has also recently arisen under another federal employment statute, the ADEA. 29 U.S.C. §§ 621–634. In *EEOC v. Sidley Austin Brown & Wood*, 315 F.3d 696 (7th Cir. 2002), the United States Court of Appeals for the Seventh Circuit concluded that partners at a law firm could be "employees," rather than employers, within the meaning of the ADEA. If a partner's role in running the firm were minimal and if a small coterie of managing partners exercised an overwhelming degree of control over him, he could potentially be deemed an "employee" under the ADEA. See *id.* at 707.

The U.S. Supreme Court faced a similar problem when it considered the meaning of "employee" under the Employee Retirement Income Security Act (ERISA). See *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323–25 (1992). There, the Court wrote:

"In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. . . ." Since the common-law test contains "no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship

employees requires an examination of that legislation's view of the term "employee." While the NLRA governs only private enterprises and thus would not apply directly to public universities, it remains the starting, and usually ending, point for this inquiry. This is because the various state statutes governing the employment relationship among public employers and employees⁶⁶ are modeled after the NLRA and usually draw their meanings from the interpretations given the NLRA by the NLRB⁶⁷ and the federal courts.⁶⁸ Therefore, an analysis of the NLRA

must be assessed and weighed with no one factor being decisive."

Id. at 323–24 (second alteration in original) (citations omitted) (quoting *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751–52 (1989) and *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 258 (1968)).

66. Some thirty-two states have public employment relations statutes which grant employees rights to organize and bargain collectively and which could be applied to employee-athletes. *See, e.g.*, CAL. GOV'T CODE §§ 3512–3524 (West 1995 & Supp. 2005) (State Employer-Employee Relations); *id.* §§ 3560–3596 (West 1995 & Supp. 2005) (Higher Education Employer-Employee Relations); 5 ILL. COMP. STAT. ANN. 315/1–315/27 (West 2005) (Illinois Public Labor Relations Act); MICH. COMP. LAWS ANN. §§ 423.201–217 (West 2001) (Public Employment Relations Act); N.Y. CIV. SERV. LAW §§ 200–214 (Consol. 1999 & Supp. 2005) (Public Employees' Fair Employment Act); OHIO REV. CODE ANN. §§ 4117.01–24 (LexisNexis 2001 & Supp. 2005) (Public Employees' Collective Bargaining); 43 PA. STAT. ANN. §§ 1101.101–2301 (West 1999 & Supp. 2005) (Public Employee [sic] Relations); WASH. REV. CODE §§ 41.56.010–950 (2004 & Supp. 2005) (Public Employees' Collective Bargaining); WIS. STAT. ANN. §§ 111.80–97 (West 2002 & Supp. 2004) (State Employees' Bargaining Rights).

67. Congress created the NLRB in 1935 to prevent the commission of unfair labor practices, 29 U.S.C. § 160(a), and to resolve questions concerning the representation of employees, *see id.* § 159. *See also* GORMAN & FINKIN, *supra* note 64, at 9.

68. *See* DONALD H. WOLLETT ET AL., COLLECTIVE BARGAINING IN PUBLIC EMPLOYMENT 25 (4th ed. 1993) ("Nearly all state public employee labor relations statutes contain declarations of organizational rights, and prohibitions against interference and discrimination, though there is some variation in language. The similarity in language between these public sector statutory provisions and . . . the National Labor Relations Act has led to extensive reliance upon federal precedents."); Note, *Developments in the Law—Public Employment*, 97 HARV. L. REV. 1611, 1680 (1984) ("Many statutes draw heavily on the NLRA in their definitions . . ."). "Virtually all of the public sector collective bargaining statutes set forth the rights of public employees. This statutory statement frequently parallels the statement of the rights of employees in § 7 of the National Labor Relations Act, as amended." HARRY T. EDWARDS ET AL., LABOR RELATIONS LAW IN THE PUBLIC SECTOR: CASES AND MATERIALS 139 (4th ed. 1991); *see also* *Goolsby v. City of Detroit*, 358 N.W.2d 856, 861 n.5 (Mich. 1984) (basing construction of state labor statutes on NLRB and federal court interpretations of analogous NLRA provisions). Other state courts also commonly look to federal interpretations of the NLRA in construing their state public employment relations statutes. *See, e.g.*, *United Faculty of Fla. v. Pub. Employees Relations Comm'n*, 898 So. 2d 96, 101 (Fla. Dist. Ct. App. 2005) (quoting *Pasco County Sch. Bd. v. Fla. Pub. Employees Relations Comm'n*, 353 So. 2d 108, 116 (Fla. Dist. Ct. App. 1977)); *State Employment Relations Bd. v. Miami Univ.*, 643 N.E.2d 1113, 1116 (Ohio 1994); *Portland Ass'n of Teachers v. Multnomah Sch. Dist. No. 1*, 16 P.3d 1189, 1200 n.6 (Or. Ct. App. 2000); *Phila. Hous. Auth. v. Pa. Labor Relations Bd.*, 620 A.2d 594, 598 n.9 (Pa. Commw. Ct. 1993).

sheds light not only upon the employee status of athletes at private universities,⁶⁹ but also upon their status at public institutions as well.⁷⁰ Parts II.A and II.B of this Article identify the two tests for “employee” that must be met under the NLRA, a common law test and a special statutory test for university students seeking coverage under the Act.

A. The Standard for “Employee” Under the NLRA Is Based upon Its Common Law Meaning

In the NLRA, Congress identified labor as a discrete category, separate and distinct from its partner and adversary, capital.⁷¹ The Act conferred federal rights upon labor, which it described as “employees” and granted only to employees “the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.”⁷² Because the NLRA gave organizing and collective bargaining rights only to employees, the question of whether a particular person was or was not an employee was plainly of central importance in administering the statute.

Unhelpfully, the Act defines both “employer”⁷³ and “employee”⁷⁴ by

69. These universities include: Boston College; Brigham Young; Duke; Georgetown; Miami (Florida); Northwestern; Notre Dame; Rice; Southern California; Stanford; Syracuse; Tulane; Vanderbilt; Villanova; Wake Forest; and others. As regards these private universities, of course, our analysis would apply directly.

70. In fact, state laws governing public employment often broaden the coverages and protections of the federal law, expanding the range of individuals considered to be “employees.” For example, unlike under the NLRA, supervisors employed by public institutions have organizing and collective bargaining rights under Michigan’s Public Employee Relations Act (PERA). *See* MICH. COMP. LAWS ANN. § 423.201(1)(e) (West 2001) (defining “[p]ublic employee” broadly to include supervisors). More to the point, the Michigan Employment Relations Commission (MERC), the agency that administers PERA, and Michigan courts interpret PERA to permit graduate students at public universities to organize and bargain collectively. *See* Macomb Cmty. Coll., 1988 M.E.R.C. Lab. Op. 741, 743–44. In *Macomb Community College*, MERC adhered to the Michigan Supreme Court’s opinion in *Regents of University of Michigan v. Michigan Employment Relations Commission*, 204 N.W.2d 218, 226 (Mich. 1973).

71. *See* 29 U.S.C. § 152(2)–(3); *Brown Univ.*, 342 N.L.R.B. No. 42, slip op. at 6, 2004 WL 1588744, at *8 (July 13, 2004) (describing how the Act was premised on the view of a fundamental conflict between employers and employees). *See generally* 29 U.S.C. § 151 (citing the inequality of bargaining power between employees and employers and the denial by some employers of the right of employees to organize as sources of depressed wage rates and industrial strife).

72. 29 U.S.C. § 157.

73. “The term ‘employer’ includes any person acting as an agent of an employer, directly or indirectly . . .” *Id.* § 152(2).

reference only to the very terms being defined, distinguishing employer only from employee and vice versa. Because the statutory language itself fails to distinguish the salient characteristics of either employer or employee from other classes of entities or persons, the judiciary and the NLRB have been guided primarily by common law principles in determining the meaning of the term “employee.”⁷⁵

The debate over the meaning of “employee” first crystallized in the form of the question as to whether certain persons were employees, and, therefore, imbued with organizing rights under the law, or independent contractors, and, therefore, without such rights.⁷⁶ While the original Act did not expressly exclude independent contractors, the Board nevertheless commonly found such persons were not “employees.”⁷⁷ To distinguish between the two categories, the Board adopted the common law approach for defining employee, the so-called “right of control” test.⁷⁸ Under this standard, the most important factor distinguishing employees from independent contractors was the degree of control the alleged employer maintained over the working life of the alleged employee.⁷⁹ Thus, the Board found an employer-employee relationship where the employer’s control or right of control included “both the end

74. “The term ‘employee’ shall include any employee, and shall not be limited to the employees of a particular employer, . . . but shall not include any individual . . . having the status of an independent contractor, or any individual employed as a supervisor . . .” *Id.* § 152(3).

75. *E.g.*, *Klement Timber Co.*, 59 N.L.R.B. 681, 683 (1944); GORMAN & FINKIN, *supra* note 64, at 38.

76. While no argument exists that athletes are independent contractors, the reasoning of the NLRB and the courts in distinguishing independent contractors from employees gives residual meaning to the term “employee.” Many precedents addressing the meaning of “employee” under the NLRA focus on distinguishing employees from others who are also paid for their work, but are not covered by the Act, such as independent contractors. *See* GORMAN & FINKIN, *supra* note 64, at 37–40. This Article examines that distinction to identify the residual meaning of “employee” and then assesses the applicability of that meaning to athletes who are paid for their work in a non-traditional manner, that is, through scholarships. As such, two sets of precedents inform our analysis: those that distinguish employees from groups such as independent contractors, *see* Part II.A (discussing the common law test), and others that determine whether an individual paid in a non-traditional manner, such as a trainee, a student, or an apprentice is properly characterized as an “employee,” *see infra* Part II.B (discussing the statutory test).

77. *See* GORMAN & FINKIN, *supra* note 64, at 38.

78. *See* *Field Packing Co.*, 48 N.L.R.B. 850, 852–53 (1943) (holding that truck drivers were employees and, therefore, not independent contractors because the employer had not fully divested itself of the right to control drivers’ work); GORMAN & FINKIN, *supra* note 64, at 38.

79. *See* *Klement Timber*, 59 N.L.R.B. at 683; *Butler Bros.*, 41 N.L.R.B. 843, 855 (1942); *Seattle Post-Intelligencer Dep’t of Hearst Publ’ns, Inc.*, 9 N.L.R.B. 1262, 1275 (1938); 2 *THE DEVELOPING LABOR LAW* 2131 (Patrick Hardin & John E. Higgins, Jr. eds., 4th ed. 2001).

result and the manner of achieving it.”⁸⁰

In its 1947 Taft-Hartley Amendments to the Act, Congress expressly excluded independent contractors from the definition of employee⁸¹ and emphatically endorsed the common law right of control test as the proper measure of statutory coverage.⁸² This right of control test examines the degree to which the employer controls the daily lives of its putative employees, including the manner in which they carry out their work.⁸³ The Board and the courts have since repeatedly referred to the right of control as the basic measure for determining whether individuals are “employees” under the Act.⁸⁴ As the NLRB has underscored, “[u]nder the common law, an 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.”⁸⁵

Over time, the Board’s reasoning has occasionally been influenced by

80. GORMAN & FINKIN, *supra* note 64, at 38; see *Nat’l Freight, Inc.*, 146 N.L.R.B. 144, 145–46 (1964). The right of control test was derived from the common law doctrine of respondeat superior, which determines whether a master might be liable for the torts of his servant. See *Carnation Co.*, 172 N.L.R.B. 1882, 1888 (1968); GORMAN & FINKIN, *supra* note 64, at 38. Under this measure, a person who performs a particular task by his own methods, not subject to the control of the alleged employer, is an independent contractor, while a person who is subject to the control of the employer, not only as to the ends to be accomplished, but also as to the methods and means of performing the work, is an employee. See *id.*

81. “The term ‘employee’ . . . shall not include any individual . . . having the status of an independent contractor . . .” 29 U.S.C. § 152(3).

82. See GORMAN & FINKIN, *supra* note 64, at 38–39.

83. See, e.g., *NLRB v. Phoenix Mut. Life Ins. Co.*, 167 F.2d 983, 986 (7th Cir. 1948) (stating that “the employer-employee relationship exists when the person for whom the work is done has the right to control and direct the work, not only as to the result accomplished by the work, but also as to the details and means by which that result is accomplished”); *Teamsters Nat’l Auto. Transp. Indus. Negotiating Comm.*, 335 N.L.R.B. 830, 832 (2001) (“[T]he contracting employer must have the power to give the employees the work in question—the so-called ‘right of control’ test.”) (footnote omitted); *Local 636, United Ass’n of Journeymen & Apprentices of the Plumbing & Pipe Fitting Indus.*, 177 N.L.R.B. 189, 190 (1969) (describing the “right to control” test as “the most readily available analytical tool”); *United Ins. Co. of Am.*, 162 N.L.R.B. 439, 455–56 (1966) (“[A]n employer-employee relationship has been found where the person for whom the work is to be done . . . retains control over, or the right to control, the significant portions of the details and means by which the desired result is to be accomplished.”). In an analogous case testing the reach of the term “employee” under the ADEA, Judge Richard Posner wrote that “the most important factor in deciding whether a worker was an employee . . . was the employer’s right to control the worker’s work.” *EEOC v. Sidley Austin Brown & Wood*, 315 F.3d 696, 705 (7th Cir. 2002) (citing *Ost v. W. Suburban Travelers Limousine, Inc.*, 88 F.3d 435, 438 (7th Cir. 1996)).

84. See cases cited *supra* note 83.

85. *Brown Univ.*, 342 N.L.R.B. No. 42, slip op. at 8 n.27, 2004 WL 1588744, at *11 n.27 (July 13, 2004) (citing *NLRB v. Town & Country Elec.*, 516 U.S. 85, 94 (1995)); see also *RESTATEMENT (SECOND) OF AGENCY* § 2(2) (1958).

consideration of the “economic realities” of the relationship, that is, the degree to which putative employees are economically dependent upon an employer.⁸⁶ Thus, since Taft-Hartley, the Board and courts have sometimes used a blended approach, measuring the degree of control an alleged employer may exercise over an alleged employee alongside a consideration of the alleged employee’s economic dependence upon the employer.⁸⁷ While the right-of-control standard remains the primary measure for differentiating employees from non-employees,⁸⁸ we will demonstrate that under either approach—the right of control standard or one also influenced by economic realities—athletic grant-in-aid students are employees under the NLRA.

B. In Brown University the NLRB Reestablished a Statutory Test for Students Seeking Status as Employees

Because university students who receive academic scholarships and perform services as teaching or research assistants appear to satisfy the common law test for “employee,” the question has arisen whether they are such under the NLRA. To analyze this question, the Board has developed an additional statutory test for this setting.⁸⁹ Under this test,

86. See A. Paladini, Inc., 168 N.L.R.B. 952, 952 (1967) (applying right-of-control test “in light of the economic realities”); ROBERT A. GORMAN, BASIC TEXT ON LABOR LAW UNIONIZATION AND COLLECTIVE BARGAINING 30 (1976).

87. See, e.g., Metro. Taxicab Bd. of Trade, Inc., 342 N.L.R.B. No. 130, slip op. at 10–11, 2004 WL 2203013, at *17–20 (Sept. 28, 2004) (finding that cab drivers were not employees due to their high degree of independence from the fleet owners); Comedy Store, 265 N.L.R.B. 1422, 1441–42 (1982) (considering the “economic realities” of comedic performers’ relationships with a comedy club and stating that the economic realities of the relationship, alone, cannot be dispositive of the question of employee status); Drukker Commc’ns, Inc., 258 N.L.R.B. 734, 744 (1981) (noting that the right-of-control “test is not mechanically applied, and is applied in the light of the economic realities of the situation”). A recent example of the use of the blended approach has arisen in *EEOC v. Sidley Austin Brown & Wood*, 315 F.3d 696 (7th Cir. 2002). At issue in that case was whether law firm partners were “employees” and, therefore, protected under the ADEA. See *id.* at 705, 706–07 (citing *Ost*, 88 F.3d at 438, for the proposition that right-of-control is the most important factor in assessing employee status under the ADEA but also acknowledging the existence of the economic-realities test and enforcing an EEOC subpoena seeking related economic information about the concentration and distribution of profits among law firm partners).

88. See GORMAN & FINKIN, *supra* note 64, at 40 (implying that the touchstone for NLRA coverage is the right of control, not economic dependence).

89. See *Brown Univ.*, 342 N.L.R.B. No. 42, slip op. at 5, 2004 WL 1588744, at *7 (July 13, 2004) (stating that “attempting to force the student-university relationship into the traditional employer-employee framework” is problematic and that “principles developed for use in the industrial setting cannot be ‘imposed blindly on the academic world’”) (quoting *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 680–81 (1980)).

students are deemed employees only if they satisfy both the common law right of control test and the Board's additional statutory test.⁹⁰

For many years, graduate assistants at American colleges and universities have sought to organize and bargain collectively, arguing that they are "employees" under the Act. And, just as the NCAA seeks to characterize grant-in-aid athletes as something other than employees,⁹¹ so, too, universities have sought to classify graduate assistants as something other than employees. During this period, a body of analogous doctrine, culminating in *Brown*, has addressed whether students who receive compensation from universities for services while also enrolled as students are employees under the NLRA.

In its 1974 *Leland Stanford Junior University*⁹² decision, the Board directly addressed whether graduate research assistants were "employees" within the meaning of § 2(3) of the Act and held they were "primarily students" and, therefore, not employees.⁹³ In support of this conclusion, the Board looked to four criteria: the persons in question were graduate students enrolled in the Stanford physics department as Ph.D. candidates; they were required to perform research to obtain their degree; they received academic credit for their research work; and their stipend from the university was not dependent upon the nature or value of the services they performed.⁹⁴

During this same period, the Board analyzed student-like relationships in the health-care industry and reached decisions parallel to that in *Stanford*. In *Cedars-Sinai Medical Center*⁹⁵ and *St. Clare's Hospital*,⁹⁶ the Board considered whether medical students who were interns, residents, and clinical fellows, collectively known as house staff, were employees under the Act.⁹⁷ Drawing on *Stanford*,⁹⁸ the *St. Clare's Hospital* Board found that medical interns who "perform services at their educational institutions which are directly related to their educational

90. See *Brown*, slip op. at 9, 2004 WL 1588744, at *12 (stating that the statutory test is required and that "[t]he issue is not to be decided purely on the basis of older common-law concepts").

91. See *supra* Part I (describing the origin of the term "student-athlete").

92. 214 N.L.R.B. 621 (1974).

93. See *id.* at 621, 623.

94. See *id.* at 621–22.

95. 223 N.L.R.B. 251 (1976).

96. 229 N.L.R.B. 1000 (1977).

97. *Id.* at 1002; *Cedars-Sinai*, 223 N.L.R.B. at 253.

98. *St. Clare's*, 229 N.L.R.B. at 1002 nn.19–20.

program,”⁹⁹ are “serving primarily as students and not primarily as employees”¹⁰⁰ within the meaning of the Act. As an equally compelling factor, the Board found that “the mutual interests of the students and the educational institution in the services being rendered are predominantly academic rather than economic in nature.”¹⁰¹

By the late 1990s, however, the Board’s view of graduate assistants and house staff had changed dramatically. In its 1999 decision in *Boston Medical Center*,¹⁰² the Board overruled *Cedars-Sinai* and *St. Clare’s* and found house staff to fall within the meaning of the term employee, notwithstanding their simultaneous status as students.¹⁰³

The following year, the Board followed suit in *New York University (NYU)*,¹⁰⁴ finding non-medical graduate students to be employees and, therefore, within the Act’s reach.¹⁰⁵ Like the hospital in *Boston Medical*, the university contended that as “students,” these persons were not “employees” and, therefore, were outside the reach and protections of the Act.¹⁰⁶ The Board flatly disagreed with the university’s contention and, consistent with its ruling in *Boston Medical*, held graduate assistants to be employees under the Act.¹⁰⁷ In *NYU*, the Board wrote that the term “employee” “reflects the common law agency doctrine of the conventional master-servant relationship,”¹⁰⁸ and that “[t]his relationship exists when a servant performs services for another, under the other’s control or right of control, and in return for payment.”¹⁰⁹ Noting “graduate assistants perform services under the control and direction of the Employer”¹¹⁰ and “are compensated for these services by the Employer,”¹¹¹ the Board found their relationship with the employer

99. *Id.* at 1002.

100. *Id.*

101. *Id.*

102. 330 N.L.R.B. 152 (1999).

103. *See id.* at 159, 161.

104. 332 N.L.R.B. 1205 (2000).

105. *See id.* at 1205.

106. *See id.*

107. *See id.*

108. *Id.* (citing *NLRB v. Town & Country Elec. Inc.*, 516 U.S. 85, 93–95 (1995)).

109. *Id.* at 1206 (citing *Town & Country*, 516 U.S. at 90–91, 93–95); *see* *Seattle Opera Ass’n*, 331 N.L.R.B. 1072, 1073 (2000) (citing *WBAI Pacifica Found.*, 328 N.L.R.B. 1273 (1999)); *Boston Med. Ctr.*, 330 N.L.R.B. 152, 160 (1999).

110. *NYU*, 332 N.L.R.B. at 1206.

111. *Id.*

“indistinguishable from a traditional master-servant relationship,”¹¹² and, therefore, they were employees under the Act.¹¹³

The status of graduate assistants at universities as “employees” under *NYU*, however, was short-lived. In July 2004, the Board issued its most recent decision on the matter in *Brown*, explicitly overruling *NYU*.¹¹⁴ In *Brown*, as in *NYU*, the issue was whether teaching assistants, research assistants, and proctors were “employees” under the NLRA.¹¹⁵ In concluding that they were not, the Board analyzed facts fitting into four specific categories:

Thus, in light of [(1)] the status of graduate student assistants as students, [(2)] the role of graduate student assistantships in graduate education, [(3)] the graduate student assistants’ relationship with the faculty, and [(4)] the financial support they receive to attend *Brown*, we conclude that the overall relationship between the graduate student assistants and *Brown* is primarily an educational one, rather than an economic one.¹¹⁶

The *Brown* Board thus returned to *Stanford*, which had held graduate research assistants were not statutory employees because they “perform[ed] services at a university in connection with their studies, [and had] . . . a predominantly academic, rather than economic, relationship with their school.”¹¹⁷ The Board in *Brown* grounded its decision on precisely that same footing, that “graduate student assistants . . . are primarily students and have a primarily educational, not economic, relationship with their university.”¹¹⁸

Brown is thus grounded on two core principles: students who work for their universities are not employees, first, if their work is primarily educational and, second, if their relationship with the university is not an economic one. When these two conditions characterize the student-university relationship, that is, when the students’ efforts are predominantly academic and not economic, then those individuals are not employees within the meaning of the Act. Conversely, when a student who works for his university performs services that are not

112. *Id.*

113. *See id.*

114. *See Brown Univ.*, 342 N.L.R.B. No. 42, slip op. at 1, 2004 WL 1588744, at *1 (July 13, 2004).

115. *See id.*

116. *Id.*, slip op. at 7, 2004 WL 1588744, at *10.

117. *Id.*, slip op. at 1, 2004 WL 1588744, at *1 (describing *Stanford*).

118. *Id.*, slip op. at 5, 2004 WL 1588744, at *7.

primarily educational or academic and his relationship to the university with respect to those services is an economic one, then the student may be an employee under the Act, provided that he also meets the common law test for that term.¹¹⁹

III. UNDER THE NLRA'S LEGAL STANDARDS, CERTAIN UNIVERSITY ATHLETES ARE EMPLOYEES

While primarily serving the purpose of higher education, American colleges and universities also act as employers with respect to hundreds of thousands of faculty and staff, including many students who are enrolled in classes and simultaneously perform certain services for their universities.¹²⁰ Indeed, at many state universities, even graduate assistants who teach and perform services as part of their academic programs are recognized as employees under the laws in those states.¹²¹ There being no dispute that universities are employers, the only question is whether the relationship between the universities and their athletic grant-in-aid students is an employment relation in which the athletes are employees.

119. Significantly, the *Brown* Board did not overrule *NYU*'s use of the common law test for "employee" as applicable under the NLRA. See *id.*, slip op. at 1, 2004 WL 1588744, at *1 (returning to pre-*NYU* precedent that included the common law test); *id.*, slip op. at 9, 2004 WL 1588744, at *12 (declining to abandon the common law test by indicating that common law concepts could be considered in part); *id.*, slip op. at 8 n.27, 2004 WL 1588744, at *11 n.27 (finding that the common law test is still relevant, and noting Member Peter Schaumber's separate analysis that graduate student assistants fail to be employees under that common law test). Because the *Brown* majority found that graduate assistants were not employees by virtue of failing the NLRA's statutory definition of employee, and not because they failed the common law test, see *id.*, slip op. at 8 n.27, 2004 WL 1588744, at *11 n.27 (noting that Member Schaumber believed graduate assistants had failed the common law test and declining to state that any other member of the Board was in agreement with him), *Brown* does not eliminate that common law standard.

The applicability of the common law test to employee-athletes is addressed in Part III.A.

120. For example, students who work for an hourly wage in the library, the bookstore, and administrative offices, would unquestionably be considered employees of their universities.

121. See *Brown*, slip op. at 17 n.27, 2004 WL 1588744, at *25 n.27 (Liebman & Walsh, dissenting). Graduate assistants at public universities in the following states have organized under state laws granting bargaining rights: California; Florida; Iowa; Kansas; Massachusetts; Michigan; New Jersey; New York; Oregon; Pennsylvania; and Wisconsin. See Daniel J. Julius & Patricia J. Gumpert, *Graduate Student Unionization: Catalysts and Consequences*, 26 REV. OF HIGHER EDUC. 187, 192-93 tbl. 1 (2002) ("The Status of Graduate Student Unions in U.S. Institutions").

A. *Certain College Athletes Meet the Common Law Standard for “Employee”*

Grant-in-aid athletes in revenue-generating sports at NCAA Division I institutions are employees under the common law. They perform services for the benefit of their universities under an agreement setting forth their responsibilities and compensation, are economically dependent upon their universities, and are subject virtually every day of the year to pervasive control by the athletic department and coaches. Put somewhat differently, employee-athletes perform services for their universities under a contract of hire which subjects them to the universities’ control and in return for payment. Thus, employee-athletes meet the common law definition of employee. Having described the common law standard by which to assess our thesis, we next examine the actual degree of control exercised by university-employers over employee-athletes,¹²² the compensation paid them, and the economic realities of the lives of those employee-athletes.

1. *Right of Control: The Daily Lives of Employee-Athletes Demonstrate that They Are Controlled by the University*

Employee-athletes are subject to an extraordinary degree of control by their universities. Indeed, employee-athletes are subject to more control by their universities than is any other employee or group of employees at their institutions.¹²³ Part III.A.1 of this Article describes a composite view of the daily life of the football and men’s basketball employee-athlete at different universities and illustrates graphically the pervasive and virtually constant control university-employers exercise over employee-athletes. We gathered this evidence through interviews with four current and former grant-in-aid athletes from three different NCAA Division I and Division I-A universities.¹²⁴ All play or played in

122. It is the reality of the athlete’s relationship to his university that governs his legal status as an employee or otherwise. In language beautifully apropos to our thesis, Judge Posner has written that the resolution of the question of whether law firm partners were, in fact, employees turned on the actual circumstances of the relationship and not upon “the tyranny of labels.” *EEOC v. Sidley Austin Brown & Wood*, 315 F.3d 696, 705 (7th Cir. 2002). So, here, whether athletes are properly deemed employees depends not upon their label as “student-athletes,” but rather upon the reality of their lives, especially the degree of control exercised over them.

123. What other university employee is subject to such control by his supervisor that he must lift weights at 5:30 a.m., run in the summer sun, and seek permission to leave campus during summertime off hours, or risk termination? *See* Part III.A.1–2.

124. We conducted lengthy interviews with these athletes. All information regarding athletes’

revenue-generating sports, that is, football and men's basketball, at their institutions. Given the vital economic importance of a full grant-in-aid to the players, the precariousness of that financial aid,¹²⁵ the importance of the player-coach relationship to the continuance of that aid as well as to the players' development, and, hence, to their financial potential, we offered all interviewees anonymity. All accepted it.

a. *Football Players' Daily Lives Illustrate the Great Control Universities Exercise over Those Players*

The actual life of the athlete contrasts dramatically with the image portrayed in the NCAA's rules and media messages. Drawing upon data from personal interviews, this Section chronicles the daily existence of Division I-A football players throughout the football season, the remaining academic year, and the summer. The extent to which coaches exercise control over players supports the conclusion that these athletes are employees under the NLRA's common law test.

(1) *Coaches Exercise Inordinate Control over the Football Athlete During the Season*

The regular football season begins on the Thursday preceding Labor Day and ends on the second Saturday or Sunday in December, lasting

experiences in Part III.A.1 arises from these interviews. Interviews were conducted by Robert A. McCormick and Amy Christian McCormick with four anonymous athletes on September 7, 2003 (football player), September 25, 2003 (former basketball player), October 15, 2003 (former football player), and November 10, 2003 (former basketball player). Through these interviews, we provide qualitative data regarding the daily lives of employee-athletes to illustrate university control and do not here purport to provide a quantitative analysis.

Finding athletes to interview was challenging because, as we discovered, many fear reprisals from their coaches. We scheduled interviews with other athletes as well, but those arrangements were unilaterally cancelled by the players and were not rescheduled. *Cf.* BYERS, *supra* note 6, at 14 (describing athletes' similar reluctance to talk to NCAA investigators about activities taking place at their colleges because of intimidation by coaches). Athletes are commonly instructed not to give interviews to members of the media, and that interviews may be approved only by the university's sports-information department. *See* Ted Gup, *Losses Surpass Victories, by Far, in Big-Time College Sports*, CHRON. HIGHER EDUC., Dec. 18, 1998, at A52. With regard to whether the experiences of these four athletes are representative of life for all Division I football and men's basketball players, published information confirms much of what the interviews revealed and is noted where applicable. Moreover, the information provided by each athlete was independently corroborated by the descriptions of the others. That is, although minor details varied, the stories were uniform and consistent.

125. *See infra* notes 183–88, 192–93 and accompanying text (discussing the conditions under which athletes can lose their scholarships).

more than fourteen weeks, but as many as nineteen weeks if the team plays in a January bowl game.¹²⁶ During this period, a conservative estimate of a player's time commitment to football during the week of a home game is approximately fifty-three hours.¹²⁷ Daily afternoon

126. See DIV. I MANUAL, *supra* note 3, arts. 17.11.3–4.

127. This computation assumes that players report to the training facility at 1:00 p.m. from Monday through Friday where they practice until 5:30 p.m.; that they lift weights twice a week for ninety minutes; that mandatory training table dinners last an hour each evening, Monday through Thursday; that on Friday before the game, they stay together from 5:30 p.m. until bedtime at approximately 10:00 p.m.; that on game day they are controlled from 8:00 a.m. until approximately 7:00 p.m. when the game ends; and that on Sunday, their time is directed from 10:00 a.m. until 2:00 p.m. and again from 4:00 p.m. until 8:00 p.m. A player who is “red-shirted,” however, must lift weights at least three times each week, not twice. Under “red-shirting” rules, a player practices with and is retained on the team, but does not play. By this device, the university may extend players’ servitude with an apprenticeship because, under NCAA rules, a red-shirt year does not count towards the player’s four years of playing eligibility. See DIV. I MANUAL, *supra* note 3, art. 14.2.1 (explaining the five-year rule). By the end of a Saturday football game, when the players may finally leave, they will have spent nearly thirty consecutive hours under the direction and control of their coaches.

Evaluating the Pac-10 football programs, noted sociologist Professor Harry Edwards found that football players spent an average of forty hours per week, year round, meeting all the obligations for their athletic scholarships. See RICHARD E. LAPCHICK & JOHN B. SLAUGHTER, *THE RULES OF THE GAME: ETHICS IN COLLEGE SPORT* 116 (1989) (detailing Professor Edwards’ findings); Chin, *supra* note 3, at 1247 n.274; accord Ted Gup, *Foul!*, TIME, Apr. 3, 1989, at 54, 55 (asserting that athletes commonly practice as many as thirty hours per week). The total time commitment amounted to approximately eighty hours a week during away-game weeks. See LAPCHICK & SLAUGHTER, *supra*, at 116; Lynch, *supra* note 24, at 602, 604 (estimating athletic commitments of from forty to sixty hours per week).

The following discussion about players’ time commitment was part of a recent *60 Minutes* episode:

Stahl: No money, but between the workouts, practices, games and travel, being a big-time athlete amounts to a full-time job and more.

Huma: The NCAA official rulebook reads that a student athlete isn’t supposed to put in more than 20 hours of mandatory service a week.

Stahl: If they say it’s 20 hours a week, what is it really?

Huma: Anywhere between 30 and 60 hours. I think it can get that high.

60 Minutes, *supra* note 24, transcript at 17 (Lesley Stahl interviewing Ramogi Huma, former UCLA linebacker). John Square, a football player at the University of Miami, started his Tuesdays with a 7:00 a.m. defensive line meeting, after which he lifted weights for an hour, attended classes until a 2:00 p.m. team meeting, practiced from 3:20 p.m. until 5:30 p.m., gulped down dinner, and went to class from 6:00 p.m. until 9:00 p.m. See Joe Drape, *A Full Ride Can Have Its Bumps: Scholarships Often Leave Athletes Looking for More Money*, N.Y. TIMES, Oct. 4, 2003, at D1.

The above description of the daily experience of football players during the season mirrors published accounts of off-season life. Dominick Brown, a former Michigan State University and Northern Iowa University football player described his typical day: “Every day it’s football when you get up at 6 in the morning till 9 at night.” Geoff Kimmerly, *Winston Could See Much Playing Time Early in his Career: Coaches Impressed by Recruit’s Ability Beyond Linebacker*, LANSING ST. J., Feb. 23, 2004, at 6C. Michigan State University football player Brian Davies reported “conditioning is at 5:30 a.m., throughout the whole winter. After that, we have to go to class, finish

practice is one significant component of this time commitment. Arriving late for practice is not permitted and may result in sanctions as moderate as additional running, weightlifting, or other exercises, to those as severe as demotion to a lower string.¹²⁸ For repeat offenders, outright dismissal from the team and withdrawal of the grant-in-aid can and does result. One consequence of daily required practice is that football players are foreclosed from taking afternoon classes, although they are simultaneously required by NCAA rules and by their universities to carry full academic loads.¹²⁹ The highly regimented nature of practice and training schedules and the excessive number of hours required of athletes are important elements showing the extreme control coaches exercise over athletes as to both the ends sought and the means of achieving them. The athletes are controlled to such a degree that they are commonly foreclosed from certain classes and majors.¹³⁰

The fifty-three hours required each week for football, of course, is in addition to class time, study time, and ten hours per week of mandatory study hall time in academic-support facilities. Thus, although the primary job of the players is to win football games, even studying has become part of their jobs as universities and the NCAA seek to deflect criticism over low graduation rates.¹³¹ And the university-employers

all of our homework, . . . and you might be running on five hours of sleep per night.” Adrienne LaFrance, *Davies Invests in His, Football Program’s Future: Senior Defensive Tackle Brian Davies Reflects on the Opportunities for Success that Emerge from Change, on the Field and off, at Michigan State and Beyond*, SPARTANS ONLINE, July 7, 2004, <http://msuspartans.collegesports.com/sports/m-footbl/spec-rel/070704aaa.html>. Jeremy Bloom described the experience of football players at the University of Colorado:

We football players get up at dawn, do an hour of wind sprints, go to classes, spend two hours in the weight room, devote a couple of hours to seven-on-seven drills, study for school, and try to have something of a social life. And this is our off-season—the hours only increase after the games start.

Jeremy Bloom, Op-Ed., *Show Us the Money*, N.Y. TIMES, Aug. 1, 2003, at A21.

128. Interviews reveal that while such disciplinary measures are common, they are not uniformly applied. Favored players are regularly given special dispensation.

129. See, e.g., Wendel, *supra* note 24, at 23A (noting that athletes are advised not to take classes that conflict with practice time); *AM 870 SportsTalk with Earle Robinson* (WKAR public radio broadcast Sept. 29, 2003) (university professor calling in and reporting that an athlete requested permission to miss half of his scheduled classes and that his coach had suggested he change his major because classes conflicted with practice). NCAA rules state: “To be eligible for competition, a student-athlete shall be enrolled in at least a minimum full-time program of studies leading to a baccalaureate or equivalent degree as defined by the institution, which shall not be less than 12 semester or quarter hours.” DIV. I MANUAL, *supra* note 3, art. 14.1.8.2.

130. See *infra* notes 326–28 and accompanying text.

131. See *infra* Part III.B.2.b.(7) (describing progress requirements), Part III.B.2.b.(8) (describing the Academic Performance Program).

exercise control over the location, duration, and manner in which the employee-athletes carry out even these academic commitments.

The time required of players is even greater during away-game weeks. Their schedule depends upon how far away the opposing team is located, and thus upon the mode of transportation used for travel. On a typical Friday preceding an away game, players must report to the stadium by noon where the team assembles and is transported to the airport. Upon arrival at the destination, the athletes are transported to a hotel where the team checks in, holds team meetings, and eats dinner together. On game day, usually Saturday, they are controlled from 8:00 a.m. until the game ends. After the game, the team travels home together, and the following day, Sunday, their time is directed from 10:00 a.m. until 2:00 p.m. and from 4:00 p.m. until 8:00 p.m.

NCAA rules require players to take twelve credit hours—a full academic load—each term,¹³² and some universities require their players to take a minimum of fifteen credit hours to bolster flagging graduation rates. Players are required to attend class and sometimes even to sit as near the front of the classroom as possible. Athletic department student tutors police these rules and monitor the athletes to ensure their compliance. Thus, virtually every aspect of the athletes' lives on campus is regulated by their university-employers.

(2) *Coaches' Control over Players' Lives Extends to the Rest of the Academic Year as Well*

Even during the off-season, football players are under the regular direction and control of their coaches. In early spring, for six weeks prior to the NCAA-sanctioned spring training season,¹³³ football players undergo a rigorous conditioning period. Three conditioning workouts are required each week, beginning promptly at 5:30 a.m. Players often arise at 4:30 a.m. to be punctual because, as one player put it, “you can't be late.” These one- to two-hour workouts often include running, agility drills, and vigorous cardiovascular conditioning. Furthermore, on three or four additional days per week during this period, players must also report for weightlifting for at least sixty to ninety minutes each session.

In addition, players must attend team meetings for forty-five minutes

132. See DIV. I MANUAL, *supra* note 3, art. 14.1.8.2.

133. See *id.* art. 17.11.6(b) (describing sanctioned spring practice period); Interview with anonymous employee-athlete (Oct. 15, 2003) (describing early spring practice period); Interview with anonymous employee-athlete (Sept. 7, 2003) (same).

each day, Monday through Friday. Freshmen and those having academic difficulty continue to have mandatory study hall. During this period, when classes are also considered, players' lives are essentially regulated from 5:30 a.m. to 10:00 p.m., four days per week.

Once spring practice ensues, the regimented nature of the players' schedules continues, but is accompanied by an even more demanding set of workouts. Like regular-season practice, spring practice involves physically draining and strenuous full-contact drills. In April, the grueling nature of practice escalates as the team undergoes fifteen days of full-contact practices which culminate in the spring intra-squad game. This spring practice period, like the period immediately preceding the season, consumes virtually all of the players' waking hours.

(3) *During the Summer Term, Coaches Continue to Control the Lives of Football Athletes*

Even in the summer, players are controlled by their university-employers. They are required to remain on campus during the week, Monday through Friday. Indeed, if a player wishes to leave campus during the week, he must obtain advance permission from a coach. The coach grants permission, it was reported, only if he deems the proffered reason for leaving significant. On summer weekends, players who can arrange transportation are allowed to leave campus and visit their homes.

During summer months, players are "strongly encouraged" to be present for weightlifting sessions from 6:30 a.m. to 8:00 a.m. every weekday. On four of those days, the players must also run in the afternoon for two to two and one-half hours each day.¹³⁴ Running takes place in the summer heat, humidity, and sun, not in an air-conditioned facility. Players are also encouraged to take summer classes, but may not do so during the second summer session because those classes conflict with official practices, which begin in the first week of August.

(4) *Coaches' Control Intensifies During Summer Pre-Season Practice*

Pre-season "camp" opens in early August and begins the annual cycle again.¹³⁵ During this most intensive training period, players are

134. "[T]o be a good player, you should spend most of your summer working out, not working [at a job]." Telander, *supra* note 39, at 97.

135. Under NCAA bylaws, pre-season football practice may begin as early as thirty-five days prior to the first scheduled game. See DIV. I MANUAL, *supra* note 3, arts. 17.02.11, 17.11.2.1.

effectively “on duty” from 6:30 a.m. to 10:00 p.m. six days a week. They must participate in three arduous full-contact practices every two days. The physical regimen during this pre-season period is legendary. Designed to harden the players for the rigors of the upcoming season, this boot-camp-like experience includes weightlifting, running, meetings, and group meals and is universally considered to be exhausting and brutal.

From the commencement of pre-season practice, attendance at all practices and other scheduled events is mandatory and recorded. Moreover, players are required to sign a statement each week describing the number of hours they practiced. These statements, prepared by team personnel, are maintained to comply with NCAA rules limiting total practice time and often falsely understate the amount of time the players actually spend.¹³⁶

(5) *Other Information Also Demonstrates Universities’ Extensive Control over Football Players*

In years in which the team does not attend a post-season bowl game, demands are placed upon these athletes for approximately 240 days.¹³⁷ If a team plays a bowl game, this increases to as many as 262 days.

136. Under NCAA rules, records documenting the amount of time each athlete engages in required athletically related activities must be maintained. *Id.* art. 17.1.5.3.4. Athletes must receive one day off per week during the regular playing season. *Id.* art. 17.1.5.4. NCAA rules require them to spend no more than four hours per day and twenty hours per week engaging in required athletically related activities, *id.* art. 17.1.5.1, but certain meetings and so-called “voluntary” workouts, at which coaches may be present, are not counted in these limits. See *id.* arts. 17.02.1, .13. Athletes uniformly commented that so-called “voluntary” workouts are, in reality, required. See *infra* note 325 and accompanying text.

NCAA hours limitations similarly do not count as days used to travel to an athletic event. DIV. I MANUAL, *supra* note 3, art. 17.1.5.4. Moreover, the university may treat travel days as a “day off” provided the athletic contest occurs the day preceding or following the day of travel. *Id.* art. 17.1.5.4.1. Therefore, the time an athlete must actually commit to his sport is significantly greater than the NCAA limits suggest.

137. A published account describes the Ohio State University football calendar. The football year commences in the second week of January and does not end until December or the following January. The training schedule begins in January with eight weeks of weight-lifting, four days a week. Spring football practice begins in mid-March and lasts for six weeks. After a week off, players continue their conditioning regimen throughout the summer. Athletes’ conditioning peaks by mid-August when pre-season practice begins. Thereafter, the fourteen-week season begins. Welch Suggs, *How Gears Turn at a Sports Factory: Running Ohio State’s \$79-Million Athletics Program Is a Major Endeavor, with Huge Payoffs and Costs*, CHRON. HIGHER EDUC., Nov. 29, 2002, at A32. According to one football athlete we interviewed, his athletic obligations span 330 days each year.

Notably, this time commitment approximates or exceeds the 250 days an average American works each year.

Coaches place tremendous pressure on the players throughout the year, and many transfer or quit before exhausting their eligibility. If a player falls into disfavor with the coaching staff, he may be “recruited over,” that is, replaced by a newer player.¹³⁸ Coaches often encourage players who have been recruited over to quit the team or to transfer. By this, the coach may terminate a player by refusing to renew his scholarship, reserving it instead for another player.¹³⁹ If a player transfers, he loses one of his four years of NCAA eligibility.¹⁴⁰ Moreover, if a new player transfers without permission from his university after having signed a National Letter of Intent, he loses two of his four years of eligibility.¹⁴¹ This regime often induces players who are “recruited over” to give up and withdraw from school altogether.¹⁴² In

138. For a published account of football player Sammy Maldonado being recruited over at Ohio State University, see Ryan Hockensmith, *Extra Credit*, ESPN THE MAGAZINE, Nov. 12, 2004, <http://sports.espn.go.com/ncf/news/story?id=1919255>. See also *infra* note 142.

139. See *infra* Part III.A.2 and sources cited therein. NCAA rules limit the number of scholarships available in a given sport. Each scholarship, thus, is a valuable resource to the university. The number of scholarships available at any given time for a Division I-A football program is eighty-five. DIV. I MANUAL, *supra* note 3, arts. 15.02.3, 15.02.3.1, 15.5.5.1.

140. DIV. I MANUAL, *supra* note 3, arts. 14.5.1, 14.5.5.1 (requiring an athlete to complete one full academic year of residency at the new institution before becoming eligible to compete); *id.* art. 14.2.1; NCAA, 2004–05 TRANSFER GUIDE: DIVISION I/II/III 25 (2004) [hereinafter NCAA, TRANSFER GUIDE] (indicating that once an athlete begins competing, the five-year clock for using four eligibility years does not pause). These two sets of rules function together to cause the transferring athlete to lose one of his four years of eligibility completely. See DIV. I MANUAL, *supra* note 3, art. 14.2.

141. See Collegiate Comm’rs Ass’n, Text of the National Letter of Intent, paras. 4–5, http://www.national-letter.org/guidelines/nli_text.php (last visited Feb. 5, 2006) (charging an athlete who transfers before completing one year with a year of eligibility at his subsequent institution, which is in addition to the year lost under NCAA rules); see also NCAA, TRANSFER GUIDE, *supra* note 140, at 7; Chin, *supra* note 3, at 1239; Collegiate Comm’rs Ass’n, Administrative Guidelines & Interpretations for the National Letter of Intent, <http://www.national-letter.org/documents/AdminGuide.pdf> (last visited Feb. 5, 2006); Collegiate Comm’rs Ass’n, National Letter of Intent Penalty Provisions & Appeals Process, <http://www.national-letter.org/documents/AppealsProcess.pdf> (last visited Feb. 5, 2006); Collegiate Comm’rs Ass’n, Release Request Form, <http://www.national-letter.org/documents/ReleaseRequest.pdf> (last visited Feb. 5, 2006).

142. One player told the following story. He was recruited from a California junior college to a Midwestern university. He started for the team immediately and was very successful, earning conference player-of-the-week honors. At the conclusion of the season, the university fired his coach. During the following spring practice, it became apparent that his new coach wanted to “weed him out.” Despite carrying a 3.7 grade point average and never missing a practice, the coach ridiculed the player, calling him “lazy,” “unmotivated,” and unwilling to listen to directions. Assistant coaches, he reported, refused to help him, train him, or otherwise coach him. Understanding that the head coach wanted him to quit the team to recoup his scholarship, see DIV. I

such a system, coaches exert plenary control over athletes.

Many other rules restrict even the private lives of the athletes. At some schools, athletes may not use tobacco products or alcohol at any time, nor may they frequent any alcohol-serving establishment. Breaching these rules results in discipline. With few exceptions, no other university employees in America are controlled by their employers to this degree.¹⁴³ And while alcohol and illegal drugs are prohibited, the use of protein supplements, by contrast, is encouraged. One athlete reported that at his school some ninety percent of the players take creatine.¹⁴⁴ Random drug testing is carried out, but is administered by the coaching staff and is loosely executed to make evasion possible.¹⁴⁵

b. The Daily Lives of Men's Basketball Players Demonstrate the Pervasive Control Universities Exercise over Them

Like football players, men's basketball players at NCAA Division I

MANUAL, *supra* note 3, art. 15.5.5.1, but not wishing to relinquish it, he continued to practice and to comply with team rules. In June, however, he received a letter saying that, by the coach's decision, his scholarship would not be renewed. He had been "recruited over," and thereafter was forced to pay out-of-state tuition to remain in school.

143. Faculty members and staff at Brigham Young University, for example, may not drink alcoholic beverages at any time or any place. Brigham Young Univ., Church Educational System Honor Code, http://campuslife.byu.edu/HONORCODE/honor_code.htm (last visited Mar. 20, 2005) (making it a "condition of employment" to "[a]bstain from alcohol[] . . . [and] tobacco" "at all times and . . . in all places").

144. Creatine is a chemical dietary supplement that some athletes use to promote muscle strength and bulk.

145. See Brent Schrotenboer, *Tested . . . and then Discarded: Trainer Says Aztecs Dump Some Samples Taken for Drug Screens*, SAN DIEGO UNION-TRIB., July 3, 2005, at C1 (describing other questionable drug-testing procedures employed at San Diego State University that may permit athlete drug use to go undetected; criticizing in-house drug-testing programs as less reliable than those of independent labs; noting that the NCAA does not monitor or regulate universities' independent drug-testing programs and suggesting those programs may be administered loosely; criticizing an NCAA drug-testing program for frequently notifying coaches in advance as to which athletes will be tested and implying that coaches may warn athletes; and describing acknowledgement among several former players of steroid use on a university football team and recounting one's sworn declaration that the coach "encouraged steroid use"); Chad Starkey et al., *Athletic Trainers' Attitudes Toward Drug Screening of Intercollegiate Athletes*, 29 J. ATHLETIC TRAINING 120, 120 (1994) (confirming that athletic trainers administer the drug-screening process for athletes at NCAA institutions); cf. Ed Garvey, *University Athletics Contain Incentives for Abuse*, CAP. TIMES (Madison, Wis.), Mar. 2, 2004, at 9A (describing a Baylor University coach's refusal to allow the results of failed drug tests to be reported); Mark Winitz, *Drugs in Sports: An Ethical Maze*, AM. TRACK & FIELD, Winter 2002, at 38, 41, available at http://www.american-trackandfield.com/features/winter02_drugs.html (stating that athletes in general often get drugs and training supplements from coaches and other support staff).

universities live lives much more akin to employees than to students. Their lives are highly regimented and subject to detailed control by the coaching staff which regulates the manner in which they perform their athletic and other duties. Drawing upon information gathered through interviews, Part III.A.1.b describes the daily lives of basketball players during the season and the remainder of the year. The pervasive control coaches exercise over these players supports the conclusion that these athletes are employees under the NLRA.

(1) *Coaches Exercise Extensive Control over Men's Basketball Players During the Season*

During basketball season, one athlete said, "life revolves around the athletic schedule." From mid-October until the end of the season, sometime in March, players are required to spend four to five hours per day, six days a week, wholly devoted to basketball. In mid-October, official practices begin with a "midnight madness" celebration. This period, one player said, is "pure misery." Monday through Friday he awakens at 6:00 a.m. to report to the gym at 7:00 a.m. for a grueling workout of running, weight training, and cardiovascular conditioning, including long-distance running and wind sprints. The team eats breakfast together at 8:30 a.m. Classes start at 9:00 a.m. and last until early afternoon. Like football players, basketball players are not permitted to enroll in afternoon classes because teams devote afternoon and early evening hours to required practice and related activities. From 2:30 p.m. to 5:00 p.m. the team practices and watches film of past games or future opponents' games. The team then eats dinner together, after which freshmen and players whose academic performance is deemed deficient attend mandatory study hall. On Saturdays, as one player said, "some kind of meeting or practice" takes place, "especially if we lost the previous game." There is no Sunday obligation, although "most of us are there on Sunday for [treatment of our] aches and pains."¹⁴⁶

146. This description echoes a published account of a typical day in the life of Alan Anderson, a member of the Michigan State University men's basketball team. See Joe Rexrode, *Playing It Smart: Proposed NCAA Rule Demands Higher Grades, Better Graduation Rates: A Day in the Life*, LANSING ST. J., Mar. 14, 2004, at 1A. On January 29, 2004 at 3:00 a.m. Anderson and the team arrived at the Lansing airport after having played the University of Minnesota the previous evening. He returned home, took a nap, and arose in time to attend his 8:00 a.m. health psychology class until 9:20 a.m. From 10:20 a.m. until 11:40 a.m. and then again from 12:40 p.m. until 2:00 p.m., he attended two family child ecology classes. After class, he rushed to the Breslin Center, the MSU basketball arena, where he got taped up for practice. From 3:00 p.m. until 7:00 p.m., he practiced, lifted weights, and ate dinner with the team. During this period, he was also available for university-

The game schedule begins in early November with the conference season starting a month later. For most away games, the team is bussed to and from the game site the day of the game. For an eight-hour trip, the team departs at 6:00 a.m. Occasionally, the group spends the night, returning the following morning and arriving back at the campus in the afternoon. Games, both at home and away, are often played during the week.¹⁴⁷

Athletes with whom we spoke make their “best attempt” to select classes so as to not miss many. Despite this, one said, it is “impossible not to miss class.” One player estimated that he is typically absent from fifteen to twenty percent of his classes. While he is not “forgiven from any of the academic requirements,” he said, “the professors are extremely accommodating” and excuse his absences due to basketball-related activities. Professors fill out progress reports chronicling the athletes’ classroom performance. Athletes who miss class or who fail to maintain adequate grades are reported to the coaching staff and must “run wind sprints or bleachers.”

The holiday season revolves around basketball. Indeed, for one player, Thanksgiving dinner is at the coach’s house. While players may leave campus during this period “for a couple of days here and there,” that, too, depends upon “being in good stead with the coach” and is the “exception rather than the rule.” In all cases, players play in tournaments during the holidays, some at very long distances from home. Players have little time to spend with family during the holidays and are assured only two days off, Christmas Day and New Year’s Day. During this holiday period, when they are not competing, players are required to lift weights in the morning and practice in the afternoon for two hours, followed by film sessions and meetings. From October to March, one player said, there was much we “were obligated to do and obligated to not do.”

approved media interviews. From 7:30 p.m. to 9:00 p.m., he studied in the athlete study facility, and then from 9:00 p.m. until 11:00 p.m., he reviewed game film and practiced shooting at the gym. *See id.*

147. During the 2004–05 season, for example, the MSU basketball team played twenty-nine regular-season games, twelve of which were played away from campus and thirteen of which were played during the week—Tuesday, Wednesday or Thursday. *See* Men’s Basketball Mich. State Univ. Spartans, 2004–05 Results/News Releases, <http://msuspartans.collegesports.com/sports/m-baskbl/archive/msu-m-baskbl-sched-2004.html> (last visited Feb. 5, 2006). Post-season Big-10 and NCAA tournament games, not included in these figures, were all away from campus. *See* Wendel, *supra* note 24 (noting that several times in a basketball season, one team played two games in three days to facilitate national media coverage).

(2) *Off-Season Life and Ancillary Issues Also Demonstrate the Control the University Exercises over Basketball Athletes*

After the season ends in March, study hall hours are still required, and progress reports must be completed. During this off-season period, players may devote more time to school.¹⁴⁸ At the same time, as one player commented, players are required to stay in shape and in contact with the coaching staff. It is “understood” that an athlete will practice on his own and lift weights, and that his failure to do so may result in him being “replaced.” Thus, even during the off-season, one athlete works out a minimum of three hours per day, seven days a week. In the summer, he explained, most players attend summer school, work, and continue their spring workout schedule. At least two to three days per week, they have pick-up games and run wind sprints. They also perform, and are given training in, weightlifting and cardiovascular conditioning. As this athlete recounted, toward the end of the summer, the workout schedule intensifies.

The remarkable degree of control exercised by the coaching staff throughout the athlete’s daily life in both football and basketball shows that they are directed not only as to the end—winning games—but also as to the means for doing so. Our data suggest, and other sources confirm, that no other university employee is even remotely subject to the degree of control, day by day, hour by hour, minute by minute, as the employee-athlete. Coaches and administrators exercise pervasive control over the manner in which athletes undertake their athletic and other responsibilities and even over their daily lives. The exercise of this degree of control over any other employee at the university would be unimaginable. Indeed, if any group of persons may be called “employees” based upon the degree of control exercised by a university, it must be the employee-athletes enrolled there.

2. *The Athletic Grant-in-Aid Functions as Compensation for Athletic Services and Illustrates Additional Control by Coaches over Athletes*

The common law definition of employee requires that the employer

148. Very little of the academic year occurs outside of the basketball season. Only the periods from late August to mid-October and from the end of March through the end of April fall squarely outside of the season. Thus, during the vast majority of the regular academic year, players have little time to devote to class or study.

compensate the alleged employee for services rendered,¹⁴⁹ and the athletic grant-in-aid fulfills this role.¹⁵⁰ The athletic grant-in-aid is unquestionably a transfer of economic value to the employee-athlete in return for his athletic services.¹⁵¹ For their service, players receive grants-in-aid to cover tuition, housing, books, and a meal plan for the term. Players whom we interviewed told us they also receive four free tickets for each home game.¹⁵²

Athletic grants-in-aid are strictly regulated by NCAA rules,¹⁵³ and constitute a central feature in the economic regime by which the NCAA governs the university-athlete relationship. NCAA Division I institutions may award scholarships solely on the basis of athletic ability or achievement, irrespective of the student's academic promise or financial need.¹⁵⁴ Denominated "grants-in-aid," athletic scholarships function as contracts of employment, setting forth the obligations of employee-athletes and defining the resulting economic compensation to be provided.¹⁵⁵

149. See *Brown Univ.*, 342 N.L.R.B. No. 42, slip op. at 8 n.27, 2004 WL 1588744, at *11 n.27 (July 13, 2004) (citing *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 94 (1995)) (noting that an employee must perform service "in return for payment" under the common law).

150. The terms "grant-in-aid" and "scholarship" will be used interchangeably throughout this Section.

151. See NCAA MEMBERSHIP SERVICES, 2001-02 NCAA GUIDE TO FINANCIAL AID 87-88 [hereinafter NCAA, AID GUIDE] (providing a Sample Athletics Financial Aid Agreement to be signed by the athlete and his university and setting forth the dollar amount and duration of the award); BYERS, *supra* note 6, at 373; Lynch, *supra* note 24, at 608-09, 617 (asserting that grant-in-aid constitutes compensation for services); Stephen L. Ukeiley, *No Salary, No Union, No Collective Bargaining: Scholarship Athletes Are an Employer's Dream Come True*, 6 SETON HALL J. SPORT L. 167, 191-92 (1996); Orion Riggs, Note, *The Facade of Amateurism: The Inequities of Major-College Athletics*, KAN. J.L. & PUB. POL'Y, Spring 1996, at 137, 143 (asserting that the grant-in-aid is a contract for hire); Rhoden, *supra* note 24; General Release, Rev. E. William Beauchamp, Executive Vice President, Univ. of Notre Dame, College Athletes Already Are Fairly Compensated (Mar. 10, 1997), available at <http://und.collegesports.com/genrel/nd-genreleases06.html> (characterizing athletic grants-in-aid as compensation for entertainment and athletic services).

152. This number of university-provided tickets was not enough for all of the immediate family members of one interviewee to attend. He noted that the price of each ticket—more than \$40 at that time—represented more than his remaining family members could afford to pay. Interview with anonymous employee-athlete (Sept. 7, 2003).

153. See DIV. I MANUAL, *supra* note 3, art. 15.

154. See *id.* art. 15.1.

155. See NCAA, AID GUIDE, *supra* note 151, at 87 (providing a Sample Athletics Financial Aid Agreement). The financial value of the athletic grant-in-aid is capped by NCAA rule at the cost of attendance at the university. See DIV. I MANUAL, *supra* note 3, art. 15.1. That amount varies, of course, from institution to institution. At Michigan State University, for example, the estimated cost of attendance for in-state students in 2004-05 was \$12,545. Mich. State Univ., *Estimated Annual Expenses (2004-05)*, SPARTAN SPORTSZONE MAG., Oct. 9, 2004, at 46. At Duke University, the

NCAA rules governing athletic grants-in-aid are also highly detailed.¹⁵⁶ Compensating an athlete in excess of the maximum permissible scholarship results in NCAA penalties upon the institution and the athlete.¹⁵⁷ Excess compensation or payments to athletes, such as cash or cars,¹⁵⁸ are prohibited whether provided directly by the university or indirectly by alumni or other “boosters”¹⁵⁹ and constitute a significant source of NCAA violations.¹⁶⁰

cost of attendance that same year was \$41,820. Duke Univ., Financial Aid Statistics for Duke, http://www.finaid.duke.edu/prospect_statistics.html (last visited Feb. 5, 2006). At the University of Florida, the cost of attendance was \$12,715. Univ. of Fla., Tuition and Annual Cost of Attendance, <http://www.admissions.ufl.edu/annualcosts.html> (last visited Feb. 5, 2006). Of course, these amounts are significantly more than the real cost to the university of providing another seat in the classroom, *see supra* note 10, and significantly less than the value to the university of athletes' services. *See infra* note 298. The Reverend Edmund Joyce of Notre Dame has conceded that “[parents realize] that their son’s effort will generate far more revenue for the school than the cost of his grant-in-aid.” BYERS, *supra* note 6, at 233 (quoting Rev. Joyce).

156. The rules governing athletic scholarships span twenty-three pages of the *2004–05 Division I Manual*. *See* DIV. I MANUAL, *supra* note 3, art. 15.

157. *See generally id.*, arts. 15.1, 19.

158. Covert booster gifts of new cars or their use has long been widespread. *See, e.g.*, BYERS, *supra* note 6, at 124–28, 171–72.

159. *See* DIV. I MANUAL, *supra* note 3, art. 15.01.4.

160. Most NCAA rules violations are for impermissible recruiting, misuse of athletic funds, or improper aid to student-athletes. *See, e.g.*, BYERS, *supra* note 6, at 23–24, 27–28, 31 (documenting examples of excessive, prohibited payments to athletes at Southern Methodist University and Texas Christian University, such as gifts of cars, rent-free apartments, a \$25,000 signing bonus, and annual stipends of approximately \$30,000); *id.* at 62 (referring to impermissible cash payments to basketball recruits at the University of Kentucky); *id.* at 124–28, 171–72, 208 (discussing the common but prohibited practice of providing a new car to star athletes); *id.* at 154 (discussing the increasing use of modest cash payments when predominantly white universities began recruiting black athletes in the late 1960s); *id.* at 160, 182, 198–201, 208–09 (describing impermissible financial benefits for athletes as commonplace); DICK DEVENZIO, RIP-OFF U.: THE ANNUAL THEFT AND EXPLOITATION OF MAJOR COLLEGE REVENUE PRODUCING STUDENT-ATHLETES 104, 115–16, 118, 146–48, 153–54, 164–67 (1986) (describing numerous examples of covert benefits being paid to athletes in violation of NCAA rules); MURRAY SPERBER, COLLEGE SPORTS INC.: THE ATHLETIC DEPARTMENT VS THE UNIVERSITY 250–51 (1990) (describing covert payments in many forms, including jobs for parents); ZIMBALIST, *supra* note 14, at 24 (reporting 1982 “signing bonuses” in the five figures); Timothy Davis, *African-American Student-Athletes: Marginalizing the NCAA Regulatory Structure?*, 6 MARQ. SPORTS L.J. 199, 223–24 (1996) (describing factors among African-American players, such as poverty, that further their incentive to accept prohibited financial benefits); *Harrick Steps Down as Coach of Georgia*, ST. LOUIS POST-DISPATCH, Mar. 28, 2003, at D3 (reporting on allegations that a former Rhode Island basketball coach arranged for players to receive lodging, cars, and money from boosters); Welch Suggs, *College Basketball on the Line*, CHRON. HIGHER EDUC., Mar. 26, 1999, at A53 (noting that “coaches continue to offer improper inducements to recruits”); Tim Sullivan, *Coaches’ Payoffs Spur Pay-for-Play Movement*, ENQUIRER ONLINE EDITION, Jan. 20, 2001, http://www.enquirer.com/editions/2001/01/20/spt_coaches.html (estimating the black-market rate for top college football players at \$200,000 in 2001); Ryan Hockensmith, *Buckeyes Chime In*, ESPN THE MAG., Nov. 9, 2004, <http://sports.espn.go.com/ncf/>

The history and development of the grant-in-aid shows that players receive such compensation only in return for athletic services. In 1948, the NCAA membership adopted the so-called "Sanity Code," which formally outlawed scholarships based solely on athletic ability.¹⁶¹ Scholarships under the Sanity Code were to be based instead only upon financial need and/or academic ability, criteria both independent of athletic skill. And significantly, once such scholarships were granted, they could not be withdrawn by the institution, even if the student later decided not to participate in intercollegiate athletics at all.¹⁶²

At the 1956 NCAA Convention, however, the membership officially sanctioned, for the first time,¹⁶³ scholarships based solely on athletic ability. It amended the NCAA's Constitution to authorize "schools to pay . . . regardless of need, . . . [or] of academic potential . . . all 'commonly accepted educational expenses' for the undergraduate athlete."¹⁶⁴ By this, the delegates explicitly authorized, formalized, and legitimized the practice of using scholarships to compensate college athletes for their athletic services alone.

This official sanctioning of athletic scholarships began the modern era

news/story?id=1919258 (describing improper payments to members of the Ohio State University football team including cash, cars, furniture, meals, additional cash in exchange for athlete-signed OSU memorabilia, and payments received in jobs for which work was never performed); cf. Lynch, *supra* note 24, at 618 (noting that under the current NCAA regime, athletes may not receive market-value compensation, and that this encourages "covert payments").

Such payments constitute compensation to athletes for their athletic services and demonstrate to some degree the actual market value of these athletes' services. The amount of covert payment to an athlete generally corresponds to his perceived athletic value to the team, and in this manner the quantity of compensation roughly reflects the quality of athletic services rendered. See Tom Friend, *My Side*, ESPN THE MAG., Nov. 9, 2004, <http://sports.espn.go.com/ncf/news/story?id=1919246> (noting that cash payments to OSU football players varied in direct proportion to the quality of play on the field). It bears noting, therefore, that prohibited compensation more accurately reflects the athlete's actual worth to the university than does sanctioned compensation in the form of financial aid.

161. See SACK & STAUROWSKY, *supra* note 14, at 43–44; Lynch, *supra* note 24, at 617; Gary T. Brown, *NCAA Answers Call to Reform: The 'Sanity Code' Leads Association Down Path to Enforcement Program*, NCAA NEWS, Nov. 22, 1999, available at <http://www.ncaa.org/news/1999/19991122/active/3624n24.html> (noting that the Sanity Code adopted the principle of "awarding financial aid without consideration for athletics ability").

162. See BYERS, *supra* note 6, at 67; SACK & STAUROWSKY, *supra* note 14, at 44; Allen L. Sack, *Big-Time Athletics vs. Academic Values: It's a Rout*, CHRON. HIGHER EDUC., Jan. 26, 2001, at B7.

163. See BYERS, *supra* note 6, at 10, 72.

164. *Id.* at 72. Later, in 1957, "commonly accepted educational expenses . . . were defined as tuition, fees, room and board, books, and \$15 per month for nine months for laundry money." *Id.* Cash stipends for laundry or other purposes are no longer permitted. See DIV. I MANUAL, *supra* note 3, art. 15.2.

of college sports in which universities openly and unabashedly pay players for their athletic services in abrogation of the amateurism principles the NCAA professes to uphold. Former NCAA Executive Director Byers described this change as “forswearing old amateur principles without admitting it.”¹⁶⁵ It “was an act of administrative convenience for college management and a recruiting bonanza for coaches. It . . . sanctified an industry-wide, common pay scheme based on athletic skill.”¹⁶⁶ Equally pointedly, Fritz Crisler, former head football coach at the University of Michigan, described it as “professionaliz[ing]”¹⁶⁷ the college athlete. Once universities began compensating students solely for their athletic services, they fulfilled the compensation requirement of the common law test,¹⁶⁸ thereby propagating the employment relation with their athletes.

Initially, NCAA rules safeguarded the athletes to some degree. For example, an athletic grant-in-aid could be awarded for up to four full years,¹⁶⁹ guaranteeing a gifted athlete four years of education and giving him a significant incentive to select a university offering a four-year aid package over other schools offering only one-year scholarships with merely the possibility for renewal. Under the initial legislation, such a four-year grant-in-aid could not be withdrawn by the university even if the athlete elected not to play.¹⁷⁰ Finally, a university scholarship committee, not the athlete’s coach, made determinations regarding the

165. BYERS, *supra* note 6, at 74.

166. *Id.* at 338–39; *see also id.* at 65 (noting that “in 1956 the colleges, acting through the NCAA in the name of ‘amateurism,’ installed their own pay system called the athletics grant-in-aid or athletics ‘scholarship’”). Former NCAA director Byers stated that

[t]he colleges are *already* paying their athletes. The grant-in-aid established that. . . . The uniform stipend is awarded without regard to the financial need or the academic attainment of the recipient. . . . College leaders argue that a free education is sufficient pay for a varsity athlete, even though it is subject to being terminated or renewed annually, based on what the coaching staff decides.

Id. at 373 (emphasis in original); *see* SACK & STAUROWSKY, *supra* note 14; JOHN SAYLE WATTERSON, COLLEGE FOOTBALL 287–307 (2000); Chin, *supra* note 3, at 1236 (arguing that each annual scholarship constitutes pay to the athlete); Sack, *supra* note 162.

167. BYERS, *supra* note 6, at 74.

168. *See* Brown Univ., 342 N.L.R.B. No. 42, slip op. at 8 n.27, 2004 WL 1588744, at *11 n.27 (July 13, 2004) (citing N.L.R.B. v. Town & Country Elec., Inc., 516 U.S. 85, 94 (1995)) (describing the common law test, which includes a compensation element); *supra* Part II.A.

169. *See* BYERS, *supra* note 6, at 72; Sack, *supra* note 162.

170. *See* BYERS, *supra* note 6, at 72; Louis Hakim, *The Student-Athlete vs. the Athlete Student: Has the Time Arrived for an Extended-Term Scholarship Contract?*, 2 VA. J. SPORTS & L. 145, 158 (2000); Sack, *supra* note 162.

renewal or non-renewal of a one-year athletic grant-in-aid.¹⁷¹

Over time, however, these initial safeguards were repealed, rendering the athletic grant-in-aid even more obviously compensatory. The most significant erosion in player protection occurred at the 1973 NCAA Convention with the adoption of Proposal 39.¹⁷² Under that legislation, athletically related aid could “not be awarded for a period in excess of one academic year.”¹⁷³ The proffered rationale for the change from four-year scholarships to one-year renewable grants was to treat athletes like non-athlete students whose scholarships, it was claimed, were awarded on a year-by-year basis.¹⁷⁴ In fact, however, institutions often awarded non-athletes scholarships on a multi-year basis,¹⁷⁵ and the real reason for the shift from four-year to one-year athletics scholarships was, instead, to create a mechanism by which university athletic programs could maintain pressure on the scholarship athlete throughout his college career.¹⁷⁶

The shift from multi-year to one-year athletic scholarships was an important step in the evolution of the university-athlete relationship to an employment relationship. For the first time, the NCAA tied compensation directly to the athletes’ performance of athletic services, not merely to athletic promise, and NCAA rules no longer allowed the athletic scholarship to be guaranteed regardless of whether or not the

171. See BYERS, *supra* note 6, at 73, 76.

172. See *id.* at 163–64; Hakim, *supra* note 170, at 158.

173. BYERS, *supra* note 6, at 163; see also Sack, *supra* note 162. This rule is still in place today. See DIV. I MANUAL, *supra* note 3, art. 15.3.3.1; NCAA, AID GUIDE, *supra* note 151, at 87 (showing a Sample Athletics Financial Aid Agreement, stating that the period of the award may either be an “academic year” or a “semester/quarter,” and providing no option for multi-year aid grants). The rejection of multiple-year scholarships in favor of a rule restricting members to one-year contracts likely offends the Sherman Act, which prohibits “[e]very contract, combination . . . , or conspiracy in restraint of trade or commerce among the several states.” 15 U.S.C. § 1 (2000).

174. See BYERS, *supra* note 6, at 163; Hakim, *supra* note 170, at 158.

175. See BYERS, *supra* note 6, at 163.

176. See *id.* (describing the view of former NCAA President Alan J. Chapman that proffered justifications for Proposal 39 were “bogus”); Hakim, *supra* note 170, at 148; *AM 870 SportsTalk with Earle Robinson*, *supra* note 129 (host interviewing Professor Robert A. McCormick and discussing use of the one-year scholarship to “run off” players “all the time”).

When Proposal 39 was under consideration, proponents “complained that some athletes, once they had the four-year award in hand, decided not to play or at least not to give their best efforts. Such players were cheating the college, they pointed out, and young people should not be permitted to learn bad habits.” BYERS, *supra* note 6, at 163. How could refusal to participate in athletics constitute “cheating the college” unless the four-year grant was considered compensation for those as yet unprovided services?

athlete performed those services.¹⁷⁷ The one-year limit on grants-in-aid thus rendered that aid even more clearly compensation for athletic services.¹⁷⁸

Shortly after the NCAA limited scholarships to one year, it transferred authority over decisions to continue or terminate scholarships from university committees to coaches.¹⁷⁹ Under this regime, any athlete's ability to retain a scholarship depended in substantial part upon his athletic performance the previous year,¹⁸⁰ and coaches gained unparalleled power over the athlete.¹⁸¹ This transfer of scholarship-renewal authority from faculty to coaches cemented the employment nature of the relationship because the athlete's continued compensation depended upon performing to the satisfaction of the athletic supervisor rather than academic personnel who, in theory, would be disinterested in athletic performance.¹⁸² Thus, the coach's power not to renew the one-

177. See DUDERSTADT, *supra* note 24, at 197; SACK & STAUROWSKY, *supra* note 14, at 84.

178. See Chin, *supra* note 3, at 1237 (noting that the one-year limit on grants-in-aid illustrates the university's preference for "fielding a superior sports team" and thereby increasing revenue over concern for an athlete's education which would be better served by a scholarship guaranteed for four years). See *supra* Part II.B for a discussion of the relevance of commercialism in establishing an employer-employee relationship and *infra* Part III.B.2.a for an examination of the entrenched commercial nature of the university-athlete relationship.

179. See BYERS, *supra* note 6, at 76, 164 (noting that even though Proposition 39 passed because of a promise that university committees, rather than coaches, would make scholarship decisions, "[t]he exigencies of big-time athletics—the need to win and survive—in time would also strip away the safeguards promised in the one-year grant legislation"); *id.* at 232–34 (describing an unsuccessful attempt in 1976 to wrest control of the full grant-in-aid away from coaches and to give it back to university scholarship committees); *id.* at 103 (noting that the coach controls the renewals); NCAA, AID GUIDE, *supra* note 151, at 100 (demonstrating through hypothetical case studies that it is the coach who decides whether aid will be renewed); Sack, *supra* note 162.

180. See BYERS, *supra* note 6, at 164, 165–66.

181. See *id.* at 103 ("Both parties understand the grant-in-aid is given on a year-to-year basis, sometimes semester-to-semester The coaches, in fact, control the renewals. . . . If the player does not conform to the demanding college practice and game schedule [whether denoted as mandatory or voluntary], his or her grant-in-aid is not renewed and can be terminated [early] for disciplinary reasons."); see also Murray Sperber, *The NCAA's Last Chance to Reform College Sports: An Open Letter to the Next President of the National Collegiate Athletic Association*, CHRON. HIGHER EDUC., Apr. 19, 2002, at B12 (asserting that one-year scholarships are often not renewed due to unsatisfactory athletic performance).

182. In 1976, several NCAA member schools proposed to limit athletic scholarships to tuition only, reserving additional stipends covering lodging, food, and books to financially needy students exclusively. See BYERS, *supra* note 6, at 231–34, 340; Hakim, *supra* note 170, at 159; *Timeline—1940 to 1979*, NCAA NEWS, Nov. 22, 1999, available at <http://www.ncaa.org/news/1999/19991122/active/3624n27.html>. This measure would have prevented schools from offering a full ride to gifted athletes whose families could afford to pay for living expenses. At the 1976 NCAA Convention, however, this initiative was defeated. Schools opposing it grounded their position,

year athletic grant-in-aid further demonstrates that the control element required by the common law test for employee is satisfied.

Other features of NCAA Division I rules underscore that the athletic grant-in-aid gives coaches leverage over athletes and is compensation for athletic services rendered. For example, under current NCAA rules, an athlete's financial "aid may be immediately reduced or canceled"¹⁸³ during the quarter, semester, or year it covers if, among other reasons, the athlete "voluntarily withdraw[s] from the sport for personal reasons."¹⁸⁴ The fact that a university can terminate financial aid to a player immediately upon the athlete's refusal to play demonstrates that such aid is compensation and a quid pro quo for athletic services rendered.

While the athlete's scholarship may not be immediately reduced or cancelled mid-term "on the basis of . . . athletics ability, performance or contribution to [the] team's success, because of an injury or illness that prevents [the athlete] from participating in athletics, or for any other athletics reason,"¹⁸⁵ nothing bars a coach from refusing to renew the athletic grant-in-aid for the ensuing quarter, semester, or year.¹⁸⁶ In other words, if an athlete does not play well enough or hard enough, or if a

ironically, upon arguments that reinforce the very idea we advance: that athletic scholarships are compensation paid in exchange for athletic services performed. First, they argued, "[s]tudents in big-time revenue sports return huge benefits to their institutions in terms of money, morale, and publicity." BYERS, *supra* note 6, at 234. In other words, they urged, the athletes should continue to receive additional compensation beyond tuition because they perform services which add significant value to their employers—the universities in question.

Second, they asserted, "[t]he all-encompassing commitment required of student-athletes to survive in the major revenue sports should merit a full ride." *Id.* at 234. This argument candidly recognized the commitment required of athletes and suggested that institutions should fully compensate them for that commitment. In *retaining the full athletic scholarship in 1976, Division I institutions conceded it was a quid pro quo for athletic services.*

183. NCAA, AID GUIDE, *supra* note 151, at 87 (bold in original) (Sample Athletics Financial Aid Agreement).

184. *Id.* at 87 (Sample Athletics Financial Aid Agreement that is provided for use at schools in all three NCAA divisions); see also DIV. I MANUAL, *supra* note 3, art. 15.3.4.1; NCAA, AID GUIDE, *supra* note 151, at 95 (providing a Sample Cancellation of Award During the Academic Year Letter and incorporating justifications for a mid-term cancellation of financial aid including withdrawal from the sport "for personal reasons"); *id.* at 101 (illustrating through a hypothetical case study that a university may cancel Anne's financial aid immediately if she decides to quit her sport midway through the season).

185. NCAA, AID GUIDE, *supra* note 151, at 87 (Sample Athletics Financial Aid Agreement); see also DIV. I MANUAL, *supra* note 3, art. 15.3.4.3.

186. See DIV. I MANUAL, *supra* note 3, art. 15.3.5; NCAA, AID GUIDE, *supra* note 151, at 96 (providing a Sample Nonrenewal of Award Letter and requiring no reasons to justify the nonrenewal of an award for a subsequent academic term).

better athlete arrives, or even if the athlete is injured in the course of his sport, the coach may refuse to renew the athlete's grant-in-aid.¹⁸⁷ One athlete told us that his quality of life depends much upon how well he plays. "Those who perform well get away with more. If you are on the bubble, you best behave yourself." "There are," the coaches remind them, "plenty to step into your shoes."¹⁸⁸ Again, the coaches exercise unparalleled control over athletes by having the power not to renew their scholarships. This paradigm matches that of the employment relation in which an employer may terminate an employee once he is no longer useful.¹⁸⁹

In short, the relationship between the university and the scholarship athlete is that of employer and employee.¹⁹⁰ Employers pay their employees in exchange for services. Universities likewise award grants-in-aid to athletes in exchange for the athletes' services in their sports.¹⁹¹

187. See DIV. I MANUAL, *supra* note 3, art. 15.3.5; NCAA, AID GUIDE, *supra* note 151, at 100 (illustrating through a hypothetical case study how a coach may not reduce or cancel player Max's aid during the period of the award for athletics reasons but may do so at the end of the year by refusing to renew the award for the subsequent period).

While coaches at some schools sometimes voluntarily renew an athletic scholarship in the event of injury, NCAA rules do not require that result. Moreover, NCAA rules limit the number of scholarships Division I member schools may grant. In Division I-A football, a university may award up to eighty-five scholarships at any one time. For men's basketball, the number of scholarships is limited to thirteen. See DIV. I MANUAL, *supra* note 3, arts. 15.5.4.1, 15.5.5.1; BYERS, *supra* note 6, at 355. Such limitations on the number of scholarships dramatically increase a coach's incentive to allocate these valuable resources only to the best athletes available. Therefore, even if a coach would like to renew a player's scholarship, he will be hard-pressed to do so when the player is unable to contribute to the success of the team. Allocating resources to under-performers would allow other colleges a competitive advantage on the playing field. See *id.* at 76 ("The law of survival quickly dictated that the colleges' money for full rides should go only to players who help the team."); Hakim, *supra* note 170, at 148, 159. The financial importance of winning, see Robert H. Frank, Challenging the Myth: A Review of the Links Among College Athletic Success, Student Quality, and Donations 3 (May 2004), http://www.knightfdn.org/athletics/reports/2004_frankreport/KCIA_Frank_report_2004.pdf; *infra* Part III.B.2.a (describing the financial benefits of winning), places enormous pressure on coaches not to allocate awards to unproductive players. Hakim, *supra* note 170, at 159.

188. Interview with anonymous employee-athlete (Nov. 10, 2003).

189. See, e.g., MICHAEL J. ZIMMER ET AL., CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 5 (2d ed. 1988) (describing the at-will doctrine).

190. See, e.g., Lynch, *supra* note 24, at 608–09, 617; Ukeiley, *supra* note 151; Riggs, *supra* note 151, at 143 (asserting that the grant-in-aid is a contract for hire); Rhoden, *supra* note 24.

191. Indeed, the public commonly perceives that college athletes receive compensation for their athletic services because they "get a free college education." Given low graduation rates, see *infra* Part III.B.2.b.(8), diluted curricula, see *infra* Part III.B.2.b.(4), and extraordinary demands on the athletes' time and energy, see *supra* Part III.A.1, however, even this promise of an education is not fulfilled in many cases. Thus, in many instances, athlete compensation falls woefully short of that

In effect, the athlete is an employee with a one-year, renewable contract of employment. Universities may terminate these employees for any reason, or no reason, at the end of the year through nonrenewal of their contracts.¹⁹² Furthermore, like an employee who may be terminated during the period of a contract for reasons stated therein, an athlete may be terminated mid-season for certain behavior, such as becoming academically ineligible, engaging in serious misconduct that brings disciplinary action from the school, withdrawing from the sport, or even refusing to follow the coach's rules.¹⁹³ Termination occurs in the athletic context via immediate cancellation of the athlete's compensation, or athletic scholarship.

Under the common law standard, an employee must be compensated for services rendered. Given the history and structure of the athletic grant-in-aid and the policy choices made by the NCAA in its development, grants-in-aid transparently serve as compensation for athletic services. Moreover, the coach's ability to cancel or not to renew a grant-in-aid fixes his control over athletes, another element required under the common law test.

3. *Athletes Are Economically Dependent upon Their Universities*

In addition to a right of control and compensation, the common law test for "employee" sometimes also refers to the putative employee's economic dependence upon the employer.¹⁹⁴ Grant-in-aid athletes at Division I NCAA institutions are deeply economically dependent upon their universities. In fact, their primary requirements for survival—food and shelter—are met by their university-employers through grants-in-aid.¹⁹⁵ Interviews and secondary sources suggest that many athletes come from impoverished or humble backgrounds and cannot afford

which seems to be promised them, a college education. This inadequacy of player compensation is not entirely the athlete's fault if he is not capable of doing college-level work, *see infra* Part III.B.2.b.(1), when he lacks the time needed to do so, *see supra* Part III.A.1, or when his scholarship is not renewed because he has been injured or his performance falls short of the coach's wishes, *see* Part III.A.2.

192. *See, e.g.*, Schott, *supra* note 24, at 35 (noting that the university can dismiss the athlete by failing to renew his one-year scholarship); *see also supra* notes 186–87.

193. *See* Interview with anonymous employee-athlete (Oct. 15, 2003); NCAA, AID GUIDE, *supra* note 151, at 87 (Sample Athletics Financial Aid Agreement); *see also supra* notes 183–84 and accompanying text.

194. *See supra* notes 86–87 and accompanying text.

195. *See* DIV. I MANUAL, *supra* note 3, art. 15.2.2 (permitting financial aid to cover room and board in addition to tuition, fees, and books).

school, food, or lodging without the grant-in-aid.¹⁹⁶ Although athletes are permitted under current NCAA rules to take part-time employment,¹⁹⁷ the extraordinary demands on their time and energy from their athletic obligations necessarily preclude outside employment as a meaningful means of self-support.¹⁹⁸ And, because they may not profit from their reputation as athletes,¹⁹⁹ any earnings from such employment are likely to be minimal, again leaving them fully economically dependent upon their universities.

Moreover, NCAA rules forbid players from accepting cash or other gifts from non-family members,²⁰⁰ and even gifts from family and guardians are limited to an amount which, when combined with any grant-in-aid, covers only the cost of attendance.²⁰¹ Despite providing valuable services, players whose families cannot afford to provide them

196. Athletes commonly describe lacking resources for basic necessities. "There are days . . . when training table is the only thing I eat all day." Irvin Muchnick, *Welcome to Plantation Football: The Financial Rewards for a Winning College Program Have Never Been Greater. Yet Most of the Athletes Who Make it Happen are Living in Grinding Poverty. How Fair is That?*, L.A. TIMES, Aug. 31, 2003, (Magazine), at 114 (quoting James Bethea, a U.C. Berkeley football player). "Athletes don't have the money to live the normal life of a student. They don't have the money to buy toothpaste. They don't have the money to buy toilet paper." *Id.* (quoting Kevin Murray, California state senator). Quinn Dorsey, a University of Oregon football player, was suspended for the first four games of the 2003 season when he traded his complimentary game tickets for rent. *Id.*

197. Before August 1998, the NCAA completely prohibited scholarship athletes from holding part-time jobs during the academic year. See Greg Skidmore, *Recent Development: Payment for College Football Players in Nebraska*, 41 HARV. J. ON LEGIS. 319, 321 n.15 (2004). From August 1998 until the 2003–04 academic year, they could earn no more than \$2,000 from a job during the academic year without correspondingly diminishing their financial aid. NCAA, 2002–03 NCAA DIVISION I MANUAL (2002), arts. 15.2.6, 15.2.6.1. Since 2003, athletes can take legitimate employment, and their earnings do not affect their financial aid. NCAA, 2003–04 NCAA DIVISION I MANUAL (2003), art. 15.2.6; DIV. I MANUAL, *supra* note 3, art. 15.2.7. The athletes, however, may not accept compensation for their fame as athletes and may receive pay only for work actually performed at levels commensurate with the prevailing rate for that work in that community. *Id.* arts. 12.4.1, 12.4.1.1, 15.2.7(a)–(c). Thus, while the rules now permit employment, they still prohibit the athlete from profiting from the one real source of value he possesses—his fame as an athlete. See generally *id.* arts. 12.5.2–4.

198. See Lynch, *supra* note 24, at 618; Drape, *supra* note 127.

199. See DIV. I MANUAL, *supra* note 3, arts. 12.5.2, 15.2.7.

200. See *id.* arts. 12.1.1, 15.01.2 (rendering ineligible for athletic competition any athlete who receives financial aid from sources other than those permitted under NCAA rules); *id.* art. 15.2.6 (allowing athletes to receive "financial aid from anyone upon whom the . . . athlete is naturally or legally dependent"); 60 Minutes, *supra* note 24, transcript at 16 (describing the suspension of former UCLA football player Donnie Edwards for accepting food); see also Muchnick, *supra* note 196 (noting that accepting lunch "from anyone other than an immediate family member can be construed as a gratuity from a booster—punishable by loss of eligibility").

201. See DIV. I MANUAL, *supra* note 3, arts. 15.01.2, 15.1, 15.2.6.1.

with extra money struggle financially throughout their college experience. That athletes commonly leave their universities without graduating when coaches do not renew their grants-in-aid²⁰² also demonstrates their high level of economic dependence upon those institutions. Unable to earn significant outside income, forbidden from accepting gifts other than limited amounts from parents, and with primary living expenses covered by the university through the grant-in-aid, scholarship athletes are utterly economically dependent upon their universities.

The foregoing demonstrates that athletic grant-in-aid students are employees. As the NLRB has underscored, “[u]nder the common law, an 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.”²⁰³ Athletic grant-in-aid students are employees under the common law because they serve under the substantial control of their university-employers²⁰⁴ in return for compensation and are economically dependent upon them.

B. College Athletes Are Employees Under the NLRB’s Statutory Test from Brown

Having shown that grant-in-aid athletes are employees under the common law test, we must nevertheless establish that they likewise meet the NLRA’s statutory definition of that term. That is, we must also show

202. Interview with anonymous employee-athlete (Sept. 25, 2003) (former basketball player attesting that athletes commonly leave the university when coaches do not renew grants-in-aid); Interview with anonymous employee-athlete (Sept. 7, 2003) (football player attesting to same). Nonrenewal of the grant-in-aid can occur either because the athlete exhausts his four years of eligibility before completing the course requirements for his degree, *see infra* Part III.B.2.b.(7), or because the coach decides not to renew the scholarship, opting to use it instead for another athlete. Interview with anonymous employee-athlete (Sept. 25, 2003); Interview with anonymous employee-athlete (Sept. 7, 2003); *see also supra* Part III.A.2 and note 187.

203. *Brown Univ.*, 342 N.L.R.B. No. 42, slip op. at 8 n.27, 2004 WL 1588744, at *11 n.27 (July 13, 2004) (citing *NLRB v. Town & Country Elec. Inc.*, 516 U.S. 85, 94 (1995)) (emphasis omitted).

204. NCAA regulations govern myriad aspects of the athletes’ lives:

Encyclopedic regulations will govern their lives, on and off campus, for the next four to six years, starting with the first recruiting contact while they are high school students. The youngsters have no choice in the matter. You can’t play in college unless you pledge allegiance to the rules, they are told. Then they are warned that the NCAA can rule them permanently ineligible at all 900-plus NCAA colleges for violations of marginal substance.

BYERS, *supra* note 6, at 365. Employee manuals in most industries establish the employer’s right to control how the employee performs his job. The employee manual in college sports, the 487-page NCAA Division I Manual, however, goes much further in controlling virtually all aspects of employee-athletes’ lives.

that employee-athletes are not foreclosed from being employees by virtue of their simultaneous status as students.²⁰⁵ To do so requires an analysis of the NLRB's most recent pronouncement on the status of students as employees, *Brown University*.

1. Brown Identifies Four Factors in Assessing Students' Employee Status

As discussed previously, in *Brown*, the Board examined four factual criteria to decide whether graduate assistants were statutory employees: “[(1)] the status of graduate assistants as students, [(2)] the role of graduate student assistantships in graduate education, [(3)] the graduate student assistants’ relationship with the faculty, and [(4)] the financial support they receive to attend Brown.”²⁰⁶ Applying this test to employee-athletes yields the conclusion that they are not primarily students and that their relationship with their universities is an economic one. With respect to these four areas of inquiry, employee-athletes are employees under the first three criteria. The logic underlying the fourth criterion is fallacious, and even if the fourth factor is valid, it, too, results in employee status for athletes. For these reasons, and because they also meet the common law test for employees,²⁰⁷ employee-athletes are employees under the NLRA.

a. Under the First Factor, Athletes Play a Limited Role as Students

In *Brown*, the first factor upon which the Board relied to hold that graduate assistants were not employees was their status as students.²⁰⁸ The Board noted the graduate assistants at Brown University were all enrolled as students,²⁰⁹ their status as teaching assistants (TAs), research assistants (RAs), and proctors was contingent upon being enrolled as students,²¹⁰ and they were unlike others previously held to be employees because they were still students.²¹¹

205. See *Brown*, slip op. at 5, 8, 2004 WL 1588744, at *7, *11 (requiring that students pass both the common law test and a special statutory test to acquire employee status).

206. *Id.*, slip op. at 7, 2004 WL 1588744 at *10.

207. See *supra* Part III.A.

208. *Brown*, slip op. at 7, 2004 WL 1588744, at *10.

209. See *id.*, slip op. at 6, 10, 2004 WL 1588744 at *9, *14.

210. See *id.*

211. See *id.*, slip op. at 5, 2004 WL 1588744 at *6 (distinguishing the research associates at issue in *C.W. Post Center of Long Island University*, 189 N.L.R.B. 904 (1971), who had already obtained

At the outset, it bears remembering that the Board in *Brown* did not foreclose graduate student assistants from employee status solely because they were students. That is, the Board did not rule in *Brown* that students and employees are two mutually exclusive categories. Otherwise, its analysis of and reliance on the second, third, and fourth criteria would have been superfluous. Rather, the *Brown* Board concluded that graduate assistants fell outside the Act because they were “*primarily* students.”²¹² The necessary inference is that other students compensated by universities whose services are *not primarily* educational may still be treated as employees. This reasoning is further supported through the *Brown* Board’s acknowledgment that students who perform services unrelated to their educational programs *may* properly be characterized as employees.²¹³ As we will show below, the athletic services provided by employee-athletes are predominantly unrelated to their educational programs;²¹⁴ consequently, these athletes may properly be viewed as employees.

Importantly, the Board in *Brown* looked to the substance, not merely the form, of whether the persons in question were students. It analyzed whether the graduate assistants were students in reality, not simply whether they were students in name only. In this respect the Board considered the amount of time the assistants spent performing their duties compared to the amount of time they spent otherwise as students and found that “students serving as graduate student assistants spend only a limited number of hours performing their duties, and it is beyond dispute that their principal time commitment at Brown is focused on obtaining a degree and, thus, [on] being a student.”²¹⁵ As demonstrated above, the same cannot be said of employee-athletes. On the contrary, the onerous time commitments imposed on athletes make it evident that

their degrees).

212. *Id.*, slip op. at 5, 2004 WL 1588744, at *7 (emphasis added).

213. See *id.*, slip op. at 9 n.29, 2004 WL 1588744, at *12 n.29 (“Although the dissent cites language from *Cedars-Sinai* . . . to the effect that the Board has included students in some bargaining units and in a few instances, authorized elections in units composed solely of students, the Board clarified this general assertion in *St. Clare’s* by making clear that this does not include the category of students who perform services at their university related to their educational programs.”). The necessary inference is that students whose services are unrelated to their educational programs may be employees and may organize.

214. See *infra* notes 224–26 and accompanying text.

215. *Brown*, slip op. at 6, 2004 WL 1588744, at *9; see also *id.*, slip op. at 10, 2004 WL 1588744, at *14 (stating that graduate assistants’ “principal time commitment . . . is focused on obtaining a degree, and, thus, being a *student*”) (emphasis in original).

their primary focus is on athletic, not academic, responsibilities.²¹⁶

The Board also identified “[b]eing a student” as “synonymous with learning, education, and academic pursuits,”²¹⁷ strongly suggesting that being a student requires more than mere enrollment, but also encompasses actually engaging in these activities. Under *Brown*, then, to conclude that an individual is a student, not an employee, he must be actually engaged in learning, education, and academic pursuits. Lamentably, a great many NCAA Division I football and men’s basketball players are students in name only. They do not spend the majority of their time engaged in learning, education, and academic inquiry, but rather in furtherance of their work as athletes.²¹⁸

b. The Second Factor Considers the Role of Athletic Participation in Education

The second criterion relied upon in *Brown* was the “role of graduate student assistantships in graduate education.”²¹⁹ With this factor, the Board sought to measure the degree to which the graduate assistants’ work furthered their education. It found that the graduate assistants’ services constituted a required component of their courses of study, and, thus, that they were serving as students, not employees, when performing that work.²²⁰ Moreover, the Board noted that graduate student assistants “received academic credit for their research work.”²²¹ Finally, the Board emphasized that the assistants’ services in teaching and research were directly related to their courses of study.²²² Because

216. See *supra* Part III.A.1.

217. *Brown*, slip op. at 6, 2004 WL 1588744, at *9.

218. See *supra* Part III.A.1; see also *infra* Part III.B.2.b.

219. *Brown*, slip op. at 7, 2004 WL 1588744, at *10.

220. Throughout the *Brown* opinion, the Board emphasized that serving as a TA, RA, or proctor was a required condition for obtaining a Ph.D. degree. See *id.*, slip op. at 2 & n.11, 4–5, 6–7, 10, 2004 WL 1588744, at *2 & n.11, *5–6, *9, *14. As the Board noted, for most graduate assistants “teaching is so integral to their education that they will not get the degree until they satisfy that requirement.” *Id.*, slip op. at 6, 2004 WL 1588744, at *9.

221. *Id.*, slip op. at 5, 2004 WL 1588744, at *6 (citing Leland Stanford Jr. Univ., 214 N.L.R.B. 621 (1974)).

222. The Board repeatedly emphasized the close relationship between the assistants’ services and their courses of study. Students are not employees when they perform “services . . . which are directly related to their educational program.” *Id.*, slip op. at 5, 2004 WL 1588744 at *7 (citing St. Clare’s Hosp., 229 N.L.R.B. 1000 (1977), and Cedars-Sinai Med. Ctr., 223 N.L.R.B. 251 (1976) with approval). “[T]heir service as a graduate student assistant is part and parcel of the core elements of the Ph.D. degree.” *Id.*, slip op. at 6, 2004 WL 1588744, at *9; see also *id.*, slip op. at 10, 2004 WL 1588744, at *14. “Graduate student assistant positions are, therefore, directly related to

the graduate assistants' services were an integral component of their degrees, the Board concluded that the university-graduate assistant relationship was an academic, not an economic, one.²²³

In the case of employee-athletes, the services they perform for their university employers—playing football and basketball—are wholly unrelated to their education and their degrees.²²⁴ Those services are not

the core elements of the Ph.D. degree and the educational reasons that students attend Brown." *Id.*, slip op. at 6–7, 2004 WL 1588744, at *9. The Board also wrote that "[t]he relationship between being a graduate student assistant and the pursuit of the Ph.D. is inextricably linked, and thus, that relationship is clearly educational." *Id.*, slip op. at 7, 2004 WL 1588744, at *9; *see also id.*, slip op. at 7, 2004 WL 1588744 at *10.

223. *See id.*, slip op. at 7, 10, 2004 WL 1588744, at *10, *14.

224. The official game program sold at fall 2004 Michigan State University football games lists 103 undergraduate players. Of those, thirty-five had not yet selected a major when the booklet was printed. Of the sixty-eight players with declared majors, only nine had selected a major, like Kinesiology (the study of the mechanics of human motion), that might conceivably be related to football activities. The other fifty-nine athletes, however, majored in courses of study to which their football activities bore no relation whatsoever. These majors included: Agribusiness Management; Communication; Community Relations; Criminal Justice; Economics; Education; Engineering, including Civil, Computer, General, and Mechanical; English; Family Community Services; Finance; Fisheries & Wildlife; Food Industry Management; General Business; General Management; Hospitality Business; Human Biology; Human Resources; Humanities; Landscape Architecture; Law and Society; Marketing; Merchandise Management; Pre-Law; Psychology; Sociology; Spanish; Studio Art; Supply Chain Management; and Telecommunication. Mich. State Univ., *supra* note 155, at 11–16.

While some universities have recently awarded academic credit for playing on the football or basketball teams, *see* Mark Schlabach, *Varsity Athletes Get Class Credit; Some Colleges Give Grades for Playing*, WASH. POST, Aug. 26, 2004, at A1; *Lexus Halftime Show: Michigan—Notre Dame Game* (NBC television broadcast Sept. 11, 2004), doing so violates NCAA rules. Offering such credit is an impermissible extra benefit under Article 16.02.3, which defines such a benefit as any special arrangement . . . to provide a student-athlete . . . a benefit not expressly authorized by NCAA legislation. Receipt of a benefit by student-athletes . . . is not a violation of NCAA legislation if it is demonstrated that the same benefit is generally available to the institution's students . . . or to a particular segment of the student body (e.g., foreign students, minority students) determined on a basis unrelated to athletics ability.

DIV. I MANUAL, *supra* note 3, art. 16.02.3; *see id.* arts. 2.5, 16.12.1.1, 16.12.2.1; Mathewson, *supra* note 10, at 100 & n.89 (asserting that a university may not provide any benefit to student-athletes, including special courses, that are not provided to students in general); accord BYERS, *supra* note 6, at 103 (describing requirement that courses such as weight-lifting classes must be posted and open to all students). Because participation in varsity football or basketball is limited to NCAA athletes, offering academic credit for that participation violates these provisions. Even though some universities have impermissibly awarded credit for being an athlete, to our knowledge, no university confers a degree in football or basketball.

We do not suggest athletes gain nothing by playing sports. Teamwork, discipline, and dedication are all undeniably important aspects of character, and are arguably strengthened through athletic preparation and competition. But character development is distinct from education and learning and is neither what we mean nor what the *Brown* Board meant by "education." No doubt the NCAA hopes to persuade the public that athletics participation is a core component of athletes' educations

required elements of any course of study at any university, nor are they requirements for the completion of any degree.²²⁵ In short, playing football or basketball is completely unrelated to the vast majority of athletes' courses of study. As a consequence, the services employee-athletes perform are not educational but are, instead, economic; the athletes do not serve primarily as students, but rather as employees.

The Board also used this second factor as support for its conclusion that the relationship between Brown University and its graduate students was primarily academic and not economic.²²⁶ That is, the fact that their work as graduate assistants was part of their degree requirements supported not only the idea that they were primarily students, but also

and, for this reason, insists that "student-athletes" learn so-called life skills by participating in their sports. See NCAA, Public Service Campaign, *supra* note 7. Such potential for character development, however, is completely unrelated to their degrees, and, apart from the one to two percent of college athletes who become professional athletes, this learning is also unrelated to their future professions. See NCAA, Estimated Probability, *supra* note 30 (stating that only 2% of football players and 1.3% of men's basketball players later play professionally).

Moreover, although the NCAA emphasizes the life lessons athletes may learn through their athletic training and participation, the reality may be far different. See JAMES L. SCHULMAN & WILLIAM G. BOWEN, THE GAME OF LIFE: COLLEGE SPORTS AND EDUCATIONAL VALUES 265 (2001) (finding that athletes are no more likely to provide leadership than are their non-athlete peers). Many coaches, in fact, socialize their players "into young men with warped perspectives on obedience, morality and competition. These young men are often unable to function appropriately in the real world . . . until they learn new methods of behavior and thought." Telander, *supra* note 39, at 98. Sociologists studying this phenomenon have concluded that coaches often

educate participants in a "dysfunctional manner." . . . [T]he things players are taught are not what they need to learn to be good citizens. . . . "How often is blind obedience taught in place of the courage of conviction? How often is intimidation taught under the guise of tenacity? How often is manipulation and deliberate rule violation taught as strategy? How often is composure and sportsmanship mistaken for lack of effort?"

Id. at 98–99 (quoting sociologists John Massengale and James Frey of the University of Nevada at Las Vegas, who noted that coaches are "experts at brainwashing, at keeping their players subservient, thankful for the simplest of rewards," and explaining that many former football players cannot function "on their own").

225. Athletic services on the football and men's basketball teams cannot be required elements of any course of study because if they were, regular, non-athlete students could not meet that requirement, and as a result could not major in that particular course of study. NCAA rules require all courses for which credit may be granted to be open to all students, not solely to athletes. See DIV. I MANUAL, *supra* note 3, arts. 16.02.3, 16.12.1.1., 16.12.2.1. Consequently, playing football or basketball cannot, under NCAA rules, be a requirement for any major.

226. See *Brown*, slip op. at 7, 2004 WL 1588744, at *10 ("Since the individuals are rendering services which are directly related to—and indeed constitute an integral part of—their educational program, they are serving primarily as students and not primarily as employees. 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.") (quoting *St. Clare's Hosp.*, 229 N.L.R.B. at 1002); see *id.*, slip op. at 10, 2004 WL 1588744, at *14.

that their relationship with the university was not economic. In the case of employee-athletes, the dearth of educational content in their services as athletes confirms that their working relationships with their universities are economic, not primarily academic.²²⁷

c. *Under the Third Factor, Athletes Are Supervised by Coaching Staff, Not by Faculty*

The third criterion the Board used in *Brown* to conclude that graduate assistants were not employees was the nature of the “graduate student assistants’ relationship with the faculty.”²²⁸ At Brown University, faculty oversaw the functions graduate assistants carried out and decided whether graduate assistants’ scholarships would be renewed.²²⁹ In this regard, the Board heavily emphasized the supervisory role of faculty, as opposed to university administrators, to show that the work of TAs, RAs, and proctors was part of their education.²³⁰ The Board pointedly observed that the faculty members who oversaw the teaching and research of the graduate assistants were the same individuals who taught them, supervised their studies, and evaluated their dissertations.²³¹ Because the graduate assistants were supervised by faculty members, rather than by administrators or other staff, teaching and learning functions were occurring through the services being performed, and, therefore, graduate assistants were acting as students, not as employees.

The situation regarding employee-athletes is diametrically opposed to that of the graduate assistants in *Brown*. Faculty have no supervisory role whatsoever over the athletic services athletes provide.²³² Rather, coaches and athletic staff, who are not faculty at those schools, supervise athletes.²³³ The fact that coaches, not faculty members, supervise the

227. See *infra* Part III.B.2.b.(4).

228. *Brown*, slip op. at 7, 2004 WL 1588744, at *10.

229. See *id.*, slip op. at 7, 2004 WL 1588744, at *9.

230. See *id.* (“Brown’s faculty oversees graduate student assistants in their role as a research or teaching assistant. . . . [M]ost [graduate student assistants] perform under the direction and control of faculty members . . . [and] generally do not teach independently RAs performing research do so under grants applied for by faculty members, . . . [who] are often the same faculty that teach or advise the graduate assistant student in their [sic] coursework or dissertation preparation.”).

231. See *id.*

232. Faculty do not review a player’s athletic contribution to the university and usually may not even observe practice, let alone comment upon an athlete’s performance or make suggestions for improvement.

233. Coaches are not eligible for tenure, they do not engage in scholarly research or publication, and they rarely, if ever, teach courses that are open to the general student body. See Steven G.

athletes' services demonstrates that players' work as athletes is not educational in nature. Moreover, university faculty have no authority whatsoever over renewal of an athletic grant-in-aid; that decision lies solely in the hands of the coach,²³⁴ and, therefore, cannot fairly be described as academic. Under *Brown*, these facts establish that employee-athletes are not students with respect to their services but are employees and that their relationship with their universities regarding those services is not primarily academic.

d. Under the Fourth Factor, Athletic Scholarships Are Compensation for Athletic Services, Not Merely Financial Aid

Finally, the *Brown* Board relied upon a fourth element in concluding that the graduate assistants were primarily students and not employees. The financial rewards graduate assistants received were not pay for teaching and research services performed, the Board asserted, but were merely financial aid to permit attendance at Brown.²³⁵ In support of this conclusion, the Board underscored two aspects of graduate assistants' financial packages. First, the amount provided to TAs and RAs was the same as that provided to graduate fellows for whom no teaching or

Poskanzer, *Spotlight on the Coaching Box: The Role of the Athletic Coach Within the Academic Institution*, 16 J.C. & U.L. 1, 9–18 (1989) (asking in the 1980s whether coaches may fairly be considered faculty and concluding even then that they could not); *id.* at 18, 28–34 (indicating that coaches are not normally placed in the tenure system and arguing that they should not be eligible for tenure); Edward N. Stoner II & Arlie R. Nogay, *The Model University Coaching Contract ("MCC"): A Better Starting Point for Your Next Negotiation*, 16 J.C. & U.L. 43, 46 (1989) (indicating that "[a] coach does not teach in a classroom and the precepts of academic freedom do not apply to coaches" and giving reasons why few coaches would request tenure when negotiating their contracts) (citation omitted); *cf.* Fish, *Sign of the Times*, *supra* note 19 (describing coaches' recent contract terms and failing to note that those terms impose teaching or scholarship obligations or that they place coaches in the tenure system); Fish, *Sweet Deals*, *supra* note 19 (same). As college sports have become professionalized, occasional instances in which some coaches functioned like faculty have all but disappeared. NCAA policy changes evidence this trend. In the 1980s the NCAA recommended, but did not require, that institutions' contracts with coaches should be "similar to those entered into with the other members of the faculty . . . [and] should include the assignment of faculty rank, benefits of tenure . . . , and such other rights . . . as are enjoyed by other members of the contracting institution's faculty." NCAA, 1986–87 MANUAL OF THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION 209 (1986). Significantly, not only has this policy never been mandated, it is no longer even recommended with respect to Division I institutions. See NCAA, 2004–05 NCAA DIVISION I MANUAL (2004), available at http://www.ncaa.org/library/membership/division_i_manual/2004-05/2004-05_d1_manual.pdf (failing to include such language).

234. See *supra* notes 179–82 and accompanying text.

235. See *Brown*, slip op. at 6–7, 2004 WL 1588744, at *9–10.

research activity was required.²³⁶ Second, the fact that financial aid awarded to graduate assistants was unrelated to the quality or value of services they rendered indicated that the payment was not compensation for services rendered, but was financial assistance to attend school.²³⁷

At first blush, it might appear as though the Board's reasoning with respect to this fourth factor would equally apply to grant-in-aid athletes. After all, such athletes receive the same amount of financial aid, i.e., full tuition, room, board, and books,²³⁸ as do non-athlete full-scholarship students. In addition, the amount of scholarship each athlete receives does not necessarily depend upon his intrinsic value as a football or basketball player. Thus, a journeyman offensive lineman can receive the same full scholarship as a star quarterback. From this, the NCAA could argue, as did Brown University with regard to graduate assistants, that "grants-in-aid"²³⁹ are merely financial assistance enabling these students to attend college.

In both of the underpinnings for this fourth criterion, however, the Board's reasoning is fallacious. First, it does not follow that TAs and RAs were not receiving compensation, but merely financial aid, simply because they received the same amount as did some other graduate fellows. In determining whether a payment is compensation for services rendered, the proper inquiry is whether the payment would cease were services to be withheld,²⁴⁰ not whether a third party—a fellow in this instance—receives like payment without providing similar services. In other words, the fact that Brown University voluntarily supports fellows does not mean distributions of similar amounts to TAs and RAs are not compensation for the services they render. Indeed, were TAs and RAs to withhold their teaching and research services either collectively or

236. See *id.*, slip op. at 3, 6–7, 2004 WL 1588744, at *3, *9–10.

237. See *id.*, slip op. at 5, 2004 WL 1588744, at *6, (referencing Leland Stanford Junior Univ., 214 N.L.R.B. 621 (1974)); *id.*, slip op. at 4, 8 n.27, 2004 WL 1488744, at *5, *11 n.27.

238. See DIV. I MANUAL, *supra* note 3, arts. 15.01.7, 15.02.2, .5.

239. The NCAA requires schools to refer to the agreement between the university and the athlete as a "grant-in-aid" or scholarship, rather than as an employment contract providing pay or other compensation. Article 12.1.1 of the Division I Manual makes it clear that an athlete is not permitted to receive "pay" for athletic services: "An individual loses amateur status and thus shall not be eligible for intercollegiate competition in a particular sport if the individual: (a) Uses his or her athletics skill (directly or indirectly) for pay in any form in that sport." DIV. I MANUAL, *supra* note 3, art. 12.1.1. And under NCAA bylaws, the grant-in-aid is not considered "pay" and thus is permitted. See *id.* art. 12.01.4.

240. See, e.g., Lynch, *supra* note 24, at 608–09 (asserting that grants-in-aid are compensation for services because athletes lose scholarships by withdrawing from their sports).

individually, it is inconceivable they would continue to receive full “scholarships” and “stipends.” Thus, this “financial aid” must be compensation for services.²⁴¹

Additionally, even if the Board in *Brown* were correct that the proper inquiry is whether a third party receives the same financial benefit without having to provide services, the athlete situation is vastly different. Athletic grants-in-aid are never given without the requirement of athletic services being rendered. Even third- or fourth-string athletes who do not play during games must still come to practice, abide by team rules, undertake required and “voluntary” training, and, in short, perform all the services other grant-in-aid athletes must perform.²⁴² In fact, no third parties receive athletic grants-in-aid without having to participate in the athletic program as a condition of continued receipt.

Comparing the athletic scholarship with the merit-based or need-based scholarship awarded to a non-athlete undergraduate also shows that the former is compensation. Athletic scholarships are granted only if the athlete provides athletic services, while merit- or need-based scholarships awarded to non-athletes require no such services in return. The latter are given to enable students simply to attend the university. In addition, the athletes’ situation is distinct from that of graduate assistants in that undergraduate employee-athletes often have all costs waived while regular undergraduate students rarely receive scholarships covering all costs of attendance.

Likewise, the Board’s conclusion that payments to TAs and RAs are financial aid, not compensation for services, does not follow from the fact that the amount of aid was unrelated to the quality of services rendered or to their value on an open market. All over America, where employees’ wages are set either by collective bargaining agreements establishing uniform wages or under federal or state civil service rules similarly setting uniform wages within classifications, employees receive equivalent compensation regardless of the quality of the services each renders or their intrinsic value.²⁴³ Notwithstanding their uniform

241. Similarly, under NCAA rules, college athletes may lose their athletic scholarships if they fail to perform their athletic services. See DIV. I MANUAL, *supra* note 3, arts. 15.3.4.1(d), 15.3.5.1; Lynch, *supra* note 24, at 609; Interview with anonymous employee-athlete (Oct. 15, 2003); Interview with anonymous employee-athlete (Sept. 7, 2003). In fact, they may, and often do, lose their scholarships merely by failing to perform well athletically. See *id.*; Interview with anonymous employee-athlete (Oct. 15, 2003).

242. Interview with anonymous employee-athlete (Oct. 15, 2003); Interview with anonymous employee-athlete (Sept. 25, 2003); Interview with anonymous employee-athlete (Sept. 7, 2003).

243. Uniform wages are standard in collective bargaining agreements. See *United Mine Workers*

wages, it could hardly be argued that such individuals are not employees.

Even if the Board's reliance on uniformity of wages as evidence that service providers are not employees were logically correct, once again, the athlete situation is distinctly different from that faced by the graduate assistants in *Brown*. In *Brown*, the decision to make compensation or wages uniform among graduate students was the university's, acting independently of any other university.²⁴⁴ In the case of athletes, however, the uniformity of compensation for all grant-in-aid athletes is mandated by agreement among NCAA member schools.²⁴⁵ More specifically, NCAA member institutions made athlete wages uniform by agreeing to limit athlete compensation to the level of the cost of attending each respective university.²⁴⁶ This anticompetitive and illegal arrangement²⁴⁷ can hardly serve as a justification for concluding that athletes are not employees any more than a wage-fixing arrangement among employers in industry would render their workers non-employees. Without the NCAA's wage-fixing agreement standardizing the price of labor, there is no reason to believe athletes' wages would remain uniform. The free market would operate, allowing those athletes with the greatest skill to garner the greatest economic rewards. In addition, the fact that the fixed wage for athletes coincides with the cost of attending school does not transform what is compensation for services into non-compensatory financial aid. The fact that the compensation comes in the form of in-kind benefits, e.g., tuition, room, board, and

of *Am. v. Pennington*, 381 U.S. 657, 666 (1965) ("This Court has recognized that a legitimate aim of any national labor organization is to obtain uniformity of labor standards and that a consequence of such union activity may be to eliminate competition based on differences in such standards." (citation omitted)). "Inevitably, this process produces standardization of employment terms for particular classes of employees." Robert A. McCormick & Matthew C. McKinnon, *Professional Football's Draft Eligibility Rule: The Labor Exemption and the Antitrust Laws*, 33 EMORY L.J. 375, 384 (1984); see Michael S. Jacobs & Ralph K. Winter, Jr., *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 YALE L.J. 1, 8–9 (1971).

244. See *Brown Univ.*, 342 N.L.R.B. No. 42, slip op. at 3–4, 2004 WL 1588744, at *4–5 (July 13, 2004) (noting that Brown University, not other universities, sets graduate assistant stipends and tuition remission levels at Brown).

245. See DIV. I MANUAL, *supra* note 3, art. 15.1. In actuality, athletes' wages are not uniform because superior athletes, those with the most potential earning power, commonly receive illicit payments from boosters, and indeed from the universities themselves, in defiance of NCAA rules limiting compensation to the grant-in-aid. See *supra* note 160. This black-market compensation is evidence of varying market values for different athletes' services and demonstrates that their actual compensation is anything but uniform.

246. See DIV. I MANUAL, *supra* note 3, art. 15.1.

247. See *supra* note 37.

books, likewise makes it no less compensatory.²⁴⁸

In sum, the Board's decision in *Brown* was grounded upon the idea that the relationship between graduate assistants and the university was not an economic one, but rather was primarily an academic one.²⁴⁹ This followed from the Board's view of the Act as a "vision of a fundamentally economic relationship between employers and employees."²⁵⁰ Because the underlying premise of the Act is to cover only economic relationships,²⁵¹ the Board refused to "assert jurisdiction over relationships that are 'primarily educational.'"²⁵²

2. *Employee-Athletes Are Not Primarily Students and Their Relationship with Their Universities Is an Economic One*

Brown stands for the proposition that graduate assistants are not employees under the NLRA because their relationship with universities is primarily academic and not economic.²⁵³ The relationship between employee-athletes and their universities, by contrast, is nearly exclusively economic, or commercial, and is decidedly not predominantly academic. Thus, by virtue of the Board's own reasoning in *Brown*, employee-athletes are employees under the National Labor Relations Act.

Having shown that employee-athletes meet the common law definition of "employee,"²⁵⁴ and that the four factors used in *Brown* also support our thesis, we now proceed to a discussion of the facts surrounding the economic and academic status of employee-athletes to confirm the applicability of the *Brown* Board's reasoning to them. The

248. Under analogous federal income tax principles, both cash and in-kind benefits can be compensatory. "Gross income includes income realized in any form, whether in money, property, or services. Income may be realized, therefore, in the form of services, meals, accommodations, stock, or other property, as well as in cash." Treas. Reg. § 1.61-1(a) (2005). More specifically, "[i]f services are paid for in exchange for other services, the fair market value of such other services taken in payment must be included in income as compensation." *Id.* § 1.61-2(d)(1).

249. See *Brown*, slip op. at 1, 2004 WL 1588744, at *1.

250. *Id.*, slip op. at 6, 2004 WL 1588744, at *8 (quoting WBAI Pacifica Found., 328 N.L.R.B. 1273, 1275 (1999)) (alteration in original).

251. See *id.*, slip op. at 6, 2004 WL 1588744, at *8.

252. *Id.*, slip op. at 6, 2004 WL 1588744, at *8.

253. See *id.*, slip op. at 5, 2004 WL 1588744, at *7.

254. See *supra* Part III.A. Significantly, the majority in *Brown* did not find that graduate assistants were not common law employees, only that they were not statutory employees. Only Member Schaumber contended that graduate assistants were not common law employees. See *Brown*, slip op. at 8 n.27, 2004 WL 1588744, at *11 n.27.

remainder of this Article sets out those facts, first focusing in Part III.B.2.a on the entrenched economic nature of the college sports industry, and then documenting in Part III.B.2.b the lack of genuine academic experiences for athletes, while simultaneously revealing that even the NCAA's academic rules are designed to further universities' economic interests more than athletes' academic needs.

a. College Sports Are Thoroughly Commercial

To comply with the teachings of *Brown*, the NCAA must argue that athletes are primarily students and only secondarily athletes.²⁵⁵ This notion, in turn, is grounded upon the related assertion that college sports are amateur, not commercial. Neither is true. Many of the athletes in revenue-generating sports attend universities not for their intellectual development but in the nearly always unrealistic hope they will play professionally later.²⁵⁶ More importantly, the college sports industry is far from "amateur." Instead, revenue-generating sports are highly professional and commercial in every sense save that of their obligations to their employees. College sports is a fabulously profitable commercial enterprise as well as a lucrative component of the sports entertainment industry. Athletes generate great wealth for their university-employers through their skill and effort. As a result, their services and their relationships with their university-employers are deeply commercial.

The commercial nature of the college sports industry is illustrated by revealing the vast wealth it generates.²⁵⁷ While the \$6 billion NCAA-CBS contract is an exquisite example,²⁵⁸ it is only one of many. Like the NCAA, the conference entities into which the universities group themselves also sell rights to broadcast their members' football and basketball games.²⁵⁹ In so doing, they, too, profit handsomely. For example, the Southeastern Conference generated \$122.5 million in the 2002–03 season,²⁶⁰ largely from the sale of rights to televise regular-

255. See *Brown*, slip op. at 5, 2004 WL 1588744, at *7.

256. See *infra* note 399.

257. The financial structure and size of the college sports industry will be explored in greater depth in a forthcoming article.

258. See *supra* note 11 (describing NCAA's \$6 billion sale to CBS of the rights to broadcast March Madness over an eleven-year period).

259. See *Riggs*, *supra* note 151, at 138. A few universities, like Notre Dame, have remained independent, opting not to join a conference, but instead to reserve for themselves the economic value of their television rights. See *id.*

260. See SOUTHEASTERN CONFERENCE, IRS FORM 990, EIN 63-0377461 (2003) (on file with

season football and men's basketball games, conference basketball tournament games, its football championship game, and post-season bowl games.²⁶¹ Conferences likewise profit when their universities win, or even attend, tournaments.²⁶² At the end of the 2003–04 college football season, college bowl games generated more than \$181 million in additional revenue for the conferences of participating universities.²⁶³ The following year, bowls distributed nearly \$190 million.²⁶⁴ Most revenues earned by the NCAA and conferences are then distributed to their college and university members.²⁶⁵

In addition to harvesting the financial benefit of distributions from the NCAA and from conferences, colleges and universities with successful athletic programs also enjoy significant revenue directly from their operations. Ticket sales alone generate substantial income. For the fall 2003 season, more than 3.6 million fans attended football games at the top-five-attended schools.²⁶⁶ In 2004, Division I men's basketball games

authors).

261. See *id.* In another example, the Big Ten Tournament netted \$21.9 million in its first five years from the sale of broadcasting rights and tickets as well as from corporate sponsorships. See Joe Rexrode, *Success Story: Big Ten Event Has Made Money, Helped Teams Get Prepared for NCAA Tourney*, LANSING ST. J., Mar. 12, 2003, available at http://www.greenandwhite.com/mens_basketball/p_030312_bigtentourney_1c.html.

262. See *60 Minutes*, *supra* note 24, transcript at 14. One athlete we interviewed commented that his school was “compensated well for being invited to the field of sixty-four. We were taken out for a steak dinner,” he said, “that was our reward. . . . How much money did the school make?” There is an “inequitable relationship between people generating the money and the people who distribute the money,” another said.

263. See NCAA, 2003–04 Postseason Football Analysis of Excess Bowl Revenue and Expense by Conference, http://www.ncaa.org/financial/postseason_football/2003-04/2003ExcessRevenue.html (last visited Mar. 14, 2005); NCAA, 2003–04 Postseason Football Summary of Institutional Expenses, http://www.ncaa.org/financial/postseason_football/2003-04/2003summaryInstitutionalExpenses.html (last visited Mar. 14, 2005).

264. See Paul Pedersen, *College Bowl Games Spread the Wealth*, TREASURE COAST BUS. J., Jan. 15, 2005, at A1.

265. Thus, in 2003–04, Division I universities received NCAA distributions totaling more than \$280.1 million. See MEMBERSHIP REPORT, *supra* note 3, at 23. Annual conference distributions to university members are also significant. In 2002–03, the Southeastern Conference distributed more than \$103 million to its twelve university members, averaging \$8.6 million each. See SOUTHEASTERN CONFERENCE, *supra* note 260.

266. See FOOTBALL ATTENDANCE, *supra* note 36, at 4. The five universities with the highest average attendance per football game were Michigan, Penn State, Tennessee, Ohio State, and Georgia. *Id.* The University of Michigan enjoyed the largest per-game attendance in the nation, with an average in 2003 of 110,918 fans. *Id.* In fall 2005, season tickets there cost \$350 per seat. Ticket revenues alone could, therefore, exceed \$38.5 million for the year. See *U-M Reveals Football Ticket Prices*, LANSING ST. J., Mar. 9, 2005, at 2C.

drew more than 25.5 million attendees.²⁶⁷

Not surprisingly, successful athletic programs derive the most income, and the greatest revenue follows particularly successful seasons.²⁶⁸ Of the \$280.1 million the NCAA distributed among member conferences in 2004,²⁶⁹ \$105.3 million was divided among the conferences based upon the teams' tournament performances.²⁷⁰ That year, each conference received approximately \$141,000 for every game a conference member played in the preceding six tournaments, other than for the three final tournament games.²⁷¹ Thus, as a general rule, the greater the number of teams from a given conference participating in the tournament, and the further those teams advance, the more money the NCAA distributes to that conference.²⁷² In 2005, conferences received an estimated \$152,000 for each tournament game, other than the three final games, that a conference member played in the preceding six tournaments.²⁷³ Total distributions to all conferences based on

267. See BASKETBALL RECORDS, *supra* note 36. At the five universities with the highest average attendance per men's basketball game, over 1.5 million fans attended games, an average of more than 20,500 per game. *Id.* at 263. The top five programs in per-game attendance were Kentucky, Syracuse, North Carolina, Louisville, and Maryland. *Id.* The University of Kentucky enjoyed the largest average per-game attendance. *See id.* In the 2004–05 season, ticket prices there ranged from \$22 to \$27 per seat. *See* Univ. of Ky. Athletic Dep't, Men's Basketball Ticket Information, http://www.ukathletics.com/index.php?s=&change_well_id=2&url_article_id=11359 [hereinafter Kentucky Ticket Information] (last visited Feb. 5, 2006). With an average per-game attendance at Kentucky of 22,710, *see* BASKETBALL RECORDS, *supra* note 36, at 263, ticket sales generated between \$499,620 and \$613,170 per game, for a total of \$8.5 million to \$10.4 million for the season. *See* Kentucky Ticket Information, *supra* (providing University of Kentucky 2004–05 home schedule of seventeen games).

268. *See* Frank, *supra* note 187; Telander, *supra* note 39, at 97; Martin, *supra* note 11.

269. *See* MEMBERSHIP REPORT, *supra* note 3, at 24.

270. *See id.*; NCAA, 2004–05 Revenue Distribution Plan, para. 5, http://www1.ncaa.org/finance/revenue_distribution_plan (last visited Feb. 5, 2006) [hereinafter NCAA, Revenue Distribution Plan]; Stefan Fatsis, *Money Drives March Madness*, CINCINNATI POST, Mar. 16, 2004, at C1.

271. *See* Tim Martin, *Big Ten's Share of NCAA Pot May Dwindle*, CENTRE DAILY TIMES (State College, Penn.), Mar. 16, 2004, at B1; *see also* Tom Lambert, *Spartan Fever: March Madness is Sweeping East Lansing as MSU Basketball Takes Center Stage at the Final Four: Fans Revel in Men's, Women's Success*, LANSING ST. J., Mar. 31, 2005, at 1A; Suggs, *supra* note 11; NCAA, Distribution of Basketball-Related Moneys According to Number of Units by Conference, 1999–2004, http://www.ncaa.org/financial/revenue_distribution/d1_bkb_distribution.pdf [hereinafter NCAA, Distribution Units by Conference] (last visited Mar. 23, 2005); NCAA, Revenue Distribution Plan, *supra* note 270.

272. *See* Martin, *supra* note 271, at B1; Martin, *supra* note 11. Conferences have their own internal agreements governing the distribution of tournament revenues among their members. The Big Ten, for example, divides NCAA tournament receipts evenly among its eleven member schools after participating schools' expenses are paid. *See id.*

273. *See* NCAA, Distribution Units by Conference, *supra* note 271; NCAA, Revenue

tournament play alone aggregated approximately \$113.7 million.²⁷⁴

NCAA Division I football programs with the most successful seasons may be eligible to compete in the Bowl Championship Series (BCS), comprised of the Rose Bowl, the Tostitos Fiesta Bowl, the Nokia Sugar Bowl, and the FedEx Orange Bowl. The total revenue from the 2005–06 championship series, excluding the Rose Bowl, was projected to be \$93,150,000.²⁷⁵ Of that sum, conferences of participating teams received \$86,630,000.²⁷⁶ In addition, the fourth BCS game, the Rose Bowl, generated nearly \$29 million for participating schools in 2003–04.²⁷⁷

Winning seasons also generate substantial increases in revenues from the sale of athletic apparel and other merchandise bearing the logo of the school or the number of a star player.²⁷⁸ Athletic success likewise stimulates more interest among, and revenue from, schools' corporate sponsors or "partners."²⁷⁹ Finally, but not insignificantly, universities with successful athletic programs also derive the ancillary financial benefit of "millions of dollars of indirect revenue from alumni donations and increased enrollment."²⁸⁰

Distribution Plan, *supra* note 270; *see also* Lambert, *supra* note 271 (indicating that conferences receive no additional revenue if their teams advance to the final tournament games); Suggs, *supra* note 11 (explaining which tournament games entitle universities to payment under the NCAA formula).

274. *See* NCAA, Revenue Distribution Plan, *supra* note 270; NCAA, Distribution Units by Conference, *supra* note 271.

275. *See* Bowl Championship Series, Revenue Distribution, <http://www.bcsfootball.org/index.cfm?page=revenue> [hereinafter BCS, Revenue Distribution] (last visited Feb. 5, 2006). Rose Bowl revenue is excluded because that money is governed under a separate contract and is not collected by, or distributed from, the BCS entity. The Rose Bowl organization, not the BCS, pays the conferences of Rose Bowl participants directly. *See id.*

276. *See id.*

277. *See* NCAA, 2003–04 Distribution of BCS Revenue, http://www.ncaa.org/financial/postseason_football/2003-04/2003BcsRevenue.html (last visited Mar. 14, 2005).

278. *See* Tim Martin, *The Green Machine*, LANSING ST. J., Dec. 16, 2001, at 1A (noting how MSU's licensing revenue reached a record \$1.7 million following its NCAA men's basketball title in 2000); *see also* D. Stanley Eitzen, *Slaves of Big-Time College Sports*, USA TODAY, Sept. 1, 2000, (Magazine), at 27 (estimating \$2.5 billion in annual sales of licensed college merchandise, generating \$100 million for universities annually); *id.* (noting that the University of Michigan earns approximately \$6 million annually from sales of merchandise).

279. Corporate sponsor Comcast Cable, for example, paid the University of Maryland \$25 million for naming rights to that school's basketball arena. *See Student-Athletes*, BALT. SUN, May 5, 2004, at 18A. Value City will pay \$12.5 million over several years for such rights at Ohio State University. *See* Tim Martin, *Corporate Sponsorships Net Millions for Ohio St.*, LANSING ST. J., Dec. 16, 2001, at 6A.

280. Schott, *supra* note 24 (citation omitted); *see also* PAUL C. WEILER & GARY R. ROBERTS, SPORTS AND THE LAW 796 (2d ed. 1998) (asserting that Patrick Ewing's performance at

Under *Brown*, our thesis requires a showing that the athlete's relationship with his university is not primarily academic, but is instead commercial in nature.²⁸¹ The huge financial payoffs universities reap from their winning football and men's basketball teams demonstrate that these institutions have a powerful incentive to focus on athletic success, not on academics. The staggering wealth these sports generate makes plain their fundamentally commercial nature.

b. The University-Athlete Relationship Is an Economic One: Academic Standards Are Formulated to Serve Universities' Commercial Interests Rather than Bona Fide Academic Values

Just as the university-athlete relationship is undeniably commercial, it is decidedly not primarily academic. To demonstrate this fact, we next examine the state of academics for employee-athletes in Division I revenue-generating sports. Even NCAA academic standards are designed to serve the employers' enormous commercial interests, enabling universities to recruit and retain gifted athletes, rather than to promote true academic achievement. The weight of the evidence demonstrates that the majority of these employee-athletes are not primarily students.²⁸² On the contrary, most of them are inadequately prepared for academic inquiry and, once enrolled, face enormous obstacles to fully experiencing the intellectual aspect of university life.²⁸³ The NCAA's insistence on denoting college athletes as "student-athletes" is a clear attempt to camouflage their true function as employees in the commercial college sports entertainment industry.

Academic ability is independent of athletic talent.²⁸⁴ Consequently, a

Georgetown University for four years helped generate a forty-seven percent increase in the number of applications and a forty-point increase in its freshman SAT scores); Laura Freedman, Note, *Pay or Play? The Jeremy Bloom Decision and NCAA Amateurism Rules*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 673, 699–702 (2003) (documenting significant increases in donations and applications at the University of Maryland following particularly successful seasons in football and men's basketball).

281. See *Brown Univ.*, 342 N.L.R.B. No. 42, slip op. at 5, 2004 WL 1588744, at *7 (July 13, 2004).

282. See Part III.B.2.b.

283. The demands of the classroom are commonly viewed by coaches as "secondary" and as an inconvenient distraction from the real purpose, winning on the field. Interview with anonymous employee-athlete (Nov. 10, 2003); Interview with anonymous employee-athlete (Oct. 15, 2003); Interview with anonymous employee-athlete (Sept. 7, 2003).

284. This lack of correlation is the reason why some great athletes lack intellectual ability while others are extremely intelligent.

university program that screens admissions applications based upon potential academic success necessarily excludes many talented athletes, leaving a team on the playing field with diminished athletic potential. As former NCAA Executive Director Byers remembered:

The big timers—building a national entertainment business—wanted the great players on the field, whether or not they met customary academic requirements. In the new open-door era, [in which virtually all high school seniors were academically “eligible” for college athletics because of the wholesale abrogation of academic entrance requirements,²⁸⁵] victory-minded coaches sensed a potential recruiting paradise.²⁸⁶

To avail themselves of the best potential players, irrespective of academic ability, colleges and universities have created academic programs in name only.²⁸⁷ These programs foster the illusion that athletes are true students without subjecting them to a genuine academic experience—one that would interfere with practice or playing schedules or one that would disqualify some of the best athletes from the school and, thus, from the team. In favoring commercial success over academic standards, colleges and universities have minimized academic entrance requirements for athletes,²⁸⁸ weakened academic standards,²⁸⁹ diluted curricula,²⁹⁰ assigned responsibilities to athletes that would conflict with any meaningful academic program,²⁹¹ and stood by as wave after wave fails to graduate or even to learn.²⁹² Consequently, the label “student-

285. In 1973, NCAA members completely abolished minimum academic standards for entering students by repealing the so-called “1.600 rule” at its annual convention. See BYERS, *supra* note 6, at 165, 297, 339; *Timeline—1940 to 1979*, *supra* note 182. The 1.600 rule had been a modest attempt to ensure entering athletes were minimally prepared to do college-level work. Under the rule, the athlete had to obtain a minimum high school grade point average (GPA) in combination with a minimum SAT or ACT score, which together would predict his ability to earn a 1.600 (or C-) GPA during his freshman year of college. See BYERS, *supra* note 6, at 165, 158–59; *Timeline—1940 to 1979*, *supra* note 182.

286. BYERS, *supra* note 6, at 340.

287. See *infra* Part III.B.2.b.(4). “[N]either the NCAA nor the student-athlete pursues [the NCAA’s academic goals].” Chin, *supra* note 3, at 1234.

288. See *infra* Part III.B.2.b.(1).

289. See *infra* Parts III.B.2.b.(1), (4)–(7).

290. See *infra* Part III.B.2.b.(4).

291. See *supra* Part III.A.1; *infra* Part III.B.2.b.(2), (3).

292. See *infra* Parts III.B.2.b.(1)–(8). Allowing aid to be granted on the basis of athletic ability rather than academic potential or financial need, and relaxing entrance requirements for athletes, meant giving up hope that “athletes be genuine students, capable of profiting from higher education.” BYERS, *supra* note 6, at 153.

athlete” is mere window dressing for individuals who, in substance, are employees.

(1) *Special Admissions Practices and NCAA Admissions Policies Serve Universities' Commercial Interests and Allow Enrollment of Athletes Who Are Not Bona Fide Students*

The erosion of the college athlete's academic experience begins prior to enrollment. Many athletes lack the academic preparation or ability required to benefit from a university educational program. The system by which universities admit athletes despite inadequate academic credentials is commonly known as “special admissions.”²⁹³ Utilized originally to grant admission to children of some alumni and other donors, it has become an important tool of athletic departments to enroll promising athletes with inadequate academic training or potential.²⁹⁴

The proportion of special admissions students, or “special admits,” on revenue-generating teams like football and men's basketball is dramatically higher than for non-revenue sports and for the student body as a whole.²⁹⁵ Indeed, some talented athletes have been admitted despite being unable to read.²⁹⁶ Not surprisingly, special admissions athletes

293. See Lynch, *supra* note 24, at 602; Chin, *supra* note 3, at 1239–40.

294. See DIV. I MANUAL, *supra* note 3, art. 14.1.7.1.1 (allowing Division I programs to engage in special admissions practices); see also DUDERSTADT, *supra* note 24, at 193–95; SACK & STAUROWSKY, *supra* note 14; SCHULMAN & BOWEN, *supra* note 224, at 49 (documenting the divergence of athletes' SAT scores from student averages at Division I-A private and public universities, with greatest divergence among men's basketball and football players at private schools, and among football, wrestling, and men's basketball players at public schools); ZIMBALIST, *supra* note 14, at 16–53; Lynch, *supra* note 24, at 602–03, 610; Chin, *supra* note 3, at 1240 (noting that special admissions programs are considered the only means for obtaining sufficient numbers of superior athletes because many are not academically qualified); Derek Bok, *The Purely Pragmatic University: The Costs of Commercializing the Academy*, HARV. MAG., May–June 2003, at 28, 28–30; Jim Naughton, *Athletes Lack Grades and Test Scores of Other Students*, CHRON. HIGHER EDUC., July 25, 1997, at A43.

295. See Chin, *supra* note 3, at 1239–40. “It is estimated that over thirty percent of football and men's basketball players are special admissions students, compared with just four percent of the regular student body.” Riggs, *supra* note 151, at 141 (citing Jonathan Marshall, *Studies Say that Colleges Exploit Athletes*, S.F. CHRON., Nov. 12, 1993, at E1). “At some schools, sixty percent of special admissions [students] are athletes,” and their concentration among some other sports teams is even greater. Chin, *supra* note 3, at 1240 & n.224 (citing Craig Smith, *UW Tops in “Special Admits”—85% of Athletes Enter with Low Standards*, SEATTLE TIMES, May 20, 1991, at B1). “[I]n 1989 over 85% of the University of Washington's football and men's basketball recruits were special admits.” *Id.* at 1240 n.224 (citing Smith, *supra*).

296. See Chin, *supra* note 3, at 1240; see also 135 CONG. REC. 18,028–29 (1989) (statement of Sen. Simon) (describing how star football player Dexter Manley could not read beyond a second grade level after four years as a student at Oklahoma State University); BYERS, *supra* note 6, at 299

consistently underperform their peers in their college classes.²⁹⁷ Because colleges and universities so frequently offer admission to star athletes²⁹⁸ who are not prepared to do academic work,²⁹⁹ such athletes often enroll with no real chance to benefit from the universities' educational programs.

Recent amendments to NCAA legislation weaken initial academic eligibility requirements for potential athletes, thus exalting athletic promise over intellectual preparedness. Enacted in 1992, Proposition 16 sets forth the initial minimum academic requirements for a Division I athlete to be considered a "qualifier" and therefore eligible to play, practice, and receive financial aid during his freshman year.³⁰⁰ Under the legislation, a sliding scale is used to calibrate a required minimum grade point average (GPA) and standardized test score (e.g., SAT) so the higher an athlete's GPA, the lower his minimum SAT score may be to achieve qualifier status.³⁰¹ Prior to 2003, athletes could not be qualifiers unless they earned a minimum combined verbal and math score of 820 on the SAT.³⁰² Recently, however, the NCAA relaxed the standard, making it possible for athletes earning a combined verbal and math score of 400 on the SAT to be qualifiers.³⁰³ A score of 400 is the result if the

(describing how Kevin Ross claimed not to have learned to read despite having spent four years as a basketball player at Creighton University).

297. See Chin, *supra* note 3, at 1240–41. Realizing they can gain university admission with sub-par academic, but elevated athletic, credentials often prompts athletes to underperform academically in high school as well. See BYERS, *supra* note 6, at 300–01; Chin, *supra* note 3, at 1242.

298. Universities admit star athletes with inadequate academic training or ability, not to be students, but to form superior, semi-professional athletic teams in their revenue-generating sports. More than a decade ago, economist Robert W. Brown estimated that "each football player recruited by 'special admissions' earns major NCAA schools an average of \$155,000 in additional revenues." Riggs, *supra* note 151, at 141 (citing Marshall, *supra* note 295). Patrick Ewing alone generated an estimated \$12.3 million in value for Georgetown University in the 1980s. See *id.* at 142 (citing *Pat Ewing Made Money for His College Team Too*, JET, Jan. 20, 1986, at 49).

299. See BYERS, *supra* note 6, at 299. "Isn't it really academically indefensible to grant admission to UCLA to someone with a 700 on his SAT and a 2.000 grade-point average? I can't see why we put ourselves in these positions." *Thoughts of the Day*, NCAA NEWS, Dec. 20, 1999, available at <http://www.ncaa.org/news/1999/19991220/active/3626n26.html> (quoting Charles E. Young, Chancellor, Univ. of Cal., L.A., 1990).

300. DIV. I MANUAL, *supra* note 3, arts. 14.3.1, 14.3.1.1(a)–(b), 14.3.1.1.1; see also Kay Hawes, *Opportunity vs. Exploitation?: Concerns Over Standards and Higher-Education Access Sparked Debates in '90s*, NCAA NEWS, Dec. 20, 1999, available at <http://www.ncaa.org/news/1999/19991220/active/3626n28.html>.

301. Conversely, the higher the athlete's SAT score, the lower his GPA may be without losing "qualifier" status. See DIV. I MANUAL, *supra* note 3, at 141, art. 14.3.1.1.1 (former qualifier index).

302. See *id.*

303. See *id.* at 143, art. 14.3.1.1.1 (current qualifier index); Tom Farrey, *It's All Academic Now*,

applicant gets *every* question on those two parts of the test wrong.³⁰⁴

Under the new NCAA rule, a high school senior who misses every question on the SAT, but who has a GPA of 3.55, may be admitted to an NCAA member school where he will be eligible to compete as a freshman in intercollegiate athletics.³⁰⁵ Thus, the NCAA requires no demonstration of any objective academic ability whatsoever under the SAT as long as the athlete meets the subjective GPA element. And while the 3.55 GPA requirement might appear to be academically demanding, grades have notoriously been subject to manipulation by high school teachers and administrators.³⁰⁶ Moreover, special high schools primarily for athletes have begun to proliferate.³⁰⁷ They appear to play the major role of ensuring that athletes receive the grades needed to make them

ESPN.COM, Oct. 31, 2002, http://espn.go.com/columns/farrey_tom/1453693.html; see also Jeffrey M. Waller, *A Necessary Evil: Proposition 16 and Its Impact on Academics and Athletics in the NCAA*, 1 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 189, 193–94 (2003) (identifying the new sliding scale as having evolved from the 1992 Proposition 16 legislation).

304. See Farrey, *supra* note 303; College Board, Frequently Asked Questions, <http://www.collegeboard.com/student/testing/sat/about/sat/FAQ.html> (last visited Feb. 5, 2006) (noting in “What do SAT scores look like?” that each part of the SAT is scored on a scale of 200 to 800); *id.* (noting in “Is it true that you get a 200 on the SAT just for signing your name?” that 200 is the lowest score the college board reports for each SAT test (verbal and math)).

305. See DIV. I MANUAL, *supra* note 3, at 143, art. 14.3.1.1.1 (current qualifier index). The SAT provides an objective measure of academic ability because it is not manipulable and can be used to compare one student with all others who took the SAT nationally, while high school GPA, by contrast, is only a subjective measure of academic achievement. See BYERS, *supra* note 6, at 158–59.

306. See BYERS, *supra* note 6, at 159; see also *infra* notes 307–08 and accompanying text. High school grades are often enhanced to assist exceptional athletes gain college admission. It is easy to understand why high school teachers might inflate the grades of an economically disadvantaged student who happens to be a gifted athlete. Speaking of students at Philadelphia’s Franklin High School, where only about twenty percent of all seniors attend college but where fifty to seventy-seven percent of athlete-seniors do so, Dr. Norman Spencer, Franklin’s principal, noted that “[o]ur kids, if they don’t get the [athletic] scholarships, they don’t go to college.” BYERS, *supra* note 6, at 303 (quoting Dr. Spencer). In many disadvantaged communities, sports are considered to be the only ticket out of poverty, and teachers inflate grades to enable athletes to obtain the GPAs needed to make them eligible to play sports in NCAA colleges. “Admiring teachers and principals often ‘help’ star high school athletes by lowering their grading standards for those individuals.” Chin, *supra* note 3, at 1240 n.226 (citing Mark Ivey, *How Educators Are Fighting Big-Money Madness in Athletics*, BUS. WK., Oct. 27, 1986, at 138); see also BYERS, *supra* note 6, at 303; Steve Wilstein, *Graduation Rates Sour Sweet 16: Study Shows Blacks Less Likely to Get Degree*, J. GAZETTE (Ft. Wayne, Tex.), Mar. 25, 2003, at 1 (“There are a lot of people in our schools, too many, who think they’re doing young people a favor by promoting them from grade to grade, believing the dream that this kid is so talented that he’s going to make it into the pros. The odds remain staggeringly against a high school athlete getting a college scholarship, let alone a career in the pros.” (quoting Professor Lapchick)).

307. See Farrey, *supra* note 303.

eligible under NCAA rules for intercollegiate competition.³⁰⁸

(2) *The Freshman Eligibility Rule Is a Barrier to Academic Success and Helps Coaches Staff Better Teams*

For most of its history, the NCAA forbade freshmen from competing in varsity sports.³⁰⁹ This prohibition reflected the idea that athletes should devote their first year of college to academic life, unhampered by the demands of their sports. Becoming successful students in their new environment was the goal.³¹⁰ “Freshman ineligibility . . . had been accepted as a benchmark of sound management for almost 50 years”³¹¹ when the NCAA adopted a proposal to eliminate that rule at its 1972 Convention.³¹² In an important and radical departure from settled prior policy, that legislation permitted freshmen to play in varsity football and basketball games for the first time.³¹³

If the NCAA and its member institutions were genuinely interested in players’ academic achievements, a requirement like the freshman ineligibility rule would permit athletes a period to adjust academically to university life, free from most athletic responsibilities.³¹⁴ By choosing to

308. *See id.* (“[A] small industry of prep schools . . . serve[s] as eligibility factories for college prospects. Abuse of the system has become so accepted that in New York City, several academically troubled basketball players over the past decade have bolstered their GPAs by re-taking classes at one unaccredited school, Christopher Robin Academy in Queens, to get high grades with little or no work as part-time students.”); *see also* Pete Thamel & Duff Wilson, *Poor Grades Aside, Top Athletes Get To College on \$399 Diploma*, N.Y. TIMES, Nov. 27, 2005, at 1 (describing an unaccredited correspondence school in Florida that in the past two years “polished” at least twenty-eight athletes’ high school grades, enabling many of them to compete in Division I football programs).

309. *See* BYERS, *supra* note 6, at 102, 109.

310. *See id.* at 162.

311. *Id.* at 161.

312. *See id.* at 161–63; *Timeline—1940 to 1979*, *supra* note 182.

313. Although the NCAA had previously waived the freshman ineligibility rule, it did so only during wartime, when a low supply of college athletes required supplementation by including freshmen. At the end of each war, however, the rule rendering freshmen ineligible to play was reinstated. *See* BYERS, *supra* note 6, at 162.

314. Former University of Virginia coach Terry Holland advocates reinstating a freshman ineligibility rule as a means of addressing low graduation rates among athletes. He notes that “partial qualifiers” graduated at higher rates in four years than did “full qualifiers” in six-year periods. “Partial qualifiers” were athletes under now-repealed NCAA legislation who were considered academically marginal or at-risk and were, therefore, precluded from competing or traveling with the team during their first academic year. *Outside the Lines: Zero Percent—College Basketball’s Graduation Crisis* (ESPN television broadcast Mar. 1, 2002) (on file with authors) (interviewing Terry Holland).

repeal the freshman ineligibility rule, the NCAA, colleges, and universities exalted their commercial interests—fielding the best possible teams—over the educational advancement of athletes.³¹⁵

(3) *Demanding Playing Schedules Effectively Bar Athletes from Functioning as True Students*

Many other aspects of the athletes' college experience are also structured to serve the universities' commercial interests and are at odds with academic considerations. For example, the players' extensive practice and playing schedules monopolize their lives,³¹⁶ leaving little time or energy for academic pursuits.³¹⁷ This time commitment was not always so onerous. At one time, NCAA restrictions safeguarded an athlete's study time to some degree.³¹⁸ But because winning games generates enormous revenues,³¹⁹ coaches sought means of evading the training limitations. They required athletes, for example, "to enroll in weight-training courses outside the permissible practice season"³²⁰ and eventually prevailed upon the NCAA to legalize the practice.³²¹ Similarly, because each game represented additional revenue in ticket sales, television payments, and concession earnings, the NCAA lengthened the football and men's basketball seasons over time.³²²

In 1991, the NCAA limited the number of hours players could be

315. See Chin, *supra* note 3, at 1247–48.

316. See Lynch, *supra* note 24, at 629 (recommending restrictions on travel to permit athletes more time as students); Chin, *supra* note 3, at 1240 (characterizing heavy athletic schedules as unrealistic for students and as geared towards winning and making money for universities); see also *supra* Part III.A.1.

317. See *supra* note 127.

318. See BYERS, *supra* note 6, at 109 (describing the limit to the number of football and men's basketball games per season to nine and twenty-one, respectively); *id.* at 102 (noting that the football season could not commence before classes did); *cf. id.* at 102–03, 109 (describing limitation by some conferences of training time to two hours per day).

319. See Frank, *supra* note 187 ("In view of the enormous revenues that can accrue to the most successful programs, the incentives to compete for the limited number of positions at the top of the college athletics hierarchy are strong."); *supra* Part III.B.2.a.

320. BYERS, *supra* note 6, at 103.

321. See *id.*

322. The in-season schedule was increased by permitting "special-exception games," and the post-season football schedule was expanded to eighteen games. *Id.* at 340. The NCAA and various conferences also increased the number of games to be played in their post-season tournaments. See *id.*; MURRAY SPERBER, BEER AND CIRCUS: HOW BIG-TIME COLLEGE SPORTS IS CRIPPLING UNDERGRADUATE EDUCATION 38 (2000) (noting that football players participating in bowl games must practice during their final exam period).

required to practice to four per day and twenty per week,³²³ but soon permitted coaches to hold “voluntary” practices, thereby inviting evasion of the hour limit.³²⁴ Although coaches cannot technically require attendance at these “voluntary” practices, an athlete who does not wish to risk offending the coach or losing his athletic scholarship must attend. Thus, even at “voluntary” practices, attendance is expected.³²⁵

Unlike attendance at athletic activities, attendance in class is not always expected. In fact, coaches do not permit athletes to attend classes that conflict with practice, travel to away games, or tournaments.³²⁶ “Where else . . . does the college officially require the student to skip classes for a college-scheduled function or risk loss of financial assistance?”³²⁷ In fact, athletes report not always being able to select the major they desire because of course conflicts with team practice schedules.³²⁸

Many athletes hardly resemble the students dedicated to “learning,

323. See DIV. I MANUAL, *supra* note 3, art. 17.1.5.1.

324. See *id.* art. 17.02.13; see also BYERS, *supra* note 6, at 103, 109 (noting that the hour limits were unenforceable).

325. See BYERS, *supra* note 6, at 103. Athletes themselves believe “voluntary” practices are mandatory, as every athlete whom we interviewed confirmed. See SPERBER, *supra* note 322, at 31 (describing coaches’ use of voluntary workouts to determine starting rosters); Lynch, *supra* note 24, at 604 (noting that coaches consider such “voluntary” workouts when determining “an athlete’s status on the team”); Wendel, *supra* note 24 (acknowledging the expectation that athletes will work out on their own); Interview with anonymous employee-athlete (Nov. 10, 2003); Interview with anonymous employee-athlete (Oct. 15, 2003); Interview with anonymous employee-athlete (Sept. 25, 2003); Interview with anonymous employee-athlete (Sept. 7, 2003).

That “voluntary” workouts are, in fact, mandatory is broadly understood: “[Lesley] Stahl: But athletes know if they don’t show up, they’ll have no shot at playing. Huma: They’re pretty much mandatory. Stahl: It’s a charade. Huma: Yeah. I mean they call it ‘voluntary’ a lot of times, because you don’t know the difference.” 60 Minutes, *supra* note 24, transcript at 17.

326. See SUGGS, *supra* note 137 (describing the experience of star tailback Robert Smith, who had to quit the Ohio State University football team to be able to attend his chemistry class, which conflicted with morning practice); Interview with anonymous employee-athlete (Nov. 10, 2003) (stating that athletes are not allowed to enroll in courses that conflict with practice time); Interview with anonymous employee-athlete (Oct. 15, 2003) (same); Interview with anonymous employee-athlete (Sept. 25, 2003) (same); Interview with anonymous employee-athlete (Sept. 7, 2003) (same). *But see* DIV. I MANUAL, *supra* note 3, arts. 17.1.5.6.1, 17.1.5.6.1.1 (indicating that member institutions must not require athletes to skip classes to attend practice except during NCAA championships or for practice associated with away games).

327. BYERS, *supra* note 6, at 103.

328. AM 870 SportsTalk with Earle Robinson, *supra* note 129 (university professor calling in and reporting that an athlete requested permission to miss half of his scheduled classes and that his coach had suggested he change his major because the classes conflicted with practice); Interview with anonymous employee-athlete (Sept. 7, 2003); see also SPERBER, *supra* note 322, at 244–45.

education, and academic pursuits”³²⁹ that the *Brown* Board envisioned. Because of their demanding practice and game schedules, these athletes lack the time and energy for studying, and their obligations to the athletic department force them to miss classes regularly. An employee-athlete’s academic experience during college could hardly be more different than that of the ordinary student.

(4) *Sham Curricula Demonstrate that Athletes Are Not Bona Fide Students*

Weak curricula also characterize many athletes’ college experiences. Universities have created light academic schedules to enable athletes to devote maximum time to their sports.³³⁰ Schools regularly devise academic majors with minimal academic requirements.³³¹ Courses of dubious academic value have also become commonplace.³³² For the Summer 1986 term, the University of Nevada at Las Vegas approved a six-credit course called “Contemporary Issues in Social Welfare,” known to students as “Palm Trees 101.” The course was not listed in any catalog and was taken only by basketball team members during their nine-game participation in a sixteen-day, international tournament.³³³ Similarly, basketball players at Ohio University were awarded four credits for taking a course offered during the team’s fourteen-day summer trip to Europe.³³⁴

Academic advisors employed in the athletic department commonly arrange for academically unchallenging courses and schedules³³⁵ for the

329. *Brown Univ.*, 342 N.L.R.B. No. 42, slip op. at 6, 2004 WL 1588744, at *9 (July 13, 2004) (describing the meaning of “student”).

330. See Lynch, *supra* note 24, at 604; Chin, *supra* note 3, at 1242. More recently, universities have been increasing course loads to encourage higher graduation rates. See *infra* Part III.B.2.b.(7).

331. See SPERBER, *supra* note 160, at 283–84; Lynch, *supra* note 24, at 604.

332. Universities offer many such courses. See BYERS, *supra* note 6, at 300 (Squad Participation; Theory of Track and Field); *id.* at 305 (History of American Sport); Goldman, *supra* note 37, at 206 n.10 (citing *Notebook*, SPORTING NEWS, Apr. 3, 1989, at 42) (describing courses used to enable star Temple University football player Paul Palmer to remain academically eligible); Telander, *supra* note 39, at 97 (Bowling; Racquetball; Basketball; Leisure; Adjusting to a University); Hockensmith, *supra* note 138 (Coaching Football; Issues Affecting Student-Athletes); Hockensmith, *supra* note 160 (Officiating Basketball; Officiating Softball; Power Volleyball); *Outside the Lines: Zero Percent*, *supra* note 314 (describing courses offered in the past at Duke University, including Theory and Practice of Coaching; History of the Atlantic Coast Conference Basketball; Ethics of Sports; Sports Marketing of Collegiate Athletic Events).

333. BYERS, *supra* note 6, at 308.

334. See Chin, *supra* note 3, at 1240 n.227 (citing Gup, *supra* note 127, at 59).

335. See Friend, *supra* note 160; Hockensmith, *supra* note 138; *Outside the Lines: Zero Percent*,

athletes in their charge.³³⁶ Many of these undemanding courses are populated primarily by athletes.³³⁷ Athletes report passing classes they rarely attended.³³⁸ Independent studies and summer courses are regularly employed to give athletes needed credits without requiring much, if any, academic work.³³⁹ Athletes have claimed that tutors and professors from the university sometimes do their schoolwork for them³⁴⁰ and tell them in advance which version of a final exam will be administered.³⁴¹ Athletes have described receiving special treatment from professors, such as being allowed to take an oral retest after leaving during the regular written final examination.³⁴² Moreover, at some top sports universities, many courses are so devoid of academic value that if an athlete transfers to another school, most of the credits do not transfer.³⁴³

supra note 314. See also *id.* for a discussion of weak majors most often selected by athletes.

336. See Friend, *supra* note 160; Tom Friend & Ryan Hockensmith, *Clarett Claims Cash, Cars Among Benefits*, ESPN.COM, Nov. 9, 2004, <http://sports.espn.go.com/espn/print?id=1919059&type=story> [hereinafter Friend & Hockensmith, *Clarett Claims Cash*]; Hockensmith, *supra* note 160; Hockensmith, *supra* note 138.

337. See Friend, *supra* note 160 (describing classes in which approximately thirty of the forty enrolled students were football players); *Outside the Lines: Zero Percent*, *supra* note 314.

338. See Mike Freeman, *When Values Collide: Clarett Got Unusual Aid in Ohio State Class*, N.Y. TIMES, July 13, 2003, § 8, at 1 (stating that a teaching assistant reported that football players forged names of absent teammates on the class attendance roster); *Harrick Steps Down as Coach of Georgia*, *supra* note 160 (reporting that a player received an "A" in a course he never attended); Friend & Hockensmith, *Clarett Claims Cash*, *supra* note 336; Friend, *supra* note 160.

339. See Suggs, *supra* note 137 (describing the case of star linebacker Andy Katzenmoyer who retained eligibility at Ohio State only by passing Golf and AIDS-Awareness classes during a summer session); Friend, *supra* note 160; Friend & Hockensmith, *Clarett Claims Cash*, *supra* note 336; *Outside the Lines: Zero Percent*, *supra* note 314 (asserting that summer school has a diluted educational value and that Carlos Boozer, a former Duke University basketball player, was away from campus for half of one summer session to play basketball games while he was enrolled in four on-campus summer-school classes).

340. See Freeman, *supra* note 338 (reporting allegations of a teaching assistant and an associate professor that academic tutors sometimes did homework for players); Friend & Hockensmith, *Clarett Claims Cash*, *supra* note 336; Friend, *supra* note 160; accord Freeman, *supra* note 338 (reporting a football player's allegations that counselors who work with the university's Office of Student Athlete Support Services do the players' homework for them).

341. See Friend, *supra* note 160.

342. See *id.*; Freeman, *supra* note 338 (reporting that two graduate assistants corroborated this allegation, and stating that the athlete was the only student out of eighty in the class allowed such special treatment); see also *Outside the Lines: Zero Percent*, *supra* note 314 (describing statement of former Duke University basketball player William Avery that one of his professors "didn't believe in grading on the test" but would simply grade him orally).

343. See Friend & Hockensmith, *Clarett Claims Cash*, *supra* note 336; Hockensmith, *supra* note 160; Hockensmith, *supra* note 138. "What kind of degree can you get from Ohio State if none of your classes count at other colleges?" *Id.* (quoting Sammy Maldonado, a football player who

In 2004, eleven universities in the Associated Press pre-season top twenty-five football poll awarded athletes academic credit for playing football.³⁴⁴ Football players at Ohio State University may repeat coach Jim Tressel's two-credit "Varsity Football" class "as many as five times for a total of 10 credits."³⁴⁵ Nearly three dozen Division I-A universities award academic credit simply for participating in varsity sports.³⁴⁶ Most sport-specific classes have no syllabus or exam, require no written work, and are graded on a pass/fail basis.³⁴⁷ One basketball course offered to varsity players at the University of Georgia did have a twenty-question final examination. Among the questions were: "How many halves are in a college basketball game?" and "How many points does a 3-point field goal account for in a Basketball Game?"³⁴⁸

Schools have diluted their curricula because many athletes lack academic ability and time to study.³⁴⁹ Enrolling such athletes in marginal courses allows universities to maintain their athletes' eligibility for competition under NCAA rules.³⁵⁰ The universities' creation of weak, academically bankrupt curricula serves their commercial interests in recruiting and building winning sports programs, but abrogates their academic mission.³⁵¹ Given this widespread phenomenon, the NCAA's effort to characterize many of these athletes as "students" is disingenuous. Division I schools admit many athletes primarily to bring

transferred to the University of Maryland with only seventeen of forty Ohio State University credits after having been "recruited over" by OSU Coach Jim Tressel).

344. Schlabach, *supra* note 224. Such awarding of credit violates NCAA rules prohibiting special benefits to athletes that are not available to the student body generally. *See supra* note 224. Among the universities awarding credits for participating on the football team were: Brigham Young; Florida State; Georgia; Nebraska; Ohio State; and Penn State. Schlabach, *supra* note 224.

345. Schlabach, *supra* note 224.

346. *Id.* For example, Ohio State University awards academic credit for participating in twenty-one varsity sports, including ice hockey, lacrosse, and pistol and riflery. While those courses count towards the NCAA's credit-per-term requirements, they nevertheless do not count towards the athletes' degree requirements. *Id.*

347. *Id.* Some athletics participation courses, however, such as the Kansas State Varsity Football course, use letter grades, and the vast majority of the athletes enrolled received "A"s. *Id.*

348. *Id.*; *see also* *Lexus Halftime Show: Michigan—Notre Dame Game*, *supra* note 224.

349. *See supra* Part III.B.2.b.(1). Athletes are routinely admitted to Division I schools despite the relative weakness of their academic records compared to those of the general student body.

350. *See* BYERS, *supra* note 6, at 299 (arguing that schools "exploit the athlete by . . . providing . . . him or her course work of minimum quality" to allow the athlete to meet minimum eligibility standards).

351. "'The purpose isn't to educate and graduate,' says Drake Group associate director David Ridpath. 'They're eligibility mills.'" Hockensmith, *supra* note 138.

athletic and, therefore, commercial success to their schools, not for real learning.³⁵² As one athlete reported, some of his classes were devoid of academic rigor. The goal is not to educate the athletes, he said, but to ensure their eligibility.³⁵³

(5) *Sub-Standard Academic Performance Among Some Athletes Is Further Evidence that They Do Not Function Primarily as Students.*

Athletes' performance in the classes in which they do enroll further confirms they are in school to perform on the field, not in the classroom. "Over 40% of black football and basketball players at major Division I schools report having been on academic probation" during their college careers.³⁵⁴ Temple University certified star football running back Paul Palmer as academically eligible to play even though he "flunk[ed] remedial reading four times, [and] complet[ed] no classes in his major."³⁵⁵ More recently, Miles Simon led the University of Arizona to an NCAA national basketball championship in 1997, winning most valuable player honors, despite having been on academic probation for three years—almost his entire playing career.³⁵⁶ The toll of demanding practice schedules, coupled with special admission for academically unprepared athletes who would likely face difficulty handling academic responsibilities under the best of circumstances, virtually guarantee that many athletes will be markedly unsuccessful as students.

352. Arkansas basketball player Dwight Stewart noted in this regard: "They recruited me, you know, to come play basketball. They didn't recruit me to go to school. . . . Our degree, that's a plus for us." *Outside the Lines: Zero Percent*, *supra* note 314. Darnell Robinson, also from Arkansas, believed the same: "In the gym it was way more serious than it was off the court because that was what I was here for, you know, and, for me to act like that otherwise, I would be missing my mission." *Id.* Asked about low graduation rates, Coach Nolan Richardson defended his university's zero percent graduation rate among African-American basketball players: "Now let's be straight up and honest. Our livelihood depends on whether we win, and that's the bottom line." *Id.*; accord SACK & STAUROWSKY, *supra* note 14, at 101 (quoting a college athlete who stated that "in college the coaches be a lot more concerned on winning and the money comin' in. If they don't win, they may get the boot, and so they pass that pressure onto us athletes."). To be sure, some highly talented athletes do come to college seeking an education. While this is laudable, it is not the primary reason universities admit them; universities enroll these athletes to field winning teams.

353. Interview with anonymous employee-athlete (Sept. 7, 2003).

354. Goldman, *supra* note 37, at 206–07 n.10.

355. *Id.* at 207 n.10 (citing *Notebook*, *supra* note 332, at 42).

356. See *Arizona Denies Report Simon Got Special Favors*, STUART NEWS (Fla.), Oct. 11, 1997, at B8; Mike McGraw, *Bending the Rules to Win: MVP Made Grade Only on the Court*, KAN. CITY STAR, Oct. 10, 1997, at A1.

(6) *Athletes and Institutions Alike Engage in Academic Fraud to Maintain Athletes' Eligibility to Compete*

To perpetuate the myth that these athletes are primarily students, many schools have essentially abandoned their own standards to make an athlete's academic performance appear better than it actually is. As a result, academic fraud has often taken place at NCAA member schools.³⁵⁷ Notably, administrators in athletic departments, not faculty members, monitor compliance with NCAA academic regulations.³⁵⁸ Because of the financial incentive to win championships, many coaches and administrators also have a strong incentive to falsify compliance with academic requirements, thereby derogating the academic well-being of the athlete.³⁵⁹ For example, from 1994 through 1999 at the University of Minnesota, a university secretary and a tutor, with the knowledge of the head men's basketball coach, completed four hundred assignments and forty-eight papers for athletes on the basketball team.³⁶⁰ Even college administrators refuse to enforce rules when doing so would implicate athletes.³⁶¹ It is not unusual for athletes to get credit for, and good grades in, courses they neither attended nor for which they studied.³⁶²

357. See Lynch, *supra* note 24, at 610 (describing the practice of universities "relax[ing]" academic standards to ensure an athlete's academic eligibility). Former NCAA Executive Director Byers notes that academic cheating has long been widespread. See BYERS, *supra* note 6, at 11, 178. A common violation was students not showing up for class but still getting high "grades vital to their [continued] eligibility." *Id.* at 178. "[U]rneared [academic] credits, falsified transcripts and unwarranted intrusion' of athletics interests into the 'academic processes' of . . . universities" have also been typical. *Id.* at 179 (citing Media Release, Pac-10 Conference, Aug. 11, 1980). In a recent case, Memphis-area high school football coach Lynn Lang arranged for a third party to take the SAT for high-school All-American defensive lineman Albert Means. See Schlabach, *supra* note 21. Means testified he was afraid he would not score well enough on the exam. Woody Baird, *Ex-Prep Coach Says Michigan State Offered Money for Player*, DETROIT FREE PRESS, Jan. 26, 2005, available at http://www.freep.com/news/latestnews/pm2502_20050126.htm.

358. See Robert Sullivan, *A Study in Frustration*, SPORTS ILLUS., June 19, 1989, at 94; see also Chin, *supra* note 3, at 1231 n.150.

359. See Sullivan, *supra* note 358; Telander, *supra* note 39, at 101.

360. *Infractions Case: University of Minnesota, Twin Cities*, NCAA NEWS, Nov. 6, 2000, available at <http://www.ncaa.org/news/2000/20001106/active/3723n18.html>; Mark Clayton, *Welcome to College, Mr. Jones!*, CHRISTIAN SCI. MONITOR, Feb. 6, 2001, at 11, available at <http://scmweb2.emcweb.com/durable/2001/02/06/p11s1.htm>.

361. See, e.g., Telander, *supra* note 39, at 101 (describing Florida State University President Bernard Sliger as refusing to enforce class attendance rules against Deion Sanders); McGraw, *supra* note 356 (suggesting that University of Arizona officials made exceptions to academic standards to keep Miles Simon eligible to play basketball).

362. See BYERS, *supra* note 6, at 178–79, 200; Freeman, *supra* note 338 (noting the allegations of

Academic fraud becomes commonplace when powerful financial incentives to win athletic contests exist.³⁶³ Under these circumstances, academic achievement becomes secondary to athletic success. Schools “compete on the field with athletes who are sometimes not qualified to keep up in the classroom,”³⁶⁴ and as a result, the pressure to breach academic standards and to mask cheating is enormous both for the athlete and the university.

(7) *NCAA Progress Requirements Serve Members’ Commercial Interests but Frequently Permit Athletes to Fall Short of Acquiring a Degree*

The inordinate time required for athletes to practice means that even academically qualified athletes find it difficult to meet course requirements.³⁶⁵ Not surprisingly, athletes who are not academically well prepared do not keep up with their course work. This problem undermines the identity of athletes as students and has forced the NCAA to enact legislation tying progress towards a degree to continuing athletic eligibility.³⁶⁶

An examination of NCAA rules on academic progress, however, reveals little actual concern for athletes’ academic achievement. In 1991, the NCAA adopted legislation requiring athletes to make satisfactory progress towards a degree to remain eligible to engage in intercollegiate competition.³⁶⁷ Although the NCAA described these rules as being motivated by a desire to improve graduation rates,³⁶⁸ they have contributed to a state of affairs in which athletes cannot graduate

both a teaching assistant and an associate professor that academic tutors sometimes did homework for players); *id.* (noting a football player’s allegation that Student Athlete Support counselors do players’ homework for them); *id.* (stating that a teaching assistant reported that football players forged names of absent teammates on the class attendance roster); *Staudt on Sports* (WILX television broadcast Dec. 8, 2002) (including statement of former college quarterback Bill Burke that players who do well in classes during the semester need not take a final examination).

363. See *supra* Part III.B.2.a (describing the immense direct and indirect financial benefits for universities of winning athletic contests); see also Frank, *supra* note 187, at 22–23 (“[T]hese institutions are often forced by competition to operate close to the margins of allowable conduct.”).

364. Freeman, *supra* note 338.

365. Telephone interview with Warren D. Gower (Sept. 2, 2003) (describing his son’s experience as a college baseball player at Kansas State University).

366. See DIV. I MANUAL, *supra* note 3, at 154, art. 14.4.3.2 (former eligibility requirements); *id.* at 160, art. 14.4.3.2 (current eligibility requirements).

367. See *id.* at 152–58, art. 14.4.3; Chin, *supra* note 3, at 1240–41 n.228.

368. See Riggs, *supra* note 151, at 141.

because their eligibility for financial aid often lapses long before they complete their degree requirements. In that situation, many athletes provide their services over a period of four seasons, but never receive the anticipated college degree in return.³⁶⁹

NCAA progress requirements currently call for an athlete finishing his fourth year of college to have completed at least eighty percent of the courses required for his degree.³⁷⁰ In the meantime, the athlete's eligibility to compete may not exceed four seasons in a given sport,³⁷¹ and the institution has no obligation to continue a scholarship beyond that period.³⁷² Thus, an athlete who begins competing in his first year of college is viewed as having made satisfactory progress towards his degree if he successfully completes only four-fifths of his required courses by the end of his four seasons of competition. Having exhausted his eligibility, his scholarship aid may end.³⁷³ Thus, although his progress towards degree completion was deemed "satisfactory," and although his scholarship was called a "full-ride," his school will not have provided a completed college degree.³⁷⁴

369. Interview with anonymous employee-athlete (Sept. 25, 2003) (describing having experienced this outcome personally); Interview with anonymous employee-athlete (Sept. 7, 2003) (describing having witnessed this outcome for numerous athletes); *see also infra* Part III.B.2.b.(8) (documenting low graduation rates among athletes in revenue-generating sports).

370. *See* DIV. I MANUAL, *supra* note 3, at 160, art. 14.4.3.2 (current eligibility requirements).

371. *See id.* art. 14.2.

372. *See* Chin, *supra* note 3, at 1240 n.228.

373. Given the limitation by sport on the number of scholarships available, *see* DIV. I MANUAL, *supra* note 3, arts. 15.5.4.1, 15.5.5.1, an athlete who has exhausted his playing eligibility will likely lose his scholarship. Interview with anonymous employee-athlete (Sept. 25, 2003); Interview with anonymous employee-athlete (Sept. 7, 2003).

374. Of course the athlete may continue to take classes, meeting his degree requirements and eventually graduating, if he can pay for college after his scholarship ends. Doing so is extremely difficult for the many athletes who come from economically disadvantaged backgrounds. Interview with anonymous employee-athlete (Oct. 15, 2003); Interview with anonymous employee-athlete (Sept. 25, 2003); Interview with anonymous employee-athlete (Sept. 7, 2003). Instead, those players usually leave school. *See id.*; Interview with anonymous employee-athlete (Oct. 15, 2003); Interview with anonymous employee-athlete (Sept. 25, 2003).

In its public relations campaigns, the NCAA constantly emphasizes the "student" in "student-athlete," but if its concern were truly academic, universities would agree to be required to continue financial aid long enough to enable athletes to graduate. *See* Chin, *supra* note 3, at 1247. The NCAA could achieve this outcome by mandating the continuation of aid for a reasonable period beyond the period of eligibility in the sport. *See id.* Extending scholarships in this manner would allow these often academically unprepared athletes not only to complete their degrees, but might also permit them the additional time needed for those degrees to confer real value. Put differently, the athletes might actually have the time needed to learn from their studies. The NCAA has never seriously considered such a reform.

One of the players we interviewed said basketball “gave [him] a chance to go to college” and “there were some good times,” but he was unable to complete his degree requirements by the time his eligibility, and therefore his scholarship, expired. He dropped out of school, got a job, and returned several years later to complete his degree.³⁷⁵ Given NCAA requirements on academic progress, it cannot be said that athletes regularly receive a college degree in exchange for their athletic services.³⁷⁶ These low standards permit athletes with little academic ability to remain eligible to play, thereby enhancing the economic value of the college sports industry. Thus, the NCAA has structured its own academic rules more to serve members’ economic interests than to safeguard the players’ academic needs. Clearly, this choice reveals the economic, not primarily academic, nature of the university-athlete relationship.

(8) *Low Graduation Rates Show Athletes Are Not Primarily Students*

The NCAA’s claim that scholarship athletes are predominantly students and, therefore, not employees is further belied by appallingly low graduation rates among athletes in revenue-generating sports. The NCAA claims athletes are like regular students, pointing to graduation rates among Division I scholarship athletes that exceed those of the general student body. In this regard, it emphasizes statistics released in 2004 showing that the graduation rate for all scholarship athletes³⁷⁷ was sixty-two percent, while that for students generally was only sixty percent.³⁷⁸

375. Interview with anonymous employee-athlete (Sept. 25, 2003). In eventually returning to school, this particular athlete is the exception rather than the rule. Most athletes who leave school without graduating never return to complete their degree. Interview with anonymous employee-athlete (Sept. 7, 2003).

376. Not all athletes fail to complete their degree requirements, of course, but those who do—those who probably should not have been initially admitted for academic reasons—are being exploited. They provide valuable services which generate great revenues for their universities, but they get no degree in return. And if they are among the ninety-eight to ninety-nine percent of college football and men’s basketball players who do not later play professionally, *see* NCAA, Estimated Probability, *supra* note 30, their prospects can be bleak.

377. Scholarship athletes are those “who received athletics aid from the college or university for any period of time during their entering year.” NCAA, Information About the Graduation-Rates Report: Division I, http://www.ncaa.org/grad_rates/2004/d1/information.html (last visited Feb. 5, 2006) [hereinafter NCAA, Information About Report].

378. NCAA, 2004 NCAA Graduation Rates Report Data, Division I, http://www.ncaa.org/grad_rates/2004/d1/DI.html (last visited Feb. 5, 2006) [hereinafter NCAA, Graduation Rates

Two defects, however, flaw this comparison. First, the comparison is not between similarly situated groups. By definition, those in the scholarship athlete group all have at least some degree of athletically based financial assistance, with many receiving “full rides.”³⁷⁹ By contrast, many fewer individuals in the overall student population receive waivers for tuition, room, board, and books. Thus, many regular students who leave school without graduating do so because of financial challenges that make it difficult to pay for school.³⁸⁰ Given this sizeable built-in financial advantage for athletes, were all other factors equal, athletes should graduate at much higher rates than the student body overall. Yet they do not.

Second, the sixty-two percent graduation rate for scholarship athletes is inflated because it includes individuals in non-revenue-generating sports who are not the subject of our thesis and who typically graduate at such high rates that they camouflage the much lower graduation rates that persist for scholarship athletes in the revenue-generating sports. These outliers include female scholarship athletes who graduate at the stunningly high rate of seventy percent.³⁸¹ When such groups are excluded, leaving only scholarship athletes from the revenue-generating sports, the athlete graduation rate for Division I universities plummets.

It is the Division I grant-in-aid athlete in revenue-generating sports, however, who is an employee.³⁸² Therefore, most germane to our inquiry is a comparison of the graduation rates of football and men’s basketball players on the one hand, and all students on the other. The 2004 data

Report]. This inquiry examined students entering college in the fall of 1997. Students who were freshmen in the fall of 1997 and the spring of 1998 are the most recent group for which the six-year graduation rate data exist. NCAA, Information About Report, *supra* note 377.

379. See NCAA, Information About Report, *supra* note 377.

380. See, e.g., Stephen L. DesJardins et al., *Simulating the Longitudinal Effects of Changes in Financial Aid on Student Departure from College*, J. HUM. RESOURCES, Summer 2002, at 653, 653–55, 669, 671–74 (demonstrating that the availability of scholarships for undergraduate students reduces attrition rates compared to students receiving loans or those receiving no financial aid at all); Stanley I. Iwai & William D. Churchill, *College Attrition and the Financial Support Systems of Students*, RES. IN HIGHER EDUC., 1982, at 105, 105–06 (stating that in sixteen of twenty-one attrition studies, financial difficulty was among the top three most important factors); Lydia Kalsner, *Issues in College Student Retention*, HIGHER EDUC. EXTENSION SERV. REV., Fall 1991, at 3, 3, 6 (noting that financial difficulties play a “central role” in student attrition and that the availability of grants can significantly ameliorate the problem).

381. See NCAA, Graduation Rates Report, *supra* note 378.

382. It is the athlete in the revenue sports, not the others, who meets the *Brown* requirements of not being primarily a student and of having primarily an economic, not educational, relationship with his university. See *supra* Parts III.B.1, III.B.2.a–b.

show football players at all Division I universities graduating at a rate of fifty-five percent and men's basketball players at forty-four percent, both far below the sixty percent graduation rate for all students.³⁸³

Graduation rates are particularly problematic for those athletic programs with the most success on the field or court. In football, for example, the graduation rates for the eight teams that played in the four 2004–05 BCS bowl games were significantly lower than the rates for the overall student bodies at those schools.³⁸⁴ At the University of Texas, for example, the graduation rate for football players was only thirty-four percent while that of the overall student body was seventy percent; at the University of Pittsburgh, the respective rates were thirty-one and sixty-three percent.³⁸⁵ At both universities, the graduation rate for football players was less than half that for students overall.³⁸⁶

The same pattern occurred in men's basketball. Of the sixteen teams advancing to the "Sweet Sixteen" in March 2004, team graduation rates were available for only eleven. Of those eleven, every team but one had a graduation rate significantly lower than that for the student population overall at their universities.³⁸⁷ Indeed, consistent with the general pattern, the greater the athletic success, the worse graduation rates tend to be. Thus, the two teams with by far the lowest graduation rates were the same two that advanced the furthest—to the coveted NCAA championship game. They were the University of Connecticut and the Georgia Institute of Technology, each with a mere twenty-seven percent graduation rate for their men's basketball players. In each case, the graduation rates for the student bodies as a whole at those universities, sixty-nine and sixty-eight percent respectively, were more than two and one-half times greater than those of the basketball teams.³⁸⁸ This large disparity is consistent with the conclusion that these athletes are not

383. These football and basketball athletes also trailed the fifty-seven percent graduation rate for all male students. See NCAA, Graduation Rates Report, *supra* note 378.

384. See INST. FOR DIVERSITY AND ETHICS IN SPORT, UNIV. OF CENT. FLA., KEEPING SCORE WHEN IT COUNTS: ASSESSING THE 2004–05 BOWL-BOUND COLLEGE FOOTBALL TEAMS—GRADUATION RATES, <http://www.bus.ucf.edu/sport/public/downloads/media/ides/Table%20-%20Graduation%20rates%202004-05%20bowl-bound%20teams.pdf> (last visited Jan. 28, 2006).

385. See *id.*

386. See *id.*

387. See INST. FOR DIVERSITY AND ETHICS IN SPORT, UNIV. OF CENT. FLA., KEEPING SCORE WHEN IT COUNTS: THE 2004 MEN'S SWEET 16 TEAMS—GRADUATION RATES, TRANSFERS AND RACIAL BREAKDOWN OF ROSTER PLAYERS, http://www.bus.ucf.edu/sport/public/downloads/media/ides/table_04.pdf (last visited Feb. 5, 2006).

388. See *id.*

primarily students, a showing required under *Brown* to demonstrate their employee status.

In 2002, ESPN released a report that scandalized the college basketball world. It documented a zero percent graduation rate among African-American basketball players at thirty-six different Division I universities over the five-year period from 1990 through 1994.³⁸⁹ Out of concern about the public relations problem created by its claim that employee-athletes are primarily students when so many never graduate, the NCAA has undertaken a campaign to improve those rates.³⁹⁰ To address the problem, the NCAA has recently passed legislation rewarding programs that meet minimum scholastic requirements and punishing those that do not.³⁹¹

While this “Academic Performance Program” will undoubtedly encourage some universities to improve athlete graduation rates, the legislation itself is likely to have a smaller impact than recent media reports would suggest. The major penalties, such as warnings, loss of scholarships, ineligibility for post-season play, and reclassification to restricted status, are imposed on a progressive basis,³⁹² allowing most universities to avoid sanctions for a number of years. With regard to these major penalties, no punishment at all may be imposed on schools

389. See *Outside the Lines: Zero Percent*, *supra* note 314; see also *Study: Many Don't Make Grade on Graduation: Blacks Lag Whites; Men Lag Women*, LANSING ST. J., Mar. 16, 2005, at 4C (describing the continuing graduation rate crisis among African-American men's basketball players).

390. See DIV. I MANUAL, *supra* note 3, art. 23.01.2 (noting the NCAA's commitment to improve graduation rates). While NCAA efforts to improve graduation rates may be laudable, they bypass the most direct means of increasing them—ending special admissions, ceasing the monopolization of virtually all the athletes' time to allow for academic pursuits, and providing scholarship aid for a sufficient period to permit graduation. If universities were to take these three actions with respect to their revenue-generating sports, graduation rates among athletes could soar, and actual education could take place. The relationship between athletes and their universities could become more academic than economic. But universities have not taken these simple steps precisely because to do so would harm their economic interests—their ability to dominate on the playing field, and thus to generate tens of millions of dollars. See *infra* Part III.B.2.a (describing how financially lucrative it can be for universities to win in Division I athletics); see also Joe Drape, *College Football at a Crossroads*, N.Y. TIMES, Aug. 29, 2003, at D1 (quoting Scott S. Cowen, President of Tulane, lamenting that the football and basketball programs with some of the worst graduation rates are permitted to participate in profitable post-season play).

391. See DIV. I MANUAL, *supra* note 3, arts. 15.01.9, 23.01.2. Under the legislation, first effective in the fall of 2004, teams with low graduation rates could lose scholarships and be excluded from postseason play. See DIV. I MANUAL, *supra* note 3, arts. 23.2.1.2.2–3. Teams with exemplary academic performance, on the other hand, could earn additional revenue from the NCAA and gain more scholarships. See Drape, *supra* note 390.

392. See DIV. I MANUAL, *supra* note 3, art. 23.2.1.2.

until data have been collected for three years.³⁹³

Of greater concern than the delay in implementation of sanctions is that the Academic Performance Program's academic requirements have been set so low that most institutions will never be found to have violated the rules.³⁹⁴ The NCAA Division I Board of Directors recently set the minimum acceptable rate at a level that "is roughly equivalent to an expected 50 percent graduation rate."³⁹⁵ NCAA data show that under this new program, only approximately 7.4% of teams in all Division I sports would fall below this standard.³⁹⁶ Given this low standard, most universities will be able to continue recruiting athletes with minimal academic ability without experiencing any sanctions whatsoever. Only those institutions with the most academically marginal athletes will run the risk of violating these new rules and of incurring sanctions.³⁹⁷

How much, if at all, this reform will actually improve athletes' graduation rates remains to be seen. And, of course, such reform guarantees nothing regarding whether a graduate has actually learned anything from his college experience.³⁹⁸ Whether reform packages such as the Academic Performance Program will actually improve athletes' education, or whether they are only more window dressing, a mere fifty percent graduation rate belies the assertion that these athletes are genuine students, enrolled in the university for an education.

In the end, the fact that so many athletes fail to graduate undermines the NCAA's assertion that those athletes are students and, therefore, not employees of their universities. We have already described numerous factors that contribute to this phenomenon: the admission of some athletes who are not intellectually prepared to succeed in college; the monopolization of their time; the bone-crushing and exhausting series of

393. See MEMBERSHIP REPORT, *supra* note 3, at 38.

394. See NCAA, NCAA Division I Board of Directors Sets Cutlines for Academic Reform Standards, January 10, 2005, http://www2.ncaa.org/media_and_events/press_room/2005/january/20050110_d1_bod.html [hereinafter NCAA, Cutlines] (announcing the NCAA Board's determination of minimum standards).

395. *Id.*

396. *Id.*

397. NCAA estimates show that for 79.9% of Division I men's basketball teams and for 69.3% of Division I football teams, not even one player will be below the standard. See *id.* (claiming that for 20.1% of men's basketball and 30.7% of football programs, at least one player would fail the standard). This demonstrates that the new program should be a relatively easy standard for universities to meet.

398. See ZIMBALIST, *supra* note 14, at 39, 46–48 (noting that graduation rates say nothing about the quality of education); Lynch, *supra* note 24, at 602.

practice and game schedules; prevailing attitudes about college athletics being a prelude to a professional career rather than a way to attend college;³⁹⁹ and the fact that scholarships often end prior to completion of degree requirements. Unacceptably low graduation rates demonstrate that universities and the NCAA are being dishonest when they characterize these particular individuals as full-fledged students.

Universities' commercial interests have prevailed over the academic interests of their athletes,⁴⁰⁰ rendering the university-athlete relationship a commercial, not an academic, one. As a result, employee-athletes rarely obtain a real education. As former Washington Redskin and Northwestern University Athletic Director Mark Murphy has commented: "Money has blurred the line, and makes some schools ignore things when the revenues are going up. . . . Schools are not insisting that their athletes get an education."⁴⁰¹

CONCLUSION

NCAA athletes in Division I revenue-generating sports are employees under the NLRA. They meet both the common law and statutory standards for that classification. They are common law employees because they are compensated for their services with athletic scholarships that are unquestionably a quid pro quo for athletic services rendered, and they are subject to a pervasive level of control by their employers on which they are also economically dependent. They are also statutory employees under *Brown* because their relationships with their universities are not primarily academic; they are overwhelmingly commercial. In fact, intercollegiate athletics has become a dazzlingly commercial activity. It is managed and generates revenue like a highly

399. See SPERBER, *supra* note 160, at 8; Lynch, *supra* note 24, at 609, 619. Many athletes indicate they do not attend college for an education. When asked if he wanted to be in college, Deion Sanders responded, "No But I have to be." Telander, *supra* note 39, at 96. Stephon Marbury, a point guard from Georgia Tech, admitted college was "to position myself for the [NBA] draft." ZIMBALIST, *supra* note 14, at 39. Andy Katzenmoyer said he attended Ohio State University "to play football, not to attend class." Suggs, *supra* note 137. Coaches, too, believe many athletes are in school for one reason only—to transition into the professional leagues. "They come here not actually wanting a degree. . . . The number one thing in their mind is, is the NBA." *Outside the Lines: Zero Percent*, *supra* note 314 (quoting Nolan Richardson, former Arkansas basketball coach); see also Peter Alfano, *Basketball's 2 Stressful Worlds Offer Coaches a Tough Choice*, N.Y. TIMES, May 28, 1989, at 8 (revealing Larry Brown's wish as a college coach for all his players to feel they could play professionally).

400. See, e.g., Sack, *supra* note 162.

401. Drape, *supra* note 390 (quoting Mark Murphy).

successful business and has become a professional enterprise, abandoning amateurism in all respects save one: the treatment of its players. Bobby Bowden, the most successful coach in the history of college football, has candidly conceded: “The boys go out and earn millions for their university. Everyone benefits except the players.”⁴⁰²

Although players devote extraordinary energy, time, and dedication to their “jobs” as athletes, they have none of the protections of “employee” status. They are not paid a negotiated wage for their services and are not regarded as eligible for workers’ compensation in the event of injury. Their employers provide limited health or injury insurance, and, most important to our thesis, they are not eligible to bargain collectively with their employers.

The parties to this employment relationship hardly share equal bargaining power.⁴⁰³ And unfortunately for these athletes, their voices are not nearly so powerful as those of the forces that oppose them. Naturally, those with the greatest pecuniary stake in this question—the universities, the NCAA that represents them, the corporations,⁴⁰⁴ and the many other beneficiaries that profit from college sports⁴⁰⁵—will likely decry our thesis as blasphemy. Their opposition to this truth, however, is simply a reflection of the profit that so richly rewards them.

To call NCAA Division I athletes in revenue-generating sports

402. Riggs, *supra* note 151, at 142 (citing Bob Oates, *In the Never-Ending Scramble to Uphold the So-Called Amateur Code by Catching and Punishing Great Universities, the Student-Athlete has Become the Forgotten Man*, L.A. TIMES, Oct. 3, 1993, at C3); see Drape, *supra* note 127. “You see all the money changing hands over what you do and then you go home and—and you struggle to make ends meet.” *60 Minutes*, *supra* note 24, transcript at 14 (statement of former UCLA linebacker Ramogi Huma).

403. See generally Daniel Nestel, *Athletic Scholarships: An Imbalance of Power Between the University and the Student-Athlete*, 53 OHIO ST. L.J. 1401 (1992) (describing the athletes’ lack of bargaining power). Given the gross disparity in bargaining power, the substance of the contract cannot be considered fair. “Freedom of contract begins where equality of bargaining power begins.” Oliver Wendell Holmes, Jr. in GEORGE SELDES, *THE GREAT QUOTATIONS* 229 (Pocket Books 1968). For many reasons, employee-athletes have no real power to exact an appropriate bargain for their labors. They are young men between the ages of eighteen and twenty-three, not competent in the arts of negotiation or deal making. Moreover, NCAA rules preclude any bargain exceeding the cost of attending the university and, indeed, prohibit professional bargaining representation altogether. DIV. I MANUAL, *supra* note 3, art. 15.01.2 (prohibiting unauthorized aid); *id.* art. 12.3.1 (prohibiting the use of agents). “Against such an array of power stands the young athlete, unorganized and a part of the system for only four to six years before he or she moves on to be replaced by another 18- or 19-year-old.” BYERS, *supra* note 6, at 371.

404. See *supra* notes 17, 20 and accompanying text (discussing corporate sponsors’ marketing opportunities and earnings of broadcast networks).

405. See *supra* note 19 and accompanying text (discussing exorbitant coaching salaries).

amateurs is farcical. The NCAA's droning insistence on labeling them "student-athletes" is done simply to shore up the fiction that they are something other than employees. NCAA rules, promulgated by the university-employers themselves, bar these athletes from earning compensation representing their true worth. Unaware of their market value, constrained by NCAA strictures, and raised in the myth of the student-athlete, they enter into servitude by the thousands every year. Thus, this fiction has worked to convince even the players themselves to bask in the bright, but brief, glow of their status as campus heroes, and has nurtured their unrealistic dreams of glory, obscuring the reality of their exploitation.

The power of myth is undeniable.⁴⁰⁶ It has served the economic interests of the NCAA and many other participants in major college sports richly. But the power of the law is also great, and a society that respects the law looks through the myth and the propaganda to facts. The rule of law eschews a "tyranny of labels"⁴⁰⁷ and seeks truth. And the truth is that these athletes are employees under the law.

406. See generally JOSEPH CAMPBELL & BILL MOYERS, *THE POWER OF MYTH* (Betty Sue Flowers ed. 1988) (describing the power of myth throughout human history).

407. *EEOC v. Sidley Austin Brown & Wood*, 315 F.3d 696, 705 (7th Cir. 2002) (Posner, J.).

