LETTING GO: NCAA REFORM AS AN ALTERNATIVE TO THE UNIONIZATION OF COLLEGE ATHLETES

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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.[1] 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.[2] The court enjoined the NCAA from enforcing any rules that prohibit its member institutions from offering a student-athlete a portion of revenues generated from the use of their likeness.[3] The Ninth Circuit Court of Appeals recently upheld the ruling of the District Court for the Northern District of California that the NCAA regulations violate antitrust laws.[4]

In a similar lawsuit, the NCAA recently reached a twenty-million-dollar settlement with former college athletes who sued over the use

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[1] *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, 7 F. Supp. 3d 955 (N.D. Cal. 2014); Consolidated Amended Complaint, In re NCAA Athletic Grant-In-Aid Cap Antitrust Litig., No. 4:14-md-2541-CW (N.D. Cal. July 11, 2014), ECF No. 60.

[2] *O'Bannon*, 7 F. Supp. 3d at 955, 1007–08.

[3] *Id.* at 1008 (allowing NCAA to cap the amount of dollars held in trust, but that amount can be no less than $5000).

[4] O'Bannon v. NCAA, No. 14-16601, 2015 WL 5712106, at *26 (9th Cir. Sept. 30, 2015). The Ninth Circuit, however, vacated the district court ruling in part. *Id.* The District Court for the Northern District of California ruled that schools could pay up to $5000 in deferred compensation to student-athletes. The Ninth Circuit disagreed and limited the amount of compensation that schools can provide to student-athletes to the full cost of attendance. *Id.*

of their likeness in video games and sought monetary rather than injunctive relief.[5] In yet another class action lawsuit brought by former student-athletes, it is alleged that the NCAA unfairly capped the value of athletic scholarships.[6] 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.[7] Members of the Northwestern University Football Team recently petitioned the National Labor Relations Board (NLRB or "the Board") for recognition as employees of Northwestern University ("Northwestern" or the "University") under a labor law theory as a potential solution to their grievances.[8] The student-athletes claimed that they were "employees" as defined by the National Labor Relations Act (NLRA or "the Act") and, thus, entitled to form a union and collectively bargain.[9]

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 rule-making 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 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 single entity. These additional benefits could come 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

[5] 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/ncaafootball/ncaa-settles-sam-keller-video-game-suit-for-20-million.html.

[6] Jerry Hinnen, *Sharrif 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.

[7] *See* Northwestern Univ., 2014 NLRB LEXIS 221 (N.L.R.B. Mar. 26, 2014).

[8] *Id.* at *1–2.

[9] *Id.* at *2.

scholarship shortfalls—the differences between the cost of a scholarship and the actual cost of attending a university.[10] These structural changes will lead to a drastic improvement in the welfare of the Division I[11] scholarship student-athlete while preserving the NCAA's amateurism model.[12]

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 introduce the legal framework for a possible solution: the unionization of these student-athletes. Part III will analyze the unionization effort of the Northwestern University football team,[13] the most recent and prominent case of student-athletes attempting to unionize. While the unionization effort in *Northwestern* ultimately did not result in a designation of employee status,[14] it is important to examine the decision because of the potential implications for similar efforts in the future. Part IV will consider various ways in which individual states and universities could avoid student-athletes being designated as employees, both under the NLRA, 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 will conclude by stating that this proposal of internal NCAA reform has already begun,[15] and is the most feasible and preferable solution to the problems that currently plague NCAA Division I athletics. This proposal will create an "arms race" that will not work to the detriment of the student-athlete as has been suggested by previous authors,[16] but rather

[10] *See, e.g.*, 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, 367–70 (2003) (discussing the goals of the Collegiate Athletes Coalition (CAC)); Rohith A Parasuraman, *Unionizing NCAA Division I Athletics: A Viable Solution?*, 57 DUKE L.J. 727, 728 (2007) (discussing the goals of the National College Players Association ("NCPA")).

[11] *NCAA Division I*, NCAA, http://www.ncaa.org/about?division=d1 (last visited Feb. 12, 2015) ("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.").

[12] *See infra* Part V.

[13] Northwestern Univ., 2014 NLRB LEXIS 221 (N.L.R.B. Mar. 26, 2014).

[14] Northwestern Univ., 362 N.L.R.B. 167, at 1 (2015).

[15] Sharon Terlep, *NCAA Votes to Give Big Conferences More Autonomy*, WALL ST. J. (Aug. 7, 2014, 7:44 PM), http://online.wsj.com/articles/ncaa-votes-to-give-big-conferences-more-autonomy-1407433146.

[16] *See* Nygren, *supra* note 10; Matthew Mitten & Stephen F. Ross, *A Regulatory Solu-*

would greatly improve the welfare of the student-athlete.

II. BACKGROUND AND LEGAL FRAMEWORK—A STUDENT-ATHLETE UNIONIZATION EFFORT

While internal NCAA reform would be the optimal solution to the problems that both the NCAA and its student-athletes face, 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. An existing legal framework laid out by the NLRB addresses this issue.[17] In cases such as the unionization effort by the scholarship football players of Northwestern University, the NLRB governs because it can choose to exercise jurisdiction over private entities.[18] For example, in the past, student-workers at private universities have petitioned the NLRB for the right to unionize.[19] The students claimed that they were "employees" as defined by the NLRA and, thus, entitled to the right to form a union and collectively bargain.[20] 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.

Section seven of the NLRA states that "[e]mployees 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 concerted activities for the purpose of collective bargaining."[21] The main problem that the NLRB faces when interpreting this section, however, is who constitutes an "employee." The NLRA's definition of the term is rather vague,[22] so the NLRB has em-

tion to Better Promote the Educational Values and Economic Sustainability of Intercollegiate Athletics, 92 OR. L. REV. 837 (2014).

[17] *See* Brown Univ., 342 N.LR.B. 483, 483 (2004).

[18] 29 U.S.C. § 152(2) (2006).

[19] *See* Boston Med. Ctr., 330 N.L.R.B. 152 (1999); New York Univ., 332 N.L.R.B. 1205 (2000), *overruled by* Brown Univ., 342 N.LR.B. 483 (2004).

[20] *See Boston Med. Ctr.*, 330 N.L.R.B. at 152; *New York Univ.*, 332 N.L.R.B. at 1205.

[21] 29 U.S.C. § 157.

[22] 29 U.S.C. §152(3) ("The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly 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 any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or an individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other

ployed different tests to determine the precise definition of an "employee."[23]

A. New York University Test

The NLRB previously employed the "right of control" test described in the *New York University* case.[24] In this case, a group of doctoral students at New York University (NYU) petitioned the board for recognition of employee status for work they performed as graduate assistants in connection with NYU's doctoral program.[25] The Board was tasked with deciding whether these graduate assistants were employees within the meaning of the Act.[26]

In analyzing this issue, the Board determined that the definition of employee should be defined broadly to include "any employee"[27] and to "reflect the common law agency doctrine of the conventional master-servant relationship."[28] According to the Board, "[t]his relationship exists when a servant performs services for another, under the other's control or right of control, and in return for payment."[29] 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."[30] Additionally, the Board rejected the idea that the graduate assistants should be deprived of the statutory protections afforded to employees simply because they are also students.[31] Ultimately, the Board found that the graduate assistants were employees of New York University, and, therefore, allowed to engage in collective bargaining.[32]

person who is not an employer as herein defined.").

[23] *See Boston Med. Ctr.*, 330 N.L.R.B. at 152; *New York Univ.*, 332 N.L.R.B. at 1205; *Brown Univ.*, 342 N.LR.B. at 483.

[24] *New York Univ.*, 332 N.L.R.B. at 1205.

[25] *Id.*

[26] *Id.*

[27] *Id.* at 1205.

[28] *New York Univ.*, 332 N.L.R.B. at 1205 (citing NLRB v. Town & Country, 516 U.S. 85, 93–95 (1995)).

[29] *Id.* at 1206.

[30] *Id.*

[31] *Id.* at 1208.

[32] *Id.* at 1209.

B. Brown University Test

After only a few years, however, the Board overruled the test in *New York University* when it announced its most recent test in the *Brown University* decision.[33] Similar to *New York University*, in *Brown*, a group of graduate students, who performed work as teaching assistants and research assistants, petitioned the Board to be recognized as employees.[34] In *Brown*, the Board determined that *New York University* was decided incorrectly and explicitly overruled that decision.[35] Thus, the Board returned to its previous twenty-five-year precedent and utilized what could be described as the "primary purpose" or "primary function" test.[36]

The Board looked at the nature of the relationship between Brown's graduate assistants 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 or a primarily economic purpose.[37] If the relationship was primarily educational, the Board reasoned that the graduate assistants would not be employees, and if the relationship was primarily economic in nature, the graduate assistants would be employees under the Act.[38] In making this determination, the Board considered multiple factors including: (1) that 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"; and (3) the money that the graduate assistants received was not "consideration for work," but rather financial aid.[39] The Board determined that the relationship between the graduate assistants and Brown University was primarily educational and that their service as graduate assistants was "part and parcel"[40] of the core elements of their degree; thus, they were not employees.[41]

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[33] Brown Univ., 342 N.LR.B. 483 (2004).
[34] *See id.* at 483.
[35] *Id.*
[36] *Id.*
[37] *Id.* at 489.
[38] *Id.*
[39] *Brown Univ.*, 342 N.LR.B. at 488.
[40] *Id.* at 492.
[41] *Id.*

C. *Governing Law at Public Universities*

Because the NLRB only maintains jurisdiction over private entities and not public universities,[42] the governing law for student-athletes seeking employee status at public universities would be the relevant labor law statute passed within an institution's state.[43] 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 twelve states, public employees do not have any type of collective bargaining rights,[44] while other states grant only a select group of public employees the right to unionize.[45] 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,[46] while it is hard to predict such an outcome in many other states.[47] In sum, the result of an effort by a group of student-athletes to be recognized as employees at a public university would largely depend on the state where the institution is located.

III. NORTHWESTERN UNIVERSITY FOOTBALL TEAM UNIONIZATION EFFORT

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

In *Northwestern University,* 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.[48] The Regional Director of Region Thirteen of the NLRB, Peter Sung Ohr,

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[42] 29 U.S.C. § 152(2) (2006).

[43] Northwestern Univ., 362 N.L.R.B. 167 (2015).

[44] Nicholas Fram & T. Ward Frampton, *A Union of Amateurs: A Legal Blueprint to Reshape Big-Time College Athletics*, 60 BUFFALO L. REV. 1003, 1068 (2012) (noting that Alabama, Arizona, Arkansas, Colorado, Louisiana, Mississippi, New Mexico, North Carolina, South Carolina, Texas, Virginia, and Utah do not extend any collective bargaining rights to public employees, while Wisconsin "sharply limits the scope of collective bargaining").

[45] *Id.*

[46] *See* Fram & Frampton, *supra* note 44 at 1045–59. Prior precedent has recognized student tutors and graduate student instructors as employees in each of these states.

[47] *See* Fram & Frampton, *supra* note 44.

[48] Northwestern Univ., 2014 NLRB LEXIS 221, at *2 (N.L.R.B. Mar. 26, 2014).

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.[49] Upon review, the NLRB recently declined to exercise jurisdiction over the scholarship football players in *Northwestern*,[50] effectively denying these scholarship football players the right to form a union. The NLRB decided that the structure of Division I football is such that "asserting jurisdiction would not promote stability in labor relations."[51] While the NLRB declined to exercise jurisdiction and answer the question of whether the scholarship football players are employees within the meaning of the NLRA, the Regional Director's analysis remains important because similarly situated student-athletes might bring a similar petition before the NLRB in the future. As a result, it is important to be aware of both the factual basis and legal analysis on which the Regional Director based his conclusion.

1. Factual Background

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[52] with nineteen Division I varsity sports programs.[53] The varsity football team at Northwestern has roughly 112 members, 85 of whom receive grant-in-aid scholarships.[54] Since 2006, Patrick Fitzgerald, Jr. has been the University's head football coach.[55]

During the recruitment process, Northwestern awards potential football players four-year scholarships compared to the one-year renewable scholarships required by the NCAA.[56] Officials can revoke these scholarships for a number of reasons;[57] Northwestern, however, maintains a policy "to not cancel a player's scholarship due to injury or

[49] *Id.* at *23.

[50] Northwestern Univ., 362 N.L.R.B. 167, at 1 (2015).

[51] *Id.*

[52] Northwestern Univ., 2014 NLRB LEXIS 221, at *2.

[53] *Id.* at *3.

[54] *Id.* at *5.

[55] *Id.* at *4.

[56] *Id.* at *7.

[57] *Id.* at *4 ("[T]he scholarship can be reduced or canceled 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 time for any reason; (6) accepts compensation for participating in an athletic contest in his sport; or (7) agrees to be represented by an agent.").

position on the team's depth chart."[58] In the past five years, only two players have had their scholarships cancelled.[59]

Football players at Northwestern are subject to certain special team and athletic department rules.[60] The time commitment of the football players to the sport includes both voluntary and mandatory activities, with some players spending forty to fifty hours per week on football-related activities during the season.[61]

Finally, there were also factual disputes that related to the scholarship football players' ability to schedule classes. Quarterback Kain Colter testified that his "coaches and advisors discouraged him from taking [a required chemistry class] because it conflicted with morning football practices."[62] 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,"[63] 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."[64]

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."[65] 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."[66] 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.[67] The

[58] Northwestern Univ., 2014 NLRB LEXIS 221, at *8 n.8.

[59] *Id.* at *44.

[60] *Id.* at *10–13.

[61] *Id.* at *13–26.

[62] *Id.* at *32.

[63] *Id.* at *33.

[64] Northwestern Univ., 2014 NLRB LEXIS 221, at *33.

[65] *Id.* at *40; Brown Univ., 342 NLRB 483, 490 n.27 (2004) ("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.") (emphasis omitted).

[66] Northwestern Univ., 2014 NLRB LEXIS 221, at *53–54.

[67] *Id.*

Regional Director noted 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."[68]

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.[69]

In sum, the Regional Director found that the scholarship football players at Northwestern University were employees within the meaning of the NLRA and were granted the right to vote on representation for collective bargaining.[70] The results of the vote were kept secret, pending the result of the appeal by Northwestern to the NLRB.[71] On appeal, the NLRB recently declined to exercise jurisdiction over the case, which effectively denied the scholarship football players the right to form a union.[72] In doing so, it chose not to decide whether or not the scholarship football players are employees within the meaning of the Act.[73] The results of the vote were not released in connection with the NLRB decision.

B. Analysis—Northwestern University Scholarship Football Players are Not Employees

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

The Regional Director should not have disregarded prior Board precedent and should have applied the *Brown University* test.[74] The test

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[68] *Id.*

[69] *Id.* at *63–65.

[70] *Id.* at * 67–68.

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

[72] Northwestern Univ., 362 N.L.R.B. 167, at 1 (2015).

[73] *Id.*

[74] *See* Brief of Amicus Curiae National Collegiate Athletic Association in Support of Northwestern University at 2–3, Northwestern Univ., 2014 NLRB LEXIS 221 (N.L.R.B. Mar. 26, 2014) (13-RC-121359); Northwestern University's Reply Brief to the Board on Review of Regional Director's Decision and Direction of Election at 10, Northwestern Univ., 2014 NLRB LEXIS 221 (N.L.R.B. Mar. 26, 2014) (13-RC-121359); Northwestern University's Brief to the Board on Review of Regional Director's Decision and Direction of Election, Northwestern Univ., 2014 NLRB LEXIS 221 (N.L.R.B.

from *Brown University* examines the nature of the relationship between an employer and an employee to determine if the employee has a primarily educational or primarily economic purpose.[75] In the instant case, Northwestern University clearly maintains an academic relationship with all of its students, including its scholarship football players. One can suggest that the players' football duties at Northwestern are unrelated to their academic studies, which precludes a finding that *Brown University* should apply.[76] 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, the Regional Director should have reaffirmed the NLRB's longstanding recognition that "labor law principles cannot be mechanically applied in an educational setting,"[77] and the test from *Brown University* should have been applied to determine if the scholarship football players at Northwestern were 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.[78] In addition, the United States Supreme Court has acknowledged the distinction between the respective settings when it noted that "the Board has recognized that principles developed for use in the industrial setting cannot be 'imposed blindly on the academic world.'"[79] 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."[80] 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 sports while

Mar. 26, 2014) (13-RC-121359); Brief of *Amici Curiae* University of Notre Dame et al. in Support of Northwestern University, Northwestern Univ., 2014 NLRB LEXIS 221 (N.L.R.B. Mar. 26, 2014) (13-RC-121359).

[75] *See supra* Part II.B.

[76] Steven L. Willborn, *College Athletes as Employees: An Overflowing Quiver*, 69 U. MIAMI L. REV. 65, 78 (2014).

[77] Northwestern University's Reply Brief, *supra* note 74, at 1.

[78] NCAA's Amicus Brief, *supra* note 74 (citing Adelphi Univ., 195 NLRB 639 (1972); Leland Stanford Junior Univ., 214 NLRB 621 (1974); Brown Univ., 34 NLRB 483 (2004)).

[79] NLRB v. Yeshiva Univ., 444 U.S. 672, 680–81 (1980) (citing Syracuse Univ., 204 NLRB 641, 643 (1973)).

[80] Labor Law Professors' Brief Amici Curiae at 12, 19–20, Northwestern Univ., 2014 NLRB LEXIS 221 (N.L.R.B. Mar. 26, 2014) (13-RC-121359).

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

Moreover, a university maintains an inherent level of control over *all* of its students—not just scholarship football players—that is vital to the academic mission of the university.[81] 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 have governed the Regional Director's analysis.[82]

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.[83] As previously discussed, the test from *Brown University* examines the nature of the relationship between an employer and an employee to determine if the employee had a primarily economic or primarily academic purpose.[84] The Regional Director stated that the Board in *Brown* considered four factors in identifying the graduate assistants as non-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."[85] Here, the Regional Director inappropriately analyzed multiple factors of this test.[86] As a result, the scholarship members of the Northwestern University Football Team should not be entitled to employee status under the *Brown University* test.[87]

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.[88] The Regional Director determined that scholarship members of Northwestern's football team

[81] Brief of Amicus Curiae National Collegiate Athletic Association, *supra* 74, at 11.

[82] *Id.* at 10–11.

[83] *Id.* at 1–3.

[84] *See supra* Part II.B.

[85] Northwestern Univ., 2014 NLRB LEXIS 221, at *53 (N.L.R.B. Mar. 26, 2014).

[86] Brief of Amicus Curiae National Collegiate Athletic Association, *supra* note 74, at 11–12; Northwestern University's Brief, *supra* note 74, at 21–23; Northwestern University's Reply Brief, *supra* note 74 at 1; Brief of *Amici Curiae* University of Notre Dame, *supra* note 74 at 25–30.

[87] Northwestern University's Brief, *supra* note 74, at 21.

[88] Northwestern Univ., 2014 NLRB LEXIS 221, at *54.

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.[89]

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.[90] 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."[91] 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 their coaches."[92]

This analysis, however, is a flawed evaluation 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 or strength training"[93] or voluntary "7-on-7" drills.[94] The "voluntary" football-related activities performed "without the direct orders of their coaches"[95] in this analysis, however, were *already included* in the Regional Director's estimate that the scholarship football players devote forty to fifty hours per week to football-related activities during the regular season.[96] 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 on appeal, at the very least, the Board must conduct further investigation

[89] *Id.* at *54–55.

[90] *Id.* at *15 n.11, 17 (discussing the players' voluntary "weight conditioning or strength training" and "7-on-7" drills, which the Regional Director includes in his estimate that the scholarship football players are required to commit around forty to fifty hours per week to football-related activities).

[91] *Id.* at *55.

[92] *Id.* (emphasis added).

[93] *Id.* at *15 n.11.

[94] Northwestern Univ., 2014 NLRB LEXIS 221, at *17.

[95] *Id.* at *55.

[96] *Id.* at *15–21 (including the voluntary activities of "weight conditioning or strength training" and voluntary "7-on-7" drills to conclude that during the regular season, many players regularly devote forty to fifty hours per week to football-related activities).

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.[97] 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,[98] the athletics program as a whole, including the football team, is certainly "part and parcel" of the University's educational mission.[99] "[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."[100] Education in this regard should be viewed broadly. It should be noted that participation in Division I scholarship athletics is different from merely participating in extracurricular activities because this extracurricular participation is linked to the student-athlete's financial aid. 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 employees' responsibilities and their relationship to the academic faculty.[101] The Regional Director found that football coaches, and not members of the academic faculty, supervised the players' football-related duties.[102] The Regional Director correctly concluded that this factor most likely favors a finding of employee status for the student-athletes.[103]

The fourth, and final, factor evaluates the type of compensation received to determine whether scholarships constitute financial aid or "compensation for services performed."[104] In evaluating this factor, the

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[97] *Id.* at *55–57.

[98] *Id.*

[99] Northwestern University's Brief, *supra* note 74, at 19.

[100] Northwestern University's Reply Brief, *supra* note 74, at 5.

[101] Northwestern Univ., 2014 NLRB LEXIS 221, at *57–58.

[102] *Id.*

[103] *Id.*

[104] *Id.* at *41–44.

Regional Director found that the scholarships received are not financial aid, but rather compensation for services performed.[105] 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 football-related activities or one's position on the team's depth chart.[106] Rather, every scholarship player receives the same amount which is determined by the cost of tuition, food, books, and other similar expenses.[107]

It is true that universities offer football players this financial aid because they play football, and if they did not play football, their financial aid could be revoked.[108] 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.[109] 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.[110] As a result of this analysis, the scholarship football players at Northwestern University should not be considered employees under the *Brown University* test.

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

Even if the Regional Director used the common law test in determining the employment status of the petitioners in this case, the Northwestern University football players should not be employees. In his analysis, the Regional Director utilized the following common law test: "Under 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."[111] The University's scholarship football players do not meet this common law

[105] *Id.*

[106] *Id.* at *8 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.").

[107] Northwestern Univ., 2014 NLRB LEXIS 221, at *5.

[108] Willborn, *supra* note 76, at 77.

[109] *See infra* Part III.B.3.

[110] Northwestern University's Reply Brief, *supra* note 74, at 10.

[111] Northwestern Univ., 2014 NLRB LEXIS 221, at *40 (citing Brown Univ., 342 N.L.R.B. 483, at 490 n.27 (2004)).

test's requirements and, therefore, are not employees within the meaning of the Act.

The most glaring issue with the Regional Director's finding that the petitioners qualify for employee status under this common law test is that no "contract for hire" existed in this case.[112] The Regional Director erroneously claims that the tender offer presented to prospective student-athletes constitutes a contract for hire.[113] On the contrary, the tender offer merely is an offer of financial aid,[114] which is no different than a financial aid offer made to any other student at Northwestern University, whether the offer is merit- or need-based.[115] 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.[116] Further supporting this conclusion is the fact that the tender offer "makes no mention of [the terms] 'employment' or 'labor' or 'services' or 'hire.'"[117] 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."[118]

On the other hand, some have noted that a contract for hire is not always necessarily included in the common law definition of an employee.[119] 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.'"[120] Based on this definition, any argument over the need for a contract for hire becomes moot. This, however, was not the common law definition that the Regional Director employed in his analysis.

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."[121]

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[112] Northwestern University's Reply Brief, *supra* note 74, at 10–12; Brief of *Amici Curiae* University of Notre Dame, *supra* note 74, at 10–15.

[113] Northwestern University's Reply Brief, *supra* note 74, at 10; Northwestern Univ., 2014 NLRB LEXIS 221, at *40.

[114] Northwestern University's Reply Brief, *supra* note 74, at 10.

[115] *Id.* at 11.

[116] *Id.* at 12.

[117] Northwestern University's Brief, *supra* note 74, at 7.

[118] *Id.* at 6.

[119] *See* Willborn, *supra* note 76, at 70–71.

[120] *Id.* (citing New York Univ., 332 N.L.R.B. 1205, 1205–06 (2000)).

[121] Northwestern University's Reply Brief, *supra* note 74, at 11–12; Northwestern Univ.'s Brief, *supra* note 74, at 34.

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 [e]mployer throughout the calendar year, but especially during the regular season and postseason."[122] 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.[123] 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."[124]

In sum, the scholarship members of the Northwestern University Football Team are not employees under the *Brown University* test or the common law definition utilized in the Regional Director's analysis. Therefore, the players should not be considered employees within the meaning of the Act, and the Board was correct not to affirm the decision of the Regional Director.

IV. METHODS TO AVOID "EMPLOYEE" STATUS FOR STUDENT-ATHLETES: NLRB AND STATE LABOR LAW

This Comment argues that the scholarship football players in *Northwestern* are not employees within the meaning of the NLRA. On appeal, the NLRB did not decide this issue; rather, it declined to exercise jurisdiction over the petitioners.[125] In effect, the NLRB did not agree or disagree with the Regional Director's decision in declining to exercise jurisdiction, but still denied the scholarship football players in *Northwestern* the right to unionize.[126] The NLRB's decision, however, only applies to the scholarship football players at Northwestern University, and not to similarly situated student-athletes at other schools,[127] due to the fact-specific and case-by-case nature of NLRB proceedings. Any other university, private or public, could take proactive measures to avoid employee status for its student-athletes. 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

[122] Northwestern Univ., 2014 NLRB LEXIS 221, at *41–42 (N.L.R.B. Mar. 26, 2014).

[123] Northwestern University's Brief, *supra* note 74, at 34.

[124] Northwestern University's Reply Brief, *supra* note 74, at 12.

[125] Northwestern Univ., 362 N.L.R.B. 167, at 1 (2015).

[126] *Id.*

[127] *Id.*

relation to the student-athletes over whom it exercises control.[128] These guidelines may be different for a private university over which the NLRB maintains jurisdiction and a public university subject to state labor laws. Nonetheless, if an entity closely examines the decision of the Regional Director in *Northwestern* and adjusts its conduct accordingly, its chance of being deemed an employer will likely decrease.

First, many of the actions that a private institution could undertake to avoid employer status would likely come in the form of diminished control over the lives of its student-athletes.[129] 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 student-athletes.[130] Also, the university could voluntarily reduce the amount of athletic responsibilities, such as practice time, that the athletes must attend. Although training camp lasts for only one month, the Regional Director stresses that student-athletes are obligated to spend fifty to sixty hours per week on football duties during this time.[131] 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,[132] but rather to the law of the state where the university is located.[133] Therefore, the legislature of that state will play a much larger role in determining if student-athletes are entitled to collective bargaining rights. If the legislature were persuaded to adopt legislation less favorable to public employees with 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.

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[128] *See* Northwestern Univ., 2014 NLRB LEXIS 221, at *10–38 (noting the factors that the Regional Director used in his decision: (1) the special rules to which players are subject; (2) the amount of time that the players are required to spend on "football-related activities"; (3) the Tender offer of Financial Aid that serves as an employment contract).

[129] *See id.* at *45–50 (noting that "players who receive scholarships are under strict and exacting control by their Employer throughout the entire year").

[130] *See id.* at *49 (referring to this level of control as a factor in the 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.").

[131] *Id.* at *54–55.

[132] 29 U.S.C. § 152(2) (2006).

[133] Northwestern Univ., 362 N.L.R.B. 167, 6 (2015).

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 such a solution were implemented, it would not be dispositive on the question of employee status, but likely would be highly persuasive in demonstrating the nature of the educational relationship as opposed to an employment relationship.

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 plague the NCAA and its member institutions.[134] 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.[135] An alternative proposal advocates for the appointment of an independent federal commission to oversee the NCAA rulemaking process.[136] The NCAA could be incentivized to accept the suggestions of the independent commission if offered a "carrot," such as exemption from antitrust liability.[137] Another proposal, rather than advocating change of the NCAA's current amateurism model or declaring student-athletes as employees, supports granting student-athletes a limited form of collective bargaining rights.[138] These rights would not include the right to strike or earn wages, and would use the "union substitution effect"[139] to put pressure on the NCAA to provide a voice and additional benefits to student-athletes.[140]

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[134] *See* Fram & Frampton, *supra* note 44; Mitten & Ross, *supra* note 16; 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).

[135] Fram & Frampton, *supra* note 44, at 1010, 1071–72.

[136] *See* Mitten & Ross, *supra* note 16, at 868–76.

[137] *Id.* at 877.

[138] *See generally* LeRoy, *supra* note 134.

[139] *Id.* at 1136 ("The union substitution effect shows that employers respond to credible threats of unionization by providing individuals more voice and better financial treatment.").

[140] *Id.* at 1089–91.

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 plague the NCAA.

A. The 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").[141] The Division I Board is comprised of various Division I members and is one of the committees established to direct the ongoing operations of Division I.[142] It could vote to delegate regulatory authority concerning student-athlete welfare and allowable benefits to the individual "Power Five" Conferences.[143] In this proposal, the NCAA would still retain regulatory authority for the on-field rules of competition. The individual "Power Five" Conferences would be allowed, however, to make rules and regulations for their member institutions concerning allowable additional benefits.

The NCAA could maintain 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,[144] the individual conferences could agree that they will take no steps to treat their member

[141] *See* NATIONAL COLLEGIATE ATHLETICS ASSOCIATION, DIVISION I MANUAL, CHANCELLORS AND PRESIDENTS art. 5 (2014–15 abr. ed. 2014), *available at* http://www.ncaapublications.com/productdownloads/14chancellors.pdf.

[142] *Division I Committees*, NAT'L COLLEGIATE ATHLETICS ASS'N, http://www.ncaa.org/governance/committees?division=d1 (last visited Feb. 12, 2015).

[143] *See generally* DIVISION I MANUAL, *supra* note 141; Brian 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 (explaining that the "Power Five" Conferences consist of sixty-four 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).

[144] *See College Football Playoff Overview,* COLLEGEFOOTBALLPLAYOFF, http://www.collegefootballplayoff.com/overview (last visited Sept. 24, 2015) (explaining that 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).

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 reducing the amount of control that they exercise over student-athletes,[145] to avoid its student-athletes garnering employee status. Outside of that limited restriction, the individual conference would possess the power to declare what types of benefits its member institutions could provide to student-athletes.

These benefits would most likely come in many different forms. Some possible forms include: (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 difference between the cost of a scholarship and the actual cost of attending a university).[146] If the individual conferences allow these benefits, they all 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")[147] because many of these Recruits possess rare, non-fungible abilities to perform on the football field and are, therefore, 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 force the conferences to establish a regulatory framework that is both appealing and beneficial to Recruits, who maintain strong bargaining positions in choosing schools 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

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[145] *See generally supra* Part IV.

[146] *See* Nygren, *supra* note 10, at 367–70; Parasuraman, *supra* note 10, at 728–29.

[147] 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 of money that each Top-25 Athletic Program spent on recruiting for men's sports in the 2011–2012 academic year, topped by the University of Alabama which spent $1,402,041).

an "arms race" or "race to the top" in order to be the most appealing destination for Recruits. 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

Internal NCAA reform is a superior alternative to a student-athlete unionization effort because it will avoid the difficult analysis that accompanies case-by-case determinations of employee status. Because, as previously discussed, the NLRB maintains jurisdiction over private entities,[148] its determinations would govern any student-athlete unionization efforts at private institutions.

There are currently seventeen private institutions that maintain Division I Football Bowl Subdivision programs.[149] Therefore, determinations of whether student-athletes at these schools qualify as employees 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."[150] 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 Division I private institution athletic team 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[151] 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

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[148] *See supra* Part IV.

[149] Northwestern Univ., 2014 NLRB LEXIS 221, at *4 n.2 (N.L.R.B. Mar. 26, 2014).

[150] Labor Law Professors' Brief Amici Curiae, *supra* note 80, at 19–20.

[151] Some factors to consider in this fact-specific analysis would be the level of control that the university exercises over the private life of the student-athlete, the type of financial aid or scholarship that the university offers, and the amount of student-athletes' time that the university requires. *See* Northwestern Univ., 2014 NLRB LEXIS 221, at *40–52.

thereof" from its reach,[152] 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 university was located in a state with robust protection for its public workers. At the same time, another student-athlete competing in the same sport, at the same level of competition, but at a different public university with less robust statutory protection or a private university, may not be entitled to similar benefits. This uncertainty was the major reason that the NLRB declined to exercise jurisdiction in *Northwestern*.[153] The Board cited the fact that, while it could exercise jurisdiction over Northwestern, it could not exercise jurisdiction over the "vast majority" of Division I Football Bowl Subdivision teams.[154] The Board decided that the structure of Division I Football Bowl Subdivision is such that "asserting jurisdiction would not promote stability in labor relations."[155]

Furthermore, internal NCAA reform will preserve the NCAA's amateurism model.[156] NCAA student-athletes are, by definition, amateur athletes and not professional athletes.[157] The unionization of student-athletes, however, would challenge the existing model, and potentially lead to a professionalization of intercollegiate athletics. This could harm the institution as a whole by altering the 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."[158] It is suggested that this "arms race" will harm the NCAA because "certain conferences would dominate intercollegiate athletics

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[152] 29 U.S.C. § 152(2) (2006).

[153] Northwestern Univ., 362 N.L.R.B. 167, 1 (2015).

[154] *Id.* at 5.

[155] *Id.* at 6.

[156] DIVISION I MANUAL, *supra* note 141, art. 2, § 9 ("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.").

[157] *Id.*

[158] *See* Nygren, *supra* note 10, at 394; Mitten & Ross, *supra* note 16, at 849.

because they were more willing to grant student-athletes extra benefits."[159] 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."[160]

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 benefit 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 achieves athletic success by offering the most appealing additional benefits, then the other conferences will likely follow. The existence of such an "arms race" in intercollegiate athletics would not harm the welfare of the student-athlete. Rather, this "arms race" would improve the welfare of the student-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."[161] The reasoning behind this argument lies in the idea that the member institutions of the NCAA will put self-interest above all else and the individual student-athlete will suffer.[162] 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

[159] Nygren, *supra* note 10, at 394.

[160] Marc Tracy, *NCAA Votes to Give Richest Conferences More Autonomy,* N.Y. TIMES (Aug. 7, 2014) http://www.nytimes.com/2014/08/08/sports/ncaafootball/ncaa-votes-to-give-greater-autonomy-to-richest-conferences.html (internal quotation marks omitted).

[161] *See* Mitten & Ross, *supra* note 16, at 857.

[162] *See id.*

rules. The organization of rules concerning allowable additional benefits at the conference level, rather than the individual school level, will drastically reduce the self-interest factor.

C. Reform Process is Already Underway

The type of reform process advocated in this Comment has already begun. The Division I Board recently voted to give the "Power Five" Conferences the power to make their own rules concerning the provision of additional benefits to student-athletes.[163] The changes would not destroy the current amateurism model of intercollegiate athletics and would not allow individual conferences to pay student-athletes for on-field performances.[164] Rather, the rules would be "limited to specific areas such as loosening recruiting curbs, offering more comprehensive health insurance and letting schools cover the gap of roughly $2,000 to $4,000 between what a scholarship typically pays and the actual cost of attending school."[165]

These rules are not yet in effect, and, if enough NCAA Division I member schools oppose the proposed rule changes, the Division I Board will reconsider them at the next meeting.[166] 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

The Northwestern University scholarship football players should not be considered employees. The NLRB declined to exercise its jurisdiction in *Northwestern*. Even if the NLRB had exercised its jurisdiction, the scholarship football players do not fit within the legal definition of employees and should not be entitled to collective bargaining rights.

Additionally, putting aside any NLRB decision 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

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[163] Terlep, *supra* note 15.

[164] *Id.*

[165] *Id.*

[166] *Id.*

rather than at the *individual university* level is the most appropriate and comprehensive way to solve this issue. This internal NCAA reform would include the delegation of rulemaking authority to individual conferences. If individual conferences control the rules and regulations concerning the distribution of non-monetary benefits to student-athletes, these conferences will compete with one another to provide the most appealing additional benefits to prospective student-athletes. This competition will drastically improve the welfare of the student-athlete. These non-monetary benefits will come in the form of more flexible transfer rules, stricter mandatory time limits on sports-related activities, a stronger devotion to health concerns—specifically concussion-related issues—and a more transparent grievance process. If meaningful internal NCAA reform, as suggested within this Comment, occurs, unionization efforts will be unnecessary to improve the welfare of the student-athlete, and the NCAA, its member institutions, and its student-athletes will all benefit.