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**Collegiate Athletes As Employees:  
An Analysis of the Northwestern Football Challenge and its Relation to the Columbia  
NLRB Ruling**

*Jared Fattore\**

## I. Introduction

Division I football is a popular and profitable business in which the sixty-five universities that comprise the Power Five Conferences (plus Notre Dame) generated \$6.3 billion in revenue during 2014-15.<sup>1</sup> This extremely large amount of revenue would surely not be generated if it were not for the players providing the athletic service of performing on the field. Are these players primarily students that are voluntarily offering these services usually in exchange for a free education? Or are they primarily employees performing said services for their employer and also gaining an education at the same time?

A number of players from Northwestern University believe that they are the latter and that they should be considered employees of the University.<sup>2</sup> These players brought a challenge rooted in this belief before the National Labor Relations Board (“NLRB” or the “Board”).<sup>3</sup> This article examines that challenge, the ruling of both the regional and federal Boards, and another recent decision by the NLRB, *Columbia*.<sup>4</sup> *Columbia* consisted of a similar employee-status-seeking challenge but involved collegiate teaching and research assistants rather than athletes.<sup>5</sup> This article will lay out the *Northwestern* challenge, the *Columbia* challenge, how they relate to one another, how *Columbia* can possibly aid the Northwestern situation, and what is likely to come of this topic in the future. This article notes that the employee-seeking challenge for

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<sup>1</sup> Jon Solomon, *Inside College Sports: SEC, Big Ten dominate \$100M revenue club*, CBS Sports, <http://www.cbssports.com/college-football/news/inside-college-sports-sec-big-ten-dominate-100m-revenue-club/> (last visited Mar. 4, 2017). The “Power Five” conferences are the Big 10 conference, the Big 12 conference, the Pac-12 conference, the Atlantic Coast Conference (ACC), and the Southeastern Conference (SEC).

<sup>2</sup> Post-Hearing Brief of Petitioner College Athletes Players Association, 2014 WL 1922054 (N.L.R.B.).

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

<sup>4</sup> *The Trustees of Columbia University in the City of New York and Graduate Workers of Columbia-GWC, UAW*, 364 NLRB No. 90 (2016).

<sup>5</sup> *Id.*

collegiate athletes is currently at a stalemate, and it is predicted that any progress that may occur in the future will likely come from the individual states.

## II. Original Challenge

Approximately eighty-five Northwestern University football players on athletic scholarship (the “Players”) attempted to obtain representation by a labor organization—the College Athletes Players Association (“CAPA”)—so they could collectively bargain the terms and conditions of what would be their employment.<sup>6</sup> This attempt involved an area that the NLRB has never considered: Division I Football.<sup>7</sup> According to the challengers however, the issue involves questions that have been considered and decided by the Board previously.<sup>8</sup> Per the evidentiary record, the Players claimed that they were employees within the meaning of Section 2(3) of the NLRA, that CAPA was a labor organization within the meaning of Section 2(5), and that CAPA seeks to represent an appropriate unit.<sup>9</sup> In opposition, Northwestern University argued that *Brown University*<sup>10</sup>, another NLRB decision, barred the Players’ attempt to organize, and in addition, claimed that their challenge violated public policy.<sup>11</sup> The decision of whether these Players were able to organize and collectively bargain turned on whether they were in fact considered “employees”.<sup>12</sup> After analyzing the Players’ duties, the benefits Northwestern receives from the Players’ services, and the Players’ compensation, the Regional NLRB determined that the Northwestern Players were in fact “employees.”<sup>13</sup>

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<sup>6</sup> Post-Hearing Brief of Petitioner College Athletes Players Association, 2014 WL 1922054 at 2.

<sup>7</sup> *Id.*

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

<sup>9</sup> *Id.*; See also National Labor Relations Act, 29 U.S.C. § 152 (3), (5).

<sup>10</sup> *Brown University and Int’l Union et al.*, 342 NLRB No. 42 (2004)).

<sup>11</sup> Post-Hearing Brief of Petitioner College Athletes Players Association, 2014 WL 1922054 at 3.

<sup>12</sup> *Id.* at 16-17 (citing *NLRB v. Town & Country, Inc.*, 516 U.S. 85, 90 (1995) (“the ordinary dictionary definition of ‘employee’ is any ‘person who works for another in return for financial or other compensation’”).

<sup>13</sup> *Id.* at 34.

### **A. The Players' Duties**

According to the Players, football has been called a “year-round gig” at Northwestern, as players have “extensive mandatory football-related duties that they perform throughout the year, under the comprehensive control of the coaches.”<sup>14</sup> Starting with Training Camp and finishing with Summer Workouts, the Players invest approximately twenty to thirty hours per week in football-related activities.<sup>15</sup> Northwestern’s own football coach, Patrick Fitzgerald, has been quoted saying that his Players’ football responsibilities are viewed as a “full-time job.”<sup>16</sup> Former player Kain Colter testified in detail regarding a Northwestern player’s football-related activities.<sup>17</sup> He explained that these activities could be divided into eight periods.<sup>18</sup> These periods are as follows:

#### **i. Training Camp**

Players are required to report to training camp in early August, during which time Colter explained “it’s football every day.”<sup>19</sup> The Players participate in activities each day based on the schedules prepared by the coaching staff, from early in the morning to late in the evening.<sup>20</sup> If the Players fail to participate in said activities, they are subject to discipline by the coaching staff.<sup>21</sup> A typical day during training camp lasts about fourteen hours, totaling about fifty to sixty hours per week of football-related activities.<sup>22</sup>

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<sup>14</sup> *Id.* at 4.

<sup>15</sup> *Id.* at 5-12.

<sup>16</sup> *Id.* at 12.

<sup>17</sup> *Id.* at 5.

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

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

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

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

## **ii. Regular Season**

Lasting from September through November/early December, the Players devote over forty hours per week to football-related activities, including work-outs, practices, and games.<sup>23</sup> They are once again provided a detailed schedule of required activities prepared by the coaches.<sup>24</sup> In addition to the requirement of performance during games on Saturdays, the Players are also required to handle media obligations, adhere to a dress code, and participate in team activities (such as watching film and strength training).<sup>25</sup>

## **iii. Post Season**

If the team qualifies for a post-season bowl game, the Players experience an extended season, with the hours devoted to football-related activities per week similar to that of the Regular Season.<sup>26</sup> The Players are limited in any vacation they may take to see their families due to the football related conflict, but when they can travel, they must get their travel plans approved by the coaching staff.<sup>27</sup>

## **iv. Winter Workouts**

This period begins in mid-January, normally about two weeks after the post-season ends, and continues until around mid-February.<sup>28</sup> During this period, Players participate in approximately twelve to fifteen hours per week of football-related activities, including strength and conditioning training.<sup>29</sup>

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<sup>23</sup> *Id.* at 9.

<sup>24</sup> *Id.* at 6.

<sup>25</sup> *Id.* at 6-7.

<sup>26</sup> *Id.* at 9.

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

<sup>28</sup> *Id.* at 10.

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

#### **v. “Winning Edge”**

After the Winter Workouts, the Players partake in one week of “Winning Edge.”<sup>30</sup> During this period, the Players engage in intense workouts dictated by the coaches.<sup>31</sup> “Winning Edge” is conducted to prepare the Players to “transition” into football.<sup>32</sup> This week requires the Players to sacrifice about fifteen to twenty hours of time.<sup>33</sup>

#### **vi. Spring Football**

Beginning after “Winning Edge” and continuing until mid-April, the Players participate in football activities for six days a week, totaling twenty to twenty-five hours per week.<sup>34</sup> These activities consist of practices, meetings with the coaching staff, and weightlifting and conditioning.<sup>35</sup>

#### **vii. Spring Workouts**

Similar to Winter Workouts, Spring Workouts require players to devote twelve to fifteen hours per week and runs from about one week after Spring Football ends and continues through May.<sup>36</sup>

#### **viii. Summer Workouts**

After Spring Workouts, the Players are allowed about one to two weeks of vacation, but then must report back to campus for Summer Workouts, which consist of twenty to twenty-five hours per week of football-related activities.<sup>37</sup> If a Player is taking a summer class or has a

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

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

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

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

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

<sup>36</sup> *Id.* at 11.

<sup>37</sup> *Id.*

summer internship that conflicts with the Summer Workouts, he must report early at 5:30 am to do his assigned workouts.<sup>38</sup>

### **B. The Benefits Northwestern Receives from Players' Services**

Being a team in one of the Power Five conferences (the Big Ten), Northwestern generates significant revenue from its football team.<sup>39</sup> Between 2003 and 2012, Northwestern reported approximately \$235 million in revenue generated directly by its football program.<sup>40</sup> This revenue creates a five to ten million dollar net profit per year.<sup>41</sup> In addition to the revenue gained from ticket sales and television contracts, Northwestern also profits from selling merchandise bearing its Players' names, numbers, and likenesses.<sup>42</sup>

In addition to the direct monetary benefits Northwestern receives, the school also capitalizes on indirect benefits attributable to the school's football program.<sup>43</sup> One example, known as the "Flutie Effect," is the correlation between athletic success and increased student applications to the university.<sup>44</sup> For example, the Players presented evidence that Northwestern applications increased by twenty-one percent the academic year following the football season the team won the Big Ten Championship title and went to the Rose Bowl.<sup>45</sup> The Players also showed the Board that after this successful season, media mentions of Northwestern increased by one hundred and eighty-five percent, along with alumni donations increasing as well.<sup>46</sup>

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

<sup>39</sup> *Id.* at 12.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* (quoting Petitioner exhibit 5 at 5-6).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 13.

<sup>44</sup> *Id.* (citing Petitioner exhibit 5 at 7-8); *See also* Sean Silverthorne, *The Flutie Effect: How Athletic Success Boosts College Applications*, *Forbes*, <https://www.forbes.com/sites/hbsworkingknowledge/2013/04/29/the-flutie-effect-how-athletic-success-boosts-college-applications/#2b200fdc6e96> (last visited Apr. 27, 2017).

<sup>45</sup> *Id.*

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



The Players, aiming to be considered employees, additionally pointed to the similarities of the business model of a Division I (“D-1”) football program to that of professional teams in the National Football League (“NFL”).<sup>47</sup> Essentially, the Players presented the fact that both types of programs are “in the business of providing sports entertainment through the labor provided by players, and in both cases the business derives substantial revenue from that labor through ticket sales, television contracts, merchandise, stadium rights, and other sources.”<sup>48</sup> The Players also posited that, except for the compensation limitation placed upon them by the NCAA, the economic relationship between the Players and Northwestern closely resembles the economic relationship between a professional player and his NFL team.<sup>49</sup>

### **C. The Players’ Compensation**

As compensation for their services to Northwestern’s football team, the Players receive what is called “athletic aid.”<sup>50</sup> This aid consists of up to one hundred percent of the “full-ride equivalency of \$61,063, and covers tuition, room and board, books, and other fees.”<sup>51</sup> Most athletes do not receive a “full-ride”, but in 2013-14, Northwestern granted athletic aid to one hundred and sixty-nine individuals, eighty-eight of them being football players.<sup>52</sup> This aid is provided to Players explicitly in return for their services to the football team, and can be “immediately reduced or canceled” if a player becomes ineligible, voluntarily withdraws, or violates team rules as determined by the coaching staff or the athletic administration.<sup>53</sup> These

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<sup>47</sup> *Id.* at 13.

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

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

<sup>50</sup> *Id.* at 14.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

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

scholarships are different from non-athletic scholarships in that the latter are provided based on financial need rather than qualification and require no services from those receiving them.<sup>54</sup>

#### **D. The Players' and CAPA's Argument**

Based on the factors laid out above, the Northwestern Players and CAPA (the "Petitioners") contended that the Players were statutory employees based on "the common law of agency."<sup>55</sup> According to the law of agency, as discussed in *NLRB v. Town & Country, Inc.*, an "employee" is "any person who works for another in return for other compensation."<sup>56</sup> This previous NLRB decision stated that, "in the past, when Congress has used the term 'employee' without defining it, [the Supreme Court has] concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law principles."<sup>57</sup> The Petitioners contended that the Players perform services under the University's control, similar to what a player employed by an NFL team performs.<sup>58</sup>

First, the Petitioners claimed that the Players provided services that were as extensive as a full-time job separate from and in addition to the responsibilities of other students.<sup>59</sup> Second, the Petitioners claimed that it is indisputable that the Players' services were performed for the University, considering the millions of dollars in revenue attributable solely to the football program.<sup>60</sup> Lastly, the Petitioners contended that the services they provided were completed in return for payment.<sup>61</sup> They pointed to the fact that only "a rudimentary economic relationship" is required between employee and employer.<sup>62</sup> Petitioners also pointed out that the Board

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<sup>54</sup> *Id.* at 15-16

<sup>55</sup> *Id.* at 16

<sup>56</sup> *Id.* (quoting *Town & Country*, 516 U.S. at 90.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 17.

<sup>59</sup> *Id.* at 18.

<sup>60</sup> *Id.* at 20-21.

<sup>61</sup> *Id.* at 21.

<sup>62</sup> *Id.* (quoting *WBAI Pacifica Found.*, 328 NLRB 1273, 1274 (1998)).

recognized in-kind benefits as compensation just like wages, and by doing so, contended that the benefits (such as tuition payments and room and board) constituted compensation.<sup>63</sup>

### **E. The Regional NLRB's Decision**

After considering Petitioner's arguments set forth above, the Regional Board determined that "the extensive and undisputed record shows that Northwestern scholarship football players are 'employees' within the meaning of Section 2(3) of the NLRA, that CAPA is a labor organization with [sic] the meaning of Section 2(5), and that CAPA's petitioned for unit of scholarship football players is appropriate."<sup>64</sup>

### **III. The Higher NLRB's Review**

After the Regional Board, located in Chicago, found that the Northwestern grant-in-aid scholarship football players were considered employees, Northwestern University requested the Higher NLRB to review the Regional Board's decision.<sup>65</sup> The Board noted that even when it has the statutory authority to act, it has the power to properly decline to do so if it concludes that asserting jurisdiction over a particular case would not effectuate the purposes of the National Labor Relations Act.<sup>66</sup> The Board continued by stating that it has "never been asked to assert jurisdiction over any type of college athlete, and the scholarship football players do not fit neatly into any analytical framework that the Board has used in cases involving other types of students or athletes," and therefore must determine whether they should exercise its discretion to decline jurisdiction.<sup>67</sup>

After an evaluation of the facts, the Board decided to decline jurisdiction due to two main factors: (1) A decision rendered by them regarding one team would promote instability for the

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<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 34.

<sup>65</sup> *Northwestern University*, 362 NLRB No. 167 at 1 (2015).

<sup>66</sup> *Id.* at 3.

<sup>67</sup> *Id.* at 3-4.

NCAA and conferences in controlling each team; and (2) The fact that the FBS consists mostly of public institutions suggests that a Board decision regarding this one school would promote instability.<sup>68</sup>

**A. The Nature of League Sports and the NCAA's Oversight Renders Individual Team Bargaining Problematic<sup>69</sup>**

The Board noted that the NCAA exists to, among other things, set common rules and standards governing their competitions, and exerts a substantial amount of control over the operations of individual teams, including areas in which the Northwestern Players attempt to collectively bargain.<sup>70</sup> The Board noted that a “symbiotic relationship” exists between the various teams, the conferences, and the NCAA.<sup>71</sup> As a result, the Board stated, “labor issues directly involving only an individual team and its players would also affect the NCAA, the Big Ten, and the other member institutions.”<sup>72</sup> Consequently, the Board stated, any ruling applied to one team would have ramifications for other teams, and that ““it would be difficult to imagine any degree of stability in labor relations’ if we were to assert jurisdiction in this single-team case.”<sup>73</sup> The Board concluded that such a decision is unprecedented, as all previous Board decisions concerning professional sports involved league-wide bargaining units.<sup>74</sup>

**B. The Structure of the FBS and the Nature of Most Colleges Within It Renders a Team Specific Ruling Problematic<sup>75</sup>**

The Board noted that of all the universities that participate in FBS football, all but seventeen are state-run institutions.<sup>76</sup> As a result, the Board noted that it could not assert

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<sup>68</sup> *Id.* at 5.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 4.

<sup>72</sup> *Id.* at 5.

<sup>73</sup> *Id.* (quoting *North American Soccer League*, 236 NLRB 1317, 1321-22 (1978)).

<sup>74</sup> *Id.* at 5.

<sup>75</sup> *Id.*

jurisdiction over the vast majority of FBS teams because they are not operated by “employers” within the meaning of Section 2(2) of the Act.<sup>77</sup> The Board also noted that, specifically, Northwestern is the only school in the Big Ten that is a private institution, and that it could not assert jurisdiction over any of Northwestern’s primary competitors.<sup>78</sup> The Board determined that because most FBS schools are state-run institutions, they are subject to state labor laws, which at least in a few cases, expressly state by statute that scholarship athletes are not employees.<sup>79</sup> Because this issue creates an “inherent asymmetry” of the labor relations, the Board determined that asserting jurisdiction would not promote but would rather hinder stability in labor relations.<sup>80</sup>

### **C. Board’s Note as to its Decision**

Although the Board declined to assert jurisdiction, it stated a few disclaimers in accordance with the topic being brought up in the future.<sup>81</sup> Namely, the Board noted that its decision to decline jurisdiction was purely based on the facts in the specific record before it, and “that subsequent changes in the treatment of scholarship players could outweigh the considerations that motivate [their] decision . . . .”<sup>82</sup> In issuing its conclusion regarding its decision to deny jurisdiction, the Board specifically stated that it did not decide whether the scholarship players are employees or not under Section 2(3).<sup>83</sup> Additionally, the Board stated that, “we therefore do not address what the Board’s approach might be to a petition for all FBS

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<sup>76</sup> *Id.* at 8.

<sup>77</sup> *Id.* at 5; *See Big East Conference*, 282 NLRB 335, 340 (1986).

<sup>78</sup> *Id.* at 5.

<sup>79</sup> *Id.* at 6; *See Ohio Rev. Code § 3345.56; Mich. Comp. Laws § 423.201(1)(e)(iii)* (covering Big Ten members Ohio State University, University of Michigan, and Michigan State University).

<sup>80</sup> *Id.*

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

<sup>82</sup> *Id.*

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

scholarship football players (or at least those at private colleges and universities).<sup>84</sup> Lastly, as a final note, the Board stated that its decision to decline jurisdiction “does not preclude a reconsideration of this issue in the future”, and that if “[their] conclusions regarding jurisdiction warrant reassessment, the Board may revisit its policy in this area.”<sup>85</sup> It is this final section of notes that left this topic open for reconsideration, and with the recent case discussed below, *Columbia*, this topic could and might be revisited in the future.

#### IV. The Columbia Decision

In an August 23, 2016 hearing, the NLRB was faced with the challenge of whether students who perform services at a university in connection with their studies are statutory employees within the meaning of Section 2(3) of the National Labor Relations Act.<sup>86</sup> The case was originally filed and heard in 2015, in which the Regional Director applied *Brown University* and dismissed the petition of the graduate workers to be considered employees.<sup>87</sup> The Federal Board granted review and decided to overrule *Brown*, claiming that that Board erred as to a matter of statutory interpretation.<sup>88</sup> In *Brown*, the Board held that graduate assistants cannot be statutory employees because they “are primarily students and have a primarily educational, not economic, relationship with their university.”<sup>89</sup> In disagreeing with this analysis, the Board in *Columbia* determined that it indeed had the statutory authority to consider student assistants as employees, and in fact held that “student assistants who have a common-law employment relationship with their university are statutory employees under the Act.”<sup>90</sup> The Board then

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<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Columbia*, 364 NLRB No. 90 at 1.

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

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* (quoting *Brown University*, 342 NLRB No. 42 at 487.

<sup>90</sup> *Id.* at 1-2.

applied this general rule to the specific facts laid out by the *Columbia* petitioners and accordingly reversed the Regional Board's decision.<sup>91</sup>

### **A. The Brown and New York University Decisions**

Before one can examine the *Columbia* decision, one must look to the precedent and previous decisions that came before *Columbia*. Chronologically, the NLRB first determined in *NYU* that university graduate assistants were in fact statutory employees.<sup>92</sup> Then, four years later in *Brown*, the NLRB overruled *NYU* and determined that student graduate assistants were not statutory employees.<sup>93</sup> Hence, the *Columbia* Board was faced with an issue that has already been discussed on multiple occasions and reversed once.

#### **i. The New York University Decision**

In *NYU*, the Board examined the statutory language of Section 2(3) and the common law agency doctrine of the master-servant relationship.<sup>94</sup> This doctrine states that “such a ‘relationship exists when a servant performs services for another, under the other’s control or right of control, and in return for payment.’”<sup>95</sup> Examining this doctrine, the *NYU* Board determined that “ample evidence exists to find that graduate assistants plainly and literally fall within the meaning of “employee” as defined in Section 2(3).”<sup>96</sup> In so ruling, the Board looked to the “breadth of the statutory language, the lack of any statutory exclusion for graduate assistants, and the undisputed facts establishing that the assistants in that case performed services under the control and direction of the university for which they were compensated.”<sup>97</sup>

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<sup>91</sup> *Id.* at 2.

<sup>92</sup> See *New York University and Int'l Union et al.*, 332 NLRB 1205 (2000).

<sup>93</sup> See *Brown*, 342 NLRB No. 42.

<sup>94</sup> *Columbia*, 364 NLRB at 3; See *NYU*, 332 NLRB at 1206.

<sup>95</sup> *Columbia*, 364 NLRB at 3 (quoting *NYU*, 332 NLRB at 1206).

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

<sup>97</sup> *Columbia*, 364 NLRB at 3.

## ii. The Brown University Decision

In 2004, the NLRB reassessed the question of whether graduate students are considered employees and, in a highly contested decision, overruled *NYU*.<sup>98</sup> In doing so, the Board in *Brown* invoked what it deemed the “‘underlying fundamental premise of the Act,’ i.e. that the Act is ‘designed to cover economic relationships.’”<sup>99</sup> Additionally, the *Brown* Board stated that it would not exercise jurisdiction “over relationships that are ‘primarily educational.’”<sup>100</sup> More specifically, the Board stated that a fundamental tenant of the Act and a prerequisite to statutory coverage was that the employee-employer relationship must be *primarily* economic in character.<sup>101</sup> Lastly, the Board supported the finding of a previous Board decision, which stated that “collective bargaining is not particularly well suited to educational decision making and that any change in emphasis from quality education to economic concerns will ‘prove detrimental to both labor and educational policies.’”<sup>102</sup> Being a contested decision, there were numerous dissenters, who primarily relied on the fact that “‘collective bargaining by graduate student employees’ was ‘increasingly a fact of American university life’ and described the majority’s decision as ‘woefully out of touch with contemporary academic reality.’”<sup>103</sup>

### B. Reversing Brown

The *Columbia* Board began its discussion by analyzing how the term “employee” should be interpreted in light of Section 2(3) of the Act.<sup>104</sup> The Board pointed out that the Supreme Court has shown that the “‘phrasing of the Act seems to reiterate the breadth of the ordinary dictionary definition of the term’, a definition that ‘includes any ‘person who works for another

<sup>98</sup> *Id.*; See also *Brown*, 342 NLRB No. 42.

<sup>99</sup> *Id.* (quoting *Brown*, 342 NLRB at 483,488).

<sup>100</sup> *Id.* (quoting *Brown*, 342 NLRB at 488).

<sup>101</sup> *Id.* at 3 (emphasis in original); See also *Brown*, 342 NLRB No. 42).

<sup>102</sup> *Id.* at 3 (citing *St. Clare’s Hospital*, 229 NLRB 1000, 1002 (1977)).

<sup>103</sup> *Id.* at 4 (citing *Brown*, 342 NLRB at 493 (Liebman and Walsh, dissenting)).

<sup>104</sup> See 29 U.S.C. § 152(3).



in return for financial or *other compensation*. ”””<sup>105</sup> The Board did note that the Act does not directly define the term “employee,” nor addresses students or university employees of any sort.<sup>106</sup> However, the Board noted that the legislative history of the Act, paired with the design of the Act itself, prove that the *Brown* Board erred.<sup>107</sup>

The *Columbia* Board, looking at the “underlying fundamental purpose of the Act,” rejected the *Brown* Board claim that considering student assistants statutory employees cannot with reconciled with the Act.<sup>108</sup> Rather, the Board claimed that “[t]he Act is designed to cover a particular type of ‘economic relationship’—an employment relationship—and where that relationship exists, there should be compelling reasons before the Board excludes a category of workers from the Act’s coverage.”<sup>109</sup> This compelling reason, according to the Board, did not exist regarding the exclusion of student employees.<sup>110</sup> The Board continued, stating that the *Brown* Board’s main mistake was “fram[ing] the issue of statutory coverage not in terms of the existence of an employment relationship, but rather on whether some other relationship between the employee and the employer is the primary one—a standard neither derived from the statutory text of Section 2(3) nor from the fundamental policy of the Act.”<sup>111</sup> The *Columbia* Board stated that this “primary vs. secondary” education employment relationship is irrelevant, and unless considering student assistants employees violates public policy, coverage should in fact extend to them.<sup>112</sup>

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<sup>105</sup> *Columbia*, 364 NLRB at 4 (quoting *NLRB v. Town & Country Electric*, 516 U.S. 85, 90 (1995) (quoting American Heritage Dictionary 604 (3d ed. 1992)) (emphasis added).

<sup>106</sup> *Columbia*, 364 NLRB at 5-6.

<sup>107</sup> *Id.* at 6.

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

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 6-7.

<sup>111</sup> *Id.* at 7.

<sup>112</sup> *Id.*

In examining public policy in regards to this decision, the *Columbia* Board concluded that “affording student assistants the right to engage in collective bargaining will further the policies of the Act, without endangering any cognizable, countervailing harm to private higher education.”<sup>113</sup> Accordingly, the Board overruled *Brown* and held that, generally, student assistants who have a common-law employment relationship with their respective university are considered statutory employees entitled to the protections of the Act.<sup>114</sup>

### C. Application of this Rule to the *Columbia* Facts

The Board applied this new standard to the facts presented to it and concluded:

(1) that all of the petitioned-for student-assistant classifications consist of statutory employees; (2) that the petitioned-for bargaining unit (comprising graduate students, terminal Master’s degree students, and undergraduate students) is an appropriate unit; and (3) that none of the petitioned-for classifications consists of temporary employees who must be excluded from the unit by virtue of the limited length of their employment.<sup>115</sup>

#### i. Facts of the Case

Columbia University is a nonprofit educational institution located in New York City.<sup>116</sup> Graduate students at Columbia are selected by the faculty of the academic departments on the basis of academic prowess, based on educational background and standardized test scores.<sup>117</sup> In general, PhD. students spend five to nine years of study within their discipline, during which they take courses, prepare a doctoral thesis, and are usually required to teach as well to obtain their degree.<sup>118</sup> Columbia fully funds most PhD student assistants, typically through tuition and a stipend.<sup>119</sup> Usually, taking on teaching or research duties is a condition for such funding.<sup>120</sup>

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<sup>113</sup> *Id.* at 14.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 13.

<sup>117</sup> *Id.* at 15.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 14.

The nature of teaching duties for a teacher's assistant varies.<sup>121</sup> Columbia's Teaching Assistants ("TA's"), known as Instructional Officers, fall into various subsidiary categories such as undergraduate assistant, master's degree assistant, and PhD. assistant, all of which involve varying levels of discretion and involvement in course design.<sup>122</sup> Instructional Officers generally work up to twenty hours per week, and typically participate for one to two semesters at a time.<sup>123</sup> Duties include grading papers, holding office hours, leading discussions or laboratory sessions, or even assuming one hundred percent of the teaching duties for a given course.<sup>124</sup>

Graduate and Departmental Research Assistants, on the other hand, are graduate students that generally participate in research rather than teaching.<sup>125</sup> Their research is either funded by outside grants or by the university itself.<sup>126</sup> Both types of Assistants carry out research that will ultimately be presented as part of a thesis.<sup>127</sup> "Teaching and research occur with the guidance of a faculty member or under the direction of an academic department."<sup>128</sup>

## **ii. Instructional Officers**

The Board noted that "common-law employment . . . generally requires that the employer have the right to control the employee's work, and that the work be performed in exchange for compensation."<sup>129</sup> This, the Board claimed, is present in regard to Instructional Officers.<sup>130</sup> To start, the University directs and oversees the student's teaching activities, and if they are not performed correctly, the students are subject to corrective counseling or removal.<sup>131</sup>

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<sup>121</sup> *Id.* at 15.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 14.

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

<sup>126</sup> *Id.*

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

<sup>128</sup> *Id.* at 17.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

Additionally, Instructional Officers receive compensation for the services provided, namely tuition assistance and a cash stipend.<sup>132</sup> The Board contended that, “while overlooked by the *Brown University* Board, there is undoubtedly a significant economic component to the relationship between universities, like Columbia, and their student assistants.”<sup>133</sup> Based on these factors, the *Columbia* Board found “no difficulty” in finding that all of the petitioned-for Instructional Officers comprise statutory employees.<sup>134</sup>

### iii. Student Research Assistants

Regarding Student Research Assistants, Columbia argued that they have no common-law employment relationship with the University, and based their argument on a previous determination in *Leland Stanford*, which claimed that externally funded research assistants were not employees.<sup>135</sup> In applying the new standard adopted, the *Columbia* Board found the “core elements of the reasoning in *Leland Stanford* [as] no longer tenable.”<sup>136</sup> The Board concluded that *Leland Stanford* relied on the “primary vs. secondary” relationship requirement rather than the common-law standard and overruled it along with *Brown*.<sup>137</sup>

Using this new common-law standard rather than the previous standard used in *Leland Stanford* and *Brown*, the Board determined that because Columbia “exerts the requisite control over the research assistant’s work, and specific work is performed as a condition of receiving the financial award, a research assistant is properly treated as an employee under the Act.”<sup>138</sup>

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<sup>132</sup> *Id.* at 17-18.

<sup>133</sup> *Id.* at 18.

<sup>134</sup> *Id.* at 19.

<sup>135</sup> *Id.*; See *The Leland Stanford Junior University*, 214 NLRB 621, 623 (1974).

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 17, 20.

<sup>138</sup> *Id.* at 20.

## V. Application of Columbia to the FBS

With the recent *Columbia* ruling, a new criterion has been created for determining whether one is an employee or not, and an application of it to the Northwestern challenge is inevitable. *Columbia* re-established the common-law employment relationship as the relevant test in determining whether one is considered an employee.<sup>139</sup> On its face, *Columbia* helps the Northwestern Players, allowing them to make progress in one day being considered employees. However, when looking deeper and analyzing *Columbia* in conjunction with the Board's decision to deny jurisdiction, the Players will find themselves paralyzed in the same predicament.

### A. The New Standard

When just looking at the new standard adopted by the *Columbia* Board, it is hard to determine that the Northwestern Players would not be considered employees, as numerous similarities exist between the Players and the Instructional Officers/Research Assistants in *Columbia*.<sup>140</sup> Since the Northwestern Players, and collegiate athletes at large, form a common-law employee-employer relationship with their school in which they perform a service under the control of the University in exchange for compensation, it can be predicted that based on this test, they are considered statutory employees.<sup>141</sup>

To start, like the petitioners in *Columbia*, the Players also receive compensation in exchange for providing services to the University.<sup>142</sup> Similar to the service of assisting in the process of teaching or researching, playing football for the school and against other schools can

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<sup>139</sup> *Id.*

<sup>140</sup> See *Columbia*, 364 NLRB No. 90 at 19-21; See also Post-Hearing Brief of Petitioner College Athletes Players Association, 2014 WL 1922054 at 2, 12-16, 17-24.

<sup>141</sup> Post-Hearing Brief of Petitioner College Athletes Players Association, 2014 WL 1922054 at 2, 12-14, 20-21 (services performed); at 12-14, 17-20 (under the control of Northwestern); at 14-16, 21-24 (in return for compensation).

<sup>142</sup> *Id.* at 12-16, 21-24.

be considered a service, as it also requires sacrifice and hard work. Also, again similar to the petitioners in *Columbia*, the payment the Players receive is not a traditional form of compensation, but rather takes the form of tuition help and a stipend.<sup>143</sup> The *Columbia* Board considered this type of compensation acceptable for the Instructional Officers and Research Assistants, so it can therefore be predicted that another Board would likewise approve of the Players' compensation.<sup>144</sup>

Next, analogous to the petitioners in *Columbia*, the Players provide their services under the direction of the University and are subject to removal if they do not comply with the standards set by the school.<sup>145</sup> Both sets of petitioners have responsibilities that restrict them from simply pursuing their educational goals at their own discretion, and must adhere to the discretion of their university-funded superiors.<sup>146</sup> This similarity shows that the Players also have their respective services controlled by their "employer," the University.

Lastly, the services provided by the Players produce many benefits for the school, just like that of the petitioners in *Columbia*.<sup>147</sup> The benefits created by the Instructional Officers and Research Assistants included both the instruction of the undergraduate students of the school, which the *Columbia* Board considered a "salient economic character," as well as the direct economic benefit of the increase of research grants brought in by Research Assistants.<sup>148</sup> Similarly, Division I football players bring in substantial amounts of revenue for their respective schools, even to a much larger extent than the petitioners in *Columbia*.<sup>149</sup> If something as salient

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<sup>143</sup> *Id.* at 14-16, 21-24.

<sup>144</sup> *Columbia*, 364 NLRB No. 90 at 17-21.

<sup>145</sup> *Post-Hearing Brief of Petitioner College Athletes Players Association*, 2014 WL 1922054 at 17-20.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 12-14, 19-22; *See also Columbia*, 364 NLRB No. 90 at 18-19, 20-21.

<sup>148</sup> *Columbia*, 364 NLRB No. 90 at 18.

<sup>149</sup> *Post-Hearing Brief of Petitioner College Athletes Players Association*, 2014 WL 1922054 at 12-13; *See also* NCAA Finances, USA Today, <http://sports.usatoday.com/ncaa/finances/> (last visited Mar. 4, 2017).

as educating undergraduate students can qualify as an economic benefit to a school, then the millions of dollars produced by collegiate athletes surely will qualify.

### **B. The Still-Existing Problem**

Because of the similarities discussed above, it seems that the *Columbia* decision can bridge the gap between collegiate football players and the prospect of being considered employees. However, a major problem still exists: before the NLRB can rule whether they are considered employees or not, they must assert jurisdiction and review the case in the first place.<sup>150</sup> Although the *Columbia* decision proves to be a prediction that football players will be deemed employees, the fact remains that the NLRB can still only assert jurisdiction over a small minority of Division I schools, therefore causing instability in the event of a NLRB ruling.<sup>151</sup> This instability idea, which was the main reason the NLRB declined jurisdiction for the Northwestern players, has not been minimized by the *Columbia* decision.<sup>152</sup>

### **C. Moving Forward**

Despite not solving the major problem of instability creating a basis to decline jurisdiction, the *Columbia* decision did affect the criteria of when one is considered an employee in the University realm.<sup>153</sup> Therefore, it can be predicted that this issue will resurface again. Instead of having the problem of jurisdiction in addition to the problem of whether student athletes are employees, *Columbia* has resolved the latter, leaving only the former standing in the way of collegiate athletes becoming employees. This all but guarantees that this topic will be once again considered in the future, with both teams and players' associations attempting to bypass this jurisdiction issue.

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<sup>150</sup> *Northwestern University*, 362 NLRB No. 167.

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

<sup>152</sup> *Id.*

<sup>153</sup> *Columbia*, 364 NLRB No. 90 at 17-21.

Because the overwhelming majority of Division I football programs are located at public universities, the next step forward may have to begin with actions taking place at the state level rather than the national level.<sup>154</sup> Since most universities in the Big Ten and other Power 5 conferences are indeed public, the possibility of student-athletes unionizing at those universities rests upon the decision of the states in which those schools are located.<sup>155</sup> Some states have statutes that explicitly state that student-athletes are not employees.<sup>156</sup> Student-athletes in such states attempting to unionize may have the most difficulty in doing so.

However, other states take a more lenient stance, while others have not taken a position at all.<sup>157</sup> In his article, *College Athletes as Employees: An Overflowing Quiver*, Steven Willborn discusses this idea, most notably the fact that Florida offered a ruling parallel to the reasoning of *Columbia* before such decision was even decided.<sup>158</sup> Willborn also discusses the state of California and how it has a public-sector collective bargaining law that would grant student-athletes explicit protection as employees, as long as “the services they provide are unrelated to their educational objectives, or that those educational objectives are subordinate to the services they perform.”<sup>159</sup> Therefore, public university student-athletes in both Florida and California stand in the same position as the Northwestern players discussed here.

Based on the previous decision, it is likely that they are considered employees, yet a lack of continuity hinders an official decision in so ruling. Having Florida and California on the side

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<sup>154</sup> List of NCAA Division I Institutions, [https://en.wikipedia.org/wiki/List\\_of\\_NCAA\\_Division\\_I\\_institutions](https://en.wikipedia.org/wiki/List_of_NCAA_Division_I_institutions) (last visited Mar. 4, 2017).

<sup>155</sup> *Northwestern University*, 362 NLRB No. 167 at 5 (“[T]he Board cannot assert jurisdiction over the vast majority of [state-run institution] teams because they are not operated by “employers” within the meaning of Section 2(2) of the Act.) See, e.g., *Big East Conference*, 282 NLRB at 340.

<sup>156</sup> *Id.* at 6; See Ohio Rev. Code § 3345.56; Mich. Comp. Laws § 423.201(1)(e)(iii) (covering Big Ten members Ohio State University, University of Michigan, and Michigan State University).

<sup>157</sup> Steven L. Willborn, *College Athletes as Employees: An Overflowing Quiver*, 69 U. Miami L. Rev. 65, 89-95 (2014).

<sup>158</sup> *Id.* at 88-92.

<sup>159</sup> *Id.* at 92-94 (quoting Higher Education Employer-Employee Relations Act, Cal. Gov’t Code § 3562(e) (West 2010)).



of unionization will certainly help the Players' cause, as those two states together have a combined fourteen Division I football programs.<sup>160</sup> Hypothetically speaking, if those two states, along with the NLRB who has jurisdiction over private universities, were to approve student-athletes as employees, there would be a total of twenty-eight schools under the jurisdiction of that decision.<sup>161</sup> This may seem like a good amount, but in comparison to the total of one hundred and twenty-eight Division I football schools, one hundred schools would be without jurisdiction.<sup>162</sup> This large number of schools outside of such jurisdiction would likely still keep this hypothetical decision from happening in the first place. If a mass movement of the decision to unionize collegiate athletes were to take place, however, other states would have to sign on.

In his article, Willborn discusses the fact that thirty-four states have not issued a decision or statute showing an opinion with regard to this issue.<sup>163</sup> This vast number of states that are essentially undecided shows some promise for a possible collegiate athlete unionization movement. In fact, Nicholas Fram and T. Ward Frampton noted in their article about student-athlete unionization that twelve states, in addition to Florida and California, have issued rulings that “support the contention that student-athletes would also qualify as statutory ‘employees.’”<sup>164</sup>

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<sup>160</sup> California D1 Football Programs: California, Fresno State, UCLA, USC, San Diego State, San Jose State, Stanford. Florida D1 Football Programs: Central Florida, Florida, Florida Atlantic, Florida International, Florida State, Miami, South Florida. See List of NCAA Division I FBS football programs, [https://en.wikipedia.org/wiki/List\\_of\\_NCAA\\_Division\\_I\\_FBS\\_football\\_programs](https://en.wikipedia.org/wiki/List_of_NCAA_Division_I_FBS_football_programs) (last visited Apr. 27, 2017).

<sup>161</sup>Private Universities with a D1 Football Program: Baylor, Boston College, Brigham Young, Duke, Miami, Northwestern, Notre Dame, Rice, SMU, Stanford, Syracuse, TCU, Tulane, Tulsa, USC, Vanderbilt, Wake Forest. *Id.*, See also Kevin Trahan, Matt Brown, and Libby Nelson, *College football unionization rankings: Which private schools are next?*, SB Nation, <http://www.sbnation.com/college-football/2014/7/9/5880399/college-football-unions-teams-private-schools> (last visited Mar. 4, 2017).

<sup>162</sup> See List of NCAA Division I FBS football programs, [https://en.wikipedia.org/wiki/List\\_of\\_NCAA\\_Division\\_I\\_FBS\\_football\\_programs](https://en.wikipedia.org/wiki/List_of_NCAA_Division_I_FBS_football_programs) (last visited Apr. 27, 2017).

<sup>163</sup> Steven L. Willborn, *College Athletes as Employees: An Overflowing Quiver*, 69 U. Miami L. Rev. at 94. (citing Nicholas Fram & T. Ward Frampton, *A Union of Amateurs: A Legal Blueprint to Reshape Big-Time College Athletics*, 60 Buff. L. Rev. 1003, 1067 (2012)).

<sup>164</sup> Kansas, Illinois, New Jersey, New York, Rhode Island, Oregon, Massachusetts, Iowa, Pennsylvania, Montana. Fram and Frampton discuss the various balancing tests and methods used by these states and that all tests can be reciprocated and passed by collegiate athletes. Nicholas Fram & T. Ward Frampton, *A Union of Amateurs: A Legal Blueprint to Reshape Big-Time College Athletics*, 60 Buff. L. Rev. at 1055-1068.

Additionally, Fram and Frampton also discuss that only thirteen states specifically do not extend collective bargaining rights to any public employee.<sup>165</sup> Because of this specific restriction, it is extremely unlikely that student-athletes in those states will be afforded the ability to unionize without a statutory change. Despite this, because a number of the other thirty-seven states support employee-determining tests that collegiate athletes can pass, a majority of states supporting student-athlete-employees is definitely possible in the future.

However, despite this positive outlook, almost all of these thirty-seven states still have not explicitly ruled on the subject.<sup>166</sup> Although the door is open for such a ruling to occur, and that such a ruling would likely be favorable to student-athletes in those states, until an actual ruling happens, this analysis is merely speculation. Alone, a tendency to rule a certain way will not be sufficient for the NLRB to issue jurisdiction or allow for student-athletes to be protected at the state level. What these above mentioned states do in response to this issue receiving national attention should be monitored closely, as a few states ruling that student-athletes are employees may be the push needed to get the wheels turning in order to overcome the dubious inconsistency problem.

So, moving forward, what is likely to occur? From a realistic standpoint, it is very unlikely that student-athletes will be fully considered employees. Although they can satisfy the common-law economic employer-employee relationship articulated in *Columbia*, the Players, along with other student-athletes nationwide, will be unlikely to achieve employee status because of the lack of support this movement will receive.

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<sup>165</sup> Alabama, Arizona, Arkansas, Colorado, Louisiana, Mississippi, New Mexico, North Carolina, South Carolina, Texas, Utah, Virginia, and to a limited extent, Wisconsin. *Id.* at 1068.

<sup>166</sup> *Id.* at 1067-68.

Based on its ruling to reserve the ability to re-try and possibly reconsider its decision, the NLRB seems to be intrigued by this movement, but is paralyzed due to its short reach.<sup>167</sup> Therefore, for anything to really be changed, the classification of a student-athlete-employee must be commenced by either the NCAA or the respective states. It is very unlikely that the NCAA endorses such classification, as they would stand to lose much power if such a ruling were to occur. If collegiate athletes were considered employees and could collectively bargain, they could request higher compensation, better safety accommodations, better living accommodations, and much more.<sup>168</sup> In response, the NCAA would have to hear and probably accommodate such requests, as the athletes would have much stronger footing and would even have the ability to go on strike, therefore harming the NCAA monetarily. Because such a ruling would only weaken the NCAA's power and strengthen the power of the athletes, it is almost certain that the NCAA would not support such a movement. For the same reasons as the NCAA, each individual school would likely oppose such movement as well.

This leaves the states. Hypothetically, if numerous states ruled student-athletes as employees to the point that a majority of Division I football programs consisted of so-considered employees, the NLRB could then have a valid basis for re-assessing its decision in *Northwestern*. If that were to occur, the Board would likely lean on its reasoning in *Columbia* and therefore would almost certainly analogize collegiate athletes to TA's.

*Northwestern* and *Columbia* have created a situation that can be fittingly described by a routine football play. Consider a typical game of football, eleven men on offense versus eleven men on defense. Collegiate athletes nationwide are represented by the running back in this situation, with the end zone appropriately representing the ruling that classifies student-athletes

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<sup>167</sup> *Northwestern University*, 362 NLRB No. 167 at 6.

<sup>168</sup> See, e.g. *Post-Hearing Brief of Petitioner College Athletes Players Association*, 2014 WL 1922054 at 2.

as employees. The play is a typical hand-off to the running back around mid-field, since it is the responsibility of such athletes to prove that they are employees. Scoring a touchdown on a running play from midfield is unlikely, but not impossible, which reflects the difficulty the collegiate athletes face in attempting to unionize. In this situation, the *Northwestern* NLRB decision to decline jurisdiction is the run-stopping personnel on defense—the defensive line and linebackers. They present the best shot at stopping the running back, and will likely do so before the running back reaches the end zone. However, the running back can be aided by the offensive line—the respective states. If the states pass legislation or rule through the court system that student athletes are employees, they might hypothetically create the blocking needed for the running back to get through the run stopping defenders and therefore grant the NLRB the opportunity to issue jurisdiction. If this were to occur, all the running back would have to do is get past the defensive secondary to reach the end zone.

In this hypothetical scenario, the secondary is represented by *Columbia*. Even though the NLRB may issue jurisdiction, the Players must still prove that they are employees in accordance with the common law standard laid out in *Columbia*. However, if the case gets to that point, the Players will likely succeed in so proving. Therefore, because *Columbia* will offer little-to-no resistance in the Players' employment efforts, if the Players are able to achieve jurisdiction, they will likely be considered employees, much like a running back will likely score if bursting ahead into the defensive secondary with a full head of steam.

The X-factor in this whole situation is the individual states. Much like how a running back will likely not score a touchdown without good blocking, jurisdiction will likely never be asserted over this matter without concrete approval by the states first.

#### D. Future Uncertainty

It is hard to tell what exactly the future holds for collegiate athletes attempting to unionize. However, because of the jurisdiction-based stalemate created by *Northwestern*, the next action likely to occur will be from the states themselves. If that were to take place and NLRB jurisdiction was eventually asserted, *Columbia* will certainly be a factor, likely aiding the student-athletes in achieving employee status.

However, collegiate athletes being considered employees could have at least one serious negative implication. As of now, scholarships are not considered gross income and are tax-free.<sup>169</sup> But if student athletes are considered employees instead of students, this large amount of money given to them may become susceptible to a large tax burden.<sup>170</sup> In his comment, Patrick Johnston discusses this possibility, stating that if the Northwestern Players claim that they are first providing athletic services rather than primarily being students, the IRS could very well determine that the scholarships given to the athletes are not aid for school but for these services performed, and are therefore taxable income.<sup>171</sup> If this determination were to occur, a player receiving a typical scholarship would have to pay over \$15,000 per year in state and federal taxes.<sup>172</sup>

This additional financial burden is not the only issue this tax situation creates, either. Johnston discusses how this issue may also cause a competitive imbalance based on state income taxes.<sup>173</sup> Since all states are free to choose the amount of income tax they charge, players being taxed on their scholarships would be more likely to attend universities in states with more

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<sup>169</sup> Rev. Rul. 77-263, 1977-2 C.B. 47 (athletic scholarships are primarily for academic aid and are therefore excludable from gross income under Section 117 of the Code).

<sup>170</sup> Patrick C. Johnston, *Northwestern Football and College Athletes: Be Careful What You Wish For*, 49 J. Marshall L. Rev. 655, 665 (2015).

<sup>171</sup> *Id.* at 668.

<sup>172</sup> *Id.* at 671 (assuming the average scholarship for a Northwestern football player to be \$61,000 per year, attributing to a \$7,685 federal income tax, a FICA tax of \$4,666.50, and a \$3,050 state income tax).

<sup>173</sup> *Id.* at 672.

favorable or no income taxes, thereby consolidating talent into states like Texas and Florida, to the detriment of states with high income taxes, like New York and Ohio.<sup>174</sup> This imbalance could also have a negative impact on revenue streams for schools in these high income tax states, thereby causing damage to not only the competitive aspect of Division I football but also to individual schools as well.<sup>175</sup>

This negative effect of determining collegiate athletes as employees can easily be overlooked and should definitely be considered by any team of athletes attempting to be so considered, including the football team at Northwestern. If they learned of this possible repercussion, they may in fact reconsider pushing to get NLRB jurisdiction and may be happy accepting their scholarship tax-free as it currently is. Student-athletes around the country should consider this and other consequences before attempting to achieve employee status and in fact should “be careful what they wish for.”<sup>176</sup>

## VI. Conclusion

This article’s purpose was to inform the reader of the challenge brought by the Northwestern football team and the NLRB decisions relating to it; to describe the *Columbia* decision; and to relate said decision to the Northwestern challenge and how it can effect that cause moving forward. Unfortunately for the proponents of student-athletes becoming employees, *Columbia* does not assist in overcoming the jurisdiction problem noted by the Federal NLRB. However, if this problem can be circumvented, *Columbia* provides much assistance to these proponents, as that decision re-adopted the common law employer-employee relationship as the standard in determining who is an employee. Under this standard, collegiate

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<sup>174</sup> *Id.*, See also Tax Dollars State by State, CNN Money, [http://money.cnn.com/pf/features/lists/total\\_taxes/income.html](http://money.cnn.com/pf/features/lists/total_taxes/income.html) (last visited Mar. 4, 2017).

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 678.

athletes can surely pass as employees, just as the teaching and research assistants did in *Columbia*.

However, this article discussed an easily overlooked but important consequence of student-athletes achieving employee status—the fact that their scholarships will likely no longer be tax-free. This consequence, along with any others, should be seriously evaluated before any more challenges are made. Overall, *Columbia* works to help the proponents of collegiate athlete-employees, but does not provide a solution for the overarching jurisdictional issue that the NLRB noted. What will occur in the future, if anything significant, is difficult to predict, but any next step in the progress of this cause will likely come from individual states.