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Student-Athletes are not “Employees” under the National Labor Relations Act: The Consequences of the Right to Unionize

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Part I: Introduction

The debate over allowing student-athletes to be considered “employees” under the National Labor Relations Act (“NLRA” or the “Act”) has reached its tipping point. *Northwestern University v. College Athletes Players’ Association (CAPA)* (“*Northwestern*”)¹ has brought national attention to the idea of collegiate student-athletes joining a union and engaging in collective bargaining with their respective colleges, in addition to other topics including image and likeness restrictions, pay-to-play, lifetime medical benefits, etc. Although the Northwestern University (“Northwestern”) scholarship football players were deemed to be “employees” by Regional Director Peter Sung Ohr (“Director Ohr”) of the National Labor Relations Board (“NLRB” or the “Board”), Region 13, Northwestern appealed the decision, which is now pending in front of the full NLRB in Washington D.C. Director Ohr’s decision has reignited the argument about whether student-athletes, especially in revenue-generating sports like men’s football and basketball, should be paid a salary and other benefits in addition to the scholarships they receive that cover tuition, housing, books, and food.

Director Ohr held that Northwestern failed to carry its burden to prove that it had properly denied scholarship football players employee status.² He inappropriately utilized the common law test, which asks whether the employees “perform services for another under a

¹ *Northwestern Univ.*, Case 13-RC-121359 *2 (Mar. 26, 2014).

² *Id.* at *13.

contract of hire, subject to the other's control or right of control, and in return for payment.”³ The common law test fails to address the unique nature of a student's educational relationship with a university. Therefore, Director Ohr mistakenly declined to use the four-factor test promulgated in *Brown University*, 342 N.L.R.B. 483 (2004) (“*Brown*”) that was applied to graduate assistants,⁴ which are the closest group of potential employees to the Northwestern scholarship football players. Director Ohr reasoned that *Brown* does not control because, in that case, the overall relationship between the university and the graduate assistants was primarily educational, not economic, whereas the Northwestern players' football-related duties are unrelated to their academic studies.⁵ Unfortunately, Director Ohr errs in his analysis of why the *Brown* test does not apply and in his assessment of how vital playing a collegiate sport is to the educational development of young people. The *Brown* four-factor test was used by the Board to determine *if* the questioned employees' (graduate assistants) relationship with the university was primarily academic,⁶ not in determining what test should be used for determining an “employee” under the Act. Further, collegiate athletics develop leadership skills that college education strives to instill “such as strategic and tactical planning, persistence, sensible risk-taking, resilience, self-discipline, time management, a sense of fairness, teamwork, an understanding of one's adversaries, and sportsmanship (being both a good winner and a good loser).”⁷ Furthermore, student-athletes are required to maintain a minimum Grade Point Average and

³ *Id.* (citing *Brown Univ.*, 342 N.L.R.B. 483, 490 n.27 (2004) (internal citation omitted)).

⁴ *Id.* at *18.

⁵ *Id.*

⁶ *Brown Univ.*, 342 N.L.R.B. at 492.

⁷ Robert J. Sternberg, *College Athletics: Necessary, Not Just Nice to Have*, NACUBO.ORG, http://www.nacubo.org/Business_Officer_Magazine/Business_Officer_Plus/Bonus_Material/College_Athletics_Necessary_Not_Just_Nice_to_Have.html (last visited Apr. 10, 2015).

complete a certain amount of coursework each year,⁸ which helps motivate the student-athlete to succeed in academics so they can stay on the team.

In Part II of this Note, I will discuss the relevant portions of the Act and the process of conducting a union election through the NLRB. Additionally, Part II will address NLRB precedent on the issue and a case summary of *Northwestern*. In Part III, I will argue that student-athletes should not be considered “employees” under the NLRA based on the proper standard, which is determining whether student-athletes have a primarily educational or economic relationship to their respective institution and is formulated through NLRB precedent, legislative history, and public policy concerns. I will also argue that these same athletes should not *want* to be “employees” under the NLRA because of the unintended consequences that would diminish the rich collegiate experience enjoyed by all student-athletes. Finally, in Part IV, I will analyze the alternative, more effective methods of seeking positive changes for all student-athletes in the National Collegiate Athletic Association (NCAA).

Part II: Overview of the Act and the National Labor Relations Board

The process of forming a union can be complicated, especially if the employer, in our case the “university,” decides to fight the formation of the union. There are two ways to form a union under the NLRA: 1) file an election petition with the nearest NLRB Regional Office; or 2) persuade an employer to recognize the union by showing majority support from employees.⁹ Since the second method is highly unlikely in most instances, the employees, in our case the “student-athletes,” filing a petition is the most relevant method for this analysis. If a student-

⁸ *Remaining Eligible: Academics*, NCAA.ORG, <http://www.ncaa.org/remaining-eligible-academics> (“In Division I, student-athletes must complete 40 percent of the coursework required for a degree by the end of their second year. They must complete 60 percent by the end of their third year and 80 percent by the end of their fourth year. Student-athletes are allowed five years to graduate while receiving athletically related financial aid. All Division I student-athletes must earn at least six credit hours each term to be eligible for the following term and must meet minimum grade-point average requirements that are related to an institution’s own GPA standards for graduation”).

⁹ NATIONAL LABOR RELATIONS BOARD, www.nlrb.gov/what-we-do/conduct-elections (last visited Nov. 7, 2014).

athlete or team seeks an election petition, he/she/they must file a petition with the nearest NLRB Regional Office containing union support from at least 30% of student-athletes within the proper unit.¹⁰ Once the election petition is filed, the Regional Office will investigate to ensure that the office has jurisdiction and there are no other issues that would bar an election.¹¹ If an election is warranted, the Regional Director will issue an order directing the university to conduct an election and will oversee the election process.¹² After the election has occurred, the university may appeal the Regional Director's order to the Board in Washington D.C.¹³ If an appeal is filed, the election results are sequestered until the Board renders a decision.¹⁴ Next, if the Board upholds the Regional Director's decision, the results of the election are released to determine if the union won the election.¹⁵ This could end the university's challenge because a majority of the Northwestern players could vote against the union. If the union does prevail, the university still retains the ability to challenge the validity of the election.

The university could take two routes to challenge the validity of the election. First, the university could take a direct appeal of the Board's decision to the appropriate United States Circuit Court of Appeals then, if necessary, to the United States Supreme Court.¹⁶ Second, the employer could refuse to bargain with the union, which constitutes an unfair labor practice under section 8(a)(5) of the Act.¹⁷ A complaint and notice of hearing before the Board would then be issued to the employer by any member of the Board or its agent¹⁸ to determine if, in fact, the employer has engaged in an unfair labor practice; if it has, the Board will issue a cease and desist

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ NATIONAL LABOR RELATIONS BOARD, <http://www.nlr.gov/what-we-do/decide-cases> (last visited Apr. 20, 2015).

¹⁷ 29 U.S.C. § 158(a)(5) (2012).

¹⁸ *Id.* at § 160(b).

order for the employer to stop the unfair labor practice and commence good-faith bargaining with the union.¹⁹ If the employer continues to disregard the Board's order to bargain with the union, the Board then has the power to seek enforcement of its order with any court of appeals of the United States (most likely the D.C. Circuit).²⁰ At this proceeding, the employer would renew its claim that the employees are not "employees" under section 2(3) of the Act, and the court of appeals will issue a judgment and decree that is final, unless an appeal is filed with the United States Supreme Court.²¹

A. Statutory Background

Congress enacted the National Labor Relations Act (or Wagner Act) in 1935 to protect the rights of employees and employers, to encourage collective bargaining, and to curtail certain private sector labor and management practices that harmed the general welfare of workers, businesses and the U.S. economy.²² The Labor Management Relations Act, better known as the Taft-Hartley Act, passed in 1947 narrowed the definition of "employee" in the NLRA by excluding supervisors.²³ The relevant section for purposes of this Note is section 2(3), which reads:

The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, . . . but shall not include any individual 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 any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C. § 151 et seq.], as amended from time to time, or by any other person who is not an employer²⁴

¹⁹ *Id.* at § 160(c).

²⁰ *Id.* at § 160(e).

²¹ *Id.*

²² NATIONAL LABOR RELATIONS BOARD, <http://www.nlr.gov/resources/national-labor-relations-act> (last visited Nov. 8, 2014).

²³ NATIONAL LABOR RELATIONS BOARD, <http://www.nlr.gov/who-we-are/our-history/1947-taft-hartley-substantive-provisions> (last visited Apr. 25, 2015).

²⁴ 29 U.S.C. § 152(3) (2012).

Anyone found to be an employee under this definition is known as a “statutory employee.” In addition to this seemingly guideless definition of “employee” by the NLRA, the United States Supreme Court and the NLRB have both expanded on the definition.

The U.S. Supreme Court has held that in applying this broad definition of “employee” it is necessary to consider the common law agency doctrine.²⁵ The common law definition of “employee” includes four parts: (1) a person who performs services for another; (2) under a contract for hire; (3) is subject to the other’s control or right of control; and (4) in return for payment.²⁶ However, the Supreme Court carved out an exception to the common law definition in *NLRB v. Bell Aerospace Co.*, where the Court determined that managerial employees should not be considered statutory employees because Congress never intended them to be covered under the Act.²⁷ The Supreme Court has also been careful in applying the broad common law definition to *any* potential employee, especially in academia, considering the intent and policy behind the NLRA.²⁸ In *Yeshiva University*, the Supreme Court followed its own decision in *Bell Aerospace* when it excluded faculty as statutory employees because of their managerial function within the university.²⁹ Specifically, the Supreme Court noted that, “principles developed for use in the industrial setting cannot be ‘imposed blindly on the academic world.’”³⁰ The overriding principle from this section is the definition of an “employee” under the NLRA has evolved over the years and has constantly been applied to effect the goals and policies underlying the Act.

B. NLRB Precedent

²⁵ *NLRB v. Town & Country Elec.*, 516 U.S. 85, 94 (1995).

²⁶ *Brown Univ.*, 342 N.L.R.B. 483, 490, n.27 (2004) (citing *Town & Country Elec.*, 516 U.S. at 94).

²⁷ 416 U.S. 267, 283 (1974).

²⁸ See *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989) (stating it is a fundamental canon of statutory interpretation that the words of a statute must be read in the context of the overall statutory scheme).

²⁹ *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 679 (1980).

³⁰ *Id.* at 681 (quoting *Syracuse Univ.*, 204 N.L.R.B. 641, 643 (1973)).

Since the Supreme Court has only decided one case, *Yeshiva University*, deciphering the meaning of “employees” under the NLRA in the university context, the NLRB’s decisions have been the main source or interpretation for section 2(3) of the Act as it relates to universities. In 1972, the NLRB first discussed the meaning of “employee” in the university context.³¹ It addressed the issue of whether graduate teaching and research assistants should be included in the bargaining unit that consisted of full-time and part-time faculty.³² The Board held that since graduate teaching and research assistants were supervised by the faculty and were primarily students, they should not be included in the bargaining unit.³³

In 1974, the Board decided its first case that dealt directly with whether graduate students are employees under section 2(3) of the Act.³⁴ This decision involved the possible unionization of 83 research assistants in the Physics Department of Stanford University. First, the Board held that the payments received by the research assistants were not wages, but stipends or grants given as financial aid to pursue advanced degrees and were not based on services rendered or the type of research performed.³⁵ The research assistants also did not receive vacation, sick leave, or retirement benefits, but they did have privileges granted to all students such as access to student health insurance, student housing, and various campus activities.³⁶ Significantly, the Board also pointed to the fact that the research assistants were students who had not yet obtained their degrees and were engaged in research for the advancement of their degree requirements.³⁷ The Board drew a sharp contrast between the research assistants and research associates because the

³¹ See *Adelphi Univ.*, 195 N.L.R.B. 639 (1972).

³² *Id.*

³³ *Id.* at 640.

³⁴ *Leland Stanford*, 214 N.L.R.B. 621 (1974).

³⁵ *Id.*

³⁶ *Id.* at 622.

³⁷ *Id.*

latter are full-time, professional employees who have already achieved their degrees and are subject to discharge for unsatisfactory work.³⁸

In *Cedars-Sinai Medical Center* and *St. Clare's Hospital*, the Board upheld the rule from *Adelphi University* and *Leland Stanford* in holding that medical interns, residents, and clinical fellows were not employees under section 2(3).³⁹ In so holding, the Board said that the interns, residents, and clinical fellows were students because they were primarily engaged in graduate educational training at the hospital as a requirement to practice medicine, not to earn a living.⁴⁰ The Board noted that it has “universally excluded students” from bargaining units of non-student employees and from being represented in their own separate unit.⁴¹ In 1999, the Board overturned *Cedars-Sinai* and *St. Clare's Hospital* and ruled that medical interns, residents, and fellows, who notably already received their academic degrees, are indeed “employees” under the NLRA, but did not address the status of graduate assistants who are still seeking their academic degrees.⁴²

The only decision from the Board that holds graduate student assistants to be “employees” under section 2(3) and overturns 25 years of Board precedent was decided in 2000.⁴³ In *NYU*, the Board affirmed the Regional Director’s decision that categorized graduate assistants as statutory employees, but excluded graders and tutors.⁴⁴ The Board relied on *Boston Medical Center* and applied the common law agency doctrine (discussed herein Part II A) to determine that the conventional master-servant test was satisfied.⁴⁵ Ignoring the fact that the

³⁸ *Id.* at 623.

³⁹ See 223 N.L.R.B. 251 (1976) and 229 N.L.R.B. 1000 (1977).

⁴⁰ *Cedars-Sinai*, 223 N.L.R.B. at 253.

⁴¹ *St. Clare's Hosp.*, 229 N.L.R.B. at 1002.

⁴² *Brown Univ.*, 342 N.L.R.B. 483, 487 (2004) (citing *Boston Med. Ctr.*, 330 N.L.R.B. 152 (1999)).

⁴³ *New York Univ.*, 332 N.L.R.B. 1205 (2000).

⁴⁴ *Id.*

⁴⁵ *Id.* at 1205-1206 (citing *NLRB v. Town & Country Elec.*, 516 U.S. 85, 93-95 (1995)).

Supreme Court has found additional exceptions to section 2(3) (see Part II A), the Board noted there is not a clear exception in the Act for students who seek to be considered as employees.⁴⁶ The Board rejected the university's congressional intent and public policy arguments that the relationship between the graduate assistants and the university in primarily educational and collective bargaining will infringe on basic academic freedoms.⁴⁷ Four years later in *Brown* the Board would overrule *NYU*, and the debate over which ruling controls student-athletes would ultimately come to a head when a group of Northwestern football players decided to petition to join a labor union on January 28, 2014.⁴⁸

The *Brown* case came before the NLRB in 2004 and overturned *NYU*, returning to 25 years of prior Board precedent when it deemed graduate student assistants were not employees under the NLRA.⁴⁹ The union in *Brown* petitioned to represent 450 graduate students consisting of teaching assistants, research assistants, and proctors.⁵⁰ The Board looked at the underlying purposes of the Act and found that it was passed to cover economic relationships, not primarily educational relationships.⁵¹ The Board looked to four factors to determine whether the graduate student assistants' relationship with Brown University was primarily academic. First, the graduate student assistants were all students at the university.⁵² Second, a graduate student assistant's role in teaching and research is essential to the core elements of the Ph.D. degree they are pursuing.⁵³ Third, they acted under the direction and control of the university faculty.⁵⁴ And

⁴⁶ *Id.* at 1206.

⁴⁷ *Id.* at 1207-1208.

⁴⁸ Tom Farrey, *Kain Colter starts union movement*, ESPN.COM (Jan. 28, 2014, 9:08 PM), http://espn.go.com/espn/otl/story/_/id/10363430/outside-lines-northwestern-wildcats-football-players-trying-join-labor-union.

⁴⁹ *Brown Univ.*, 324 N.L.R.B. 483, 483 (2004)

⁵⁰ *Id.*

⁵¹ *Id.* at 488.

⁵² *Id.* at 489.

⁵³ *Id.*

fourth, the financial support received was financial aid for a student since it did not extend past graduation and was not based on the work completed each year.⁵⁵ The Board reasoned that collective bargaining would “unduly infringe upon academic freedoms” because decisions made by administrators and faculty such as class size, time, length, and location, and specific duties hours, and stipends would be subjects of collective bargaining.⁵⁶ Further, the individual and personal nature of education would be subject to the demands of the collective or group.⁵⁷ The Board also noted that the test as applied has been used in even older cases such as *Sheltered Workshops of San Diego* (1960),⁵⁸ in which the Board found that the disabled workers in question were determined to have a primarily rehabilitative relationship rather than an economic one with the employer rehabilitation program and, therefore, were not statutory employees.⁵⁹

Although the NLRB has never ruled on the status of student-athletes under the Act, the NLRB has relied on two different tests when deciding cases involving whether graduate student assistants must be treated as employees under the Act. The first test, known as the “master-servant test,” or “common law test” is satisfied “when a servant performs services for another, under the other’s control or right to control, and in return for payment.”⁶⁰ This test was applied in *Boston Medical Center* (medical school graduates serving as interns, residents, and fellows found to be employees)⁶¹ and *NYU* (graduate student assistants found to be employees).⁶² Prior

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 490.

⁵⁷ *Id.*

⁵⁸ 126 N.L.R.B. 961.

⁵⁹ *Brown Univ.*, 324 N.L.R.B. at 491 n.30.

⁶⁰ *Id.* at 483 n.3.

⁶¹ *Id.* at 483 n.4.

⁶² *Id.* at 483.

to *NYU*, “the Board’s principle was that graduate student assistants are primarily students and not statutory employees.”⁶³

The second test espoused in *Brown* should be utilized in the student-athlete context. The essential inquiry of the test is whether the graduate student assistants’ relationship with the university was primarily academic, rather than economic.⁶⁴ I will address this test as the “primarily economic relationship test.” This test was first utilized in *Adelphi* (graduate student assistants could not join the faculty bargaining unit) and *Leland* (graduate student assistants were not employees under the Act) and was specified even further in *Brown* (graduate student assistants were not employees).⁶⁵

B. *Northwestern* Case Summary

The *Northwestern* case is the Board’s first opportunity to decide whether student-athletes at a private university who receive grant-in-aid scholarships are “employees” within the meaning of the Act.⁶⁶ The College Athletes Players Association brought this claim under Section 9(c) of the Act against Northwestern University, alleging that a substantial number of players wished to be represented for collective bargaining and Northwestern wrongfully declined to voluntarily recognize CAPA as the student-athletes’ representative.⁶⁷ On March 26, 2014, Director Ohr ruled that the student-athletes are “employees” under the Act and mandated an election be held allowing football players that have received grant-in-aid scholarships and have not exhausted their playing eligibility to vote for or against unionization.⁶⁸

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Adelphi Univ.*, 195 N.L.R.B. 639, 639 (1972); *See Leland Stanford*, 214 N.L.R.B. 621 (1974).

⁶⁶ *Northwestern Univ.*, Case 13-RC-121359 *2 (Mar. 26, 2014).

⁶⁷ 29 U.S.C. § 159(c) (2012).

⁶⁸ *Northwestern Univ.*, Case 13-RC-121359 *2.

Director Ohr noted a litany of facts to justify his view that student-athletes are properly categorized as employees. He stated that they satisfy the common law or master-servant test set forth in *Town & Country Electric* because they 1) perform services for Northwestern in the form of playing football 2) do so under a contract for hire, which is a tender letter that entitles the student-athletes to a scholarship if he plays football for Northwestern 3) are subject to Northwestern's control or right of control because their coach schedules the practices, meetings, video, workouts, etc. and 4) receive payment in return for services in the amount of their scholarship, which ranges from \$61,000 per year up to \$76,000 per year.⁶⁹ Director Ohr also stressed the fact that Northwestern receives services performed by the football players that result in revenue exceeding \$235 million from 2003-2012.⁷⁰ He determined that the amount of time spent on football-related activities (40-50 hours per week during the season) was evidence of Northwestern's control or right to control the players.⁷¹ He limited the holding in this case to scholarship players because "walk-on" players do not sign a tender letter and do not receive payment from the school in return for their services.⁷²

Director Ohr decided that the Northwestern scholarship football players are still employees under the Act if he followed the *Brown* test.⁷³ First, he noted that the grant-in-aid scholarship football players are not "primarily students" because the amount of time spent on football is much greater than the time spent on their studies.⁷⁴ Second, the players' athletic duties do not constitute a core element of their educational degree requirements since they do not receive academic credit for playing football, aside from a possible credit for physical

⁶⁹ *Id.* at *14.

⁷⁰ *Id.*

⁷¹ *Id.* at *15-16.

⁷² *Id.* at *17.

⁷³ *Id.* at *18.

⁷⁴ *Id.*

education.⁷⁵ Third, Northwestern's academic faculty does not supervise the football players' athletic duties: instead their supervisors are the football coaches.⁷⁶ Finally, the compensation received by the scholarship football players was not akin to the financial aid compensation received by the graduate assistants in *Brown*.⁷⁷

After determining that the Northwestern football players were statutory employees, Director Ohr ordered an election by secret ballot that included all grant-in-aid scholarship players on the Northwestern football team who had not exhausted their playing eligibility.⁷⁸ The election would decide whether CAPA would serve as the players' exclusive bargaining representative.⁷⁹ The secret-ballot election took place on April 25, 2014 at Northwestern.⁸⁰ However, the NLRB has sequestered the ballots because Northwestern filed its Request for Review with the NLRB of the Regional Director's Decision on April 9, 2014.⁸¹ On April 16, 2014, CAPA filed its Opposition to the Request for Review.⁸² The Board granted Northwestern's Request for Review because it "raises substantial issues warranting review."⁸³ As of July 31, 2014, both Northwestern and CAPA have fully briefed the issues to the Board and are awaiting a decision.⁸⁴

Part III: Scholarship Athletes are NOT "Employees" under the NLRA

⁷⁵ *Id.* at *19.

⁷⁶ *Id.*

⁷⁷ *Id.* at *20.

⁷⁸ *Id.* at *23.

⁷⁹ *Id.*

⁸⁰ Tom Farrey and Lester Munson, *NU Players Cast Historic Vote*, ESPN.COM (Apr. 25, 2014, 10:50 AM), http://espn.go.com/chicago/college-football/story/_/id/10833981/northwestern-football-players-poised-historic-vote-whether-unionize.

⁸¹ Request for Review of Employer at 50, Northwestern Univ., Case 13-RC-121359 (Apr. 9, 2014).

⁸² Opposition of Petitioner to Request for Review at 31, Northwestern Univ., Case 13-RC-121359 (Apr. 16, 2014).

⁸³ Order Granting Request for Review at 1, Northwestern Univ., Case 13-RC-121359 (Apr. 24, 2014).

⁸⁴ NATIONAL LABOR RELATIONS BOARD, <http://www.nlr.gov/case/13-RC-121359> (last visited Nov. 28, 2014).

Unfortunately, if the holding in the *Northwestern* case is upheld by the Board, the decision would change the landscape of college athletics and could severely diminish the important benefits of being a scholarship student-athlete. The Board should follow the *Brown* precedent and rule that scholarship athletes are not “employees” under the NLRA because their relationship with Northwestern is primarily educational. Additionally, the Board should consider congressional intent and recognize the policy implications when deciding this case. Being able to go to college for free and having the opportunity to compete at the highest levels of athletics contributes to the overall educational experience and should be valued highly by the Board and student-athletes. The focus for the Board should remain on the educational experience of participating in Division 1 athletics because education is always the primary objective of higher learning institutions.

Director Ohr erred for three reasons: (1) he applied master-servant test from *NYU* and engaged in improper analysis of the primarily economic relationship test from *Brown* to the facts of this case; (2) he failed to recognize that Congress did not intend for the Act to cover student-athletes; and (3) he ignored the unintended consequences of his decision.

A. The Legal Application of *Brown*

Since the status of scholarship student-athletes is an issue of first impression, the Board should adhere to the teaching of *Brown* and apply the “primarily economic relationship test” to determine whether student-athletes are employees under the Act. The major flaw in Director Ohr’s analysis in *Northwestern* was that he used the incorrect legal standard: the common law definition of employee.⁸⁵ The Supreme Court case that used the common law definition that is

⁸⁵ *Northwestern Univ.*, 13-RC-121359 *13 (Mar. 26, 2014) (citing *NLRB v. Town & Country Elec.*, 516 U.S. 85, 94 (1995)).

relied on by Director Ohr is distinguishable from *Northwestern*.⁸⁶ The critical difference in that case is that the “employees” in question were engaged in a *primarily economic relationship* with the employer.⁸⁷ The Court also examined the underlying purposes of the Act to find that the union organizers were statutory employees in *Town & Country*.⁸⁸ Additionally, the Supreme Court found “managerial employees” were not covered under the Act even though they may satisfy the common law definition of employee because the Act was not intended to cover managerial employees.⁸⁹ Along with the common law test, the Board should reject the master-servant test from *NYU* as applied to student-athletes because a student’s relationship with an educational institution does not involve providing services to the institution. In fact, it is the exact opposite; the institution provides educational services to its student-athletes.

The legal standard enunciated in *Brown* focuses on whether the overall relationship between the graduate student assistants and the university is primarily educational (not employees) or primarily economic (employees).⁹⁰ The primarily economic relationship test should also be used because it more closely reflects the intent and purpose of the Act. The congressional intent argument will further address this issue in Part III, B, herein.

Here, the Board should follow *Brown* and rely on four non-dispositive factors to determine whether the graduate student assistants in that case had a primarily educational relationship with the university.⁹¹ The first factor considered was whether the graduate student

⁸⁶ See e.g. *Town & Country Elec.*, 516 U.S. 85 (1995) (holding that paid union organizers are statutory employees); see also *Seattle Opera v. NLRB*, 292 F.3d 757 (D.C. Cir. 2002) (holding that the opera’s auxiliary choristers are statutory employees).

⁸⁷ *Brown Univ.*, 342 N.L.R.B., 483, 491 (2004).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 489.

⁹¹ *Id.*

assistants are *students* at the university.⁹² The *Brown* Board defined a student to be one who is enrolled in the university, is pursuing a degree, and his/her status as a graduate student assistant is contingent on his/her continued enrollment as a student.⁹³ The Regional Director fails in his attempt to show that the student-athletes on the Northwestern football do not meet the first factor in *Brown*. The Regional Director attempts to redefine the first factor by arguing that the football players are not “primarily students,” instead, they are “primarily football players” since, according to the Regional Director, they spend around 40-50 hours on football only 20 hours on academics.⁹⁴ There are factual discrepancies to the analysis because the NCAA limits the amount of time a student-athlete can devote to athletics to 20 hours per week.⁹⁵ Therefore, the Regional Director points to voluntary hours spent by the student-athletes who are *trying* to improve their skills.

The legal analysis is flawed for two reasons. First, the Regional Director misstates the “student” requirement because the requirement in *Brown* states that you must first and foremost be a student enrolled at the university.⁹⁶ In fact, in order to be a collegiate athlete, you must be admitted by the institution as a regularly enrolled, degree-seeking student.⁹⁷ In addition, a student-athlete must be enrolled in a “minimum full-time program of studies” that leads to a degree, which consists of not less than 12 semester or quarter hours in order to compete for the institution.⁹⁸ There are also minimum “progress toward degree” requirements, including minimum GPA, that the student-athletes must meet to be eligible for competition.⁹⁹ First, a

⁹² *Id.* at 488 (emphasis added).

⁹³ *Id.*

⁹⁴ Northwestern Univ., 13-RC-121359 *18 (Mar. 26, 2014).

⁹⁵ *NCAA Division I Manual*, Section 17.1.7.1 (2014-2015).

⁹⁶ *Brown Univ.*, 342 N.L.R.B. at 488.

⁹⁷ *NCAA Division I Manual*, Section 14.1.1.

⁹⁸ *Id.* at Section 14.2.2.

⁹⁹ *Id.* at Section 14.4.

student-athlete at Northwestern classifies as a student at the university. Secondly, the Regional Director dismisses the fact that receiving a grant-in-aid scholarship to play football is contingent upon the student-athlete's enrollment at the university as not being dispositive to the inquiry under the first factor in *Brown*.¹⁰⁰ The Regional Director apparently does not give any weight to the fact that *but for* the student-athletes status as a student, they would not have the opportunity to participate in intercollegiate sports.¹⁰¹ The language from *Brown* states that because "their status as a graduate student assistant is contingent on their continued enrollment as students, we find that they are primarily students."¹⁰² The language from *Brown* requiring the analysis of student status is unambiguous and the fact that the Regional Director dismisses this essential point demonstrates that the first factor in the *Brown* test was not analyzed properly in *Northwestern*.

The next factor in the *Brown* analysis considers the role of graduate student assistantships in graduate education.¹⁰³ *Brown* states that for a number of graduate students, teaching is so essential to their program that they will not receive a degree unless that requirement is satisfied.¹⁰⁴ However, the Board is noted that although that fact is relevant to the analysis, it is not necessarily critical and would not require the Board to find employee status if this requirement was missing.¹⁰⁵ Even though the Regional Director correctly noted that playing football is not part of the degree requirements at Northwestern,¹⁰⁶ he unfairly diminishes the educational value of playing a division one collegiate sport. Categorizing intercollegiate

¹⁰⁰ Northwestern Univ., 13-121359 *18 (Mar. 26, 2014).

¹⁰¹ *Big Labor on College Campuses: Hearing on Examining the Consequences of Unionizing Student-athletes Before the H. Comm. on Educ. and the Workforce*, 113th Cong. (2014) (statement of Judge Ken Starr, President, Baylor University).

¹⁰² *Brown Univ.*, 342 N.L.R.B. 483, 488 (2004).

¹⁰³ *Id.* at 489.

¹⁰⁴ *Id.* at 488.

¹⁰⁵ *Id.* at 488 n.24.

¹⁰⁶ Northwestern Univ., 13-RC-121359 *19 (Mar. 26, 2014).

athletics as a mere ancillary element to a student-athlete's education is problematic given the many institutions "that take the institutional mission considerably beyond the classroom and into the development of the entire person."¹⁰⁷ Additionally, given that around 1% (9.4% for baseball) of all NCAA athletes go on to play professional sports,¹⁰⁸ the role of being a student-athlete is primarily educational. My own experience as a student-athlete imparted necessary life skills such as being a leader, being a team player, hard work, competitiveness, and the ability to handle constructive criticism. Participation in a collegiate sport is essential to a student-athlete's education because so most of what is learned in college takes place outside of the classroom in the form of extracurricular activities and employers are more inclined to hire collegiate athletes because of the benefits that translate to the real world.¹⁰⁹

The third factor outlined in *Brown* analyzes whether the graduate student assistants' perform their roles under the direction and control of the university's faculty. Similarly, the Northwestern football players perform their athletic duties under the direction and control of their coaches.¹¹⁰ However, the Regional Director conveniently chooses to distinguish coaches from faculty and athletics from the classroom.¹¹¹ This is another example of the Regional Director dismissing the educational value of intercollegiate athletics. In fact, Northwestern believes that education takes place in more than just the classroom and certainly on the athletic field in preparing for and participating in competition.¹¹² Several of the Northwestern football

¹⁰⁷ *Big Labor on College Campuses: Hearing on Examining the Consequences of Unionizing Student-athletes Before the H. Comm. on Educ. and the Workforce*, 113th Cong. (2014) (statement of Judge Ken Starr, President, Baylor University).

¹⁰⁸ *Probability of Competing in Athletics Beyond High School*, NCAA (last updated September 2013) <http://www.ncaa.org/about/resources/research/probability-competing-beyond-high-school>.

¹⁰⁹ Sternberg *supra* note 7.

¹¹⁰ Northwestern Univ., 13-RC-121359 *19.

¹¹¹ *Id.*

¹¹² Brief of Employer at 21, 13-RC-121359 (July 3, 2014).

players testified that they viewed their coach as an “educator and mentor” and he takes his job very seriously to prepare the student-athletes for life after college.¹¹³

Fourth, and finally, *Brown* looks to the financial support given to the graduate student assistants.¹¹⁴ The Board notes that this financial assistance is only provided to students and is not extended beyond the period of the students’ enrollment at the university.¹¹⁵ Again, student-athletes satisfy this requirement because they are only provided financial support while they are students and only receive aid for tuition, fees, room, board, books, food, health insurance, and clothes required to be worn by the team while traveling to games.¹¹⁶ The Regional Director in *Northwestern* curiously opines that the scholarship football players’ receive is not financial aid because they can lose their scholarship if they voluntarily withdraw from the team.¹¹⁷ This argument lacks merit because students routinely receive performance-based academic and music scholarships that may be revoked for poor performance.¹¹⁸ These scholarships are certainly still considered financial aid from the institution.

Additionally, scholarships are tax-exempt,¹¹⁹ and therefore, any form of compensation received by the student-athletes for playing football could invalidate the tax-exempt nature of the scholarship.¹²⁰ In fact, the Internal Revenue Code provides that scholarships are not exempt from taxes on any amounts received, which represents payment for services rendered by the

¹¹³ *Id.* at 23.

¹¹⁴ *Brown Univ.*, 342 N.L.R.B. 483, 489 (2004).

¹¹⁵ *Id.*

¹¹⁶ *Northwestern Univ.*, 13-RC-121359 *3 (Mar. 26, 2014).

¹¹⁷ *Id.* at *20.

¹¹⁸ See *Undergraduate Student Handbook*, UNIVERSITY OF COLORADO BOULDER - COLLEGE OF MUSIC, <http://www.colorado.edu/music/academics/undergraduate-degrees/advising/undergraduate-student-handbook> (last visited Apr. 26, 2015).

¹¹⁹ *Student-Athlete/Athlete-Employee: Tax Consequences, For Sure*, FOR THE RECORD (AndersenTax, San Francisco, Cal.), Sept. 2014, available at <http://www.andersentax.com/publications/newsletter/september-2014/student-athlete-athlete-employee-tax-consequences-for-sure>.

¹²⁰ *Id.*

student required as a condition to receiving the scholarship.¹²¹ Further, athletic departments themselves have tax-exempt status because of their close relationship to the educational mission of the university.¹²² The Regional Director is also factually inaccurate when he states that Northwestern never offers a scholarship to a prospective student unless they intend to provide an athletic service to the university.¹²³ Northwestern gives \$126 million dollars in total scholarships to undergraduates and 45% of undergraduates receive a Northwestern University Scholarship.¹²⁴

In viewing the overall relationship between Northwestern and its student-athletes, the relationship is primarily educational and, therefore, the student-athletes are not employees under section 2(3) of the Act and the Board should reverse the Regional Director's decision determining that the election for union representation is not valid.

B. Congress did not intend for Student-Athletes to be "Employees"

Even if the Board finds the student-athletes fall within the literal meaning of "employee," the Supreme Court has consistently recognized that individuals may still be excluded from the Act's coverage based on a consideration of congressional intent and national labor policy.¹²⁵ The historical examination of the congressional intent behind the NLRA shows that the Act was not intended to govern the authority structure of a university.¹²⁶ The congressional history shows that a dispute between an employer and a college professor would not be covered by the Act.¹²⁷ Congress also listed professional employees covered in a new statutory provision without

¹²¹ Theodore Connolly, *Should College Athletes Want to be Employees?*, <http://www.lgllp.com/should-college-athletes-want-to-be-employees/> (last visited Nov. 13, 2014).

¹²² *Id.*

¹²³ Northwestern Univ., 13-RC-121359 *20.

¹²⁴ *Undergraduate and Financial Aid: Northwestern Scholarships*, NORTHWESTERN UNIVERSITY <http://undergrad.aid.northwestern.edu/types-of-aid/scholarships-grants/northwestern-scholarships.html> (last visited Nov. 28, 2014).

¹²⁵ Boston Med. Ctr., 330 N.L.R.B. 152, 175 (1999) (Brame III, J., dissenting).

¹²⁶ *Yeshiva Univ.*, 444 U.S. 672, 680 (1980); *See also Adelpi Univ.*, 195 N.L.R.B. 639, 648 (1972).

¹²⁷ S. Rep. No. 74-573, at 7 (1935).

mentioning teachers.¹²⁸ In 1979, Congress rejected a bill that would have overruled *Cedars-Sinai/St. Clare's* and mandated that medical school interns would be treated as unit employees.¹²⁹

The Act was created to address conflicting economic interests of the employer to minimize costs and the employees to maximize wages.¹³⁰ The educational process is predicated on a mutual interest in the advancement of the student's education and is therefore academic in nature.¹³¹ The student's educational process is inherently personal and individualized so the primary purpose of collective action under the Act fails to apply to higher education.¹³² Education by its nature is the transfer of knowledge by those who know to those who don't know, which makes it inherently authoritarian.¹³³

Congress had over 25 years to correct the Board's precedent prior to *NYU I* if it disagreed with the Board's interpretation of the Act as it applied to graduate student assistants.¹³⁴ The central purposes behind the Act demonstrate that Congress has never meant to apply collective action to student-athletes.

C. The Unintended Consequences of Being "Employees"

If the Board does not overrule Director Ohr's decision, the student-athletes will find some of the unintended consequences unfavorable to their plight. First and foremost, the entire landscape of collegiate athletics could be changed if student-athletes are considered employees under the NLRA and allowed to unionize because the costs to the institutions will rise dramatically. In addition, there are certainly other state and federal laws that are implicated if

¹²⁸ H.R. Rep. No. 80-510 at 36 (1947); *See also* S. Rep. No. 80-105, at 11, 19 (1947).

¹²⁹ *Boston Med. Ctr.*, 330 N.L.R.B. at 169 (Hurtgen, J., dissenting).

¹³⁰ *St. Clare's Hosp.*, 229 N.L.R.B. 1000, 1002 (1977).

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Boston Med. Ctr.*, 330 N.L.R.B. at 178-79 (Brame III, J., dissenting) (internal citation omitted).

¹³⁴ *Brown Univ.*, 342 N.L.R.B. 483, 493 (2004).

student-athletes are found to be employees. While the costs to the institutions will rise with unionization, the costs to the student-athletes as a whole will also increase.

1. Costs to the Institutions

If student-athletes are allowed to bargain collectively for a weekly salary, improved benefits, and pensions, the costs to athletic departments will significantly rise. Now, only about ten percent of Division 1 college sports programs make a profit and most of them even lose money.¹³⁵ In fact, 154 out of 230 public universities' athletic departments received over half of their total revenue from state subsidies in 2013.¹³⁶ Only 23 out of 228 public schools generated enough revenue to cover their athletic departments' total expenses.¹³⁷ Private institutions do not have to release their budget figures because of a state exemption.¹³⁸ A number of consequences from student-athletes unionizing would only see the numbers on the expense side of the ledger increase.

If unionization resulted in player salaries as opposed to scholarships, those earnings would likely be taxed and the universities would have to pay more to each student-athlete to match the value of the scholarship.¹³⁹

If the university is considered the employer, it might be held responsible for any tort committed by one of its employees (student-athletes) within the scope of employment (athletic event) on a theory of vicarious liability.¹⁴⁰

¹³⁵ Patrick T. Harker, *Student-athletes Shouldn't Unionize*, Op.-Ed., N.Y. TIMES, Apr. 1, 2014, www.nytimes.com/2014/04/02/opinion/student-athletes-shouldnt-unionize.html.

¹³⁶ Steve Berkowitz, et al., *Most NCAA Division I athletic departments take subsidies*, USATODAY.COM (July 1, 2013, 12:48 PM), <http://www.usatoday.com/story/sports/college/2013/05/07/ncaa-finances-subsidies/2142443/>.

¹³⁷ *Id.*

¹³⁸ *Methodology for NCAA athletic department revenue database*, USATODAY.COM (June 4, 2014, 4:52 PM), <http://www.usatoday.com/story/sports/college/2013/05/10/college-athletic-department-revenue-database-methodology/2150123/>.

¹³⁹ Harker, *supra* note 135.

Also, student-athletes as employees may jeopardize the history of the courts showing deference to athletics as a part of the universities' educational mission.¹⁴¹ This could lead to a shift in policy at the Internal Revenue Service ("IRS"), who has exempted athletic departments from paying taxes on profits.¹⁴² If student-athletes are considered employees by courts and the IRS, the profits generated by athletic departments may be classified as unrelated business income and subject to corporate tax rates of between 15-35% at the federal level alone.¹⁴³ However, the most severe tax consequences for athletic departments would be the elimination of tax-deductible contributions.¹⁴⁴ Contributions to athletic departments are the largest source of income for athletic departments.¹⁴⁵ In addition, any gift over \$14,000 would be subject to the gift tax (up to 45%) and the donors would not be able to deduct the donation.¹⁴⁶ Lastly, tax-exempt bonds that are used to build athletic facilities may no longer be available to the universities.¹⁴⁷ All of these tax consequences would put an additional strain on the universities' total expenses and revenue.

Another potential cost that universities would incur is workers' compensation and unemployment insurance. As employees, the student-athletes would be eligible for workers' compensation claims for their injuries. Up to now, courts have ruled that student-athletes are not employees eligible for workers' compensation.¹⁴⁸ Adding upwards of 200 new employees

¹⁴⁰ Ivan Maisel, *Paying Players Might Create Havoc*, ESPN.COM, July 15, 2011, http://espn.go.com/college-sports/story/_/id/6768571/legal-issues-arise-paying-student-athletes.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ For the Record: *Student-Athlete/Athlete Employer: Tax Consequences, For Sure*, ANDERSEN TAX, Sept. 2014, <http://www.andersentax.com/publications/newsletter/september-2014/student-athlete-athlete-employee-tax-consequences-for-sure>.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ See *Waldrep v. Tex. Emp'rs Ins. Ass'n*, 21 S.W.3d 692 (Tex. Ct. App. 2000) (holding a former TCU football player who was paralyzed while playing college football does not qualify for workers' compensation because he is not an employee of the university).

(student-athletes) would certainly burden the athletic departments who are already struggling to break even.

While it is true that some Division I football and basketball programs make a profit, the rest of the sports at the institution generally operate at a loss and use that profit to fund those other sports.¹⁴⁹ If the costs of the football and basketball programs increase, it is natural for the athletic departments to look to other sports to offset this cost. This could lead to less collegiate scholarship opportunities for men and women who do not play basketball or football in the form of fewer sports and/or less scholarships.¹⁵⁰ One may argue that the scholarship football players should not bear that cost of the entire athletic department but Congress has already done so by enacting legislation such as Title IX.

2. Costs to the Student-athletes

The first and most obvious cost to student-athletes will be the payment of union dues. Most unions across the United States charge between 1-3% of an employee's base salary.¹⁵¹ Since the Northwestern players are estimated by Director Ohr to make up to \$76,000 per year, the union dues would likely be in the range of \$760 to \$2,280.

Additionally, there will be tax implications for student-athletes if they are deemed to be employees under the Act. Section 117 of the Internal Revenue Code ("IRC") excludes from gross income any amount received by an individual through a qualified scholarship as long as the individual is a candidate for a degree.¹⁵² The IRC provides that scholarships are not exempt from taxes for any amount received as payment for services the student provides as a

¹⁴⁹ Connolly *supra* note 121.

¹⁵⁰ *Id.*

¹⁵¹ Ben Casselman, *Closer Look at Union vs. Nonunion Workers' Wages*, WSJ.COM (Dec. 17, 2012, 3:40 PM), <http://blogs.wsj.com/economics/2012/12/17/closer-look-at-union-vs-nonunion-workers-wages/>.

¹⁵² I.R.C., § 117(a) (2013).

requirement for the scholarship.¹⁵³ Again, Director Ohr found that Northwestern football players receive the equivalent of up to \$76,000 annually.¹⁵⁴ Therefore, student-athletes would be facing a tax bill of between \$8,000 and \$10,000 from the federal government in addition to a smaller state tax bill.¹⁵⁵

The question becomes: Can student-athletes afford the union dues and taxes they would be required to pay? The likely answer, especially from those from low-income families is “no.” Some might say yes because they can bargain for higher wages. However, bargaining is a give and take so if the student-athletes want higher wages they would likely need to sacrifice in other areas which could be just as detrimental.

Third, the Title IX consequences of Director Ohr’s decision may force many universities to cut back on the number of scholarships they offer and, therefore, the number of teams they carry. Title IX prohibits discrimination based on sex as it pertains to the participation in, receiving the benefits of, or be subjected to discrimination under any educational program or activity receiving federal financial assistance.¹⁵⁶ This federal law also has been applied to collegiate athletics.¹⁵⁷ A university will be found to violate Title IX if it ineffectively accommodates students’ interests and abilities.¹⁵⁸ This “effective accommodation” test can be satisfied in two ways: (1) intercollegiate participation opportunities for men and women is not substantially proportionate to their respective enrollment, and (2) the interests and abilities of the

¹⁵³ *Id.* at § 117(c)(1).

¹⁵⁴ Northwestern Univ., 13-RC-121359 *3 n.4 (Mar. 26, 2014).

¹⁵⁵ Connolly, *supra* note 121.

¹⁵⁶ 20 U.S.C.S. § 1681(a) (LexisNexis 2014).

¹⁵⁷ *See* 34 C.F.R. § 106.41(a) (2014); *Miami Univ. Wrestling Club v. Miami Univ.*, 302 F.3d 608 (6th Cir. 2002) (holding that male athletes could not state a valid discrimination claim under Title IX when male sports programs were dropped for female programs because the university equalized athletic opportunities for both genders).

¹⁵⁸ *Cohen v. Brown Univ.*, 991 F.2d 888, 897 (1st Cir. 1993); *See also* *Roberts v. Colo. Bd. of Agric.*, 998 F.2d 824, 828 (10th Cir. 1993); *Kelley v. Board of Trustees*, 35 F.3d 265, 268 (7th Cir. 1994).

underrepresented sex are not effectively accommodated by present practices.¹⁵⁹ There are ten factors that the Director of Education will examine to determine if a university is providing equal opportunities to both sexes in athletics:

- (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
- (2) The provision of equipment and supplies;
- (3) Scheduling of games and practice time;
- (4) Travel and per diem allowance;
- (5) Opportunity to receive coaching and academic tutoring;
- (6) Assignment and compensation of coaches and tutors;
- (7) Provision of locker rooms, practice and competitive facilities;
- (8) Provision of medical and training facilities and services;
- (9) Provision of housing and dining facilities and services; and
- (10) Publicity.¹⁶⁰

The logical result of the Northwestern football players forming a union and bargaining for better wages and benefits would be the university ensuring that the female athletes received many of those same benefits, which would increase the university's financial burden because many schools have upwards of 200 scholarship athletes.¹⁶¹ Lawsuits and adverse reactions from advocacy groups raising Title IX concerns would emerge all across the country if scholarship football players received better benefits than other student-athletes.¹⁶² In fact, the President of the University of Delaware has noted that many schools, including his own, have had to trim varsity sports in recent years and if the costs go up even further, many schools will face pressure to cut back even more.¹⁶³ This financial burden on institutions will result in the elimination of entire sports and in less scholarship athletes and, therefore resulting in fewer opportunities for high school students to have their college education paid for based on their athletic ability.¹⁶⁴

¹⁵⁹ *Id.* at 897-898.

¹⁶⁰ 34 C.F.R. 106.41(c)(1)-(10) (2014).

¹⁶¹ Connolly, *supra* note 121.

¹⁶² *Hearing on: Big Labor on College Campuses: Examining the Consequences of Unionizing Student-athletes Before the H. Comm. on Educ. & Workforce*, 113th Cong. (May 8, 2014) (statement of Ken Starr, Pres. and C. of Baylor Univ.).

¹⁶³ Harker, *supra* note 135.

¹⁶⁴ Connolly, *supra* note 121.

The final, yet most important cost to student-athletes would be the decreased emphasis on the valuable education these young men and women are provided. It is true that some scholarship athletes find it difficult to balance schoolwork with the demands of playing a Division I sport when the scholarship obligates educational opportunity, but one can only imagine how difficult this would become if these athletes were being paid to play and perform at a high level.¹⁶⁵

Part IV: Alternate Means to Effect the Changes Needed for Student-Athletes

Although, as a former student-athlete myself, I admire quarterback Kain Colter's resolve to effect change at Northwestern, the improvements he seeks will likely be stalled because of the NCAA and its regulation of Division 1 college athletics. I agree that scholarship student-athletes in all NCAA-sanctioned sports should receive guaranteed scholarships, medical benefits that extend past the student-athlete's playing career, and additional stipends based on demonstrated financial need. However, bargaining with Northwestern will not result in any of these changes that many student-athletes, including Colter, seek. Instead, since only 17 of the 120 Division 1 football schools are private, the change needs to come at the NCAA level since it regulates all of Division 1 athletics.

In fact, since Colter's attempt at unionization, there have already been major changes being made by the NCAA and its members. In April 2014, the NCAA approved unlimited meals and snacks for Division 1 athletes.¹⁶⁶ The NCAA also approved a measure to reimburse student-athletes' families for travel to see their student-athletes play in the Final Four or College Football

¹⁶⁵ Harker *supra* note 135.

¹⁶⁶ Steve Berkowitz, *NCAA Increases Value of Scholarships in Historic Vote*, USATODAY.COM (Jan. 17, 2015, 11:05 PM), <http://www.usatoday.com/story/sports/college/2015/01/17/ncaa-convention-cost-of-attendance-student-athletes-scholarships/21921073/>.

Playoff.¹⁶⁷ The Big Ten now offers guaranteed four-year scholarships and the Pacific Athletic Conference (PAC-12) guaranteed scholarships and postgraduate healthcare benefits.¹⁶⁸ Additionally, 65 schools and 15 athlete representatives voted on January 17, 2015 to expand athletic scholarships to pay for items such as transportation and miscellaneous personal expenses.¹⁶⁹ All Division 1 schools have a Student-Athlete Advisory Committee (SAAC), which should be a forum for student-athletes to show solidarity and bring issues and concerns to the administration. Student-athletes and parents need to continue voicing their concerns to their coaches, institutions, conferences and the NCAA.

Part V: Conclusion

The holding in the *Northwestern* case needs to be overturned by the Board for the reasons given above. The reliance of many young men and women on college athletics to have an opportunity to receive a quality education should not be jeopardized with an employer/employee relationship. Although changes such as allowing players to profit off their likeness, extending medical benefits past college, and guaranteeing scholarships need to be made, private unionization against one of the hundreds of NCAA institutions will not be effective in bringing about those changes and will only hurt student-athletes in the long run. The players, their families, their coaches, and especially the institutions need to be proactive in approaching the NCAA about the changes listed above. However, a change in employee status will not result in a positive change for student-athletes.

¹⁶⁷ *NCAA to pay for family travel for CFP, Final Fours under pilot program*, NCAA.COM (JAN. 6, 2015, 3:09 PM), <http://www.ncaa.com/news/ncaa/article/2015-01-06/ncaa-pay-family-travel-cfp-final-fours-under-pilot-program>.

¹⁶⁸ Michael Powell, *A Threat to Unionize, and Then Benefits Trickle In for Players*, N.Y. TIMES, Jan. 12, 2015, at B13, available at http://www.nytimes.com/2015/01/13/sports/ncaafootball/with-threat-of-union-comes-a-trickle-of-benefits-to-college-football-players.html?_r=0.

¹⁶⁹ *Id.*