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2016

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## Recommended Citation

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Letting Go: NCAA Reform as an Alternative to the Unionization of College Athletes  
Kevin DeMaio\*

**I. Introduction**

In recent years, the National Collegiate Athletic Association (NCAA) and its member institutions have been subject to a litany of lawsuits and legal proceedings concerning the legality of their system of amateurism and the student-athletes' ability to earn money while on scholarship.<sup>1</sup> In a recent court decision in the Northern District of California, a federal judge ruled that NCAA regulations, which prohibit student-athletes from earning money from the use of their likeness in video games, were an unreasonable restraint on trade.<sup>2</sup> The Court enjoined the NCAA from enforcing any rules which prohibit its member institutions from offering to the student-athlete a portion of revenues generated from the use of their likeness.<sup>3</sup> Recently, the University of Texas became the first NCAA member school to act on this decision when it announced that it plans to set aside \$6 million per year to pay football and men's basketball players.<sup>4</sup>

In a similar lawsuit, the NCAA recently reached a twenty million dollar settlement with former college athletes who sued over the use of their likeness in video games and sought monetary rather than injunctive relief.<sup>5</sup> In yet another class action lawsuit brought by former

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<sup>1</sup> See, e.g., *Keller v. Elec. Arts Inc.* (In re NCAA Student-Athlete Name & Likeness Licensing Litig.), 724 F.3d 1268 (9th Cir. 2013); *O'Bannon v. NCAA*, No. C 09-3329 CW, 2014 U.S. Dist. LEXIS 110036 (N.D. Cal. Aug. 8, 2014); Consolidated Amended Complaint, In re: NCAA Athletic Grant-In-Aid Cap Antitrust Litigation, No. 4:14-md-2541-CW (N.D. Cal. July 11, 2014), ECF No. 60.

<sup>2</sup> *O'Bannon*, 2014 U.S. Dist. LEXIS 110036 at \*148.

<sup>3</sup> *Id.* The Court allows the NCAA to cap the amount of dollars to be held in trust, but that amount can be no less than \$5,000.

<sup>4</sup> Wescott Eberts, *Texas Planning to begin paying players \$10,000 to comply with NCAA ruling*, SB NATION (Oct. 30, 2014, 11:20 PM), <http://www.burmtorangenation.com/2014/10/22/7041617/texas-longhorn-steve-patterson-paying-players-obannon-ruling>.

<sup>5</sup> Ben Strauss & Steve Eder, *N.C.A.A. Settles One Video Game Suit for \$20 Million as a Second Begins*, N. Y. TIMES (June 9, 2014) <http://www.nytimes.com/2014/06/10/sports/ncaafotball/ncaa-settles-sam-keller-video-game-suit-for-20-million.html>.

student-athletes, it is alleged that the NCAA unfairly capped the value of athletic scholarships.<sup>6</sup> All three of these high profile cases claim some form of antitrust violation on the part of the NCAA.

Antitrust liability suits, however, are not the only recent legal proceedings directed at the NCAA and its member institutions.<sup>7</sup> Members of the Northwestern University Football Team recently petitioned the National Labor Relations Board for recognition as employees of Northwestern University (“Northwestern” or the “University”) under a labor law theory as a potential solution to their grievances.<sup>8</sup> The student-athletes claimed that they were “employees” as defined by the National Labor Relations Act and, thus, entitled to the right to form a union and the right to collectively bargain.<sup>9</sup>

The student-athlete unionization effort is one possibility, but it is not the most appropriate solution to solve the problems that currently plague student-athletes. This Comment proposes internal reform to the regulatory framework of the NCAA in the form of major delegation of rulemaking authority to individual conferences as a preferable alternative to the unionization of student-athletes. This will preserve the amateur status of intercollegiate athletics in that it will not recognize student-athletes as employees. Furthermore, it will put the power into the hands of the *individual conferences*, not the NCAA or the individual universities. This will result in the individual conferences competing with one another to provide the most appealing “additional benefits” to prospective student-athletes. This competition itself will serve as a “check” against the power held over the student-athletes by any one entity. These additional benefits could come

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<sup>6</sup> Jerry Hinnen, *Shariff Floyd Plaintiff in Latest Lawsuit Against NCAA, Conferences*, CBS SPORTS (Apr. 27, 2014, 2:05 PM) <http://www.cbssports.com/collegefootball/eye-on-college-football/24541964/sharrif-floyd-plaintiff-in-latest-lawsuit-against-ncaa-conferences>.

<sup>7</sup> See Northwestern University and College Athletes Players Association, 13-RC-121359, 23 (N.L.R.B. Region 13, Mar. 26, 2014), available at [http://www.espn.go.com/pdf/2014/0326/espn\\_uniondecision.pdf](http://www.espn.go.com/pdf/2014/0326/espn_uniondecision.pdf).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

in the form of: (1) guaranteed four-year scholarships; (2) improved educational benefits; (3) long-term disability insurance for sports-related injuries; (4) more flexible transfer and eligibility rights; (5) a grievance process for abusive treatment by coaches and administrators; (6) free medical care and health insurance for all sports-related injuries; and (7) payment of scholarship shortfalls—the differences between the cost of a scholarship and the actual cost of attending a university.<sup>10</sup> These structural changes will lead to a drastic improvement in the welfare of the Division I<sup>11</sup> scholarship athlete while preserving the NCAA’s amateurism model.<sup>12</sup>

Part II of this Comment will provide an overview of the issues between the NCAA and the student-athletes of its Division I member institutions, as well as introducing the legal framework for a possible solution, the unionization of these student-athletes. Part III will analyze the most recent and prominent case of student-athletes attempting to unionize, the effort of the Northwestern University Football Team currently on appeal before the National Labor Relations Board.<sup>13</sup> Part IV will consider various ways that individual states and universities could avoid student-athletes being designated as employees, both under the National Labor Relations Act, which applies to private universities, and existing state labor law, which is applicable to public universities. Part V will propose a preferable alternative to the unionization of student-athletes—internal NCAA reform in the shape of individual conference control of the rules and regulations concerning allowable non-monetary benefits to student-athletes. Part VI

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<sup>10</sup> See Jonathan L.H. Nygren, *Forcing the NCAA to Listen: Using Labor Law to Force the NCAA to Bargain Collectively with Student-Athletes*, 2 VA. SPORTS & ENT. L.J. 359, 366-67 (2003) (discussing the goals of the Collegiate Athletes Coalition (CAC)); Rohith A Parasuraman, *Unionizing Division I Athletics: A Viable Solution?*, 57 DUKE L.J. 727, 728–29 (2007) (discussing the goals of the National College Players Association (NCPA)).

<sup>11</sup> “Among the three NCAA divisions, Division I schools generally have the biggest student bodies, manage the largest athletic budgets and offer the most generous number of scholarships.” NCAA, NCAA Division I, <http://www.ncaa.org/about?division=d1> (last visited Feb. 12, 2015).

<sup>12</sup> See *infra* Part V.

<sup>13</sup> Northwestern Univ., 13-RC-121359 (2014).

will conclude by stating that this proposal of internal NCAA reform has already begun<sup>14</sup> and is the most feasible and preferable solution to the problems that currently plague NCAA Division I athletics because it will create an “arms race” that will not work to the detriment of the student-athlete as has been suggested by previous authors,<sup>15</sup> but rather would greatly improve the welfare of the student athlete.

## **II. Background and Legal Framework – A Student-Athlete Unionization Effort**

While internal NCAA reform is the optimal solution to the problems that face both the NCAA and its student-athletes, the students themselves will inevitably explore other possible solutions such as student-athlete unionization efforts if they do not feel that their grievances are being addressed. There is an existing legal framework laid out by the National Labor Relations Board that addresses this issue.<sup>16</sup> In cases such as the unionization effort by the scholarship football players of Northwestern University, the National Labor Relations Board (NLRB or “the Board”) governs because the NLRB maintains jurisdiction over private entities.<sup>17</sup> For example, in the past, student-workers at private universities have petitioned the NLRB for the right to unionize.<sup>18</sup> The students claimed that they were “employees” as defined by the National Labor Relations Act (NLRA or “the Act”) and, thus, entitled to the right to form a union and to collectively bargain.<sup>19</sup> The general reasoning behind such a case is that a union will better represent the interests of the employees who, without collective bargaining rights, will have few methods to address their grievances.

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<sup>14</sup> Sharon Terlep, *NCAA Votes to Give Big Conferences More Autonomy*, THE WALL STREET JOURNAL (Aug. 7, 2014, 7:44 PM), <http://online.wsj.com/articles/ncaa-votes-to-give-big-conferences-more-autonomy-1407433146>.

<sup>15</sup> See Nygren, *supra* note 10; Matthew Mitten & Stephen F. Ross, *A Regulatory Solution to Better Promote the Educational Values and Economic Sustainability of Intercollegiate Athletics*, 92 OR. L. REV. 837 (2014).

<sup>16</sup> See *Brown Univ.*, 342 N.L.R.B. 483, 483 (2004).

<sup>17</sup> 29 U.S.C. § 151 (2006).

<sup>18</sup> See *Boston Med. Ctr.*, 330 N.L.R.B. 160 (1999); *New York Univ.*, 332 N.L.R.B. 1205 (2000), overruled by *Brown Univ.*, 342 N.L.R.B. 483 (2004).

<sup>19</sup> See *Id.*

Section 7 of the NLRA states that “Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other activities for the purpose of collective bargaining.”<sup>20</sup> The main problem that inevitably arises when interpreting this section, however, is how the NLRB should define who is an “employee.” The NLRA’s definition of the term is rather vague,<sup>21</sup> so the NLRB has employed multiple different tests to determine what the definition of “employee” actually is.<sup>22</sup>

#### A. *New York University Test*

The NLRB previously employed the “right of control” test described in the *NYU* case. In *NYU*, a group of doctoral students at New York University petitioned the board for recognition of employee status for work they performed as graduate assistants in connection with the University’s doctoral program.<sup>23</sup> The Board was tasked with deciding whether these graduate assistants were employees within the meaning of the Act.<sup>24</sup>

In analyzing this issue, the Board determined that the definition of employee should be defined broadly to include “any employee”<sup>25</sup> and to “reflect the common law agency doctrine of the conventional master-servant relationship.”<sup>26</sup> According to the Board, “This relationship exists when a servant performs services for another, under the other’s control or right of control,

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<sup>20</sup> 29 U.S.C. § 157 (2006).

<sup>21</sup> “The term “employee” shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act states otherwise and shall include any individual whose work has ceased as a consequences of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of an family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or an individual employed as a supervisor, or any individual employer by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.” 29 U.S.C. §152 (2006).

<sup>22</sup> See *Boston Med. Ctr.*, 330 N.L.R.B. 160 (1999); *New York Univ.*, 332 N.L.R.B. 1205 (2000), overruled by *Brown Univ.*, 342 N.L.R.B. 483 (2004); *Brown Univ.*, 342 N.L.R.B. 483 (2004).

<sup>23</sup> *New York Univ.*, 332 N.L.R.B. 1205 (2000), overruled by *Brown Univ.*, 342 N.L.R.B. 483 (2004).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 1205.

<sup>26</sup> *New York Univ.*, 332 N.L.R.B. at 1205 (citing *NLRB v. Town & Country*, 516 U.S. 85, 93–95 (1995)).

and in return for payment.”<sup>27</sup> The Board determined that the graduate assistants were compensated for their work by their employer and performed services under the control and direction of the same employer. The nature of this relationship was, thus, “indistinguishable from a traditional master-servant relationship.”<sup>28</sup> Additionally, the Board rejected the idea that the graduate assistants should be deprived of the statutory protections afforded to employees simply because they are students as well.<sup>29</sup> Ultimately, the Board found that the graduate assistants were employees of New York University, and, therefore, were allowed to engage in collective bargaining.<sup>30</sup>

### **B. *Brown University* Test**

After only a few years, however, the test in *NYU* was overruled when the Board announced its most recent test in the *Brown University* decision.<sup>31</sup> Similar to *NYU*, in *Brown*, a group of graduate students, who performed work as teaching assistants and research assistants, petitioned the Board to be recognized as employees.<sup>32</sup> Here, the Board returned to its previous 25-year precedent by determining that *NYU* was decided incorrectly and explicitly overruled that decision.<sup>33</sup> Instead, the Board utilized what could be described as the “primary purpose” or “primary function” test.<sup>34</sup>

The Board looked at the nature of the relationship between the graduate assistants at *Brown* and the University itself. It examined the nature of the employer/employee relationship and asked if the supposed employees’ relationship to the University had a primarily educational

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 1206.

<sup>29</sup> *Id.* at 1208.

<sup>30</sup> *Id.* at 1209.

<sup>31</sup> *Brown Univ.*, 342 N.L.R.B. 483 (2004).

<sup>32</sup> *See id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

or a primarily economic purpose.<sup>35</sup> If the relationship was primarily educational, the Board reasoned that the graduate assistants would not be employees, and, if the relationship were primarily economic in nature, the graduate assistants would be employees under the Act.<sup>36</sup> In making this determination, the Board looked at multiple factors including: (1) the graduate assistants were all students and had to be enrolled at the University to hold their position; (2) “[t]heir principal time commitment at Brown is focused on obtaining a degree and, thus, being a student.”; (3) the money that the graduate assistants received was not “consideration for work,” rather it was financial aid.<sup>37</sup> Ultimately, the Board determined that the relationship between the graduate assistants and Brown University was primarily educational and that their service as a graduate assistant was “part and parcel”<sup>38</sup> of the core elements of their degree, thus, they were not employees.<sup>39</sup>

### **C. Governing Law at Public Universities**

Because the NLRB only maintains jurisdiction over private entities and not public universities,<sup>40</sup> for student-athletes seeking employee status at public universities, the governing law would be the relevant labor law statute passed by the state in which the institution is located. Therefore, student-athletes who attempt to be recognized as employees at public universities will be much more concerned with the actions of their individual state legislatures than with any NLRB decision. The outcome of any such attempt would be much harder to predict and obviously less uniform than a unionization effort at a private university due to the varying levels of rights afforded to public workers of individual states. For example, in thirteen states, public

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<sup>35</sup> *Id.* at 489.

<sup>36</sup> *Id.*

<sup>37</sup> *Brown Univ.*, 342 N.L.R.B. at 488.

<sup>38</sup> *Id.* at 490.

<sup>39</sup> *Id.*

<sup>40</sup> 29 U.S.C. § 151 (2006).



employees do not have any type of collective bargaining rights,<sup>41</sup> while other states only allow a select group of public employees the right to unionize.<sup>42</sup> It has been suggested that student-athletes may have a good chance to succeed in a unionization attempt in a few states, such as Massachusetts, Oregon, Kansas, and California,<sup>43</sup> while it is hard to predict such an outcome in many other states.<sup>44</sup> In sum, the result of an effort to be recognized as employees by a group of student-athletes at a public university would largely depend on the state where the institution is located.

### **III. Northwestern University Football Team Unionization Effort**

#### **A. Regional Director's Decision and Factual Background**

In *Northwestern*, the College Athletes Players Association (CAPA) petitioned the Board to allow scholarship members of the Northwestern University Football Team to choose whether or not to be represented by CAPA for purposes of collective bargaining.<sup>45</sup> The Regional Director of Region 13 of the NLRB, Peter Sung Ohr, determined that the scholarship members of the Northwestern University Football Team are employees within the meaning of the Act, and, thus, are entitled to vote on representation for collective bargaining purposes.<sup>46</sup> By way of background, it is important to be aware of both the factual basis and legal analysis on which the

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<sup>41</sup> Nicholas Fram & Ward T. Frampton, *A Union of Amateurs: A Legal Blueprint to Reshape Big-Time College Athletics*, 60 BUFFALO L. REV. 1003, 1068 (2012) (citing *The Haves and the Have-Nots: How American Labor Law Denies a Quarter of the Workforce Collective Bargaining Rights*, AMERICAN RIGHTS AT WORK, 11, <http://www.americanrightsatwork.org>, (citing Alabama, Arizona, Arkansas, Colorado, Louisiana, Mississippi, New Mexico, North Carolina, South Carolina, Texas, Virginia, and Utah). Wisconsin also recently enacted legislation that technically still permits public-sector unions, but sharply limits the scope of collective bargaining. See Monica Davey, *Wisconsin Senate Limits Bargaining by Public Workers*, N.Y. TIMES, Mar. 9, 2011, at A1.)

<sup>42</sup> *Id.* (citing JON O. SHIMABUKURO, CONG. RESEARCH SERV., R40738, THE PUBLIC SAFETY EMPLOYER-EMPLOYEE COOPERATION ACT, 8-10 (providing table compiling all state collective bargaining laws).

<sup>43</sup> See Fram & Frampton, *supra* note 41 at 25–33. Prior precedent has recognized student tutors and graduate student instructors as employees in each of these states.

<sup>44</sup> See Fram & Frampton, *supra* note 41.

<sup>45</sup> Northwestern University and College Athletes Players Association, 13-RC-121359, 2 (N.L.R.B. Region 13, Mar. 26, 2014), available at [http://www.espn.go.com/pdf/2014/0326/espn\\_uniondecision.pdf](http://www.espn.go.com/pdf/2014/0326/espn_uniondecision.pdf).

<sup>46</sup> *Id.* at 23.

Regional Director based his conclusion that the scholarship members of the Northwestern University Football Team are employees within the meaning of the Act.

### **1. Factual Background**

To start, the Regional Director found that Northwestern University is a private university located in Illinois that maintains an intercollegiate athletic program and is a member of both the NCAA and the Big Ten Conference<sup>47</sup> with nineteen Division I varsity sports programs.<sup>48</sup> The varsity football team at Northwestern has roughly 112 members, 85 of whom receive grant-in-aid scholarships, and, since 2006 Patrick Fitzgerald, Jr. has been the head football coach.<sup>49</sup>

During the recruitment process, Northwestern awards potential football players four-year scholarships compared to the one-year renewable scholarships required by the NCAA.<sup>50</sup> Officials can revoke these scholarships for a number of reasons,<sup>51</sup> however, Northwestern maintains a policy “not to cancel a player’s scholarship due to injury or position on the team’s depth chart.”<sup>52</sup> In the past five years, only two players have had their scholarships cancelled.<sup>53</sup>

The football players at Northwestern are subject to certain special team and athletic department rules.<sup>54</sup> The time commitment that the football players commit to the sport includes both voluntary and mandatory activities, with some players spending 40–50 hours per week on football-related activities during the season.<sup>55</sup>

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<sup>47</sup> *Id.* at 2.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 3.

<sup>50</sup> *Id.* at 3–4.

<sup>51</sup> Northwestern Univ., 13-RC-121359 at 4. “[T]he scholarship can be reduced or cancelled during the term of the award if the player: (1) renders himself ineligible from intercollegiate competition; (2) engages in serious misconduct warranting substantial disciplinary actions; (3) engages in conduct resulting in criminal charges; (4) abuses team rules as determined by the coach or athletic administration; (5) voluntarily withdraws from the sport at any times for any reason; (6) accepts compensation for participating in an athletic contest in his sport; or (7) agrees to be represented by an agent.”

<sup>52</sup> *Id.* at 4 n.8.

<sup>53</sup> *Id.* at 4.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 5–8.

Finally, there were also factual disputes as related to the scholarship football players' ability to schedule classes. Quarterback Kain Colter testified that "his coaches and advisors discouraged him from taking the class (a required chemistry class) because it conflicted with morning football practices."<sup>56</sup> On the other hand, Coach Fitzgerald testified that "he never told any player that they [sic] could not leave practice early because of a class conflict"<sup>57</sup> and, if a player had to take a class required for his degree that conflicted with practice, the Director of Football Operations would "pull them [sic] out of practice about 30 minutes early and provide them [sic] a ride to class along with a to-go meal."<sup>58</sup>

## 2. The Regional Director's Legal Analysis

In making his determination, the Regional Director applied the common law test and found that the scholarship football players at Northwestern met the common law definition of the term "employee."<sup>59</sup> The Regional Director also found that *Brown University* was not applicable because "the players' football-related duties are unrelated to their academic studies unlike the graduate assistants whose teaching and research duties were inextricably related to their graduate degree requirements."<sup>60</sup> Despite the fact that the Regional Director found *Brown University* inapplicable, he nonetheless stated that, even if the *Brown University* test were applied, the outcome would not change and the scholarship football players would still be employees.<sup>61</sup> The Regional Director stated that the Board in *Brown* considered four factors in determining that the graduate assistants were not employees, "1) the status of graduate assistants as students; 2) the role of the graduate student assistantships in graduate education; 3) the graduate student

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<sup>56</sup> *Id.* at 11.

<sup>57</sup> Northwestern Univ., 13-RC-121359 at 12 (2014).

<sup>58</sup> *Id.*

<sup>59</sup> "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." *Brown University*, 342 NLRB 483, 490, n.27 (2004) (citing NLRB v. Town & Country Electric, 516 U.S. at 94).

<sup>60</sup> *Id.* at 18.

<sup>61</sup> *Id.*

assistants' relationship with the faculty; and 4) the financial support they receive to attend Brown University."<sup>62</sup>

Finally, the Regional Director rejected the idea that non-scholarship members of the football team share an overwhelming community of interest with the scholarship football players and, therefore, must be included in the bargaining unit.<sup>63</sup>

In sum, the scholarship football players at Northwestern University were found to be employees within the meaning of the NLRA and were granted the right to vote on representation for collective bargaining.<sup>64</sup> The results of the vote are being kept secret, pending the result of the appeal by Northwestern to the NLRB.<sup>65</sup>

## **B. Analysis – Northwestern University Scholarship Football Players are not Employees**

### **1. The *Brown University* Test is The Governing Law and Should Not Be Disregarded.**

In this case, the Regional Director should not have disregarded prior Board precedent, and the test from *Brown University* should have been applied.<sup>66</sup> The test from *Brown University* examines the nature of the relationship between the employer and employee to determine if the employee has a primarily educational or primarily economic purpose.<sup>67</sup> In the instant case,

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<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 21–22.

<sup>64</sup> Northwestern University and College Athletes Players Association, 13-RC-121359, 18 (N.L.R.B. Region 13, Mar. 26, 2014), available at [http://www.espn.go.com/pdf/2014/0326/espn\\_uniondecision.pdf](http://www.espn.go.com/pdf/2014/0326/espn_uniondecision.pdf)

<sup>65</sup> Tom Farrey & Lester Munson, *NU Players Cast Historic Vote*, ESPN (Apr. 25, 2014, 10:50 AM) [http://espn.go.com/chicago/college-football/story/\\_/id/10833981/northwestern-football-players-poised-historic-vote-whether-unionize](http://espn.go.com/chicago/college-football/story/_/id/10833981/northwestern-football-players-poised-historic-vote-whether-unionize)

<sup>66</sup> See Brief of *Amicus Curiae* National Collegiate Athletic Association in Support of Northwestern University at 2, Northwestern Univ. and College Athletes Players Association, 13-RC-121359 (N.L.R.B. Region 13, Mar. 26, 2014); Northwestern University's Reply Brief to the Board on Review of Regional Director's Decision and Direction of Election at 10, Northwestern Univ. and College Athletes Players Association, 13-RC-121359 (N.L.R.B. Region 13, Mar. 26, 2014); Northwestern University's Brief to the Board on Review of Regional Director's Decision and Direction of Election, Northwestern Univ. and College Athletes Players Association, 13-RC-121359 (N.L.R.B. Region 13, Mar. 26, 2014); Brief of *Amici Curiae* University of Notre Dame et al. in Support of Northwestern University, Northwestern Univ. and College Athletes Players Association, 13-RC-121359 (N.L.R.B. Region 13, Mar. 26, 2014).

<sup>67</sup> See *supra* Part II.B.

Northwestern University clearly maintains an academic relationship with all of its students, including its scholarship football players. It has been suggested that the football duties of the members of the football team at Northwestern are unrelated to their academic studies, which precludes a finding that *Brown University* should apply.<sup>68</sup> The football duties of the student-athlete, however, must be viewed in context, and the overall educational relationship between the student-athlete and the University cannot be ignored. Therefore, on appeal, the Board should reaffirm its longstanding recognition that “labor law principles cannot be mechanically applied in an educational setting,”<sup>69</sup> and the test from *Brown University* should be applied to determine if the scholarship football players at Northwestern are employees within the meaning of the Act.

The Board has long recognized that an educational setting, including the relationship between students and a university, is clearly different from a purely economic or industrial relationship between an employer and employee.<sup>70</sup> In addition, the U.S. Supreme Court has recognized the distinction between the respective settings when it noted “the Board has recognized the principles developed for use in the industrial setting cannot be ‘imposed blindly on the academic world.’”<sup>71</sup> On the other hand, it has been argued that the scholarship football players at Northwestern work in an industrial setting because “commercial relationships (in college football) have usurped traditional roles in universities.”<sup>72</sup> This argument, however, does not give appropriate weight to the fact that all of the student-athletes in question are primarily *students* at an institution of higher learning. Few student-athletes will go on to play professional

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<sup>68</sup> Steven L. Wilborn, *College Athletes as Employees: An Overflowing Quiver*, 69 U. MIAMI L. REV. 65, 78 (2014).

<sup>69</sup> Northwestern University’s Reply Brief, *supra* note 66, at 1.

<sup>70</sup> NCAA’s Amicus Brief, *supra* note 66 (citing *Adelphi University*, 195 NLRB 639 (1972); *Leland Stanford Junior University*, 214 NLRB 621 (1974); *Brown University*, 34 NLRB 483 (2004)).

<sup>71</sup> *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 680-81 (1980) (citing *Syracuse University*, 204 NLRB 641, 643(1973)).

<sup>72</sup> Brief of *Amicus Curiae* Labor Law Professors’ at 19-20, Northwestern Univ. and College Athletes Players Association, 13-RC-121359 (N.L.R.B. Region 13, Mar. 26, 2014)

sports while many will utilize the degree that they earned as a result of their studies in this academic setting, not of their time spent on athletics.

Moreover, there is an inherent level of control that a University maintains over *all* of its students, not just scholarship football players, that is vital to the academic mission of the University.<sup>73</sup> This relationship is different from the typical control exercised by an employer over its employees; therefore, the common law test should not be applied, and the test from *Brown University* should govern the outcome in this case.<sup>74</sup>

## **2. If the Test from *Brown University* is Applied, the Scholarship Football Players at Northwestern are Not Employees**

Under the relevant test from *Brown University*, the scholarship football players at Northwestern should not be considered employees.<sup>75</sup> As previously discussed, the test from *Brown University* examines the nature of the relationship between the employer and employee to determine if the employee had a primarily economic or primarily academic purpose.<sup>76</sup> The Regional Director stated that the Board in *Brown* considered four factors in determining that the graduate assistants were not employees: “1) the status of graduate assistants as students; 2) the role of the 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 University.”<sup>77</sup> Here, the Regional Director inappropriately analyzed multiple factors of this

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<sup>73</sup> NCAA’s Amicus Brief, *supra* note 66, at 11 (emphasis added).

<sup>74</sup> *Id.* at 10–11.

<sup>75</sup> *Id.* at 1–3.

<sup>76</sup> *See supra* Part II.B.

<sup>77</sup> Northwestern University and College Athletes Players Association, 13-RC-121359, 23 (N.L.R.B. Region 13, Mar. 26, 2014), available at [http://www.espn.com/pdf/2014/0326/espn\\_uniondecision.pdf](http://www.espn.com/pdf/2014/0326/espn_uniondecision.pdf)

test.<sup>78</sup> Upon review, the scholarship members of the Northwestern University Football Team should not be entitled to employee status under the *Brown University* test.<sup>79</sup>

The first factor of the *Brown University* test set forth in the Regional Director’s analysis requires an examination into whether the supposed employees are primarily students or not.<sup>80</sup> The Regional Director determined that scholarship members of Northwestern’s football team are not “primarily students” largely due to the amount of time that the student-athletes spend on football related activities compared to the amount of time spent on academic duties.<sup>81</sup>

This factor is, to some degree, an examination of the amount of control the University exerts over the players’ lives. In this respect, the Regional Director incorrectly overestimates the amount of time that the student-athletes’ athletic duties require when compared to their academic duties.<sup>82</sup> The Regional Director stated that during the academic year, “the players still continue to devote 40 to 50 hours per week on football-related activities while only spending about 20 hours per week attending classes.”<sup>83</sup> He went on to state that, “[o]bviously, the players are *also required* to spend time studying and completing their homework as they have to spend time practicing their football skills even without the direct orders of the coaches.”<sup>84</sup>

The problem is that this is an incorrect analysis of the student-athletes’ respective time requirements. The Regional Director dismissively concludes that homework and studying are voluntary and comparable to non-mandatory football activities, such as “voluntary conditioning

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<sup>78</sup> NCAA’s Amicus Brief, *supra* note 66, at 11–12; Northwestern University’s Brief, *supra* note 66, at 21–23; Northwestern University’s Reply Brief, *supra* note 66 at 1; University of Notre Dame’s Amicus Brief, *supra* note 66 at 25–30.

<sup>79</sup> Northwestern University’s Brief, *supra* note 66, at 21.

<sup>80</sup> Northwestern Univ., 13-RC-121359 at 18 (2014).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 6–7 (discussing the voluntary “weight conditioning or strength training” and “7-on7” drills held by the players that the Regional Director includes in his estimate that the scholarship football players are required to commit around 40–50 hours per week to football-related activities).

<sup>83</sup> *Id.* at 18.

<sup>84</sup> *Id.* (emphasis added).

or strength training”<sup>85</sup> or voluntary “7-on-7” drills.<sup>86</sup> The “voluntary” football-related activities that are performed “without the direct orders of the coaches”<sup>87</sup> in this analysis, however, were *already included* in the Regional Director’s estimate that the scholarship football players devote 40–50 hours per week to football-related activities during the regular season.<sup>88</sup> As a result, the Regional Director actually counted the amount of “voluntary” time required of the scholarship football players twice in his analysis. This caused the Regional Director to overestimate the amount of time required of the scholarship football players and, more generally, the amount of control the University exerts over their lives. Therefore, in examining the first factor, at the very least, on appeal the Board must conduct further investigation into whether this error resulted in a substantial enough difference to change the Regional Director’s analysis. This could very well result in a finding that the football players should be considered primarily students and not employees.

The second factor of the *Brown University* test should also weigh in favor of not recognizing the student-athletes as employees. This factor looks at the supposed employees’ responsibilities and how they relate to the academic setting of the University as well as the students’ educational degree requirements.<sup>89</sup> Here, while the student-athletes’ football-related duties do not merit the receipt of any academic credit and are not a core element of the degree requirements,<sup>90</sup> the athletics program as a whole, including the football team, is certainly part

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<sup>85</sup> *Id.* at n.11.

<sup>86</sup> *Id.* at 6–7.

<sup>87</sup> *Id.* at 18.

<sup>88</sup> *Id.* at 6–7. The Regional Director includes the voluntary activities of “weight conditioning or strength training” (n.11) and voluntary “7-on-7” drills in his conclusion that during the regular season, many players regularly devote 40-50 hours per week to football-related activities.

<sup>89</sup> Northwestern University and College Athletes Players Association, 13-RC-121359, 19 (N.L.R.B. Region 13, Mar. 26, 2014), *available at* [http://www.espn.go.com/pdf/2014/0326/espn\\_uniondecision.pdf](http://www.espn.go.com/pdf/2014/0326/espn_uniondecision.pdf)

<sup>90</sup> *Id.*



and parcel of the University's educational mission.<sup>91</sup> "[E]ducation [at a college or university] is a far more expansive concept...[that] encompasses not only academic activities but also extracurricular and other activities engaged in by virtue of a student's enrollment there."<sup>92</sup> Education in this regard should be viewed broadly. It should be noted that participation in Division I scholarship varsity athletics is different from other extracurricular activities because participation in this extracurricular activity is linked to the financial aid that the student receives. Nonetheless, the fact that the football players do not receive academic credit for their football-related duties should not be dispositive of the idea that their responsibilities are not closely related to the overall mission of the University.

The third factor examines the employee's responsibilities and their relationship to the academic faculty.<sup>93</sup> The Regional Director found that football coaches, and not members of the academic faculty, supervised the players' football-related duties.<sup>94</sup> The Regional Director correctly concluded that this factor most likely favors a finding of employee status for the student-athletes.<sup>95</sup>

The fourth, and final, factor evaluates the type of compensation received to determine whether it was financial aid or "compensation for services performed."<sup>96</sup> In evaluating this factor, the Regional Director found that the scholarships that the student-athletes receive are not financial aid, but rather compensation for services performed.<sup>97</sup> As discussed later, however, the athletic scholarship tender offer ("tender offer") is not a contract for hire. Additionally, the amount of the football players' scholarships is not determined by the amount of time spent on

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<sup>91</sup> Northwestern University's Brief, *supra* note 66, at 19.

<sup>92</sup> Northwestern University's Reply Brief, *supra* note 66, at 5 (citations omitted).

<sup>93</sup> Northwestern Univ., 13-RC-121359 at 19 (2014).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 20.

<sup>97</sup> *Id.*

football-related activities or one's position on the team's depth chart.<sup>98</sup> Rather, the same amount is awarded to every player and is determined by the cost of tuition, food, books, and other similar expenses.<sup>99</sup>

It is true that the football players are offered this financial aid because they play football, and if they did not play football, their financial aid could be revoked.<sup>100</sup> This offer of financial aid to play football, however, is no different than the financial aid offered to any other student at Northwestern for a different purpose.<sup>101</sup> The fact that the financial aid in question is conditioned upon remaining a member of the football team does not, by virtue of that fact alone, transform it into compensation for services. As a result, this factor also favors recognizing the football players' as primarily students and not employees.<sup>102</sup> In sum, the scholarship football players at Northwestern University should not be considered employees under the *Brown University* test.

### **3. Under the Common Law Test Employed by the Regional Director, the Student-Athletes Are Not Employees**

Even if the employment status of the petitioners in this case is examined under the common law test employed by the Regional Director, the Northwestern University football players should not be considered employees. In his analysis, the Regional director utilized the following common law test to determine that the petitioners are employees: “[u]nder the common law definition, 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.”<sup>103</sup> Northwestern’s scholarship football players do not meet the requirements of this common law

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<sup>98</sup> *Id.* at 4 n.8. “The Employer’s own policy is to not cancel a player’s scholarship due to injury or position on the team’s depth chart as explained in Head Coach Fitzgerald’s scholarship offer letter to recruits.”

<sup>99</sup> Northwestern Univ., 13-RC-121359 at 4 (2014).

<sup>100</sup> Wilborn, *supra* note 68, at 77.

<sup>101</sup> *See supra* Part III. B. 3.

<sup>102</sup> Northwestern University’s Reply Brief, *supra* note 66, at 10.

<sup>103</sup> Northwestern Univ., 13-RC-121359 at 13 (2014) (citing *Brown University*, 342 NLRB 483, 490, n.27 (2004) (citing *NLRB v. Town & Country Electric*, 516 U.S. at 94)).

test and, therefore, should not be allowed to vote on representation for collective bargaining purposes.

The most glaring issue with the Regional Director's finding of employee status under this common law test is that there was no "contract for hire" in this case.<sup>104</sup> The Regional Director erroneously claims that the tender offer that is presented to prospective student-athletes is a contract for hire.<sup>105</sup> On the contrary, the tender offer is simply an offer of financial aid.<sup>106</sup> It is no different than an offer of financial aid made to any other student at Northwestern University, whether the offer is merit- or need-based.<sup>107</sup> As a matter of fact, all student-athletes at Northwestern, not just football players, are required to sign a tender offer to receive financial aid.<sup>108</sup> Further supporting this conclusion is the fact that the tender offer "makes no mention of [the terms] 'employment' or 'labor' or 'services' or hire."<sup>109</sup> Additionally, the supposed employer in this case, Northwestern University, does not even control the wording of the tender offer; rather the Big Ten Conference "dictates the language of the Tender of Financial Aid."<sup>110</sup>

On the other hand, others have noted that a contract for hire is not always necessarily included in the common law definition of an employee.<sup>111</sup> Rather, the appropriate common law definition of employee states: "[a] worker is an employee when she 'performs services for another, under the other's control or right of control, and in return for payment.'<sup>112</sup> If this definition is used, any argument over the need for a contract for hire becomes moot. This,

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<sup>104</sup> Northwestern University's Reply Brief, *supra* note 66, at 10; University of Notre Dame's Amicus Brief, *supra* note 66, at 5.

<sup>105</sup> Northwestern Univ., 13-RC-121359 at 14 (2014); *Id.*

<sup>106</sup> Northwestern University's Reply Brief, *supra* note 66, at 11

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 12.

<sup>109</sup> Northwestern University's Brief, *supra* note 66, at 7.

<sup>110</sup> *Id.* at 6.

<sup>111</sup> Wilborn, *supra* note 68 at 70.

<sup>112</sup> *Id.* at 70-71 (citing New York Univ., 332 N.L.R.B. 1205, 1205-06 (2000)).

however, was not the common law definition that the Regional Director here employed in his analysis, so this issue must be addressed by the Board on appeal.

The second problem with the Regional Director's common law analysis is that the grant-in-aid scholarships awarded to members of Northwestern's football team are not "compensation for services."<sup>113</sup> The Regional Director claims that, "it is clear that the scholarships that the players receive [are] compensation for the athletic services they perform for the Employer throughout the calendar year, but especially during the regular seasons and postseason."<sup>114</sup> In making this assertion, however, the Regional Director disregarded three key facts: (1) that the scholarships are not processed or distributed through the University's payroll system; (2) that the players are not taxed for the receipt of their scholarships; and (3) that the players do not receive employment benefits of any kind from Northwestern.<sup>115</sup> Also, "[t]he amount of financial aid is not dependent upon either athletic talent (merit) or effort (time spent), but rather is determined by the cost of tuition, food, housing, and books."<sup>116</sup>

In sum, even if the Regional Director disregards previous Board precedent and does not apply the *Brown University* test, the scholarship members of the Northwestern University Football Team are not employees under the common law definition utilized in the Regional Director's analysis. Therefore, the Regional Director's decision should be overturned, and the players should not be afforded the right to hold a vote on representation for the purpose of engaging in collective bargaining.

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<sup>113</sup> Northwestern University's Reply Brief, *supra* note 66, at 11; Northwestern University's Brief, *supra* note 66, at 34.

<sup>114</sup> Northwestern University and College Athletes Players Association, 13-RC-121359, 14 (N.L.R.B. Region 13, Mar. 26, 2014), available at [http://www.espn.go.com/pdf/2014/0326/espn\\_uniondecision.pdf](http://www.espn.go.com/pdf/2014/0326/espn_uniondecision.pdf).

<sup>115</sup> Northwestern University's Brief, *supra* note 66, at 34.

<sup>116</sup> Northwestern University's Reply Brief, *supra* note 66, at 12.

#### IV. Methods to Avoid “Employee” Status for Student-Athletes: NLRB and State Labor Law

This comment argues that the Regional Director’s decision in *Northwestern* should not be upheld. Even if the Regional Director’s decision is upheld, however, it will only apply to the scholarship football players at Northwestern University due to the fact-specific and case-by-case nature of NLRB proceedings. Any other university, private or public, could take a proactive approach to avoid its student-athletes earning employee status. The Regional Director’s analysis in *Northwestern* provides guidelines for any entity that wants to minimize the chance that it will be considered an employer in relation to the individuals it exercises control over.<sup>117</sup> These guidelines may be different for a private university over which the NLRB maintains jurisdiction and a public university subject to state labor law. Nonetheless, if an entity closely examines the decision of the Regional Director in *Northwestern*, its chance of being deemed an employer will likely be reduced.

First, for private institutions, many of the actions that it could undertake to avoid employer status would likely come in the form of diminished control over the lives of its student-athletes.<sup>118</sup> For example, an athletic department could require its coaches and academic advisors to reduce the amount of control that they maintain over the class scheduling and other academic endeavors of their athletes.<sup>119</sup> Also, the university could voluntarily reduce the amount of athletic responsibilities, such as practice time, that the athletes are obligated to attend. Training camp is only one month long; however, the Regional Director stresses the fact that the student-

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<sup>117</sup> See *Northwestern University and College Athletes Players Association*, 13-RC-121359 (N.L.R.B. Region 13, Mar. 26, 2014), available at [http://www.espn.go.com/pdf/2014/0326/espn\\_uniondecision.pdf](http://www.espn.go.com/pdf/2014/0326/espn_uniondecision.pdf). The Regional Director notes as factors in his decision: 1) the players are subject to special rules; 2) the amount of time the players are required to spend on “football-related activities”; 3) the Tender offer of Financial Aid serves as an employment contract.

<sup>118</sup> *Id.* at 15. The Regional Director noted that, “the players who receive scholarships are under strict and exacting control by their Employer through the entire year.” *Id.*

<sup>119</sup> *Id.* at 16. The Regional Director uses this level of control as a factor in his decision. “[I]t is clear that the players are controlled to such a degree that it does impact their academic pursuits to a certain extent.” *Id.*

athletes are obligated to spend 50–60 hours per week on football duties during this time.<sup>120</sup> If the university, and not the NCAA, were to reduce this time commitment, it would demonstrate that the student-athletes lives are not dominated by their athletic obligations.

Public institutions could undertake some of the same measures as private institutions; however, these entities are not subject to the jurisdiction of the NLRB,<sup>121</sup> but rather subject to the law of the state where the university is located. Therefore, the legislature of that state will play a much larger role in determining in student-athletes are entitled to collective bargaining rights. If the legislature were persuaded to adopt legislation that is less favorable to public employees possessing collective bargaining rights, then the student-athletes would not have a good chance to earn such rights.

Finally, the individual conferences of the NCAA can agree that they will take no steps to treat their student-athletes as employees. Such an agreement would take place between the conferences and their member institutions, and it would likely include some of the measures described in this section. A university, in abiding by such an agreement, would inevitably reduce the amount of control that it exercises over its student-athletes. Thus, the university agrees that it will not take any steps to treat its student-athletes as employees. If a solution such as this were implemented, it would not be dispositive on the question of employee status, but rather would likely be highly persuasive in demonstrating the nature of the educational relationship to an adjudicative body.

#### **V. Internal NCAA Reform is Preferable to the Unionization of Student-Athletes**

While the unionization of Division I scholarship student-athletes may not be the answer, other commentators have suggested different solutions to solve these problems that currently

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<sup>120</sup> *Id.* at 18.

<sup>121</sup> 29 U.S.C. § 151 (2006).

face the NCAA and its member institutions.<sup>122</sup> For example, one alternative proposal states that student-athletes should be allowed to unionize, which might, contrary to popular belief, actually preserve the current NCAA intercollegiate athletic model as an alternative to professional sports.<sup>123</sup> Another alternative proposal advocates for the appointment of an independent federal commission to oversee the NCAA rulemaking process.<sup>124</sup> The NCAA could be incentivized to accept the suggestions of the independent commission if offered a “carrot” such as exemption from antitrust liability.<sup>125</sup> An additional proposal does not advocate for changing the NCAA’s current amateurism model or declaring student-athletes as employees. Yet, it supports granting student-athletes a limited form of collective bargaining rights, which would not include the right to earn wages or strike, and use the “Union Substitution Effect”<sup>126</sup> to put pressure on the NCAA to provide a voice and additional benefits to student-athletes.<sup>127</sup>

There are many possible solutions to the problems that the NCAA, its member institutions, and student-athletes currently face. All of these deserve consideration as potentially viable solutions; however, a simpler, more effective way to deal with these existing problems is internal reform of the NCAA. Internal reform to the existing structure of NCAA regulation of allowable benefits to Division I student-athletes is the most appealing solution to the problems that currently face the NCAA.

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<sup>122</sup> See Fram & Frampton, *supra* note 41; Mitten & Ross, *supra* note 15; Michael H. LeRoy, *An Invisible Union for an Invisible Labor Market: College Football and the Union Substitution Effect*, 2012 WIS. L. REV. 1077 (2012); Nygren, *supra* note 10; Parasuraman, *supra* note 10; Virginia A. Fitt, *The NCAA’s Lost Cause and the Legal Ease of Redefining Amateurism*, 59 DUKE L.J. 555 (2009).

<sup>123</sup> Fram & Frampton, *supra* note 41, at 1010.

<sup>124</sup> See Mitten & Ross, *supra* note 15.

<sup>125</sup> *Id.* at 877.

<sup>126</sup> “The union substitution effect shows that employers respond to credible threats of unionization by providing individuals more voice and better financial treatment.” LeRoy, *supra* note 122, at 1135.

<sup>127</sup> *Id.*

## A. Specifics and Implications of the Proposed NCAA Internal Reform Plan

The proposed internal reform would most likely occur by means of a vote of the NCAA Division I Board of Directors (the “Division I Board”).<sup>128</sup> The Division I Board is comprised of 18 members, all chancellors or presidents of member institutions, and was established to direct the affairs of Division I.<sup>129</sup> It could vote to delegate regulatory authority concerning student-athlete welfare and allowable benefits to the individual “Power Five” Conferences.<sup>130</sup> In this proposal, the NCAA would still retain regulatory authority for the on-field rules of competition. The individual “Power Five” Conferences<sup>131</sup> would be allowed, however, to make rules and regulations for their member institutions concerning allowable additional benefits.

The NCAA could still retain a very limited sphere of authority as it relates to these additional benefits for student-athletes. For example, in order for its member institutions to retain competition eligibility in the newly created College Football Playoff system,<sup>132</sup> the individual conferences could agree that they will take no steps to treat their member student-athletes as employees. If this agreement takes place at the conference level, it will bind the member institutions. The member institutions would then most likely take proactive steps, such as a reduced amount of control,<sup>133</sup> to avoid its student-athletes garnering employee status. Outside of

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<sup>128</sup> See NCAA, 2014-15 NCAA Division I Manual – Abridged Manual – Chancellors and President §5 (2014), available at <http://www.ncaapublications.com/productdownloads/14chancellors.pdf>.

<sup>129</sup> NCAA, Division I Committees, <http://www.ncaa.org/governance/committees?division=d1> (last visited Feb. 12, 2015).

<sup>130</sup> See 2014-15 NCAA Division I Manual, *supra* note 128.

<sup>131</sup> The “Power Five” Conferences consist of 64 schools that make up the five richest conferences in Division I athletics (the Atlantic Coast Conference, the Big 12 Conference, the Big Ten Conference, the Southeastern Conference, and the Pacific-12 Conference). Bryan Bennett, *NCAA Board Votes to Allow Autonomy*, ESPN (Aug. 8 2014, 1:22 PM), [http://espn.go.com/college-sports/story/\\_/id/11321551/ncaa-board-votes-allow-autonomy-five-power-conferences](http://espn.go.com/college-sports/story/_/id/11321551/ncaa-board-votes-allow-autonomy-five-power-conferences).

<sup>132</sup> The College Football Playoff is a new postseason format for Division I Football Championship Subdivision (FCS) football teams that allows a committee to select the four best teams to determine the FCS National Champion. *College Football Playoff Overview*, COLLEGEFOOTBALLPLAYOFF.COM, <http://www.collegefootballplayoff.com/overview> (Apr. 20 2014, 2:22 PM).

<sup>133</sup> See *supra* Part IV.



that limited restriction, the individual conference would possess the power to declare what type of benefits its member institutions would be permitted to provide to student-athletes.

These benefits would most likely come in many different forms. Some possible examples are: (1) guaranteed four-year scholarships; (2) improved educational benefits; (3) long-term disability insurance for sports-related injuries; (4) more flexible transfer and eligibility rights; (5) a grievance process for abusive treatment by coaches and administrators; (6) free medical care and health insurance for all sports-related injuries; (7) payment of scholarship shortfalls—the difference between the cost of a scholarship and the actual cost of attending a university.<sup>134</sup> If allowed by the individual conferences, all of these could potentially be available to student-athletes of the “Power Five” Conferences.

Competition among the individual schools and between the individual conferences would be the driving force behind this system of regulation. Individual institutions try very hard to be the most appealing destination for prospective student-athletes (“recruits”).<sup>135</sup> They do so because many of these prospective student-athletes possess rare, non-fungible abilities to perform on the football field, making these recruits highly sought-after. As a result, the individual institutions would most likely encourage their conference to pass more flexible regulations concerning additional benefits. The conferences would then respond to the needs of their member institutions and regulate as they see fit. This competition would discipline the conferences to establish a regulatory framework that is both appealing and beneficial to recruits since those

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<sup>134</sup> See Nygren, *supra* note 10, at 366–67 (discussing the goals of the Collegiate Athletes Coalition (CAC)); Parasuraman, *supra* note 10, at 728–29 (discussing the goals of the National College Players Association (NCPA)).

<sup>135</sup> Alicia Jessop, *The Economics of College Football: What the Top-25 Teams Spend on Recruiting*, FORBES (Aug. 31, 2013, 9:49 AM), <http://www.forbes.com/sites/aliciajessop/2013/08/31/the-economics-of-college-football-what-the-top-25-spend-on-recruiting/> (discussing the amount that each Top-25 Athletic Program spent on recruiting for men’s sports in 2011-2012. The University of Alabama topped the list by spending \$1,402,041).

recruits maintain a strong bargaining position in choosing a school due to the high demand for their unique skill sets.

In all, schools and conferences will be vying to attract the most promising recruits. The conferences will compete with each other in an “arms race” or “race to the top” in order to be the most appealing destination. This “arms race” will greatly improve the welfare of the student-athlete by allowing individual conferences to regulate and provide their member schools with the ability to provide student-athletes with additional benefits.

### **B. Policy Considerations - Why This Proposal Is Superior to a Student-Athlete Unionization Effort**

This type of internal NCAA reform is a superior alternative to a student-athlete unionization effort because it will prevent the immense amount of difficulty that could accompany individual determinations of employee status on a case-by-case basis. Because, as previously discussed, the NLRB maintains jurisdiction over private entities,<sup>136</sup> its determinations would govern any student-athlete unionization effort at a private institution. There are currently 17 private institutions that maintain Division I Football Bowl Subdivision programs.<sup>137</sup>

Therefore, determinations of student-athlete employee status at these schools would have to be made on a case-by-case basis. An amicus brief in *Northwestern* stated, “There are likely over 10,000 football players receiving scholarships at one-hundred and twenty universities. Denying this group employee status would thus exclude a significant number of individuals from statutory labor protection.”<sup>138</sup> The situation is much more complex than that statement suggests, however, and such a group could not be excluded from statutory labor protection as a result of one decision. Rather, student-athletes of each individual athletic team at these Division I private

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<sup>136</sup> 29 U.S.C. § 151 (2006).

<sup>137</sup> Northwestern University and College Athletes Players Association, 13-RC-121359, 3 n.2 (N.L.R.B. Region 13, Mar. 26, 2014), available at [http://www.espn.go.com/pdf/2014/0326/espn\\_uniondecision.pdf](http://www.espn.go.com/pdf/2014/0326/espn_uniondecision.pdf).

<sup>138</sup> Brief of *Amicus Curiae* Labor Law Professors’ *supra* note 72, at 19–20.

institutions could petition the NLRB for collective bargaining rights. The NLRB would be tasked with hearing proceedings for each case due to the fact-specific nature<sup>139</sup> of the analysis. While this type of system may be perfectly appropriate to resolve labor disputes in other settings, it would not be an efficient method to solve the problems that student-athletes face at private member institutions of the NCAA.

Additionally, there would be a similar level of uncertainty if student-athletes at a public university sought recognition of employee status. The NLRA specifically exempts “any State or political subdivision thereof” from its reach<sup>140</sup>, so an effort to be recognized as an employee, including a student-athlete unionization effort at a public university, would be subject to the labor law of the state where the university is located. This would cause even more uncertainty for the student-athletes of the NCAA. A student-athlete at a public university could be an “employee” if his or her university was located in a state with robust protection for its public workers. At the same time, a student-athlete competing in the same sport, at the same level of competition, at a different public university with less robust statutory protection or a private university, may not be entitled to similar benefits.

Furthermore, it will preserve the NCAA’s amateurism model.<sup>141</sup> NCAA student-athletes are, by definition, amateur athletes and not professional athletes.<sup>142</sup> The unionization of student-athletes, however, would challenge the existing model, and could lead to a professionalization of intercollegiate athletics. This has the potential to harm the institution as a whole by altering the

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<sup>139</sup> Some factors to consider in this fact-specific analysis would be the level of control that the university has exercised over the private life of the student-athlete, the type of financial aid or scholarship that is offered, and the level of mandatory time requirements. *See* Northwestern Univ., 13-RC-121359 (2014).

<sup>140</sup> 29 U.S.C. § 152(2) (2006).

<sup>141</sup> NCAA, 2014-15 NCAA Division I Manual – Abridged Manual – Chancellors and President §2.9 (2014), available at <http://www.ncaapublications.com/productdownloads/14chancellors.pdf>. “Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises.”

<sup>142</sup> *Id.*

nature of athletic competition on the field, while also destroying any notion of a broader educational purpose in intercollegiate athletics.

In arguing against this type of internal NCAA reform, some commentators have theorized that individual conferences possessing control over the regulations and rulemaking process might lead to an “arms race.”<sup>143</sup> It is suggested that this “arms race” will harm the NCAA because “[c]ertain conferences would dominate intercollegiate athletics because they were more willing to grant student-athletes extra benefits.”<sup>144</sup> Along the same lines, Dartmouth University President and NCAA Division I Board Member Phillip J. Hanlon recently stated, “I worry these changes (granting more autonomy to individual conferences) will further escalate the arms race in college sports, which, in my opinion, is not in the best interest of intercollegiate athletics, or higher education more generally.”<sup>145</sup>

This argument is not persuasive because it ignores the fierce level of competition in Division I athletics. The “Power Five” Conferences and their member schools would be competing with one another to attract potential student-athletes and ultimately for success on the playing field. This inherent competition will create a dynamic that will work to the benefit of the student-athlete. This level of competition will serve as a check on the amount of control that the individual conferences would be afforded. For example, if one conference were to achieve athletic success by offering the most appealing additional benefits, then the other conferences will likely follow suit. The existence of such an “arms race” in intercollegiate athletics would not harm the welfare of the student-athlete. Rather, it would improve the welfare of the student-

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<sup>143</sup> See Nygren, *supra* note 10; Mitten & Ross, *supra* note 15.

<sup>144</sup> Nygren, *supra* note 10, at 394.

<sup>145</sup> Marc Tracy, *NCAA Votes to Give Richest Conferences More Autonomy*, N.Y. TIMES (Aug. 7, 2014) <http://www.nytimes.com/2014/08/08/sports/ncaaf/football/ncaa-votes-to-give-greater-autonomy-to-richest-conferences.html>.

athlete, more so than if the student-athletes were left to advance their own interests without this strong level of competition driving the regulation of the “Power Five” Conferences.

An additional, and similar, argument against reform is that NCAA member universities could not effectively govern themselves because they are too “economically self-interested.”<sup>146</sup> The reasoning behind this argument lies in the idea that the member institutions of the NCAA will put self-interest above all else, so the long-term welfare of the individual student-athlete will suffer.<sup>147</sup> While this might be true if the individual member universities of the NCAA held the majority of the rulemaking authority, it most likely will not be true if the conference, rather than the individual university, holds the rulemaking authority. The “economically self-interested party” will seek the most advantageous rules and regulations for itself. But, this self-interest will be tempered by the fact that rival institutions of the same conference will benefit from the same rules. Organizing rules concerning allowable additional benefits on a conference, rather than individual school, level will drastically reduce the self-interest factor.

### **C. Reform Process Is Already Underway**

The type of reform process advocated for in this Comment has already begun. Recently, the Division I Board voted to give the ACC, Big Ten, Big 12, Pacific-12, and SEC, collectively the “Power Five” Conferences, the power to make their own rules concerning the provision of additional benefits to student-athletes.<sup>148</sup> The changes would not destroy the current amateurism model of intercollegiate athletics and they would not allow individual conferences to pay student-athletes for on-field performance.<sup>149</sup> Rather, the rules would be limited to areas such as “loosening recruiting curbs, offering more comprehensive health insurance and letting schools

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<sup>146</sup> See Mitten & Ross, *supra* note 15.

<sup>147</sup> See *id.*

<sup>148</sup> Sharon Terlep, *NCAA Votes to Give Big Conferences More Autonomy*, THE WALL STREET JOURNAL (Aug. 7, 2014, 7:44 PM), <http://online.wsj.com/articles/ncaa-votes-to-give-big-conferences-more-autonomy-1407433146>.

<sup>149</sup> *Id.*

cover the gap of roughly \$2,000 to \$4,000 between what a scholarship typically pays and the actual cost of attending school.”<sup>150</sup>

These rules are not yet in effect, and, if enough NCAA Division I member schools oppose the proposed rule changes, the Division I Board would reconsider them at the next meeting.<sup>151</sup> The individual conferences, however, are the regulatory bodies best suited to address the concerns of the modern student-athlete. In order to preserve amateur intercollegiate athletics, this deregulation must continue, and the individual conferences should retain the most authority in the rulemaking process.

## VI. Conclusion

In sum, the Northwestern University scholarship football players should not be considered employees, and a student-athlete unionization effort is not the method that should be used to solve the problems that currently face the NCAA and its member institutions. First, in the *Northwestern* case, the scholarship football players do not fit within the legal definition of employee. The test from *Brown University* should be the test that the full Board utilizes upon review, and if the test from *Brown University* is the relevant standard, then the scholarship football players at Northwestern will not be considered employees. Therefore, the scholarship football players at Northwestern University do not fall within the legal definition of the term “employee,” and should not be entitled to collective bargaining rights.

Additionally, putting aside any decision by the NLRB and simply viewing the issue as a matter of policy, a student-athlete unionization effort is not the most appropriate way to address the problems of the NCAA. Only a few Division I universities are private institutions, and thus, subject to the NLRA. Therefore, targeting reform at the *conference* level rather than at the

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<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

individual university is the most appropriate and comprehensive way to solve this issue. This internal NCAA reform would include the rulemaking authority being delegated to *individual conferences*. If the rules and regulations concerning the distribution of non-monetary benefits to student-athletes are controlled by the individual conferences, these conferences will compete with one another to provide the most appealing additional benefits to prospective student athletes. This competition will cause the welfare of the student athlete to improve drastically. Conferences will vie for the services of prospective student-athletes by providing additional benefits. These non-monetary benefits will come in the form of more flexible transfer rules, stricter mandatory time limits on sport related activities, a stronger devotion to health concerns, specifically concussion-related issues, and a more transparent grievance process. In all, if meaningful internal NCAA reform similar to what is proposed in this Comment were to occur, unionization efforts would be unnecessary to improve the welfare of the student-athlete, and the NCAA, its member institutions, and its student-athletes would all benefit as a result.