NOTE

The Center Cannot Hold: Why the NLRB Should Assert Jurisdiction over Division I Collegiate Athletes

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ABSTRACT

In 2015, the National Labor Relations Board ("NLRB" or "the Board") declined to assert jurisdiction over a group of football players at Northwestern University; yet, the following year, the NLRB asserted jurisdiction over a group of student assistants at Columbia University. In the past several years, there has been a proliferation of organizing among student assistants, but virtually no attempts to unionize by collegiate athletes. This Note urges the NLRB to adopt the standard it applied when asserting jurisdiction over undergraduate and graduate assistants to players on collegiate athletic teams. Alternatively, the NLRB should make a new rule categorically asserting jurisdiction over all labor disputes involving collegiate athletes at Division I schools. Looking to the treatment of student assistants as an exemplar, a common-law "right to control" test will find that collegiate athletes qualify as statutory employees, and therefore receive protections for employment-related activities. Adopting this rule will serve to further the purposes of the National Labor Relations Act ("NLRA" or "the Act") because collegiate players will be able to rely upon it as they engage in concerted activities such as collective bargaining. Asserting jurisdiction is more necessary now than ever due to the dwindling persuasiveness of the amateur model on which collegiate sports

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rely. Going through the rulemaking process will also mitigate the NLRB's tendency to fluctuate wildly with shifts in political control.

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INTRODUCTION

Northwestern University offered Kain Colter and eighty-four other teenagers full scholarships to play for its football team.[1] It worked out well for the school; by the time his senior year came along, Colter had helped propel the team all the way to a bowl game.[2] To

1 *See* Northwestern Univ., 362 N.L.R.B. 1350, 1351 (2015).

2 *See* Dave McKenna, *Kain Colter Facing Several Domestic Violence Charges, Described as "Indigent" in Court Filings*, DEFECTOR (June 30, 2021, 10:01 AM), https://defector.com/kain-colter-facing-several-domestic-violence-charges-described-as-indigent-in-court-filings/ [https://perma.cc/K8FN-VGKK].

manage a chronic ankle injury and multiple severe concussions, though, and out of fear that missing games might result in losing his scholarship,[3] Colter developed a habit for pain pills and Toradol.[4] Pills could only mask his postconcussive symptoms, and Colter believes that the constant cranial trauma caused him to develop Chronic Traumatic Encephalopathy ("CTE").[5] Because collegiate players lack bargaining power, they are unable to negotiate with their school, conference, and the National Collegiate Athletic Association ("NCAA") for benefits related to their health and wellbeing, such as minimizing full-contact practices that carry a heightened risk of concussion.[6] A year after his bowl appearance, and inspired by a union-centric visit to a steel factory,[7] Colter concluded that the best way to ensure adequate medical care for the team both during and after their playing days would be to engage in collective bargaining with the school.[8] He and the team petitioned the NLRB for recognition of the team as a legally protected labor union.[9] The Board chose to punt the issue, however, declining jurisdiction and thus depriving the players of the ability to unionize and collectively bargain with the school.[10]

If the Board had recognized the team as employees, the collegiate players could follow their professional counterparts in bargaining for policies mitigating the risk of head trauma, providing retirement and

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3 *See* Northwestern Univ., 362 N.L.R.B. at 1363 n.31.

4 *See* Rohan Nadkarni, *Kain Colter's Union Battle Cost Him More Than He Ever Expected*, DEADSPIN (Aug. 18, 2015, 3:55 PM), https://deadspin.com/kain-colters-union-battle-cost-him-more-than-he-ever-ex-1724831203 [https://perma.cc/R2KL-9J8S]. Toradol is an anti-inflammatory drug, most commonly prescribed to treat postsurgical pain, with a substantial risk of serious side effects. *See* Erica Hersh, *What You Should Know Before Taking Toradol for Pain*, HEALTHLINE (Mar. 29, 2019), https://www.healthline.com/health/is-toradol-a-narcotic [https://perma.cc/5A35-R4DQ].

5 *See* Nadkarni, *supra* note 4; McKenna, *supra* note 2. CTE is a degenerative neurological condition resulting from repeated trauma to the head that can cause symptoms including depression and dementia. *See* Joe Ward, Josh Williams & Sam Manchester, *110 N.F.L. Brains*, N.Y. TIMES (July 25, 2017), https://www.nytimes.com/interactive/2017/07/25/sports/football/nfl-cte.html?module=inline [https://perma.cc/HJB5-GP9B] (citing a study of 202 brains of deceased football players, including college players, which found evidence of CTE in eighty-seven percent of scans).

6 *See* Judy George, *Most College Football Head Impacts Occur in Practice, Not Games*, MEDPAGE TODAY (Feb. 1, 2021), https://www.medpagetoday.com/neurology/headtrauma/90975 [https://perma.cc/3EBK-7KYV]; Ben Strauss, *In a First, Northwestern Players Seek Unionization*, N.Y. TIMES (Jan. 28, 2014), https://www.nytimes.com/2014/01/29/sports/ncaafootball/northwestern-players-take-steps-to-form-a-union.html [https://perma.cc/2S5A-CMWN].

7 *See* Nadkarni, *supra* note 4.

8 *See* Strauss, *supra* note 6.

9 *See* Northwestern Univ., 362 N.L.R.B. 1350, 1350 (2015).

10 *See id.*

health insurance benefits, and establishing a trust for former players in financial need.[11] Collective bargaining may not render college sports risk-free, but it could provide players like Colter recourse to mitigate harm to their long-term health and wellness.[12] In the meantime, a new generation of athletes risk their safety every day playing for Northwestern and other Division I colleges and universities,[13] and while the institutions continue to thrive financially,[14] the players bearing their insignias lack a voice at the bargaining table.

Today, a number of factors are converging to force the Board's hand in deciding how to treat collegiate athletes. First, the Board's decision in *Trustees of Columbia University*,[15] decided after *Northwestern University*,[16] adopted a more extensive common-law definition of "employee,"[17] which this Note argues would also cover collegiate athletes.[18] Second, the Board's General Counsel, Jennifer Abruzzo, has emphasized her belief that full scholarship athletes qualify as statutory employees.[19] Lastly, prominent recent and ongoing litigation has hinted at labor-related issues inherent in the NCAA model.[20] In Justice Kavanaugh's fiery concurrence in *National Collegiate Athletic Association v. Alston*,[21] for example, he challenged collegiate players to

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11 *See, e.g.*, *How the NFLPA Works*, NAT'L FOOTBALL LEAGUE PLAYERS ASS'N, www.nflpa.com/about [https://perma.cc/8ZQF-M9FR]. Lacking such resources, Colter has faced multiple charges of domestic violence as well as homelessness and indigency after graduating, all stemming from what he believes to be untreated CTE. *See* McKenna, *supra* note 2.

12 *See* Strauss, *supra* note 6.

13 College sports are divided among three divisions: I, II, and III. *See generally* NCAA, STUDENT-ATHLETE PARTICIPATION 1981-82—2018-19, https://ncaaorg.s3.amazonaws.com/research/sportpart/2018-19RES_SportsSponsorshipParticipationRatesReport.pdf [https://perma.cc/DQ8G-LSDY]. Northwestern is one of 351 schools in Division I, which comprised more than 29,200 players in total as of the 2018–19 season. *Id.* at 157.

14 *See* Steve Berkowitz, *Big Ten Conference Had Nearly $759 Million in Revenue in Fiscal 2018, New Records Show*, USA TODAY (May 15, 2019, 6:58 PM), https://www.usatoday.com/story/sports/2019/05/15/big-ten-revenue-hit-nearly-759-million-fiscal-2018/3686089002/ [https://perma.cc/XP2A-Q25W] (reporting that the fourteen teams in the conference received an average of $54 million for the 2017–18 school year).

15 364 N.L.R.B. 1080 (2016).

16 362 N.L.R.B. 1350 (2015).

17 *Columbia*, 364 N.L.R.B. at 1081.

18 *See infra* Section II.B (discussing the Board's shift in recognizing students as employees).

19 *See* Memorandum from Jennifer A. Abruzzo, Gen. Counsel, NLRB, to All Reg'l Dirs., Officers-in-Charge & Resident Officers, NLRB (Sept. 29, 2021), https://apps.nlrb.gov/link/document.aspx/09031d458356ec26 [https://perma.cc/CNG7-WQ3B].

20 *See infra* Section II.D (discussing how recent administration changes have impacted the Board's approach to NCAA labor issues).

21 Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141 (2021).

engage in collective bargaining so they could collect a fair portion of revenue.[22]

Based on the factors above, it is likely that if a Democrat-majority Board were to rule on the merits of *Northwestern* today, it would hold that the players qualified as statutory employees; it is also probable that a Republican-majority Board would reach the opposite conclusion. Nevertheless, by failing to assert jurisdiction in *Northwestern*, the Board has denied countless collegiate players such as Colter the opportunity to collectively bargain for improved health and safety standards, a fair cut of expanding revenue, and other employment-based rights.[23] The Board's unpredictable approach to asserting jurisdiction over college workers—players and non-players alike—has undoubtedly discouraged other groups of players from organizing, impeding the goals of the Board.[24] The Board should therefore build off its 2016 *Columbia* decision and adopt a clear, reliable test for determining jurisdiction in future cases.[25]

This Note argues that the Board should apply the common-law right to control test in asserting jurisdiction over Division I players, because doing so will be consistent with the Board's treatment of other student workers in higher education.[26] Alternatively, the Board should utilize the rulemaking process to ensure that these players receive ongoing statutory protection, thereby providing a predictable expectation for players, schools, and unions after the past decades' political vacillations.[27] Part I of this Note provides background on the NLRA and the NLRB, and the history of the Board's jurisdictional determinations regarding private colleges and universities as well as athletes. Part II analyzes why the current situation justifies assertion of the Board's jurisdiction over collegiate players, as doing so would

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22 *Id.* at 2168 (Kavanaugh, J., concurring).

23 As of April 2022, there have been no prominent pushes for unionization by college players since that from the Northwestern team. *See* Alan Blinder & Billy Witz, *In Push to Play, College Football Stars Show Sudden Unity*, N.Y. TIMES (Apr. 29, 2021), https://www.nytimes.com/2020/08/10/sports/ncaafootball/coronavirus-college-football-players.html [https://perma.cc/62K7-783J]. Football players hinted at creating a Division-wide player's association as part of their push to return to competition in the midst of the COVID-19 outbreak in the fall of 2020; however, this idea did not materialize. *See id.*

24 *See* Trs. of Columbia Univ., 364 N.L.R.B. 1080 (2016); Northwestern Univ., 362 N.L.R.B. 1350 (2015).

25 As of April 2022, a piece of legislation is pending in Congress that would grant the Board jurisdiction over all colleges and universities, both public and private. *See* College Athlete Right to Organize Act, S. 1929, 117th Cong. (2021). Even in the unlikely event it passes, however, the Board will still need to adopt a more clearly defined jurisdictional standard.

26 *See Columbia*, 364 N.L.R.B. at 1081.

27 *See infra* Section III.

further the policies of the Act on a more lasting basis. Finally, Part III recommends asserting jurisdiction over and applying the right to control test to Division I players or, alternatively, to issue a rule declaring jurisdiction over these players moving forward.

I. The Board's Scrambled Jurisdiction over Students and Athletes

The Board's mission is to further the purposes of the Act—that is, to protect the rights of employers and employees, encourage collective bargaining, and resolve employment disputes.[28] The Act permits the Board to decline jurisdiction in instances where "the effect of such labor dispute on commerce is not sufficiently substantial."[29] The Board has a scattered history of asserting and declining—and then asserting again—jurisdiction over workers at higher education institutions.[30] No exception to this oscillating approach, the Board has asserted jurisdiction over athletes in fits and starts, up to its significant decision to decline jurisdiction over collegiate athletes in *Northwestern*.[31] Because of the rapidly changing legal discourse surrounding the idea of amateurism in sports, the Board's handling of collegiate players is a hot button issue today.[32]

A. Overview of the NLRA and the Goals of the Board

President Roosevelt signed the NLRA into law in 1935, in the midst of the New Deal.[33] Congress intended the Act to promote peaceful labor relations between employers and employees in order to minimize disruptions to interstate commerce.[34] After an inauspicious start, the 1947 Taft-Hartley Act overcame President Truman's veto and cemented the contours of the NLRA, leading to the version of the Act that applies today.[35] The Act's protection covers employees in most industries with ties to interstate commerce.[36] Its broad—albeit

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28 *See* 29 U.S.C. § 151.

29 *Id.* § 164(c).

30 *See infra* Section I.B.

31 *See infra* Section I.C.

32 *See infra* Section I.D.

33 *See About NLRB: 1935 Passage of the Wagner Act*, NLRB, https://www.nlrb.gov/about-nlrb/who-we-are/our-history/1935-passage-of-the-wagner-act [https://perma.cc/H8WE-MB9M].

34 *See* 29 U.S.C. § 151.

35 *See About NLRB*: *1947 Taft-Hartley Passage and NLRB Structural Changes*, NLRB, https://www.nlrb.gov/about-nlrb/who-we-are/our-history/1947-taft-hartley-passage-and-nlrb-structural-changes [https://perma.cc/UR9X-KU6D]; *see also* Philip Yale Nicholson, Labor's Story in the United States 250–54 (2004).

36 *See About NLRB: Jurisdictional Standards*, NLRB, https://www.nlrb.gov/about-nlrb/

circular—language defines "employee" as "any employee . . . , unless [the Act] explicitly states otherwise."[37] Few enumerated exceptions appear in the statutory text.[38] Courts and the Board have applied the negative-implication canon based on these listed exceptions,[39] holding that by enumerating specific exceptions, nonenumerated categories qualify as statutory employees.[40] Although the House proposed excepting as statutory employers any entity "organized and operated exclusively for religious, charitable, scientific, literary, or *educational* purposes,"[41] the Senate rejected this exception from the 1947 Taft-Hartley Amendment,[42] and it never appeared in subsequent versions.[43]

The NLRA provides and protects the right of employees to engage in concerted activity.[44] If a bargaining unit of employees demonstrates a sufficient "showing of a substantial interest" in union representation, a labor organization may petition an NLRB regional office for an election.[45] If the election is conclusive, then a Regional Director will issue a certification requiring the employer to recognize

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rights-we-protect/the-law/jurisdictional-standards [https://perma.cc/NFX8-MYA9]. This era saw an expansive interpretation of interstate commerce, as demonstrated by Congress's reach under the Commerce Clause at this time. *See, e.g.*, Wickard v. Filburn, 317 U.S. 111 (1942).

37 29 U.S.C. § 152(3). The definition of "employee" is statute specific. *See, e.g.*, 29 U.S.C. § 203(e); I.R.C. § 7701(a)(20). A worker may therefore receive statutory protection as an employee under one statute, but not under another.

38 29 U.S.C. § 152(3). The only enumerated exceptions are public employees, agricultural laborers, domestic workers, those working for their family or spouse, independent contractors, supervisors, and railway workers. *Id.*

39 *See* Antonin Scalia & Bryan A. Garner, Reading Law at 107–11 (2012) (defining the negative-implication canon as the presumption that expressing one thing implies that other things are not included).

40 *See, e.g.*, NLRB v. Town & Country Elec., Inc., 516 U.S. 85, 90–91 (1995).

41 H.R. 3020, 80th Cong. § 2 (1947) (emphasis added), *reprinted in* Staff of S. Comm. on Lab. & Pub. Welfare, 93d Cong., Legislative History of the Labor-Management Relations Act, 1947 34 (Comm. Print 1974).

42 S. 1126, 80th Cong. (1947), *reprinted in* 1 Legislative History of the Labor Management Relations Act, 1947.

43 *See* Collective Bargaining in Higher Education 23–24 (Thomas M. Mannix ed., 1975). According to the Board, the Senate may have omitted the additional exceptions because these types of nonprofit institutions lacked substantial effects on commerce and thus were beyond the Act's reach. Trs. of Columbia Univ., 97 N.L.R.B. 424, 427 (1951).

44 29 U.S.C. § 157. Concerted activities include organizing, forming, or joining a labor union, and collective bargaining. *Id.*

45 *Id.* § 158(b)(7)(C). Although the statute requires a thirty percent showing, unions typically seek seventy percent before acting. *See* Nicole Buffalano, Drew Gniewek & Francisco Guzmán, Morgan Lewis, Collective Bargaining for College Sports? *NCAA v. Alston* Opens the Door to Labor Issues 14 (2021), https://www.morganlewis.com/-/media/files/publication/presentation/webinar/2021/what-future-student-athlete-organizing-and-bargaining-could-look-like.pdf [https://perma.cc/96RW-BQFZ].

the union.[46] Alternatively, instead of petitioning the NLRB, a unit may request that their employer voluntarily recognize them as a union.[47] Once recognized, the Act grants the right to employees in the unit to collectively bargain via selected representatives with their employer.[48] Furthermore, if employers interfere with or restrain employees' attempts to engage in concerted activity or collective bargaining,[49] the Board has authority to intervene.[50]

The Act charges the Board with the goals of encouraging collective bargaining and protecting employees' right to organize.[51] The Board comprises five members appointed by the President for terms of five years.[52] Due to staggered schedules, the President appoints three out of five members of the Board,[53] as well as the General Counsel.[54] This process allows the Board and its General Counsel to align policies with the party of each presidential administration.[55]

The Board has broad jurisdiction to resolve labor disputes between workers and private—but not public[56]—employers.[57] In asserting jurisdiction, the Board has adjudicative authority to resolve labor disputes between a group of employees and the group's employer.[58] The Board may decline jurisdiction if, in its discretion, a labor dispute has such an insubstantial effect on commerce that asserting jurisdiction would not be warranted.[59] The Board has noted that, although it is not necessarily compelled to assert jurisdiction when disputes in-

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46 *See* NLRB, CASEHANDLING MANUAL PART TWO: REPRESENTATION PROCEEDINGS 11470 (2020), https://www.nlrb.gov/sites/default/files/attachments/pages/node-174/chm-part-ii-rep2019published-9-17-20.pdf/ [https://perma.cc/P4WU-7GBL]. For an election to be conclusive, a majority of those in the bargaining unit must vote in the affirmative. *See id.*

47 *See* 29 U.S.C. § 159(c)(1)(A).

48 *See id.* § 157. Collective bargaining is a process through which a union negotiates with an employer over terms and conditions of employment for all workers in a bargaining unit. BUFFALANO ET AL., *supra* note 45.

49 29 U.S.C. § 158.

50 *Id.* § 160.

51 *Id.* § 151.

52 *Id.* § 153(a).

53 *See id.*

54 *Id.* § 153(d).

55 *See* Timothy Noah, *The National Labor Relations Board Is Finally Doing Its Job*, NEW REPUBLIC (Jan. 7, 2022), https://newrepublic.com/article/164800/jennifer-abruzzo-nlrb-enforce-biden-union-agenda [https://perma.cc/B5GU-7UKE].

56 Public employees receive similar protection from other agencies. For example, the Merit Systems Protection Board protects federal employees from inappropriate conduct by employers in a similar manner to how the NLRB protects private employees. *See* 5 U.S.C. § 2301(b).

57 *See* 29 U.S.C. § 160.

58 *See id.* § 151.

59 *Id.* § 164(c).

volve substantial effects on interstate commerce, Congress strongly prefers that it does so.[60]

Finally, the Act confers on the Board the authority to undertake rulemaking[61] as permitted by the Administrative Procedure Act.[62] The Supreme Court has affirmed the Board's authority to issue general rules decoupled from individual adjudicative matters.[63] The Board has previously engaged in rulemaking when its prior decisions left important issues unresolved or ambiguous.[64]

B. NLRB's Jurisdiction over Colleges and Universities

For decades after the Act passed, the Board was reluctant to assert jurisdiction over private colleges and universities.[65] In the new century, however, the Board signaled a shift in how it viewed student workers, recognizing student assistants at New York University as statutory employees.[66] The Board then demonstrated its tendency to vacillate in the political winds when it reached the opposite result four years later regarding a class of student workers at Brown University, based on the theory that student workers have a primarily educational relationship with their school.[67] Then, in 2016, not only did the Board assert jurisdiction over student workers at Columbia University, but it rejected the "primarily educational" test in favor of the common-law "right to control" test, thereby extending statutory coverage to more student workers than ever before.[68]

1. Early History

The Board first asserted jurisdiction over workers at a private school in 1944.[69] Soon after, in *Trustees of Columbia University* ("*Columbia I*"),[70] the Board declined jurisdiction over a group of library workers at a private university based on the premise that the group's connection to educational activities of the school outweighed labor-

60 *See* Cornell Univ., 183 N.L.R.B. 329, 332 (1970).

61 29 U.S.C. § 156.

62 5 U.S.C. §§ 551–59.

63 Am. Hosp. Ass'n v. NLRB, 499 U.S. 606, 614 (1991).

64 *See* Joint Employer Status Under the National Labor Relations Act, 85 Fed. Reg. 11184, 11228 (Feb. 26, 2020) (codified at 29 C.F.R. § 103 (2020)) (stating the Board's preference for rulemaking that "foster[s] predictability and consistency").

65 *See infra* Section I.B.1.

66 *See infra* Section I.B.2.

67 *See infra* Section I.B.2.

68 *See infra* Section I.B.3.

69 *See* Henry Ford Trade Sch., 58 N.L.R.B 1535, 1537 (1944).

70 97 N.L.R.B. 424 (1951).

related concerns.[71] In other words, even though the Board acknowledged that the school had a sufficient impact on interstate commerce, the Board opted to decline jurisdiction because the school's sole purpose—ostensibly—was to educate students.

About two decades later, the Board reversed course and asserted jurisdiction over non-student workers in *Cornell University*.[72] In reaching this decision, the Board cited the lack of a bright line rule when choosing whether to assert jurisdiction.[73] It also reasoned that because more time had passed since the Act's passage, the Board's previous justification for declining jurisdiction over colleges and universities—the notion that their sole purpose was to educate students—no longer applied.[74] In a break from *Columbia I*, the *Cornell* Board stated that declining jurisdiction despite schools' substantial effects on commerce had led to an abstract dividing line between "purely commercial" and noncommercial activities that had been hard to define in practice.[75] In 1970, the Board issued a rule solidifying the *Cornell* approach to asserting jurisdiction over "any private nonprofit college or university [with] a gross annual revenue . . . of not less than $1 million."[76] In explaining why it published the rulemaking, which still applies today, the Board stated that it prefers a test that "has the advantages of simplicity and ease of application," and thus promotes consistency and reliability for employers and employees.[77]

The issue of whether the Board will assert jurisdiction over *student* workers at private colleges and universities has been subject to extreme vicissitudes in the past half-century, reflecting political trends. In its 1972 *Adelphi University*[78] decision, the Board asserted jurisdiction over the bargaining unit at issue only after excluding graduate student workers from the unit.[79] Because the graduate assistants' positions depended on their continued enrollment as students, the Board found that they were "primarily students," despite performing several faculty-like duties.[80] Due to the students' exclusion from the bargaining unit, the question of whether a unit comprising only stu-

71 *See id.* at 425.

72 183 N.L.R.B. 329 (1970).

73 *See id.* at 331.

74 *See id.* at 331–32.

75 *See id.* at 331.

76 29 C.F.R. § 103.1 (2019).

77 Other Rules, 35 Fed. Reg. 18370, 18371 (Dec. 3, 1970) (to be codified at 29 C.F.R. § 103.1).

78 195 N.L.R.B. 639 (1972).

79 *See id.* at 640.

80 *See id.*

dent workers could receive statutory recognition remained unanswered.[81]

Two years after *Adelphi*, the Board issued a decision on the merits regarding student workers' statutory coverage, concluding that graduate student research assistants do not qualify for statutory protection.[82] In *Leland Stanford Junior University*,[83] the Board held that the graduate research assistants were primarily students and therefore were not employees under the Act's coverage.[84] This approach to jurisdiction was consistent for the remainder of the twentieth century.

2. *Chaos Theory:* New York University, Brown, *and the New Millennium*

The new century brought significant shifts in the Board's policy towards bargaining units containing students. In *New York University*,[85] the Board—comprising a majority of members appointed by President Clinton—overruled twenty-five years of precedent by asserting jurisdiction and finding that a group of graduate student assistants qualified as employees.[86] The Board concluded that the graduate assistant petitioners fit into the Act's broad text.[87] It reached this conclusion because the students met the conventional common-law "right to control" test in relation to the university,[88] the test that the Supreme Court applies when statutes fail to define the term "employee" adequately.[89] The first prong of the test is whether a worker performs services for another while the other retains the right to control the "manner and means" by which the work is performed.[90] The second prong is whether the worker performs the services in exchange for compensation.[91] Compensation in this regard does not necessarily constitute regularly tendered paychecks; it may comprise other forms of remuneration.[92] Because the research assistants satisfied the two

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81 *See id.*

82 *See* Leland Stanford Junior Univ., 214 N.L.R.B. 621, 621–23 (1974).

83 *See id*.

84 *See id.* at 623.

85 332 N.L.R.B. 1205 (2000).

86 *See id.* at 1209.

87 *See id.* at 1205.

88 *See id.* at 1206. Although historically also known as the master-servant test, this Note opts to follow modern nomenclature in referring to it as the right to control test.

89 *See, e.g.*, NLRB v. Town & Country Elec., 516 U.S. 85, 93–94 (1995).

90 *See* Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751 (1989).

91 *See* N.Y. Univ., 332 N.L.R.B. at 1206.

92 *See, e.g.*, Seattle Opera v. NLRB, 292 F.3d 757, 762, 775 (D.C. Cir. 2002) (holding that

prongs of the test, and the Act failed to enumerate students as an exception, the Board recognized the student workers as employees.[93]

The shift in policy that characterized *New York University* was short-lived, however, as the Board under President George W. Bush declined to recognize the employment status of a similar group of graduate assistants and proctors in *Brown University*[94] just four years later. The Board asserted jurisdiction but ruled that the group did not constitute employees, returning to the "primarily students" framework.[95] In justifying this reversion, the Board pointed to the Supreme Court's distinction between rigid hierarchies common in industrial workplaces, which Congress purportedly intended the Act to cover, and academic settings, which do not fit as neatly into such hierarchies.[96]

The *Brown* Board also emphasized the premise that graduate student workers have both an educational and economic relationship with the school, but the former outweighs the latter.[97] In support of this conclusion, the Board noted that the petitioners devoted more hours per week to their classes than to their assistant work, and that teaching was a degree requirement for most of the unit.[98] Lastly, the Board feared that allowing graduate assistants to collectively bargain would force the Board to adjudicate disputes regarding "traditional academic freedoms," such as how tests are administered.[99] After an about-face in four years between the Clinton Board's *New York University* and the Bush Board's *Brown* decisions, no new cases involving student workers arose for another twelve years, when the Obama Board asserted jurisdiction.

3. Columbia II *and Re-Embracing the Common-Law Approach*

In *Trustees of Columbia University* ("*Columbia II*"), the Board under President Obama asserted jurisdiction over a group of graduate—and notably, undergraduate—student assistants.[100] The Board

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the compensation requirement was satisfied where the company issued flat fees labeled as reimbursements).

93 *See* N.Y. Univ., 332 N.L.R.B. at 1206.

94 342 N.L.R.B. 483, 487 (2004).

95 *Id.* at 487; *see also supra* Section I.B.2.

96 *See* Brown Univ., 342 N.L.R.B. at 494 (citing NLRB v. Yeshiva Univ., 444 U.S. 672, 680–81 (1980)).

97 *See id.* at 487.

98 *See id.* at 488.

99 *Id.* at 490.

100 364 N.L.R.B. 1080, 1080 (2016).

returned to its previous common-law analysis, applying the right to control test to find that the assistants were statutory employees.[101] It reasoned that where statutory text is clear, and statutory or policy considerations do not outweigh the Act's purpose in promoting effective labor relations, common-law employees must also qualify as employees under the Act.[102] Recognizing the student assistants as statutory employees promoted the aims of the Act, the Board reasoned, because doing so allowed them to collectively bargain for enhanced working conditions.[103] To address concern that forming an economic relationship with the school while enrolled as a student could create tension, the Board noted that the assistants performed substantive teaching duties.[104] Because other students paid tuition to avail themselves of these services, the Board found that an economic relationship already existed.[105]

Furthermore, *Columbia II* rejected the *Brown* Board's concern that allowing students to collectively bargain would constitute a threat to "academic freedoms."[106] It determined, for example, that neither the parties nor the *Brown* Board empirically demonstrated that collective bargaining would in any way infringe on the students' right to free speech in the classroom.[107] The Board also rejected the school's claim that allowing students to unionize would negatively affect students' education, as allowing collective bargaining in similar situations had not led to such dire results.[108]

Since being declared statutory employees, many more student workers have sought to collectively bargain with their colleges and universities.[109] Approximately 20,000 student workers at both public and private colleges and universities joined unions between 2013 and 2019, with most of this growth occurring in the years following *Columbia II*.[110] In fact, many of these groups did not petition the Board, but

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101 *See id.*

102 *See id.* at 6 (citing Mertens v. Hewitt Assocs., 508 U.S. 248, 261 (1993)).

103 *See id.* at 7.

104 *See id.* at 16.

105 *See id.* at 16.

106 *Id.* at 6–8.

107 *See id.* at 7–8.

108 *See id.* at 11 (discussing the lack of negative consequences after medical residential house staff unionized).

109 *See, e.g.*, David W. Chen, *Columbia Graduate Students Walk Out Over Union Fight*, N.Y. Times (Apr. 24, 2018), https://www.nytimes.com/2018/04/24/nyregion/columbia-graduate-students-strike-union-walkout.html [https://perma.cc/QYN2-VMJT].

110 *See* Dan Papscun, *Spike in Grad Student Union Petitions Likely with NLRB Changes*, Bloomberg L. (July 28, 2021, 9:42 AM).

rather requested their schools to recognize them voluntarily.[111] Many public schools have honored these requests,[112] some likely due to the precedent of *Columbia II*, whereas private schools have largely resisted.[113] Commentators have noted that the trend of student workers joining unions historically unrelated to student affairs indicates greater flexibility in terms of the Act applying to non-factory-like settings and longstanding unions adapting to prevailing labor trends.[114]

Thus, the Board's most recent assertion of jurisdiction over a group of student workers at a private college serves as the current test for determining whether students qualify as statutory employees.[115] If a group of students satisfies the broad language of the Act,[116] and no enumerated exceptions apply,[117] the Board will look for compelling reasons to decline jurisdiction.[118] Because operating private colleges and universities has a substantial impact on interstate commerce,[119] and the Board found in *Columbia II* that unsubstantiated threats to academic freedom do not suffice as a compelling justification for the

111 *See* Colleen Flaherty, *Realities of Trump-Era NLRB*, INSIDE HIGHER ED (Feb. 15, 2018).

112 *See, e.g.*, Kelly Hunter-Lynch, *6000 Strong: Student Labor and Community Organizing with the UAW Local 4121*, THE DAILY (Aug. 26, 2021), https://www.dailyuw.com/special_sections/welcome2021/power/article_56a04746-05f1-11ec-832d-9bd3bb1212cb.html [https://perma.cc/KDY8-WPB4] (University of Washington); *About UAW 2865*, UNITED AUTO WORKERS 2865, https://uaw2865.org/about-our-union/ [https://perma.cc/VUV5-67AR] (University of California schools); *Wins from the Last Contract*, UNIV. OF CONN. GRADUATE EMP. UNION, http://uconngradunion.org/wins-from-the-last-contract/ [HTTPS://PERMA.CC/3XE4-TG3E] (University of Connecticut).

113 *See* Flaherty, *supra* note 111 (describing the unlikelihood of voluntary recognition at Yale University, the University of Chicago, and Boston College).

114 *See* Barry Eidlin, *A New Force in American Labor: Academe*, THE CHRON. OF HIGHER EDUC. (Nov. 29, 2021) (reporting that student workers constitute about one-fifth of United Auto Workers, one of the most prominent unions in the country).

115 The Trump Board attempted to pass a rulemaking categorically excluding student works from statutory protection. Jurisdiction—Nonemployee Status of University and College Students Working in Connection With Their Studies, 84 Fed. Reg. 49691, 49691 (proposed Sept. 23, 2019) (to be codified at 29 C.F.R. pt. 103), *withdrawn by* 86 Fed. Reg. 14297, 14297 (Mar. 15, 2021). However, the Biden Board swiftly withdrew the proposed rulemaking. *Id.*

116 *See* 29 U.S.C. § 152(3).

117 *See* Trs. of Columbia Univ., 364 N.L.R.B. 1080, 1084 (2016).

118 *Id.* at 1087.

119 *See* NAT'L CTR. FOR EDUC. STAT., POSTSECONDARY INSTITUTION REVENUES, (2022), https://nces.ed.gov/programs/coe/indicator/cud#:~:text=IN%202018%E2%80%9319%2C%20total%20revenues,at%20private%20for%2Dprofit%20institutions [https://perma.cc/K6KS-7Q7D] (finding that revenues at American colleges and universities totaled $695 billion in 2019–20, a long way away from the nature of such schools in 1951); *see also* Andrew Rossi, *How American Universities Turned into Corporations*, TIME (May 22, 2014, 12:01 AM) (reporting that the cost of college increased from 1978 to 2014 by 1,120 percent).

Board to decline jurisdiction,[120] it will continue to assert jurisdiction unless political winds shift in the other direction.

C. NLRB's Jurisdiction in the Wide World of Sports

The move towards organized labor in professional sports dates back to the nineteenth century.[121] In 1968, the owners of the National Football League ("NFL") recognized a union composed of players.[122] The Board has consistently asserted jurisdiction over professional leagues since 1970, when it first recognized this union comprising players: the NFL Players Association ("NFLPA").[123] In a recent momentous development, Major League Baseball ("MLB") announced that it will voluntarily recognize a union representative for minor league players, after more than a century of MLB's refusal to do so.[124]

NCAA and school officials have based their policies on those of professional leagues in some aspects,[125] but they have not yet recognized unions comprising players.[126] One major difference between professional and collegiate sports is that the Act enumerates workers at public universities and colleges as exceptions to statutory coverage.[127] In fact, only seventeen of about 130 total Football Bowl Subdivision ("FBS") teams—and roughly one-third of Division I men's basketball teams[128]—play for private schools.[129] Although no FBS

120 364 N.L.R.B. at 1086.

121 *See, e.g.*, Phila. Ball Club, Ltd. v. Hallman, 8 Pa. C. 57 (C.P., Phila. Cnty. 1890).

122 *See* Kevin Jackman, *NFL Lockout: An In-Depth Look at Past Labor Disputes in Sports; Current NFL Issue*, BLEACHER REP. (June 5, 2011), https://bleacherreport.com/articles/724433-nfl-lockout-an-in-depth-look-at-pastlabor-diputes-in-sports-current-nfl-issue [http://perma.cc/243R-JCDL].

123 *See id.* Professional leagues include the National Football League ("NFL"), Major League Baseball ("MLB"), National Basketball Association ("NBA"), and National Hockey League ("NHL").

124 *See* James Wagner, *M.L.B. Will Voluntarily Recognize Minor League Union*, N.Y. TIMES (Sept. 9, 2022), https://www.nytimes.com/2022/09/09/sports/baseball/minor-league-union.html [https://perma.cc/YJ4B-9529].

125 *See, e.g.*, Billy Witz, *Doctors Enter College Football's Politics, but Maybe Just for Show*, N.Y. TIMES (Sept. 17, 2020), https://www.nytimes.com/2020/08/23/sports/ncaafootball/college-football-myocarditis-coronavirus.html [https://perma.cc/X2MM-YSD7] (reporting that schools looked to professional leagues in deciding how to handle COVID-19 risk).

126 *See* Northwestern Univ., 362 N.L.R.B. 1350, 1350 (2015).

127 *See id.* at 1354.

128 *See Your Complete List of Men's Division 1 Basketball Colleges*, NEXT COLL. STUD. ATHLETE, https://www.ncsasports.org/mens-basketball/division-1-colleges [https://perma.cc/N7A9-XD7F].

129 *See Northwestern*, 362 N.L.R.B. at 1354. The FBS is one of two subdivisions of Division I football. *See Understanding the Different College Football Divisions*, VERIFIED ATHLETICS, https://www.verifiedathletics.com/athlete-resources/2018/12/4/understand-the-different-college-football-divisions [https://perma.cc/WZB9-TKYZ].

conference currently has a majority of private schools, the Board has previously asserted jurisdiction over employees on a conference-wide basis.[130]

The Board has not ruled whether one college or university in a conference can unionize at a time.[131] In *Northwestern University*, the Board declined to assert jurisdiction over a unit of grant-in-aid[132] football players at the sole private university in the FBS Big Ten Conference; the Board therefore did not decide whether the players qualified as statutory employees.[133] The Board stated that no extant analytical framework clearly applied to recognizing a unit consisting of an individual college team.[134] Because the Act did not extend to the team's public school competitors, the Board reasoned, Northwestern might have a recruiting advantage if only their team could benefit from collective bargaining.[135] For that reason, the Board argued that asserting jurisdiction would lead to an inequitable result in terms of competitive balance and labor relations.[136]

Although it did not reach a decision, the Board implied that the group of players could theoretically qualify as employees.[137] Before the case reached the Board, in fact, the Regional Director came to this conclusion, noting that several aspects of collegiate athletics resemble professional sports.[138] For example, players receive compensation including tuition, lodging, and incidental reimbursements; spend more than forty hours each week on football activities; and must comply with the rules imposed by the school, conference, and NCAA.[139] In addition, the Board itself noted that college football teams have an

130 *See Northwestern*, 362 N.L.R.B. at 1352 n.9 (citing Big E. Conf., 282 N.L.R.B. 335 (1986)).

131 *See id.* at 1354 n.16.

132 A "grant-in-aid" scholarship covers the cost of an athlete's expenses while on the team. *See id.* at 1351. In this case, players' scholarships had a value of about $61,000 per year for each eligible player, calculated to address the costs of "tuition, fees, room, board, and books." *Id.*

133 *Id.* at 1350, 1352.

134 *Id.* at 1351–52.

135 *See id.* at 1352–54. In fact, states such as Ohio and Michigan specifically exclude scholarship athletes in the definition of "employee" in state labor law. *Id.* On the other hand, Iowa is considering legislation that would include college athletes as statutory employees. Dennis Dodd, *Iowa State Bill Aims to Reclassify College Athletes as Employees Due Compensation by Universities*, CBS Sports (Jan. 27, 2022, 11:51 AM), https://www.cbssports.com/college-football/news/iowa-state-bill-aims-to-reclassify-college-athletes-as-employees-due-compensation-by-universities/ [https://perma.cc/AD6S-JMFX] (discussing IA H.F. 2055).

136 *See Northwestern*, 362 N.L.R.B. at 1352.

137 *See id.* at 1353 n.13.

138 *See id.* at 1350–51.

139 *See id.* at 1351, 1358–59.

effect on commerce so substantial that declining jurisdiction on that basis would not be feasible.[140] Sure enough, Division I sports brought in about $18 billion total in 2019 alone,[141] and March Madness—college basketball's flagship playoff event—brings in more than $1 billion each year by itself.[142] Despite these factors, the Board declined jurisdiction, and did not indicate whether the "primarily students" or right to control test would apply to collegiate players in the future.[143]

D. Challenging the Concept of Amateurism in Collegiate Sports

In 2017, President Obama's appointed NLRB General Counsel Richard F. Griffin, Jr. set forth his position that the Northwestern grant-in-kind athletes qualified as statutory employees under the Act.[144] Griffin argued that by declining to assert jurisdiction, the Board left perilously unanswered the question of whether collegiate players could take part in concerted activities subject to Board protection.[145] Griffin advocated for applying the right to control test, opining that the *Columbia II* Board correctly applied the test to student workers.[146]

In applying the two prongs of the test to scholarship collegiate football players, Griffin maintained that (1) the players perform services for their school under the school's right to control, and (2) the players do so in exchange for compensation.[147] He asserted that schools demonstrate a right to control because they regulate minute details such as how often players workout and practice.[148] Griffin argued that the second prong—compensation in exchange for work—was also satisfied because grant-in-aid players receive up to $75,000 in scholarships per year, and all players received reimbursements for

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140 *See id.* at 1353.

141 Billy Witz, *N.C.A.A. Reorganizes Around New Constitution That Shifts Power to Universities*, N.Y. TIMES (Jan. 20, 2022), https://www.nytimes.com/2022/01/20/sports/ncaafootball/ncaa-constitution-transgender-athletes.html [https://perma.cc/B9BR-WS7R].

142 Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2150 (2021).

143 *Northwestern*, 362 N.L.R.B. at 1353. Since the Board's nondecision, no groups of collegiate players have attempted to organize in earnest. *See* Taylor Brinkman & Tatianna Witter, *From "Student-Athletes" to "Players": A Review of the 2021 Legal Developments Shaping a New Reality of College Sports*, JDSUPRA (Jan. 6, 2022), https://www.jdsupra.com/legalnews/from-student-athletes-to-players-a-6189761/ [https://perma.cc/55KK-GEMN] .

144 Memorandum from Richard F. Griffin, Jr., Gen. Couns., NLRB, to All Reg'l Dirs., Officers-in-Charge, & Resident Officers 20 (Jan. 31, 2017) (withdrawn Dec. 1, 2017), https://apps.nlrb.gov/link/document.aspx/09031d4582342bfc [https://perma.cc/3ABH-MWAN].

145 *See id.* at 17.

146 *See id*. at 10–13.

147 *Id.* at 19.

148 *Id.*

travel and childcare expenses.[149] True to the NLRB's history of political fluctuation, Peter B. Robb, the General Counsel appointed by President Trump, rescinded Griffin's memorandum without comment.[150]

In 2021, however, President Biden's appointed General Counsel Jennifer A. Abruzzo emphatically echoed Griffin's contention that grant-in-aid players are statutory employees based on the right to control test.[151] Abruzzo has encouraged Division I football and basketball teams at private colleges and universities to unionize, implying that the Board's jurisdictional concerns in 2015 are no longer an impediment.[152] Further, she suggested that players could potentially organize in a conference- or Division-wide capacity under a theory of joint employment.[153]

Perhaps contrary to popular belief, the concept of amateurism in college sports is a relatively recent phenomenon.[154] In fact, the NCAA created the term "student-athlete" in the 1950s as a litigation defense.[155] Critics point out that the NCAA has wielded the language of amateurism to prevent players from asserting their rights to organize and demand payment for their work.[156] In addition, these critics posit that the disparity between schools' revenue and players' lack of finan-

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149 *Id.* at 19 n.118.

150 Memorandum from Peter B. Robb, Gen. Couns., NLRB, to All Reg'l Dirs., Officers-in-Charge, & Resident Officers 4–5 (Dec. 1, 2017), https://apps.nlrb.gov/link/document.aspx/09031d458262a31c [https://perma.cc/DK8J-ZG2X].

151 Abruzzo, *supra* note 19, at 4.

152 *See id.* at 7–9.

153 *See id.* at 4, 9 n.34. Joint employment exists in the common law where multiple employers simultaneously possess the right to control employees' work performance. *See* Browning-Ferris Indus. of Cal., Inc. v. NLRB, 911 F.3d 1195, 1200–01 (D.C. Cir. 2018). In fact, the NLRB has proposed a rulemaking that will codify the common-law joint employment standard; that is, such a relationship will exist where two employers "share[] or codetermine[] those matters governing at least one of the employees' essential terms and conditions of employment." Standard for Determining Joint-Employer Status, 87 Fed. Reg. 54641, 54645 (Sept. 7, 2022) (to be codified at 29 C.F.R. pt. 103).

154 *See generally* RONALD A. SMITH, THE MYTH OF THE AMATEUR (2021) (detailing the professionalized nature of college sports well into the twentieth century).

155 *See* Jay D. Lonick, Note, *Bargaining with the Real Boss: How the Joint Employer Doctrine Can Expand Student-Athlete Unionization to the NCAA as an Employer*, 15 VA. SPORTS & ENT. L.J. 135, 140 (2015) (tracing the NCAA's use of the term "student-athlete" to *Univ. of Denver v. Nemeth*, 257 P.2d 423 (Colo. 1953), where an injured player argued that he was entitled to worker's compensation).

156 *See* Jeffrey L. Kessler & David L. Greenspan, *The NIL in Amateurism's Coffin: How the NCAA's Policy Reversal Shows Once Again that Compensating Student-Athletes Won't Hurt College Sports*, HARV. J. SPORTS & ENT. L. (2020) (arguing that amateurism is a tool wielded by the NCAA to "control their costs and maximize their profits").

cial benefits perpetuates race-based disparities.[157] Further, because the NCAA has failed to abide by a consistent definition of "amateurism," it has entangled courts in a convoluted guessing game, likely leading to extensive and costly litigation.[158]

Recent years have seen a higher incidence of NCAA-related litigation than ever before, each attacking the core idea of amateurism.[159] For example, in *Alston*, the Supreme Court unanimously held that NCAA rules restricting education-related benefits violate antitrust law.[160] The Court clarified that the decision centered around whether the district court's finding was reasonable, and not whether the overall amateur athletic model passed muster.[161] In Justice Kavanaugh's concurrence, however, he directly challenged collegiate players to take part in collective bargaining so they could collect a fair portion of revenue.[162]

NCAA-related litigation is also prevalent in the lower courts. One such case deals with the issue of whether collegiate athletes qualify as employees under the Fair Labor Standards Act ("FLSA"), and are therefore entitled to minimum wage.[163] Meanwhile, collegiate players filed a complaint in 2021 at an NLRB regional office alleging that schools and the NCAA are committing an unfair labor practice by misclassifying players as student-athletes, thereby violating the NLRA.[164] Partly in response to these channels of litigation, the NCAA Board of Directors has agreed on an updated, less extensive constitution that will shift power to individual conferences and away from the NCAA as a central governing body.[165] This coincides with a flurry of changes in conference composition, as schools seek advantageous financial positions.[166]

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157 *See* RAMOGI HUMA & ELLEN J. STAUROWSKY, NAT'L COLL. PLAYERS ASS'N , HOW THE NCAA'S EMPIRE ROBS PREDOMINANTLY BLACK ATHLETES OF BILLIONS IN GENERATIONAL WEALTH (2020).

158 *See* Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2170–71 (2021).

159 *See, e.g.*, Berger v. Nat'l Collegiate Athletic Ass'n, 843 F.3d 285, 294 (7th Cir. 2016) (Hamilton, J., concurring) (pointing out the disparity between players' lack of salary and the NCAA's billions in yearly revenue).

160 *Alston*, 141 S. Ct. at 2145.

161 *See id.* at 2153, 2161.

162 *See id.* at 2168 (Kavanaugh, J., concurring).

163 *See* Johnson v. Nat'l Collegiate Athletic Ass'n, No. 19-5230, 2021 U.S. Dist. LEXIS 246324, at *3 (E.D. Pa. Dec. 28, 2021) (motion for interlocutory appeal granted on issue of whether players qualify as statutory employees under FLSA).

164 The Nat'l Collegiate Athletic Ass'n, Case 25-CA-286101 (filed Nov. 10, 2021).

165 *See* Witz, *supra* note 141 (reporting that the updated constitution was approved, effective August of 2022).

166 *See* Tony Moss, *College Basketball Realignment Tracker: Keeping Track of NCAA Divi-*

Finally, collegiate athletes are now permitted to profit off of their names, images, and likenesses ("NIL").[167] After decades of prohibition, California became the first state to allow college athletes to monetize their likeness; this triggered a rush of other states to follow suit.[168] After many states drafted similar laws, the NCAA repealed its prohibitions on profiting from NIL.[169] In the wake of this momentous change, the NCAA's concern that allowing players to earn money would dwindle fan interest has not occurred to this point.[170]

II. Leveling the Playing Field with the Right to Control Test

The Board's refusal to assert jurisdiction over a particularly vulnerable group of workers like collegiate athletes runs counter to the Act's broad goal of promoting peaceful labor relations to limit disruptions to interstate commerce.[171] In addition, the right to control test is much more administrable in practice than the muddled abstractions inherent in the *Brown* test.[172] Applying the right to control test to collegiate players will also be consistent with precedent regarding collegiate workers and professional athletes.[173] Lastly, the concept of collegiate players as amateurs has proven untenable in the modern world, and denying them statutory protection is therefore inconsistent with prevailing attitudes.[174]

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sion I Conference Changes, ESPN (July 12, 2022), https://www.espn.com/mens-college-basketball/story/_/id/32855347/college-basketball-realignment-tracker-keeping-track-ncaa-division-conference-changes [https://perma.cc/L8ST-L9SW] (reporting that in 2021–22 alone, nineteen of thirty-two Division I basketball conferences added or subtracted teams).

167 *See* Caroline K. Hicks, Note, *How Pay to Play Legislation Has a Bolstering Effect on the Argument that Student Athletes Should Be Compensated as Employees and How the NCAA Should Respond*, 15 Charleston L. Rev. 491, 492 (2021).

168 *See* Alan Blinder, *After California Law, Statehouses Push to Expand Rights of College Athletes*, N.Y. Times (Jan. 13, 2020), https://www.nytimes.com/2020/01/13/sports/ncaa-athletes-pay-california.html [https://perma.cc/8M7M-HR83].

169 *See* Hicks, *supra* note 167, at 492.

170 *See* Dennis Dodd, *With the NCAA Backed into a Corner, the Age of Paying College Athletes Is Officially Upon Us*, CBS Sports (Jan. 20, 2022, 2:47 PM), https://www.cbssports.com/college-football/news/with-the-ncaa-backed-into-a-corner-the-age-of-paying-college-athletes-is-officially-upon-us/ [https://perma.cc/5BXT-DXVH].

171 *See supra* Section I.A.

172 *See infra* Section II.B.

173 *See infra* Section II.B.

174 *See infra* Section II.C.

A. Declining Jurisdiction Impedes the Purpose of the NLRA

The Act's broad language enumerates only a few exceptions to the definition of "employee," none of which apply to collegiate athletes.[175] Because the statute enumerates certain exceptions, the negative-implication canon of statutory construction presumes that unenumerated categories of workers qualify as employees.[176] In addition, because the Board exists to further the goals of the Act, it has authority to define "employee" broadly.[177] It therefore stands to reason that collegiate athletes definitionally qualify as employees according to a plain reading of the Act's text.[178]

The Board's declining jurisdiction over collegiate athletes is harmful to the goals of the NLRA because it leaves open labor-related questions that could have been resolved years ago.[179] Since the Board declined to assert jurisdiction in 2015, no college athletes have attempted to unionize in earnest, and entire additional generations of players have been unable to negotiate effectively to mitigate the inherent dangers of contact sports.[180] Meanwhile, in the years immediately after the Board asserted jurisdiction over student workers in *Columbia II*, more than 20,000 similarly situated public school student workers joined labor unions across the country—whereas far fewer of their private school counterparts did the same, fearing that a Republican-majority Board would overturn *Columbia II*.[181] The disparity between unionization at public and private schools indicates that the Board's political fluctuations have discouraged unknown numbers of would-be employees from asserting their statutory rights.[182]

The *Northwestern* Board's concerns over how the assertion of jurisdiction over players at private schools would give those schools an unfair recruiting advantage can be mitigated. If players seek to organize conference- or Division-wide through a theory of joint employment, then the Board could ensure that no disparities in bargained-for

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175 *See* 29 U.S.C. § 152(3); *supra* text accompanying notes 37–38.

176 *See* NLRB v. Town & Country Elec., Inc. 516 U.S. 85, 90–91 (1995); *see also* SCALIA & GARNER, *supra* note 39, at 107–11.

177 *See Town & Country Elec.*, 516 U.S. at 89–90.

178 *See* 29 U.S.C. § 152(3).

179 *See* Marc Edelman, *The Future of College Athlete Players Unions: Lessons Learned from* Northwestern University *and Potential Next Steps in the College Athletes' Rights Movement*, 38 CARDOZO L. REV. 1627, 1640–42 (2017).

180 *See* Brinkman & Witter, *supra* note 143.

181 *See* Papscun, *supra* note 110; Flaherty, *supra* note 111.

182 *See supra* notes 112–13.

rights exist between similarly situated teams.[183] In fact, General Counsel Abruzzo has supported the idea that the Board could potentially assert jurisdiction over a unit including public school players under a theory of joint employment by their school and their conference or the NCAA.[184] Such a theory appears plausible in light of recent jurisprudence.[185]

Lastly, the Act prompts the Board to assert jurisdiction over labor disputes with substantial effects on commerce unless compelling considerations outweigh such effects.[186] The Board conceded in *Northwestern* that Division I football has a significant impact on commerce.[187] Collegiate athletes on "revenue-generating" teams[188]—mostly football and basketball—bring substantial streams of money to their schools.[189] The Board's jurisdictional standard covers private colleges and universities with yearly revenue exceeding $1 million,[190] a threshold eclipsed roughly fifty times over by each football program in the Big Ten conference alone.[191] As demonstrated by their tremendous revenues, Division I sports have a massive impact on interstate commerce and the Board should only decline jurisdiction over players through a substantially compelling justification.[192] The Board claimed it had such a justification in *Northwestern*, citing the possible competitive imbalance that could result from one team unionizing at a time.[193] However, players could assuage this concern by joining together in conference- or division-wide bargaining units—drawing influence from professional sports' models.[194] Alternatively, the decentralized nature of the NCAA's new constitution allows conferences to realign more easily.[195] As a result, conferences could continue to realign[196]

183 *See* Abruzzo, *supra* note 19.

184 *Id.* at 9 n.34.

185 *See supra* note 153 and accompanying text.

186 *See* 29 U.S.C. § 164(c); *see also* Trs. of Columbia Univ., 364 N.L.R.B. 1080, 1081 (2016).

187 *See* Northwestern Univ., 362 N.L.R.B. 1350, 1353 (2015).

188 In most schools, only two or three sports generate more money than they cost. *See* Patrick Rishe, *College Football Profiteering a Necessary Evil for Financing Athletics, Long-Term Branding*, FORBES (Sept. 21, 2011, 2:10 PM), https://www.forbes.com/sites/prishe/2011/09/21/college-football-profiteering-a-necessary-evil-for-financing-athletics-long-term-branding/?sh=9396d1e52fd3 [https://perma.cc/3FVG-8JNX].

189 *See* Witz, *supra* note 141.

190 29 C.F.R. § 103.1.

191 *See* Berkowitz, *supra* note 14.

192 *See* Trs. of Columbia Univ., 364 N.L.R.B. 1080, 1084 (2016).

193 *See* Northwestern Univ., 362 N.L.R.B. 1350, 1352 (2015).

194 *See supra* notes 122–25 and accompanying text.

195 *See* Witz, *supra* note 165.

196 *See* Moss, *supra* note 166.

and even form a conference containing a majority of private colleges and universities, in which case the Board would be hard-pressed to find a compelling justification to decline jurisdiction.[197]

B. The Common-Law Test Is More Administrable Than the "Primarily Students" Approach

When the *Columbia II* Board rejected the *Brown* Board's "primarily students" analysis,[198] it moved from an arbitrary and abstract standard to one that promotes clarity and reliability.[199] The Board has a history of moving from abstract dividing lines to more workable bright line coverage of entire classes of workers, such as when it rejected the *Columbia I* dividing line between commercial and noncommercial activities in favor of a general jurisdiction approach.[200] Similar to the line between commercial and noncommercial activities, the line between "primarily students" and "primarily workers" is nebulous and therefore unpredictable in its analysis.[201] Moreover, the idea that a school's *only* purpose is to educate students—as advanced in *Columbia I* more than seventy years ago[202]—is no longer persuasive; private colleges' and universities' revenues have exploded and far outpaced the rate of inflation, demonstrating their commercial nature.[203] Furthermore, even though students have an educational relationship with their school, such a distinction hardly merits forcing student workers to experience oppressive labor practices.[204]

Because the *Brown* test[205] is vague, applying it to collegiate assistants and extending it to players would lead to uncertainty for schools, students, and unions. The test is vague because it implies a quantitative metric by which a worker could shift from primarily a student to primarily a worker, but fails to define such a metric.[206] The *Brown* Board held that graduate assistants were primarily students because they spent more hours per week on their own studies than on assistant work, but did not clarify how the calculus would change if the oppo-

197 *See* Big E. Conf., 282 N.L.R.B. 335, 341–42 (1986).

198 *See* Trs. of Columbia Univ., 364 N.L.R.B. 1080, 1082–83 (Aug. 23, 2016).

199 *See id.* at 1085.

200 *See supra* text accompanying notes 72–75.

201 *See Columbia*, 364 N.L.R.B. at 1086.

202 *See* Trs. of Columbia Univ., 97 N.L.R.B. 424, 425 (1951).

203 *See supra* note 119.

204 *See Columbia*, 364 N.L.R.B. at 1086.

205 *See supra* Section II.B.2.

206 *See* Brown Univ., 342 N.L.R.B. 483, 488–89 (2004). The "primarily students" test bears a strong resemblance to the NCAA's use of the term "student-athlete," strategically ordering the terms to imply that the former outweighs the latter. *See* Lonick, *supra* note 155.

site were true.[207] In the case of collegiate athletes, the opposite is in fact true; throughout the season players consistently devote more than forty hours per week to their sport.[208] In addition, whereas teaching was required for most students in *Brown* to earn a degree,[209] participating in college sports is not necessary to graduate. Therefore, although the *Brown* Board found that graduate assistants were primarily students based on allocation of time and the integrality of teaching to their roles as students, such analysis cannot withstand the more complex nature of collegiate sports.[210]

Applying the right to control test to Division I athletes better aligns with precedent set by the Supreme Court in other types of employee determinations.[211] In fact, the Supreme Court has held that it should rely on the common-law approach for determining whether a worker qualifies as an employee absent explicit Congressional indication to the contrary.[212] The Court's rationale is that the common-law right to control test—providing compensation for work plus retaining the right to control how that work is accomplished—is much more administrable in practice than alternatives.[213]

Acknowledging the Board's preference for tests embodying "simplicity and ease of application"[214]—thereby promoting consistency and reliability—it follows that the Board should favor the right to control test. To illustrate, consider the clarity with which General Counsel Griffin was able to apply the test to the facts of *Northwestern*.[215] The first prong of the right to control test—the employer's right to control—is easily satisfied because players perform grueling work on behalf of the NCAA, conferences, and colleges and universities.[216] All three manifest the right to control players' work by regulating how

207 *See Brown*, 342 N.L.R.B. at 488.

208 *See, e.g.*, Northwestern Univ., 362 N.L.R.B. 1350, 1358 (2015).

209 *See Brown*, 342 N.L.R.B. at 488.

210 *See id.* at 488–89.

211 *See, e.g.*, Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751 (1989).

212 *See* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 322–23 (1992).

213 *See id.*

214 Other Rules, 35 Fed. Reg. 18370, 18371 (Dec. 3, 1970) (to be codified at 29 C.F.R. § 103.1).

215 *See* Griffin, *supra* note 144.

216 *See* Northwestern Univ., 362 N.L.R.B. 1350, 1351 (2015). Although it may be tempting to discredit players' labor because football is a game, players such as Kain Colter demonstrate the significant toll such games consistently impose. *See supra* notes 3–5 and accompanying text.

often players work out and practice[217] and conditioning scholarships on players' strict rule compliance.[218]

Likewise, the facts of *Northwestern* satisfy the test's second prong—requiring compensation in exchange for performing work.[219] Not only do grant-in-aid players receive up to $75,000 each year to cover academic expenses, but all players regardless of scholarship status receive reimbursements for travel and childcare expenses.[220] Because compensation does not necessarily denote a formal paycheck, but can take the form of other types of reimbursements, this type of remuneration satisfies the second element of the test.[221] As a result, applying the right to control test to men's and women's Division I players will likely find that they also qualify as statutory employees.[222]

If clarity is the goal,[223] then the *Brown* test is woefully lacking. Because of its vagueness, applying it will lead to confusion for players, colleges and universities, and unions—a risk that the Board has historically sought to avoid.[224] Even if the *Brown* test were to ultimately result in players being considered employees, the uncertainty before such a finding would have the unfortunate consequence of discouraging players from asserting their rights.[225]

C. The Amateur Status of Collegiate Athletes Has Proven Untenable

Because collegiate sports are highly similar to professional sports, collegiate players should receive the same level of statutory protection afforded to professional athletes.[226] In 2011 the NFLPA collectively bargained for contact limits in practices, a rule that led to a sharp decline in concussions suffered;[227] harrowingly, college football players, with no leverage to negotiate for similar contact limits, experience a much higher incidence of concussions suffered during practice.[228] Al-

217 Griffin, *supra* note 144.

218 *See Northwestern*, 362 N.L.R.B. at 1351–58.

219 *See* N.Y. Univ., 332 N.L.R.B. 1205, 1206 (2000).

220 Griffin, *supra* note 144.

221 *See* Seattle Opera v. NLRB, 292 F.3d 757, 762 (D.C. Cir. 2002).

222 Abruzzo, *supra* note 19.

223 Other Rules, 35 Fed. Reg. 18370, 18371 (Dec. 3, 1970) (to be codified at 29 C.F.R. § 103.1).

224 *See id.*

225 *See* Trs. of Columbia Univ., 364 N.L.R.B. 1080 (2016).

226 *See* Northwestern Univ., 362 N.L.R.B. 1350, 1353 (2015).

227 *See* George, *supra* note 6.

228 *See id.* (indicating that more than seventy percent of college players' concussions occur during practice, compared to just eighteen percent for NFL players).

though football inherently includes risk to players' health and safety, NFL players have a platform to mitigate these risks, where their collegiate counterparts do not.[229]

Although the Board posited that Division I athletes' requirement to be enrolled as students meaningfully distinguishes them from professionals—therefore providing justification for declining jurisdiction[230]—such logic falls flat given that the Board asserted jurisdiction over enrolled student workers in *Columbia II*.[231] Just as teaching assistants benefit their school through teaching and assisting academically,[232] players' performance on the field leads to greater revenue to the school, increased enrollment numbers, and more generous alumni donations.[233] In addition, the Board cited as a justification for its nondecision in *Northwestern* that collegiate athletes "are prohibited by NCAA regulations from engaging in many of the types of activities that professional athletes are free to engage in, such as profiting from the use of their names or likenesses."[234] In the time since, however, the NCAA has rewritten its rules to allow players to profit off of their NIL, thereby invalidating this crucial distinction.[235]

The NCAA's impact on interstate commerce rivals that of professional leagues. In 2021, a pandemic-plagued year, the television advertisement earnings of college basketball's March Madness totaled more than $850 million.[236] March Madness routinely earns more than the NFL playoffs, and more than the National Basketball Association ("NBA"), NHL, and MLB playoffs *combined*.[237] Even with NIL reform, collegiate players still benefit far less from participating in big

229 *See* Strauss, *supra* note 6.

230 *See Northwestern*, 362 N.L.R.B. at 1353–54.

231 *See* Trs. of Columbia Univ., 364 N.L.R.B. 1080, 1080 (2016).

232 *See id.*

233 *See* Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2149 (2021).

234 *Northwestern*, 362 N.L.R.B. at 1353.

235 *See* Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image and Likeness Policy*, NCAA (June 30, 2021, 4:20 PM), https://www.ncaa.org/about/resources/media-center/news/ncaa-adopts-interim-name-image-and-likeness-policy [https://perma.cc/98SD-SNUE].

236 Jason Breslow, *March Madness is an NCAA Gold Mine. This Year, Players Can Finally Cash in Too*, NPR (Mar. 16, 2022, 2:35 PM), npr.org/2022/03/16/1085906019/march-madness-ncaa-tournament-student-athletes-nil-paid-endorsement [https://perma.cc/DNE8-ZBYC].

237 Zak Cheney-Rice, *Here's How Many Billions College Players Will Make During March Madness this Year*, MIC (Mar. 19, 2014), https://www.mic.com/articles/85763/here-s-how-many-billions-college-players-will-make-during-march-madness-this-year [https://perma.cc/5VY9-K7C8] (answering the question posed in the title with a resounding "zero"); *see also* Kris Rhim & Jesus Jiménez, *Big Ten Players Wonder Where They Fit into a $1 Billion TV Deal*, N.Y. TIMES (Aug. 19, 2022), https://www.nytimes.com/2022/08/19/sports/ncaafootball/big-ten-tv-deal-student-athletes.html [http://perma.cc/NZU9-QL47].

money athletics than do professional athletes.[238] Minor league baseball players—with a relatively meager impact on commerce[239]—will soon join a union after more than a hundred years of stifled attempts,[240] thus making the NCAA's arguments against collegiate athletes' unionizing appear even less persuasive.

Although the Board punted the issue of whether collegiate players qualify as statutory employees in 2015, the cracks in the amateur sports model make it impossible to avoid the NCAA's labor implications.[241] The Supreme Court has expressed frustration with the shifting concept of "amateurism" that the NCAA tends to define on a case-by-case basis.[242] For the first time ever, a Supreme Court Justice openly endorsed players' organizing.[243] Meanwhile, shockwaves of activism have rippled throughout collegiate sports in recent years.[244] The net result of the proliferation of litigation and activism is that the Board will need to clarify its position, and soon.[245]

III. The NLRB Should Apply *Columbia II* to Division I Athletes

The Board should apply its *Columbia II* approach in asserting jurisdiction over Division I athletes. Because asserting jurisdiction using the right to control test is necessary to further the goals of the Act and more administrable than the *Brown* "primarily student" test, and because the concept of amateurism in college athletics is losing persuasiveness, this is the optimal approach to answering the questions left unaddressed by the Board's declining of jurisdiction in *Northwestern*.[246] Alternatively, if no petitions arise, the Board should publish a rule[247] guaranteeing that it will assert jurisdiction over players. Doing so can clarify the Board's position while withstanding politically motivated fluctuations that have characterized the Board's past adjudications.[248]

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238 *See* Huma & Staurowsky, *supra* note 157, at 3.

239 *See supra* note 237 and accompanying text.

240 *See* Wagner, *supra* note 124.

241 *See supra* Section I.D.

242 *See* Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2152 (2021).

243 *See id.* at 2168 (Kavanaugh, J., concurring).

244 *See* Buffalano et al., *supra* note 45.

245 *See supra* notes 163–65.

246 *See supra* Section II.C.

247 *See* 5 U.S.C. §§ 551–59.

248 *See supra* Section II.B.

Players have multiple plausible avenues to unionizing. One option is for players at a single private college or university to seek recognition, as was the case in *Northwestern*.[249] The benefit of this approach is the relative ease of organizing in-house, pushing the Board to clarify its jurisdictional standards so other teams could then follow suit.[250] The downside, however, is that the Board could potentially decline jurisdiction again—sensible or not—leaving another generation of players in flux.[251] Players may thus prefer the approach of creating a conference- or Division-wide players' association based on the professional sports model, as suggested by football players in the fall of 2020[252] and endorsed by General Counsel Abruzzo.[253] Although this approach requires a high degree of cooperation among players and a sizable administrative burden, it more easily fits within extant framework regarding athletes unionizing.[254] As this approach would theoretically include teams at public schools, too, it also has the dual advantages of protecting more players without relying on state-by-state legislative changes[255] and allaying the Board's competitive balance concerns.[256]

Establishing a clear jurisdictional standard consistent with *Columbia II* would lead to the conclusion that Division I athletes qualify as statutory employees, and therefore could engage in collective bargaining.[257] As a result, players would be able to negotiate over terms and conditions of employment such as receiving shares of revenue, improving travel accommodations,[258] and setting more extensive health and safety standards.[259] In addition, being declared statutory employees would allow players to participate in concerted activities that the NCAA has not allowed in the past, such as the right to strike for better working conditions.[260]

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249 *See* Northwestern Univ., 362 N.L.R.B. 1350, 1352 (2015).

250 *See* Edelman, *supra* note 179, at 1643.

251 *See supra* Section III.A.

252 *See* Blinder & Witz, *supra* note 23.

253 *See* Abruzzo, *supra* note 19.

254 *See Northwestern*, 362 N.L.R.B. at 1352–53.

255 *See, e.g.*, Dodd, *supra* note 135 (discussing Iowa's push to pass legislation that would make public school college athletes employees).

256 *See* Edelman, *supra* note 179, at 1660 n.174.

257 *See supra* Section II.B.

258 *See* BUFFALANO ET AL., *supra* note 45.

259 *See About the NPCA: Mission & Goals*, NAT'L COLLEGIATE PLAYERS ASS'N, https://www.ncpanow.org/about-us [https://perma.cc/VR4Y-HU5K].

260 *See* 29 U.S.C. § 157.

Based on collective bargaining conducted by student assistants through their union representatives, student workers have demonstrated that they are invested in establishing lasting changes that benefit workers years down the line.[261] Potential concern that collegiate athletes only play for four or five years and thus have insufficient incentivization to collectively bargain is therefore misplaced. As a point of comparison, an average NFL career lasts only about three years.[262] This reality does not prevent NFL players from making an impact via their union, nor does it preclude representation during their careers and afterwards.[263] In addition, establishing unions that are specifically catered to Division I players could create professional opportunities for former players, such as the position of union representative,[264] thereby benefiting both current and former players. Moreover, just as in professional leagues, collegiate players could bargain for benefits—such as establishing a trust for graduating players—that would also benefit former players even after their playing days.[265]

Concerns that allowing players to unionize would lead to dwindling fan interest are lessened by the fact that no such trend has occurred following the repeal of prohibitions on players earning generous NIL deals.[266] Although other critics may express concern that unionization could have unintended consequences such as recruiting complications,[267] the reality is that the Act is meant to allow

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261 *See, e.g.*, *Frequently Asked Questions*, GWC-UAW Local 2110: The Union for Rsch. & Teaching Assistants at Colum. Univ., https://columbiagradunion.org/faq/ [https://perma.cc/2EZG-EDM9].

262 *See* John Keim, *With Average NFL Career 3.3 Years, Players Motivated to Complete MBA Program*, ESPN: NFL Nation (Jul. 29, 2016), https://www.espn.com/blog/nflnation/post/_/id/207780/current-and-former-nfl-players-in-the-drivers-seat-after-completing-mba-program [https://perma.cc/2FSP-NL4U]. For a look at the average career lengths of players in other leagues, see Travis Sawchik, *How Much Do MLB Players Really Make?*, FiveThirtyEight (June 5, 2020, 7:00 AM), https://fivethirtyeight.com/features/how-much-money-do-mlb-players-really-make/ [https://perma.cc/5KT6-44CK] (3.71 years for MLB players); Mona Chalabi, *The Kobe Bryant Outlier: How His Career Compares to the NBA Average*, The Guardian (Nov. 30, 2015, 5:59 PM), https://www.theguardian.com/sport/2015/nov/30/the-kobe-bryant-outlier-how-his-career-compares-to-the-nba-average [https://perma.cc/RZ33-3JA8] (4.9 years for NBA players).

263 *See How the NFLPA Works*, *supra* note 11.

264 *See* Nadkarni, *supra* note 4 (reporting that Ramogi Huma, a former college football player, as the leader of the College Athletes Players Association, represented the Northwestern team in their push to organize).

265 *See* Strauss, *supra* note 6.

266 *See* Dodd, *supra* note 170.

267 *See* Todd A. Cherry, Note, *Declining Jurisdiction: Why Unionization Should Not Be the Ultimate Goal for Collegiate Athletes*, U. Ill. L. Rev. 1937, 1968–80 (2016).

workers the freedom to organize.[268] If the players choose to organize, the Board should not act paternalistically in preventing them from making that choice.[269] Moreover, the NCAA has adjusted to countless changes since its inception,[270] including extensive conference realignment in 2021–22 alone.[271] Amid these changes and a sea of litigation challenging the nature of amateur sports,[272] the Board could lend clarity by asserting its jurisdiction over collegiate players for good.

If the trend since *Northwestern* holds and no groups of players seek to unionize in the near future,[273] the Board should use its rulemaking authority to establish a clear jurisdictional standard, which it identified to be within its statutory authorization in *Cornell*.[274] Doing so would solidify *Columbia II* as the analysis to be used regarding student workers and Division I collegiate athletes. Regarding the content of such a rulemaking, this Note suggests amending the extant jurisdictional standard as follows:

> The Board will assert its jurisdiction in any proceeding arising under sections 8, 9, and 10 of the Act—*including proceedings pertaining to employees also enrolled as students*—involving any private nonprofit college or university which has a gross annual revenue from all sources . . . of not less than $1 million.[275]

This amended language will actualize General Counsel Abruzzo's implication that the jurisdictional concerns that sank *Northwestern* will no longer impede unionization efforts.[276]

As asserting jurisdiction over collegiate players has a substantial impact on commerce, it is important that the Board seeks a course of action that can withstand the Board's characteristic political fluctuations.[277] If not, the statutory protection afforded to players could be just as inconsistent as the path graduate and undergraduate student assistants have experienced in the past two decades alone.[278] To avoid this level of uncertainty and to further the purposes of the Act, the Board should establish a strong position that can stand the test of

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268 *See* Trs. of Columbia Univ., 364 N.L.R.B. 1080, 1085 (2016).

269 *See id.*

270 *See generally* SMITH, *supra* note 154.

271 *See* Moss, *supra* note 166.

272 *See supra* Section I.D.

273 *See supra* Section II.C.

274 *See* 183 N.L.R.B. 329, 334 (1970); 29 C.F.R. § 103.1 (2019).

275 29 C.F.R. § 103.1(a) (proposed language in italics).

276 *See* Abruzzo, *supra* note 19.

277 *See supra* Section I.B.

278 *See supra* Section I.B.

time, just as its jurisdictional standard over private colleges and universities has survived since 1970.[279] Indeed, because *Northwestern* fell short,[280] it is unclear whether a group of similarly situated players will want to petition a Democrat-majority, union-favoring Board. Although rulemaking is inherently more complex and intensive than waiting for parties to bring disputes one at a time, the Board should take advantage of prevailing trends to make such a change.[281]

Conclusion

This Note urges the NLRB to adopt and apply the common-law right to control test to collegiate athletes. Alternatively, the Board should adopt a new rule automatically asserting jurisdiction over all labor disputes and attempts to organize by Division I athletes. Looking to the Board's treatment of student assistants, a right to control test will find that collegiate athletes qualify as statutory employees and therefore are entitled to employment-based protections. Adopting a rule will serve to further the purposes of the NLRA—the guiding mission of the NLRB—because unionized collegiate players could engage in concerted activities such as collective bargaining. Going through the rulemaking process will also mitigate the NLRB's tendency to fluctuate wildly along with shifts in political control.

Asserting jurisdiction over collegiate players, and finding that they qualify for statutory protection, will make the Board's treatment of collegiate players consistent with its treatment of student workers and professional athletes. Players such as Kain Colter could benefit from collective bargaining because it could provide a platform from which they could negotiate for improved health protocols, greater financial support, and the ability to engage in concerted activities. The time is now for the NLRB to act: like a quarterback scanning the field as his line breaks down around him, the Board's situation is urgent yet potentially momentous. With the game on the line and attacks on the collegiate amateur model coming from all directions, colleges and universities, players, unions, and the legal community all watch from the sideline with bated breath.

279 *See* 29 C.F.R. § 103.1.

280 *See* Edelman, *supra* note 179, at 1640–42.

281 *See* Noah, *supra* note 55.