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MOVING THE CHAINS: WHY THE NATIONAL NLRB'S AFFIRMATION OF THE DECISION IN NORTHWESTERN V. CAPA IS NECESSARY TO BEST PROTECT COLLEGIATE ATHLETES

PATRICK PRAGER¹

INTRODUCTION

Imagine that your son is a college athlete. He spends countless hours practicing, watching game tapes, and perfecting his craft in order for his team can be the best. He pours his blood, sweat, and time into his team. Sometimes this means he cannot register for the biology class he really wants to take or apply for that part-time job on-campus to earn some spending money, but he understands that he is at school to play his sport. During school breaks, he dedicates forty hours a week to his team. Even on Christmas morning, he is at school training. While his friends are enjoying the Cabo beaches during spring break, he sweats through two-a-days.² Birthdays, weddings, and family gatherings are sacrificed to his teammates and the team goals. Money and time are tight, but it is okay because he is living his childhood dream.

You marvel at his dedication and work ethic. You attend all his home games and proudly sport his jersey. But one day something terrible happens out on the field — the same field where he has spent countless

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² During football training camps, athletes participate in two session practices, separated by a break. These are called "two-a-days." Jim Halley, *In High School, 'Two-a-days' May Soon Only Be a Phrase*, USA TODAY (Aug. 17, 2012, 1:41 PM), available at <https://usatoday30.usatoday.com/sports/preps/football/story/2012-08-16/Two-a-days-dwindling-in-high-school-football/57095822/1>.

hours playing and practicing. You are in the stands cheering when he falls down awkwardly on his neck. He does not get up. A nervous hush quiets the stadium. A crowd of trainers circle around, hiding the anguish on their faces. You see your son carefully placed onto a stretcher and lifted on a cart. There is a brace around his neck, and his eyes are closed. He looks like he is sleeping. He never wakes up.

You have lost your child to his dream. He remains in a coma for the next five years and then, on a rainy evening, he passes away. The funeral is expensive. The five years of care were expensive. But through this tragedy, at least the team was around to help. The whole team is at your child's funeral. The athletic director, coaches, and university president line up to shake your hand, and thank you for sharing your son with them. The death is a national news story and countless TV vans cause traffic jams on the way to the gravesite. This was a big hassle for your family, but at least the university was willing and able to help, or so you thought.

A week later, a medical care bill arrives from the hospital. A funeral bill comes the next day. You call the school, pleading for assistance. Your loved one was an athlete, playing for the school! Is it not the school's responsibility to pay for the benefits they received from your son, or for the damages that they caused your family? They tell you that he was a student-athlete playing for his own recreation, and there is nothing they can do. Though he spent full work weeks training for his sport, devoted his whole life to his teammates, sold out stadiums, and saw his jersey on countless fans, he was not an employee.³ The school has no obligation to help with such costs and chooses not to because it would hurt its bottom line.

Though the scenario above seems far-fetched, similar situations have occurred in National Collegiate Athletics Association ("NCAA")⁴ games repeatedly in the last fifty years.⁵

³ One who is considered an employee can qualify for worker's compensation, insuring against workplace injuries. *Worker's Compensation*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/workers_compensation (last visited May 28, 2017).

⁴ The NCAA is the body that governs college athletics. It is split into multiple divisions. For the purposes of this article, I will focus on Division I. *See About the NCAA*, NCAA.ORG, <http://www.ncaa.org/about> (last visited June 17, 2017).

⁵ Ray Dennison, Kent Waldrep, Eric LeGrand, and many others will be discussed during this paper. All were financially harmed by on-field injuries during NCAA sanctioned events. *See generally* Jared Wade, *How the NCAA Has Used the Term "Student-Athlete" to Avoid Paying Workers Comp Liabilities*, NAT'L LAW FORUM (Sept. 18, 2011), <http://nationallawforum.com/2011/09/18/how-the-ncaa-has-used-the-term-student-athlete-to-avoid-paying-workers-comp-liabilities>.

One of the earliest examples — and quite possible still the most striking — was Ray Dennison. Dennison was a college football player.⁶ He was also a husband.⁷ He played for the Fort Lewis A&M Aggies in Fort Lewis, Colorado, and he left it all on the field, including his life.⁸ When he died, his widow attempted to obtain worker's compensation from his employer: his school.⁹ The case reached the Colorado Supreme Court and thanks to the work of then NCAA director, Walter Byers, the claim was dismissed.¹⁰

Under the leadership Byers, the NCAA grew from small beginnings to an all-powerful agency with the power to sanction and fine schools and NCAA athletes. The NCAA is a non-profit organization regulating collegiate athletics in the United States.¹¹ It is the body that creates the rules for athletes, holds championship events, and licenses rights to NCAA media interests.¹² Walter Byers was the NCAA's director from the 1950's until the 1980's.¹³ In his biography he discusses how he crafted the term "student-athlete" to protect against athlete-employment issues, specifically worker's compensation.¹⁴ The term was deliberately ambiguous so that the players were neither fully students nor fully professionals. Because they were students, they were not professionals; but the term also served as a way to remind people of the athletic responsibilities and downplay the athletes' academic obligations. They could favor athletics over academic achievement, but did not have to be paid. Being coined student-athletes, athletes could be forgiven if they floundered

⁶ *Id.*

⁷ See generally Taylor Branch, *The Shame of College Sports*, THE ATLANTIC (Sept. 7, 2011, 11:28 AM) http://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/?single_page=true.

⁸ *Id.*

⁹ See Leonard Jurnigan, *Workers' Compensation and the NCAA's "Student Athlete,"* N.C. WORKERS' COMP. J. (Nov. 28, 2011), <http://newworkcompjournal.com/2011/11/28/workers-compensation-and-the-ncaas-student-athlete/>; see also Wade, *supra* note 4.

¹⁰ See Wade, *supra* note 4.

¹¹ See About the NCAA, *supra* note 3.

¹² NCAA Licensing Program FAQs, NCAA.ORG, <http://www.ncaa.org/championships/marketing/ncaa-licensing-program-faqs#one> (last visited June 17, 2017).

¹³ Bruce Webber, *Walter Byers, Ex-N.C.A.A. Leader Who Rued Corruption, Dies at 93*, N.Y. TIMES (May 27, 2015), available at <http://www.nytimes.com/2015/05/28/sports/walter-byers-ex-ncaa-leader-who-rued-corruption-dies-at-93.html>.

¹⁴ WALTER BYERS, UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETICS, 69 (1995).

academically. It also meant that the schools had no duty to compensate its players.

The term student-athlete became both a sword, used to promote the NCAA's amateur status, and a shield used against recognizing its athletes as employees. It operated as a shield against worker's compensation lawsuits and academic underperformance.¹⁵ "When injured, the players are considered to be students. When underperforming in the classroom, the players are considered to be athletes."¹⁶ Because of the student-athlete title, athletes are not university employees and, as such, are not afforded the protections that come with that title under the National Labor Relations Act ("the NLRA").¹⁷ For sixty years, this shield has shifted the burden of life-altering injuries experienced on NCAA fields to the young unsuspecting athlete.¹⁸ The student-athlete is many things, but he is never an employee. Additionally, the term is used to promote the NCAA. Amateurism is a highly marketable ideal that the NCAA projects to win viewers.¹⁹ It frames college sports as a place where athletes play for the love of the game. Of course, that is only because the people who make money from the student-athletes' performances have made it against the rules to do anything else.

As a group whose efforts generate large amounts of revenue,²⁰ the "student-athlete" is surprisingly uncompensated and unprotected. In 2013, the NCAA generated revenues nearing \$900 million dollars.²¹ But athletes have not been allowed to collectively

¹⁵ See Branch, *supra* note 6.

¹⁶ *Id.*

¹⁷ The National Labor Relations Act is a 1935 law written to protect employee rights and encourage collective bargaining. 29 U.S.C. § 151.

¹⁸ Anthony Castellano, *Louisville's Kevin Ware Has Surgery After Gruesome Tourney Injury*, ABC NEWS (Apr. 1, 2013, 1:24 AM), <http://abcnews.go.com/blogs/headlines/2013/04/louisvilles-kevin-ware-has-successfully-surgery-after-gruesome-injury-during-ncaa-tournament>; see generally Waldrep v. Texas Emp'r Ins., 21 S.W.3d 692 (Tex. Ct. App. 2000); TAYLOR BRANCH, THE CARTEL, Ch. 5 (2011); Megan Walsh, *I Trusted 'Em': When NCAA Schools Abandon Their Injured Athletes*, THE ATLANTIC (May 1, 2013, 8:38 AM), <http://www.theatlantic.com/entertainment/archive/2013/05/i-trusted-em-when-ncaa-schools-abandon-their-injured-athletes/275407>. In all of these examples athletes suffered long-term injuries while playing for their schools and were made to pay medical bills arising from the injuries.

¹⁹ *Amateurism*, NCAA.ORG, www.ncaa.org/amateurism (last visited June 17, 2017).

²⁰ *Revenue*, NCAA.ORG, <http://www.ncaa.org/about/resources/finances/revenue> (last visited June 17, 2017).

²¹ In 2011, NCAA President, Mark Emerett, made \$1.7 million, other NCAA staff salaries approached \$1 million, the NCAA spent more than \$4 million on legal fees, the

bargain, stripping them of the ability to fight for fewer work hours, compensation for the use of their own images, or even worker's compensation.²² In exchange for a scholarship (plus room and board), coaching staffs closely control athletes' social and academic lives.²³ Student-athletes work more than forty hours a week,²⁴ limiting their ability to truly appreciate the university experience or fully dedicate themselves to their academic work. Due to the efforts of student-athletes, Division 1 universities rake in millions of dollars annually.²⁵

Schools are exploiting student-athletes. All aspects of the student-athletes' lives are controlled in order to achieve the best on-field or on-court results. They are admitted to schools for the sole purpose of achieving athletic excellence and as a result, their academic lives are not prioritized. In exchange for their athletic excellence, they receive an education, or so the public is expected to believe. Routinely, members of the NCAA have failed to keep their commitment to education.²⁶ Additionally, receiving just an

average Division 1 head coaching salary was \$1.64 million, and players received \$0 per year in salary. Steve Berkowitz, *Emert Made \$1.7 million, According to the NCAA Tax Return*, USA TODAY (Jul. 14, 2013, 1:16 PM), www.usatoday.com/story/sports/college/2013/07/10/ncaa-mark-emmert-salary-million-tax-return/2505667/?AID=10709313&PID=6156889&SID=i6r195o73q00r31000dth; Erik Brady, *College Football Coaches Continue to See Salary Explosion*, USA TODAY (Nov. 20, 2012, 1:46 PM), www.usatoday.com/story/sports/ncaaf/2012/11/19/college-football-coaches-contracts-analysis-pay-increase/1715435/?AID=10709313&PID=6156889&SID=i6r195o73q00r31000dth.

²² Nw. Univ. Emp'r & Coll. Athletes Players Ass'n (CAPA), Case 13-RC-121359, at 2 (N.L.R.B. Region 13 Mar. 26, 2014), *available at* <http://www.nlr.gov/case/13-RC-121359>.

²³ *Id.* at 5.

²⁴ *Id.*

²⁵ See Revenue, *supra* note 19.

²⁶ Professors at the University of North Carolina were found guilty of creating fake classes for athletes. By participating in these "paper classes", the athletes avoided having to go to class and had their grade point averages inflated. UNC valued these athletes for their athletic achievement but encouraged them to ignore their academic responsibilities. See Sara Ganim & Devon Sayers, *UNC Report Finds 18 Years of Academic Fraud to Keep Athletes Playing*, CNN (Oct. 23, 2014, 10:28 AM), <http://www.cnn.com/2014/10/22/us/unc-report-academic-fraud>. This scandal has led to an NCAA investigation of 20 other schools. See Brad Wolverson, *NCAA Says It's Investigating Academic Fraud at 20 Colleges*, THE CHRON. OF HIGHER EDUC. (Feb. 26, 2015), <http://chronicle.com/article/NCAA-Says-It-s-Investigating/151315>. Additionally, academic counselors for the Minnesota University basketball team did work for 20-40 members of the program. See *Minnesota University Cheating Scandal Timeline*, MINNESOTA PUBLIC RADIO, http://news.minnesota.publicradio.org/features/199903/11_newsroom_cheating/timeline.shtml (last visited June 17, 2017); Florida State also had a large cheating scandal in the 2000's. See Lynn Zinser, *N.C.A.A. Penalizes Florida State for Academic Fraud*, N.Y. TIMES (Mar. 6, 2009), http://www.nytimes.com/2009/03/07/sports/ncaaf/07ncaa.html?_r=1&.

academic scholarship for athletic achievement looks like a bad deal for students, especially in a situation like Ray Dennison's, who died in the 1950's, and whose widow was left with no access to worker's compensation. It looks even more like a bad deal when a player injures his leg on a basketball court and his mother is sent a \$10,000 MRI bill.²⁷ These athletes fill stadiums, and bring in millions in TV revenue, jersey sales, and alumni donations, and yet they often live below the federal poverty line.²⁸ They should be entitled to the fruits of their labor, or at least be protected from the dangers of it. The NCAA should be proactive while engaging in collective bargaining with its "student-athletes" to provide them with the opportunity to be treated fairly and to use the goodwill garnered to keep student demands realistic.

The first step to witnessing college athlete unionization has already occurred. In 2013, Northwestern University quarterback, Kain Coulter, joined by former UCLA football player, Ramogi Huma, and former University of Massachusetts basketball player, Luke Bonner, formed the College Athletes Players Association ("CAPA").²⁹ CAPA then petitioned the Chicago Regional Office of the NLRB to grant employee status to the Northwestern football team, to declare CAPA a labor organization, and to order a vote to allow collective bargaining.³⁰ In March 2014, the Regional Director of the NLRB in Chicago, Peter Sung Ohr, granted the

²⁷ Kyle Hardrick injured himself playing basketball for the University of Oklahoma. He underwent multiple MRIs and surgery. When he transferred to a community college his mother received a 10,000 bill for these past MRIs, though they were administered by the university for injuries experienced while playing for the Oklahoma men's basketball team. Bill Pennington, *When Injured Athlete Leaves Camps, College Responsibility Ends*, N.Y. TIMES (April 4, 2013), <http://www.nytimes.com/2013/04/05/sports/ncaabasketball/broken-leg-renews-focus-on-college-athletes-health-insurance.html?pagewanted=all>. See Walsh, *supra* note 17.

²⁸ See Revenue, *supra* note 19. A single person household is considered below the poverty line by the federal government when the person earns less than \$11,670 per year. Drexel University found that 85% of collegiate athletes live off of the equivalent of less than that amount. See Ellen Staurowsky, *Study College Athletes Worth Six Figures Live Below the Federal Poverty Line*, DREXEL NOW (Sept. 13, 2011), <http://www.drexel.edu/now/archive/2011/September/Study-College-Athletes-Worth-Six-Figures-Live-Below-Federal-Poverty-Line>; See also OFFICE OF THE ASSISTANT SECRETARY FOR PLAN, AND EVALUATION, *2014 Poverty Guidelines*, U.S. DEPT OF HEALTH AND HUM. SERV. (Dec. 1, 2014), <http://aspe.hhs.gov/poverty/14poverty.cfm>.

²⁹ C. ATHLETES PLAYERS ASS'N, *Who We Are*, <http://www.collegeathletespa.org/about> (last visited May 17, 2017).

³⁰ NAT'L LAB. RELATIONS BOARD, *Northwestern University Docket Activity*, <https://www.nlr.gov/case/13-RD-192825> (last visited May 17, 2017).

players employee status, declared CAPA a labor organization, and ordered a vote on collective bargaining among the football players at Northwestern.³¹

In August 2015, the NLRB declined to assert jurisdiction in the *Northwestern* Case.³² Noting that the NCAA is made up of both private and public schools (where the NLRB has no authority), the NLRB decided that exercising jurisdiction would promote labor instability.³³ The NLRB did not rule that players were *not* employees; instead, it determined that declaring them employees would be too harmful to the current NCAA system.³⁴ They did negate the decision of Director Ohr. The National Board had the opportunity to make major strides in protecting college athletes; instead it chose not to act.

This Note argues that the NLRB erred in their decision to decline to assert jurisdiction. Instead, it stresses that athletes should be allowed to unionize and collectively bargain, so they will finally receive the protections they need, both medical and financial. Without unionization, progress can be made, but a solution cannot be realized.

This note analyzes the effect of *Northwestern v. CAPA*³⁵ on the “student-athlete.” Part I of the Note discusses the relevant labor law. Part II examines the *Northwestern* case and the reasoning behind the decision of the NLRB Regional Director in Chicago. Part III discusses the advancements in player safety and compensation that have occurred since *Northwestern* and why those changes have not solved the problem. Part IV discusses counterarguments to athlete unionization and refutes those arguments. Finally, Part V proposes a scenario where the NCAA amicably negotiates an employment agreement with a college athlete player’s union and what items must be a part of that contract. By taking these measures, the NCAA can address the

³¹ Nw. Univ. Emp’r & Coll. Athletes Players Ass’n (CAPA), Case 13-RC-121359, at 24 (N.L.R.B. Region 13 Mar. 26, 2014), *available at* <http://www.nlr.gov/case/13-RC-121359>.

³² *Id.* at 1.

³³ *Id.* at 3.

³⁴ *Id.* at 4.

³⁵ *Id.*

most immediate athlete needs, while preserving the appeal of amateurism.³⁶

I. LABOR LAW APPLICABLE TO STUDENT-ATHLETES

In 1935, Congress enacted the NLRA to “protect the rights of employees and employers, to encourage collective bargaining, and to curtail certain private sector labor and management practices.”³⁷ Under the NLRA, employees have the right to self-organization, to form, and join labor organizations, to bargain collectively through representatives that they choose, and to engage in other activities for the purpose of other protections.³⁸

To resolve problems arising under the NLRA, Congress created the National Labor Relations Board (“NLRB”), charged with settling disputes in the private sector.³⁹ The NLRB is a federal agency consisting of five members, three nominated by the President and two nominated by the opposition party’s leadership in Congress.⁴⁰ It is headquartered in Washington, D.C.⁴¹ The NLRB has the power to establish regional offices and assign powers to the regional directors who hear cases across the country.⁴² There are 32 such regional offices.⁴³ The NLRB then has the power to review the decisions of those regional offices.⁴⁴ A regional office’s decision can be appealed to the national headquarters for review.⁴⁵

³⁶ “The NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports. There can be no question but that it needs ample latitude to play that role, or that the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act.” *National Collegiate Athletic Ass’n v. Board of Regents*, 468 U.S. 85, 120 (1984).

³⁷ 29 U.S.C.A. § 151 (West 1947).

³⁸ 29 U.S.C.A. § 157 (West 1947).

³⁹ 29 U.S.C.A. § 153(a) (West 1982).

⁴⁰ *See id.*

⁴¹ *Introduction to the NLRB*, NAT’L LAB. REL. BOARD, available at <https://www.nlr.gov/nlr-introduction> (last visited May 17, 2017).

⁴² 29 U.S.C.A. § 153(b) (West 1982).

⁴³ *Who We Are: Regional Offices*, NAT’L LAB. REL. BOARD, available at <http://www.nlr.gov/who-we-are/regional-offices> (last visited May 17, 2017).

⁴⁴ 29 U.S.C.A. § 153(b) (West 1982).

⁴⁵ *The NLRB Process*, NAT’L LAB. REL. BOARD, available at <https://www.nlr.gov/resources/nlr-process> (last visited May 17, 2017).

The NLRA's definition of employee is broad; the writers took purposeful steps not to limit it. The Act states: "[t]he term 'employee' shall include any employee, *and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise.*"⁴⁶ The U.S. Supreme Court has held that in applying this broad definition of "employee" it is necessary to consider the common law definition.⁴⁷ "Under the common law, an employee is a person who (1) performs services *for another* (2) under a contract *of hire*, (3) subject to the other's control or right of control, and (4) *in return for payment.*"⁴⁸ The NLRA also defines "labor organization" as "any organization of any kind . . . in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."⁴⁹ Labor organizations are charged with being the sole negotiator for employees during collective bargaining.⁵⁰

Representatives selected for the purposes of collective bargaining by the majority of the employees are the exclusive representatives of all the employees in unit requesting employee status for the purposes of collective bargaining.⁵¹ Whenever an employee or labor organization files a petition to be represented for collective bargaining and the employer declines to recognize the representative, the employee or organization can file an appeal with the NLRB to resolve the dispute.⁵² Generally a decision will be heard first by the Regional Office and appealed to the national headquarters of the NLRB. Decisions of the D.C. Board can be appealed to a United States Court of Appeals.⁵³

Being declared employees and a labor union is not enough to collectively bargain. After the NLRB recognizes a labor union, the Board shall take a secret ballot of the employees in the questioned group and certify the results to the labor organization and to the

⁴⁶ 29 U.S.C.A. § 152(2) (West 1978) (emphasis added).

⁴⁷ Nat'l Lab. Rel. Board v. Town & Country Electric, 516 U.S. 85, 94 (1995).

⁴⁸ Brown Univ. & Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., 342 N.L.R.B. 483, 493 (2004) (emphasis in original).

⁴⁹ 29 U.S.C.A. § 152(5) (West 1978).

⁵⁰ *Id.*

⁵¹ 29 U.S.C.A. § 159(a) (West 1959).

⁵² 29 U.S.C.A. § 159(c)(1)(a) (West 1984).

⁵³ 29 U.S.C.A. § 160(e) (West 1984).

employer.⁵⁴ Thirty percent of those polled must vote in favor of that labor union to elect its representation.⁵⁵

Additionally, employees who seek to collectively bargain must prove they are not temporary employees since temporary employees are not eligible to vote in representation elections.⁵⁶ Under Board law, the test to determine the eligibility of those designated as temporary employees depends on the certainty of their tenure.⁵⁷ However, the NLRB will not find individuals to be temporary employees simply because their employment will terminate on a certain date.⁵⁸ In *Boston Medical*, the Board declared that it, “has never applied the term ‘temporary’ to employees whose employment, albeit of finite duration, might last from 3 to 7 or more years . . . In many employment relationships, an employee may have a set tenure and, in that sense, may not have an indefinite departure date.”⁵⁹

When a group gains full-time employee status and its labor union is recognized, it can actively participate in collective bargaining, either with its specific employer or with a group of employers.⁶⁰ The NLRA obligates employees and employers to collectively bargain in good faith.⁶¹ To bargain collectively is the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment.⁶² The NLRB has declared that topics directly relating to the NLRA are mandatory subjects of bargaining.⁶³ Mandatory subjects include (among other things) wages, hours, profit sharing, health and welfare plans, drug testing, transfers,

⁵⁴ 29 U.S.C.A. § 159(e)(1).

⁵⁵ *Id.*

⁵⁶ *Boston Med. Ctr. Corp.*, 330 N.L.R.B. 152, 166 (1999).

⁵⁷ *In Re Catholic Healthcare W. S. California*, 339 N.L.R.B. 127, 128 (2003) (stating that if an employee has a certain date of termination, that person is considered a temporary employee).

⁵⁸ *Boston Med. Ctr. Corp.*, 330 N.L.R.B. at 166 (Medical Residents were often serving their internships at a hospital for three to seven years).

⁵⁹ *Id.*

⁶⁰ 29 U.S.C. § 158(d).

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

health and safety, and disciplinary procedures.⁶⁴ It is an unfair labor practice for an employer to refuse to collectively bargain with employees.⁶⁵

Interestingly enough, there are no actual cases pre-dating *Northwestern* regarding the employee status of student-athletes. The most analogous cases concern graduate assistants. The graduate student example is fascinating because it highlights the fluctuating nature of the NLRB. Cases decided in the 1970s, such as like *Adelphi* and *Stanford*, held that graduate and research assistants were not employees because they were performing work that was contingent upon enrollment in academic classes and because student stipends and grants were not equivalent to wages.⁶⁶ Under a Clinton-appointed NLRB, *Boston Medical* granted employee status to hospital residents and interns (not graduate assistants), highlighting that students were not a class of “employee” exempted from the NLRB and ignoring past precedent.⁶⁷ In 2000, in *New York University*, the NLRB again disregarded past precedent, this time it cast aside *Adelphi* and *Stanford* and granting employee status to graduate assistants, and declared that graduate assistants meet the “employee” requirements at common law and dismissed the idea that allowing collective bargaining will infringe upon a university’s academic freedom.⁶⁸ However, a Bush-appointed NLRB reversed *NYU* just four years later in *Brown University*.⁶⁹ The Board relied on

⁶⁴ *What Subjects Are to be Considered During Collective Bargaining?*, SOC’Y FOR HUM. RESOURCE MGMT. (June 1, 2012), <http://www.shrm.org/templatetools/hrqa/pages/collectivebarginingsubjects.aspx>.

⁶⁵ 29 U.S.C. §§ 158(a)(5), 158(b)(3).

⁶⁶ See e.g. *Adelphi University*, 195 N.L.R.B. 693 (1972) (the NLRB found that graduate students are primarily students and could not be part of the faculty’s bargaining group), and *Leland Stanford Junior Univ.*, 214 N.L.R.B. 621 (1974), *overruled by* Trustees of Columbia Univ. in N.Y. City and Grad. Workers of Columbia, 364 N.L.R.B. 90 (2016) (the NLRB found that graduate students were not employees under the NLRA).

⁶⁷ *Boston Med. Ctr. Corp.*, 330 N.L.R.B. 160-61 (the NLRB found that medical residents were employees under the NLRA after applying the master/servant test: At common law, a servant was one who performed services for another and was subject to the other’s control or right of control. It also stated that, “status as students is not mutually exclusive of a finding that they are employees.”).

⁶⁸ *N.Y. Univ.*, 332 N.L.R.B. 1205, 1208 (2000), *overruled by* Brown Univ. & Int’l Union, United Auto., Aerospace & Agric. Implement Workers of Am., Uaw Afl-Cio, 342 N.L.R.B. 483 (2004) (holding that graduate students should be given employee status under the same reasoning as *Boston Medical*).

⁶⁹ *Brown Univ.*, 342 N.L.R.B. at 487, *overruled by* Trustees of Columbia Univ. in N.Y. City and Grad. Workers of Columbia, 364 N.L.R.B. 90 (2016), (overturning *N.Y. Univ.*, and

Adelphi and *Stanford* and claimed that collective bargaining rights would be detrimental to the educational process; so, the NLRB declared that graduate students were not “employees” within the meaning of the NLRA.⁷⁰ Northwestern University relies on this line of jurisprudence that Northwestern University to argue that its football players are not employees.⁷¹ The NLRB’s Regional Board in Illinois examined whether these student-athletes were employees.

II. NORTHWESTERN V. CAPA

Northwestern is a private, non-profit university in Illinois.⁷² Additionally, it is a member of the National Collegiate Athletic Association (“NCAA”) and the Big Ten Conference.⁷³ It has 19 Division One varsity athletic teams, and its football team is part of the Football Bowl Subdivision (FBS)⁷⁴; its football staff is large and well paid.⁷⁵

Furthermore, many of Northwestern’s student-athletes are on grant-in-aid scholarships,⁷⁶ which is approximately \$61,000 per year (including tuition, room, board, and books).⁷⁷ Northwestern

applying the education test used by *Adelphi* and *Stanford* and finding that graduate students should not be considered employees because they work was primarily educational).

⁷⁰ Brown Univ., 342 N.L.R.B. at 489.

⁷¹ See generally, Nw. Univ. Emp’r & Coll. Athletes Players Ass’n (CAPA), Case 13-RC-121359 (N.L.R.B. Region 13 Mar. 26, 2014), available at <http://www.nlr.gov/case/13-RC-121359>.

⁷² *Id.* at 2.

⁷³ *Big Ten Schools*, CBSI ADVANCED MEDIA, <http://www.bigten.org/school-bio/big10-school-bio.html> (last visited May 30, 2017). The Big Ten is the conference that organizes sports for 12 Midwestern schools, including Northwestern.

⁷⁴ *FCS Name No Longer Perfect*, ASSOCIATED PRESS (June 6, 2014), <http://www.foxsports.com/collegefootball/story/football-championship-subdivision-schools-debate-name-change-082712>. The NCAA splits Division 1 football into two levels: the Football Bowl Subdivision (the FBS) and the Football Championship (FBC). These were formally known as Divisions 1 and 1AA.

⁷⁵ Steve Berkowitz, *Northwestern Football Coach Pat Fitzgerald Gets Big Pay*, USA TODAY (Sept. 4, 2013, 5:02 PM), <http://www.usatoday.com/story/sports/ncaaf/2013/09/04/pat-fitzgerald-northwestern-football-coach-pay-2011/2763163/?AID=10709313&PID=6156889&SID=i6p7s6gxdk00r31000dth>. Pat Fitzgerald makes more than \$2 million per year.

⁷⁶ Nw. Univ. Emp’r & Coll. Athletes Players Ass’n (CAPA), Case 13-RC-121359, at 3 (N.L.R.B. Region 13 Mar. 26, 2014), available at <http://www.nlr.gov/case/13-RC-121359>.

⁷⁷ *Id.* at 2.

elects to offer its athletes four-year scholarships, but until 2012 it exclusively offered renewable scholarships;⁷⁸ many other schools still offer only these types of scholarships.⁷⁹ High school athletes are offered a “tender” which includes the terms and conditions⁸⁰ of their scholarship offer.⁸¹

In 2014, CAPA petitioned the Chicago Regional Office of the NLRB to grant employee status to the Northwestern football team, to declare CAPA a labor organization, and to order a vote to allow collective bargaining.⁸² If athletes were confirmed as employees, Northwestern would have a legal obligation to meet and bargain with them. In March 2014, Director Ohr evaluated CAPA’s claim against Northwestern and assessed whether Northwestern’s football players were employees under common law. The Director determined that scholarship members of the Northwestern football team met all the requirements for employee status.

A. Northwestern Football Players are Employees of the University

To determine whether the players were employees, Director Ohr considered whether they (1) performed services for another (2) under a contract of hire, (3) subject to the other’s control or right of control, and (4) in return for payment.⁸³

1. Northwestern Football Players Perform Services for the University.

The Director found that athletes perform services for the University. Athletes are recruited for football, and their athletic

⁷⁸ *Id.* Northwestern previously offered 1 year scholarships, renewable by the head football coach each spring.

⁷⁹ *Id.*

⁸⁰ *Id.* at 9. “More specifically, it explains to the recruit that, under NCAA’s rules, the 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 action; (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.”

⁸¹ *Northwestern University*, Case 13-RC-121359, at 9.

⁸² *Id.* at 1.

⁸³ *Id.* at 19 (citing *Brown University*, 342 NLRB 483, 490 (2004) (citing *Town & Country Electric*, 516 U.S. at 94)).

performance results in revenue for the school.⁸⁴ The performance of a football team on the field is the product that the University sells to networks and fans to bring in millions of dollars. The Director determined that grant-in-aid athletes perform services for the benefit of their universities, as shown by large revenues from these sports.⁸⁵

The school generates revenue through ticket sales, TV broadcast deals, and merchandise sales.⁸⁶ From 2003-2012, the school athletic department made \$235 million in revenue (mostly from football) and accrued \$159 million in expenses.⁸⁷ Northwestern also supplements its other non revenue-generating sports using these profits.⁸⁸

The athletes' time commitment also demonstrated their service to Northwestern. The time devoted by athletes to the school is impressive. On average, athletes exceed 60 hours per week during training camp.⁸⁹ During the season, football players devote more than 40 hours per week to football.⁹⁰ They practice five days a week, playing games on a sixth.⁹¹ After classes, team captains organize the team,⁹² running drills and watching film.⁹³ The team travels to away games on Fridays or goes to an off-campus hotel for home games.⁹⁴ On Saturdays, between breakfast, games, and travel, they do not generally return to campus until 9pm.⁹⁵ Being eligible for a bowl game extends the season a month, sometimes to

⁸⁴ *Northwestern University*, Case 13-RC-121359, at 19.

⁸⁵ *Id.*

⁸⁶ *Id.* at 14.

⁸⁷ *Id.*

⁸⁸ *Id.* Many sports do not generate revenue. Because of this some schools use the revenues provided by football and basketball to finance their other sports.

⁸⁹ Nw. Univ. Emp'r & Coll. Athletes Players Ass'n (CAPA), Case 13-RC-121359, at 11 (N.L.R.B. Region 13 Mar. 26, 2014), available at <http://www.nlr.gov/case/13-RC-121359>.

⁹⁰ *Id.* at 12.

⁹¹ *Id.*

⁹² *Id.* NCAA guidelines limit the amount of time coaches are allowed to spend with their teams. In response, they often encourage team captains to organize film studies and player-only practice sessions.

⁹³ *Id.* at 12.

⁹⁴ *Id.*

⁹⁵ Nw. Univ. Emp'r & Coll. Athletes Players Ass'n (CAPA), Case 13-RC-121359, at 13 (N.L.R.B. Region 13 Mar. 26, 2014), available at <http://www.nlr.gov/case/13-RC-121359>.

January.⁹⁶ In the spring semester, there are additional winter workouts and spring practices.⁹⁷ Football is a year-round commitment. Those countless hours are rewarded by their athletic scholarship.

Noting that those scholarships can be immediately cancelled if the player voluntarily withdraws from the team or abuses team rules, the Director ruled that the scholarship is clearly tied to the player's performance of athletic services.⁹⁸

2. *The Scholarship Agreements Signed by the Athletes are Equivalent to a Contract of Hire.*

Because the scholarship is tied to athletic service, the Director next concluded that the athletes play football for Northwestern under a contract of hire.⁹⁹ Since athletes provide their services in exchange for scholarships, the Director found that they were under a contract. The "tender" that athletes sign when accepting their scholarships serves as an employment contract and gives the players detailed information concerning the duration and conditions under which the compensation will be provided.¹⁰⁰ These athletes are recruited by Northwestern specifically for their ability to play football.¹⁰¹ When they receive the "tender" offering them a scholarship, football is mentioned specifically.¹⁰² They receive no academic credit for time committed to football, and their coaches are not part of the faculty.¹⁰³ The many hours put into football have no correlation to their academic lives.¹⁰⁴ Their binding scholarship agreements establish that athletics are an

⁹⁶ *Id.* Only teams with 6-6 or better records are eligible to play in bowl games, which start around Christmas and continue through the first two weeks of January. Only teams involved in bowl games are eligible to practice during that time.

⁹⁷ *Id.* at 15.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 19.

¹⁰¹ Nw. Univ. Emp'r & Coll. Athletes Players Ass'n (CAPA), Case 13-RC-121359, at 19 (N.L.R.B. Region 13 Mar. 26, 2014), available at <http://www.nlr.gov/case/13-RC-121359>.

¹⁰² *Id.* at 20.

¹⁰³ *Id.* at 24. An occasional coach may actually be part of a faculty, but only because he actually teaches classes. Some high level coaches teach classes in leadership or management. See Associated Press, *Jim Tressel Teaching Class at Akron*, ESPN (Aug. 21, 2013, 8:12 AM), available at http://espn.go.com/college-football/story/_/id/9587332/former-ohio-state-buckeyes-coach-jim-tressel-teaching-class-akron.

¹⁰⁴ *Northwestern University*, Case 13-RC-121359 at 24.

athlete's primary concern.¹⁰⁵ The school offers to provide scholarship, room, and board for the students' absolute obedience to team rules and guidelines, which is accepted when the student signs the agreement.¹⁰⁶

3. *Football Players are Subject to Their Coaches' Control Because of the Rules Imposed on Them.*

The Director also found that the football players were subject to the school's control.¹⁰⁷ Starting with training camp, Northwestern's coaches exercise a great deal of control over their players.¹⁰⁸ Coaches prepare and distribute daily itineraries to the players setting forth the football-related activities the players are to engage in from as early as 5:45am until 10:30pm, when they are expected to be in bed.¹⁰⁹ Even during the season, players can commit up to 50 hours per week to football-related activities.¹¹⁰ This time includes eating at a "training table" where players can only eat food approved by the coaching staff to make sure that they are fueling their bodies properly.¹¹¹ Players can spend 25 hours on game day weekend alone.¹¹²

Additionally, the football players have special rules, specific to their non-football lives.¹¹³ They must have their cars and apartments approved by coaches,¹¹⁴ they have special media rules,¹¹⁵ they cannot swear in public, and they are prohibited from "embarrassing" the team.¹¹⁶ Because of NCAA regulations,

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 19.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 6.

¹¹⁰ *Northwestern University* at 6.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* at 5.

¹¹⁴ For the first two years athletes are in school, they are mandated to live on campus. Afterwards, they are given a stipend to pay for their rent. *id.*

¹¹⁵ The players must also abide by a social media policy, which restricts what they can post on the internet, including Twitter, Facebook, and Instagram. In fact, the players are prohibited from denying a coach's "friend" request and the former's postings are monitored. The Employer prohibits players from giving media interviews unless they are directed to participate in interviews that are arranged by the Athletic

Department. *id.* at 5.

¹¹⁶ *Id.*

athletes may not profit off of their own image,¹¹⁷ but are coerced into signing a release so their schools can use their images.¹¹⁸ The team has stringent drug and alcohol policies and subjects athletes to drug tests.¹¹⁹ Failure to comply with these rules can lead to discipline or the loss of a scholarship.¹²⁰

The coaching staff also controls player academics. At Northwestern, athletes' academics are monitored closely,¹²¹ and they are subject to mandatory study halls and sign-in policies for classes.¹²² Scholarship players are not allowed to miss practice when it conflicts with class and, as a result, cannot register for classes before 11:00 AM because it overlaps with practice.¹²³ Northwestern offers six and eight-week long classes, but players

¹¹⁷ *Id.* at 5. Players are prohibited from profiting off their image or reputation, including the selling of merchandise and autographs. Accepting money can for their image (or even autograph) can leave a player ineligible. Chronology of the Ohio State Scandal, NCAA, <http://www.ncaa.com/news/football/article/2011-12-21/chronology-ohio-state-scandal>.

¹¹⁸ Players are also required to sign a release permitting the Employer and the Big Ten Conference to utilize their name, likeness and image for any purpose. It is undisputed that the Employer sells merchandise to the public, such as football jerseys with a player's name and number that may or may not be autographed by the player. *Northwestern University* at 5;

Under *O'Bannon v. NCAA*, athletes can make some profits off their image. A United States District Court judge ruled against the NCAA in a class-action lawsuit that accused the NCAA of violating antitrust laws by illegally limiting trade. *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, No. C 09-1967 CW, 2010 WL 445190 (N.D. Cal. Feb. 8, 2010) at 2. The Court issued an injunction that has two components: A) The NCAA cannot cap the amount of a scholarship below the actual cost of attendance; and B) The NCAA cannot ban schools from creating a trust fund to pay players equal shares for use of their Name Image and Likeness. See generally *O'Bannon v. Nat'l Collegiate Athletic Ass'n*; Tom Farey and Lester Munson, Judge Rules Against NCAA, ESPN.com News Service (Aug. 9, 2014, 6:20 pm), http://espn.go.com/college-sports/story/_/id/11328442/judge-rules-ncaa-ed-obannon-antitrust-case.

¹¹⁹ *Northwestern University* at 5.

¹²⁰ *Id.*; See *supra* note 78;

¹²¹ *Northwestern University* at 11.

¹²² *Id.* at 13, 15.

¹²³ Some players offered testimony that conflicts with Coulter's testimony:

In contrast, Blais and Fitzgerald testified that, if a player had to take a class required for their degree that conflicted with practice, Cody Cejeda (Director of Football Operations) would pull them out of practice about 30 minutes early and provide them a ride to class along with a to-go meal. Fitzgerald also testified that he never told any player that they could not leave practice early because of a class conflict. In addition, if a large number of players had the same class conflict, Fitzgerald testified that he would sometimes move the practice time up to accommodate the class. He cited one Friday during a bye week when he moved up practice for this very reason. Scholarship player Ward corroborated this testimony by citing an example where he and other players had an early class during Spring practice in 2011 so practice was moved up to avoid the conflict.

Id. at 13 (footnote omitted).

can only register for six-week classes because eight-week classes conflict with training camp.¹²⁴ Testifying before the Regional NLRB Director, former Northwestern quarterback, Kain Coulter, recalled his time as a player.¹²⁵ Specifically, he mentioned that athletes were discouraged from taking necessary classes due to conflicts with football.¹²⁶ Coulter was forced to change his major to something less demanding so that he could meet his football requirements.¹²⁷ Football controls all aspects of the athletes' lives, including academics, though the University claims football is just a supplemental activity.¹²⁸

4. *The Scholarships received by football players are payment in return for their services.*

Finally, the Director determined that players receiving scholarships to perform football-related services for Northwestern were receiving compensation.¹²⁹ Scholarships are a transfer of economic value because Northwestern pays for the players' tuition, fees, room, board, and books for up to five years (and six in rare cases) in return for participation in the football program.¹³⁰ The "monetary value of these scholarships totals as much as \$76,000 per calendar year and results in each player receiving total compensation in excess of one quarter of a million dollars throughout the four or five years they" play for the school.¹³¹

"Because NCAA rules do not permit players to receive any additional compensation or otherwise profit from their athletic

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ Coulter came to Northwestern hoping to go to medical school. *Id.* Because of football conflicts, he had to change his major to psychology, which was less demanding. *Id.* at 12. The Northwestern lawyers provided evidence that the school helped their athletes achieve academically. *Id.* at 13. Northwestern offered its student-athlete handbook as evidence of its commitment to athletes' scholastic achievement. *Id.* This handbook outlines requirements for study tables, tutors, and mandatory attendance policies. *Id.* They also pointed to Northwestern's NU P.R.I.D.E. program, which serves to prepare athletes for life after college, and its 97% graduation rate for athletes. *Id.*

¹²⁸ *See id.* at 14.

¹²⁹ *Id.* at 15.

¹³⁰ *Id.* at 14.

¹³¹ *Id.* The Director further ruled that Northwestern's choice to not treat these scholarships or stipends as taxable income is not dispositive of whether they are compensation. *Id.*; *see also* Seattle Opera v. NLRB, 292 F.3d 757, 763 n.8.

ability and/or reputation,¹³² the scholarship players are truly dependent on their scholarships to pay for basic necessities, including food and shelter.”¹³³ The reliance on scholarships to provide for basic necessities is partially why the Director equates scholarships to compensation.¹³⁴

B. The Northwestern players are not temporary employees.

To find that the Northwestern football players were employees, the Director also needed to find that their employments were not temporary because the NLRA excuses temporary employees to protect the employer against heightened duties for short-term employees.¹³⁵ The Director determined that the athletes in question were not temporary employees just because their employment has a certain termination date; they maintain their duties to the university full time for a four-year period.¹³⁶ Therefore the athletes are not short-term, temporary employees.

C. CAPA should be considered a labor organization

The Director next addressed whether CAPA was the proper organization to represent the Northwestern football team. Declaring CAPA a labor organization would allow it to take steps in representing the Northwestern football players. The Director found that CAPA should be considered a labor organization.¹³⁷ This would allow CAPA to continue to organize for college athletes.

¹³² NCAA *Division I Manual*, NCAA PUBL'NS, at 61-63, <http://www.ncaapublications.com/productdownloads/D115JAN.pdf> (last visited July 3, 2017).

¹³³ *Nw. Univ.*, 362 N.L.R.B. No. 167, at 14.

¹³⁴ *Id.*

¹³⁵ *Id.* at 17.

¹³⁶ *Id.* at 18. To determine if an employment is temporary, “[i]t is only necessary to prove that the prospect of termination was sufficiently finite on the eligibility date to dispel reasonable contemplation of continued employment beyond the term for which the employee was hired.” *Bos. Med. Ctr. Corp.*, 330 N.L.R.B. 152, 166 (1999) (citations omitted) (internal quotation marks omitted).

¹³⁷ To fall within the definition of a “labor organization,” the Board has held that employees must participate in the organization and it must exist for the purpose, in whole or in part, of dealing with employers on their behalf regarding their wages, hours of employment and other terms and conditions of employment.

. . . Petitioner introduced evidence that it was established to represent and advocate for certain collegiate athletes, including the Employer’s players who receive scholarships, in collective bargaining with respect to health and safety, financial support, and other terms and conditions of employment.

Finally, the Director ruled that Northwestern football players should be considered employees within the meaning of the NLRA.¹³⁸ That classification is the first step to allowing athletes to bargain for the types of protection that their efforts should make them entitled to.

III. THE EFFECT OF *NORTHWESTERN* ON TODAY'S NCAA

Still, *Northwestern* has had an impact on the NCAA that cannot be understated. Since the initial decision has come down, the NCAA has done its best to show that no unions are needed to ensure the best situation for players.¹³⁹ The intimidation of impending player unionization led the NCAA to make seismic shifts in its organization and amazing advances for college athletes.¹⁴⁰

The catalyst for this change occurred in August 2014 when the NCAA's Board of Directors adopted a new Division 1 structure.¹⁴¹ In all releases and comments concerning restructuring, the NCAA made sure to highlight that athletes had some representation.¹⁴² Essentially, the NCAA created a three-part structure for major college sports.¹⁴³ The top level will continue to consist of the Board of Directors, but it would be expanded and add a student and

Nw. Univ., 362 N.L.R.B. No. 167, at 18-19.

¹³⁸ *Id.* at 19. The Director also concluded that *Brown University* was inapplicable because the athletes' football-related duties are unrelated to their academic studies, unlike the graduate assistants in *Brown*, whose teaching and research duties were directly related to academics. *Id.* at 16. The Director then went through the factors from *Brown* and showed why those factors would not interfere with a decision to grant athletes employee status, even if they were applicable. *Id.* at 16-17.

¹³⁹ See Ron Clements & Joe Rodgers, *Power 5 NCAA Schools Pass New Scholarship, Concussion Proposals*, SPORTING NEWS (Jan. 18, 2015), <http://www.sportingnews.com/ncaa-football/news/power-5-ncaa-schools-vote-new-scholarship-concussion-proposals-autonomy/mdv2pvwbc6py1e6v16tsa0ew8>.

¹⁴⁰ *Id.*

¹⁴¹ Michelle Brutlag Hosick, *Board Adopts New Division I Structure*, NCAA (Aug. 7, 2014, 11:49 AM), <http://www.ncaa.org/about/resources/media-center/news/board-adopts-new-division-i-structure>.

¹⁴² *Id.*; Michelle Brutlag Hosick, *Student Voice, Vote Continues to Grow Stronger*, NCAA (Feb. 5, 2015, 1:10 PM), <http://www.ncaa.org/about/resources/media-center/news/student-voice-vote-continues-grow-stronger>.

¹⁴³ *Division I Steering Committee on Governance: Recommended Governance Model*, NCAA, at 5-6 (July 18, 2014), <http://www.ncaa.org/sites/default/files/DI%20Steering%20Committee%20on%20Gov%20Proposed%20Model%2007%2018%2014%204.pdf>.

faculty representative.¹⁴⁴ The second level, the Council, will also consist of some student and faculty members and will run the day-to-day operations of the NCAA.¹⁴⁵ Additionally, it will be in charge of rule changes for issues that affect all NCAA teams.¹⁴⁶ The last and most impactful level of the NCAA's new organization is a group that will govern the NCAA's Power Five Conferences¹⁴⁷ with autonomy on pre-decided subject matter.¹⁴⁸

Conceptually, the Power Five Conferences are those that benefit most from large revenues and can most afford to reward athletes in some ways.¹⁴⁹ It is presumed that the smaller conferences were purposefully left out of this group to shield them from the financial impacts of Power Five votes.¹⁵⁰ Sixty-five schools belong to these conferences and each conference also appoints three student-athlete representatives.¹⁵¹ These schools will meet annually at the NCAA Convention in January and hear all issues proposed for discussion by one conference.¹⁵² The first Convention Committee meeting of the Power Five (the "Committee") was held in January 2015; it brought sweeping change for college athletics.¹⁵³ The

¹⁴⁴ *Id.* at 16.

¹⁴⁵ *Id.* at 21.

¹⁴⁶ They will not have control over certain subjects for some conferences. Those schools have been given autonomous control over those topics. *See id.* at 24-26.

¹⁴⁷ *Id.* at 28. The Power 5 Conferences are the five conferences with the most financial and on-field success. The Power 5 consists of the Atlantic Coastal Conference (ACC), the Big 12, the Big Ten, the Southeastern Conference (SEC) and the Pacific 12 Conference (Pac-12), plus independent Notre Dame football. These schools bring in the most revenue, win the most championships, and have the most to give college athletes. *See* Mitch Sherman, *Full Cost of Attendance Passes 79-1*, ESPN (Jan. 18, 2015), http://espn.go.com/college-sports/story/_/id/12185230/power-5-conferences-pass-cost-attendance-measure-ncaa-autonomy-begins.

¹⁴⁸ The NCAA has granted the Power 5 autonomy in areas concerning health and wellness, meals, financial aid, student-athlete support, pre-enrollment support, career transition, career pursuit, time demands, academic support, recruiting, and personnel. *Division I Steering Committee on Governance: Recommended Governance Model*, *supra* note 141, at 29-32.

¹⁴⁹ George Schroeder, *NCAA Looks to Protect the Many as a Few Gain Autonomy*, USA TODAY (Jan. 15, 2015, 8:59 PM), <http://www.usatoday.com/story/sports/college/2015/01/15/ncaa-convention-autonomy-college-sports-conferences-mark-emmert/21829025>.

¹⁵⁰ *Id.* NCAA president Mark Emmert commented that it is important to "make sure the success of the 3 percent doesn't come at the cost of the 97 percent." *Id.*

¹⁵¹ *See* Clements & Rodgers, *supra* note 137; *Division I Steering Committee on Governance: Recommended Governance Model*, *supra* note 141, at 28.

¹⁵² *Division I Steering Committee on Governance: Recommended Governance Model*, *supra* note 141, at 42.

¹⁵³ *Id.*; *see* Clements and Rodgers, *supra* note 137.

Committee made positive changes for athletes, but the changes remaining to be made cannot be accomplished without unionization.

A. *What Went Right?*

This initial meeting seemed to do its best to address as many issues for athletes' well-being as it could in one sitting. It actively pursued the input of student representatives and had vigorous debate on a variety of issues.¹⁵⁴ The group's meeting resulted in historic decisions affecting three main areas of athlete life: their financial outlook, scholarship security, and health concerns.

1. *Big 5 Athletes Had Their Financial Outlook Improved.*

The first thing the Committee did was address athletes' financial outlook. The most significant it made was to redefine athletic scholarships to cover the full cost of attendance.¹⁵⁵ Athletic scholarships can now include the incidental costs of everyday life.¹⁵⁶ Travel costs and personal expenses are no longer expected to come out of the pockets of the athletes putting in the work.

Separately, (announced before the Convention), the NCAA declared it would cover travel expenses for the families of athletes participating in the Final Four of College Football Playoff Championship Game.¹⁵⁷ When athletes reach the apex of their collegiate careers, their families will be able to attend no matter their economic realities.

Both of these advancements provide financial relief to college athletes and their families. For the star athlete experiencing hunger pains,¹⁵⁸ the increase amounts to a stipend that could

¹⁵⁴ See Clements and Rodgers, *supra* note 137.

¹⁵⁵ See *id.*

¹⁵⁶ Sean Gregory, *Some College Athletes Will Now Get Paid-a Little*, TIME (Aug. 7, 2014), <http://time.com/3089288/ncaa-college-athletes-pay>.

¹⁵⁷ Stacey Osburn, *NCAA to Pay for Family Travel Under Pilot Program*, NCAA (Jan. 6, 2015, 2:31 PM), <http://www.ncaa.org/about/resources/media-center/news/ncaa-pay-family-travel-under-pilot-program>.

¹⁵⁸ Shabazz Napier was the star of Connecticut's 2014 national championship men's basketball team. He was the face of one of the nation's most successful programs and, for a time, the NCAA's poster boy. When asked about the *Northwestern* case he said, "I don't feel student-athletes should get hundreds of thousands of dollars, but like I said, there are hungry nights that I go to bed and I'm starving." His scholarship money did not afford him

approach \$5,000 and will go a long way to relieving those hardships.¹⁵⁹

2. *Big 5 Athletes Received Some Scholarship Security.*

Also on the Convention agenda was improving the security of scholarships. Addressing the scholarship insecurity that may result from coaching changes and limited scholarship numbers,¹⁶⁰ the Committee adjusted scholarships for athletes in two ways. First, it made all Power Five Conference scholarships four-year offers.¹⁶¹ No major school will offer renewable scholarships to their athletes. Going a step further, the Committee also voted to ensure that going forward, no scholarship can be reduced or rescinded for athletic reasons.¹⁶² Guaranteed scholarships mean that students will not be afraid to also commit fully to their academic endeavors and will never again find themselves without a school (or the funds to attend that school) mid-way through their collegiate careers.¹⁶³

enough food money after his rent was paid and as a result he went to bed hungry. His statements launched an initiative to allow state university athletes to unionize in Connecticut. Sara Ganim, *UConn Guard on Unions: I Go to Bed 'Starving'*, CNN (Apr. 8, 2014, 1:26 PM), <http://www.cnn.com/2014/04/07/us/ncaa-basketball-finals-shabazz-napier-hungry>. Arian Foster, formerly one of the NFL's premier running backs, has talked about violating NCAA rules because he sometimes had money for food or rent, but not both. In order to have food in his fridge, he had to violate NCAA regulations. Chip Patterson, *Arian Foster: 'I was getting money on the side' at Tennessee*, CBS SPORTS (Sept. 20, 2013), <http://www.cbssports.com/college-football/news/arian-foster-i-was-getting-money-on-the-side-at-tennessee>.

¹⁵⁹ See Hosick, *supra* note 139.

¹⁶⁰ Coaching changes lead to insecurity when new coaches ask members of the team they judge as not good enough to move on in an attempt to open up scholarships for players that they want to bring in to the program. *See id.*

¹⁶¹ See Clements, *supra* note 137.

¹⁶² Scholarship athletes cannot be cut from their teams because they are not performing well enough on the field. *See id.*

¹⁶³ NCAA teams can only give out 85 scholarships per season. Because of this limit, coaches have been known in the past to rescind scholarships because of signing too many players, to give to a younger, more promising recruit and to encourage medical scholarships to hurt (not injured) players, effectively ending their career for roster space. Josh Levin, *The Most Evil Thing About College Sports*, SLATE (May 17, 2012, 7:50 PM), http://www.slate.com/articles/sports/sports_nut/2012/05/ncaa_scholarship_rules_it_s_morally_indefensible_that_athletic_scholarships_can_be_yanked_after_one_year_for_any_reason_single.html; Hannah Karp & Darren Everson, *Alabama's Unhappy Castoffs*, WALL ST. J. (Sept. 24, 2010, 12:01 AM), <http://www.wsj.com/articles/SB10001424052748703384204575509901468451306>.

3. *Progress Was Made Concerning the Concussion Policy.*

The Committee also took measures to affect change concerning player health. Again, it enacted two proposals that improved the situations of athletes. First, the Committee voted to approve a new concussion management protocol, to protect athletes from returning to games when they have been concussed.¹⁶⁴ Second, the group voted to allow athletes to borrow against future earnings to buy insurance policies protecting their draft stocks against injuries.¹⁶⁵ If a player with a high draft stock returns to finish his degree, he has the option to take out an insurance policy that will pay him the amount of money he will earn as an expected pro if he is injured and unable to play or if his draft stock is significantly impacted by an injury.¹⁶⁶ Then, the athlete can pay back the school either from his pro earnings or from his insurance payment.¹⁶⁷ This way, when an athlete chooses to be a part of the program despite a paycheck looming in his immediate future, he will not be punished for an on-field injury.

Northwestern has already had an immediate impact. The threat of unionization has mobilized the NCAA to take action to appease its “student-athletes.” However, the progress made is not enough to render the need for unions moot. There are still areas where the athletes are undercompensated and under protected. Additionally, only the upper echelon of college athletes feels the impact of the Convention Committee’s vote. Though the new NCAA regulations are a positive start, they must only be a beginning. Granting athletes employee status will provide them a means to an end.

B. What went wrong?

The NCAA’s response to the *Northwestern* decision has certainly benefited the college athlete. More progress has probably been

¹⁶⁴ See Clements, *supra* note 137.

¹⁶⁵ The policies protect against a player anticipated as going high in the next NFL draft from injuring themselves and getting drafted lower and being hurt financially. The higher you are drafted, the more money you are paid. *Id.*

¹⁶⁶ Bryan Fischer, *NCAA Issues Waiver Allowing Greater Access to Insurance*, NFL (Oct. 15, 2014, 2:04 PM), <http://www.nfl.com/news/story/0ap3000000411358/article/ncaa-issues-waiver-allowing-greater-access-to-insurance>.

¹⁶⁷ *Id.*

made in one year than in the previous ten. The average Power Five athlete is much better off than any “student-athlete” ever has been. But it is not enough.

Addressing a problem is not the same as solving one. As Richard Southhall, director of the College Sport Research Institute at the University of South Carolina, said following the NCAA Conference, “The crumbs are more nutritious than they used to be, but they’re still crumbs.”¹⁶⁸ Unless the D.C. Board affirms the *Northwestern* ruling, and unless the NCAA fully embraces it, the athletes will never be fully protected.

The NCAA Convention did not eliminate the plight of the student athlete. The status quo of college sports still leaves thousands of athletes in the same situation they were in prior to the Convention. First, the changes only impact the most successful athletic schools. Second, solutions to health issues addressed by the Committee were not fully developed. Third, academic concerns were largely ignored. Fourth, athletes remain unable to appeal conflicts within their specific programs. Finally, all athletes are still exposed to the ramifications of on-field injuries. Only through a national labor organization, under the protection of the NLRA, will the athletes get all of the protections that they need and deserve.

1. *The NCAA Has Ignored Athletes at Smaller Schools.*

The resolutions reached at the NCAA Convention do not apply to schools with less financial clout because the Convention is limited to Power Five schools.¹⁶⁹ The reason smaller conferences were deprived of the Power Five’s autonomy was for fear of increased financial responsibilities.¹⁷⁰ Omitting small schools shielded them from having to increase athletic scholarships because of concern that they would not be able to afford adjusting their scholarship equations.¹⁷¹ But leaving out smaller schools also deprived those schools’ athletes from the other benefits awarded, which cost schools nothing.

¹⁶⁸ Gregory, *supra* note 154.

¹⁶⁹ See Schroeder, *supra* note 147.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

In many ways, the concessions given to Power Five athletes are needed even more for athletes of the other conferences, as they are less likely to play their sport professionally. When high school athletes choose to go to a Power Five school, they often do so with an eye toward professional sports.¹⁷² Athletes at lower schools are less highly recruited, and as such, have lower professional aspirations.¹⁷³

Because they are less likely to play their sport professionally,¹⁷⁴ the non-represented athletes would benefit more from the scholarship guarantees the Power Five athletes received from the Committee. All of the concerns of the Power Five athletes are felt by those in other conferences.¹⁷⁵ But non-Power Five schools are not mandated to offer four-year scholarships to their athletes. And, they are still allowed to deprive those athletes of their scholarship because of athletic performance. With a smaller likelihood of professional athletic success, these players are more likely to need their degrees to financially benefit in the future. By ignoring them, the NCAA has exposed its most vulnerable.¹⁷⁶

Additionally, progress made toward better player safety does not apply to schools outside of the Power Five. When the topic of concussions was brought up, Chris Hawthorne, one of the player representatives, reportedly asked, “Why is this an autonomy issue? Shouldn’t it impact all of NCAA?”¹⁷⁷ And that question is immensely relevant. Why has the NCAA given the Power Five the autonomy to dictate their own athletes’ safety policies? The NCAA

¹⁷² *Probability of Competing Beyond High School*, NCAA, <http://www.ncaa.org/about/resources/research/probability-competing-beyond-high-school> (last visited July 6, 2017).

¹⁷³ *Id.*

¹⁷⁴ *Number of NFL Players Ranked by College: 2014 NFL Season*, SPORTING CHARTS, <http://www.sportingcharts.com/nfl/stats/number-of-nfl-players-by-college/2014/> (last visited July 6, 2017).

¹⁷⁵ For example, the Mountain West and Mid Atlantic Conferences, two NCAA conferences not represented by the Power Five, have similar concerns about scholarship security. See *College Football Conferences*, ESPN, <http://www.espn.com/college-football/conferences> (last visited July 8, 2017).

¹⁷⁶ Though some argue that these schools cannot afford all of the improvements the wealthier Power Five schools have granted their athletes, there are plenty of free improvements (guaranteed scholarships, safety rules, etc.) that are cost neutral but not implemented for smaller schools.

¹⁷⁷ Chip Hawthorne wondered why only the autonomous five conferences were seeing progress in these areas. See Clements, *supra* note 137.

should be mandating rules that best serve the athletes' health at all levels, not just for those who benefit it most.

2. *Player Safety Issues Were Not Properly Addressed.*

In addition to player safety resolutions not applying to all athletes, questions have been raised regarding the effectiveness of the Committee's approved concussion safety protocol. Representatives of the Big 12, one of the Big Five conference, specifically criticized the protocol.¹⁷⁸ The Big 12 suggested that physicians should have "unchallenged authority" to hold a player off the field after experiencing concussion-like symptoms and protested the influence coaches have on determining the health of a player under the passed model.¹⁷⁹ Dr. Michele Kirk, a team physician at Texas Christian University, said the passed concussion policy was a public relations stunt, lacking "teeth."¹⁸⁰ The Committee should have taken the most cautious approach possible, but instead showed the reflex to prioritize winning¹⁸¹ over player safety.

Public outcry for new player safety initiatives, specifically with regards to concussions, has been something of a national trend.¹⁸² The concussion problem shines a spotlight on the danger associated with sports at a high level, specifically football. The impact that concussions have had on the sport in recent years is hard to overestimate, and new technologies are being developed to prevent them.¹⁸³ Even the NFL has committed great resources to

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Big 12 Concussion Diagnosis and Management Policy*, GoFROGS (Feb. 18, 2015), www.gofrogs.com/genrel/021815aab.html.

¹⁸¹ In the end, the Power Five passed a concussion policy that gave final say to the coaches, whose need to win can cause a conflict of interest since caring for a player's safety is not beneficial to wins and losses. See Clements, *supra* note 137.

¹⁸² Centers for Disease Control and Prevention, *Heads Up: Concussions in Football*, LCAJFL, http://www.lcajfl.com/doclib/Football_Fact_Sheet_Coaches.PDF (last visited July 8, 2017); *Head Injuries In Football*, N.Y. TIMES, <https://www.nytimes.com/topic/subject/head-injuries-in-football> (last visited July 8, 2017); *NFL: Kevin Kolb, Concussions and Life After Football*, HNGN (Oct. 28, 2014, 2:15 PM), <http://www.hngn.com/articles/47046/20141028/nfl-kevin-kolb-concussions-and-life-after-football.htm>.

¹⁸³ Alison Bruzek, *Sideline Robot Helps Trainers Spot Football Concussions*, NPR (Nov. 6, 2014, 7:36 AM), <http://www.npr.org/blogs/health/2014/11/06/359301692/sideline-robot-helps-trainers-spot-football-concussions>; Brad Myers, *High-tech Heads Up for Football Concussions*, DEL. ONLINE (Nov. 6, 2014, 10:26 AM),

researching and altering rules to prevent concussions.¹⁸⁴ The Committee's policy is a first step, but it is miles away from resolving the problem.

Additionally, dangers threatening athlete bodies are not limited to concussions. YouTube videos of the latest on court horror draw attention to the catastrophic injuries,¹⁸⁵ but maybe more important is the everyday wear and tear and the damage occurring to the athletes' bodies.¹⁸⁶ Athletes embrace part of that danger, but few realize that it can affect their lives for many years after.¹⁸⁷ The Committee did not address any solutions to monitor the wear and tear of their athletes.

3. *Students Need More Control Over Their Academic Lives.*

The Committee also ignored the academic lives of college athletes, almost entirely.¹⁸⁸ Player's academic lives should be a priority at the universities enlisting their services. If athletes are students, they should be allowed to fully realize their academic potential. As the NCAA often advertises, "most [student athletes will] go pro in something other than sports."¹⁸⁹

The control coaches have over athletes and the commitment required from those athletes can inhibit athletes' academic achievement. Practice time limits should be more strictly enforced

<http://www.delawareonline.com/story/sports/high-school/2014/11/05/high-tech-heads-football-concussions/18552105>.

¹⁸⁴ The NFL implemented new concussion protocols and rules to protect the heads of its athletes. *New NFL Rules Designed to Limit Head Injuries*, NFL (July 26, 2012, 8:40 PM), <http://www.nfl.com/news/story/09000d5d81990bdf/article/new-nfl-rules-designed-to-limit-head-injuries>.

¹⁸⁵ Gruesome injuries often trend and are shared via social media. Search Results for "Sports Injuries", YOUTUBE, https://www.youtube.com/results?search_query=sports+injuries (last visited July 6, 2017).

¹⁸⁶ Recent studies have shown that we have dramatically underestimated the amount of damage that is done to athletes' bodies by playing professional sports, specifically football. Casey Walker, *Aging Athletes More Prone to Injuries*, COLUM. CHRON. (Mar. 31, 2014, 6:00 AM), http://www.columbiachronicle.com/health_and_tech/article_869a237c-b15d-11e3-9440-0017a43b2370.html.

¹⁸⁷ *Id.*

¹⁸⁸ Scholarship guarantees arguably allow an increased focus on academics since athletes do not have to worry about their financial aid status.

¹⁸⁹ *NCAA Launches Latest Public Service Announcements, Introduces New Student-Focused Website*, NCAA (Mar. 13, 2007), <http://fs.ncaa.org/Docs/PressArchive/2007/Announcements/NCAA%2BLaunches%2BLatest%2BPublic%2BService%2BAnnouncements%2BIntroduces%2BNew%2BStudent-Focused%2BWebsite.html>.

so that students have time to focus on their studies, and academic standards should be seriously enforced. In *Northwestern*, the Director does not address this, pointing to Northwestern's great graduation rate as an example of how the school embraced its academic mission.¹⁹⁰

However, that is not a national standard. Northwestern's 97% graduation rate is tied for number one in the country, and is in fact 27 points above the national graduation rate average.¹⁹¹ Highly ranked universities, like Cal-Berkley and Texas's football teams, graduate less than 60% of their team.¹⁹² Meanwhile, the average college football graduation rate is under 80%.¹⁹³ These shocking statistics reflect an attitude across the NCAA, Northwestern being one of the few exceptions, that prioritizes winning over academic achievement.

Furthermore, because of certain schools' emphasis on athletic achievement, they often admit athletes whose academic applications are below that of the average student admitted at their universities; once they attend the university, they are worried about keeping those athletes eligible to play.¹⁹⁴ Some athletes struggle to maintain the grade point average that the NCAA requires to participate in athletics.¹⁹⁵ In response, universities downplay academics for all and put athletes into easy classes that do not conflict with football and will not lead to poor grades (that could impact athlete eligibility).¹⁹⁶ Athletes are rarely

¹⁹⁰ *Nw. Univ.*, 362 N.L.R.B. No. 167, at 13 (Aug. 17, 2015).

¹⁹¹ Dustin Hockensmith, *Penn State Graduation Rates Again Rank Among Big Ten, National Leaders*, PENN LIVE (Oct. 24, 2013, 1:32 PM), http://www.pennlive.com/pennstatefootball/index.ssf/2013/10/penn_state_graduation_rate_s_ag.html.

¹⁹² *Graduation Success Rate Report*, NCAA, https://web1.ncaa.org/app_data/gsr2016/107.pdf (last visited July 8, 2017); *Graduation Success Rate Report*, NCAA, https://web1.ncaa.org/app_data/gsr2016/703.pdf (last visited July 8, 2017).

¹⁹³ Hockensmith, *supra* note 189. Less than 2% of college athletes make it to the NFL; the majority of those students who do not graduate are not going to play professionally.

¹⁹⁴ See *Student-Athletes: Admissions*, LSU SPORTS, http://www.lsusports.net/src/data/lsu/assets/docs/ad/policymanual/pdf/502B.pdf?DB_OEM_ID=5200 (last visited July 8, 2017).

¹⁹⁵ See *NCAA Division I Manual*, *supra* note 130, at 157.

¹⁹⁶ Some argue that athletes should be allowed to pursue a major in sports. Athletes pursue a craft that may result in a professional opportunity, much like a drama major. Instead of asking athletes to pretend to care about their course load, the NCAA could allow athletes to take general education requirements and provide credit for their on-field pursuits. Sally Jenkins, *NCAA Colleges Should Consider Offering Sports as an Academic*

allowed to pursue academically challenging courses and majors. Often, schools place athletes into specific “athlete majors,” including Sports Management, TV, and Media, that the school deems “less grueling.”¹⁹⁷

A recent scandal at the University of North Carolina, which is another highly ranked school, had athletes taking “paper” classes.¹⁹⁸ For over 18 years, thousands of athletes took the “paper” classes, which were only for registration purposes.¹⁹⁹ Athletes never attended class and were given high grades by “pro-sport” teachers.²⁰⁰ This academic dishonesty did a disservice to athletes,²⁰¹ many of who will not make a career out of their sport.²⁰² Because of this academic dishonesty, certain North Carolina athletes did not receive the education their university claimed was their “pay.”

Even at schools like Northwestern that do emphasize academic achievement, athletics often takes precedence over academic classes. Former Notre Dame tight end Joey Hiben wanted to major in architecture, but he could not because the major conflicted with his football commitments.²⁰³ The architecture program conflicted with football, for one reason it included requiring the student to study for a year in Rome, so Hiben quit football and paid for his tuition out of his own pocket.²⁰⁴ He was highly regarded coming out of high school and could have been a

Major, WASH. POST (Oct. 5, 2011), http://www.washingtonpost.com/sports/ncaa-colleges-should-consider-offering-sports-as-an-academic-major/2011/10/05/gIQAF6ijOL_story.html.

¹⁹⁷ Jill Lieber Steeg et al., *College Athletes Studies Guided Toward ‘Major in Eligibility’*, USA TODAY (Nov. 19, 2008, 11:21 PM), http://usatoday30.usatoday.com/sports/college/2008-11-18-majors-cover_N.htm?AID=10709313&PID=6156889&SID=i6pd5jek9y00r310014ak.

¹⁹⁸ *North Carolina Academic Probe*, NBC NEWS (Oct. 22, 2014, 7:52 PM), <http://www.nbcnews.com/nightly-news/north-carolina-academic-probe-n232021>.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² The percentage of NCAA football players that will play in the NFL is 1.5%. *Football*, NCAA, <http://www.ncaa.org/about/resources/research/football> (last updated March 10, 2017).

²⁰³ Keith Arnold, *Hiben’s Journey Comes Full Circle*, NBC SPORTS (Feb. 22, 2011, 12:56 PM), <http://irish.nbcsports.com/2011/02/22/hibens-journey-comes-full-circle/>.

²⁰⁴ *Id.*

productive and positive team member.²⁰⁵ Unfortunately, he was faced with a decision between academics and athletics.

If the athletes “hours” are more tightly controlled, they will have more time to commit to their academics. If athletes’ academic scholarships are the majority of their compensation, they should truly get an education. The NCAA should ensure that athletes are given more control over their academic lives, and they should place significant emphasis on athletes’ academic achievement.

4. *Players Have No Way to Air Their Grievances.*

New rules and policies were passed to benefit athletes, but without a player’s union, they have no way to enforce them, nor do they have any way to air grievances with their school or with the NCAA. This is specifically problematic in a system where disciplinary proceedings are not entirely transparent. Without a labor agreement, requiring oversight to enforce new player benefits and observe termination for rule violations, athletes face uneasiness regardless of what they are publically given. Athletes are inundated by rules and regulations, and they should not be punished for alleged violations of them without some oversight of those decisions.²⁰⁶ For example, athletes at Brigham Young should not be dismissed from school for having pre-marital sex,²⁰⁷ and athletes at Notre Dame should be allowed to know what they are being suspended for in a timely manner.²⁰⁸ Athletes need

²⁰⁵ Recruiting Profile for Joey Hiben, RIVALS, <https://n.rivals.com/content/prospects/2005/joey-hiben-45139> (last visited July 9, 2017).

²⁰⁶ Universities are in charge of their own player discipline. The NCAA does not have any authority to manage disciplinary problems for each school. NCAA President Mark Emmert said, “Every campus has disciplinary policies and a disciplinary system. The most important thing to NCAA membership is students aren’t treated in any privileged or disproportionate fashion. Someone does something silly, they all get judged in the same way.” Blair Kerkhoff, *NCAA President Mark Emmert Discusses NCAA Model, Athletic Issues at Rockhurst*, KAN. CITY STAR (Sept. 23, 2014, 7:28 PM), <http://www.kansascity.com/sports/college/article2220959.html>.

²⁰⁷ BYU basketball player Brandon Davies was found engaging in behavior violating the BYU Honor Code and was dismissed from school without any appeals process. Michelle Tuzee, *BYU Player Kicked Off Team for Premarital Sex*, ABC 7 (Mar. 3, 2011, 12:00 AM), <http://abc7.com/archive/7993990>.

²⁰⁸ The “Frozen Five” involved a group of five Notre Dame players who were accused of academic dishonesty. They were not informed about their accusations for extended periods of time, their parents were not provided any information and no decisions were made until late fall, costing those players a year of eligibility. Angelo Di Carlo, *Irish Illustrated: ‘Frozen Five’ Unlikely to Play for ND This Season*, WNDU (Oct. 9, 2014, 7:25 PM),

employee status and representation by a union to make sure progress is truly happening and not a show for those outside the NCAA.

5. *Worker's Compensation Rights are Necessary and Cannot be Realized Without a Player's Union*

Finally, and perhaps the most critical point, college athletes in today's athletic environment are deprived of the right to workers' compensation, and that will never happen without the assistance of a players union.²⁰⁹ That athletes can now take out insurance protecting future earnings' against a career-harming injury seems like progress, but it only affects those with a professional future.²¹⁰ While this policy protects the financial interests of star athletes, every person committing time and energy to a program should be equally protected against the life-altering injuries that lurk on college playing fields. Without the protection of workers' compensation, the worst occurrences of athlete mistreatment may be repeated.

When athletes are injured during an athletic activity, their medical treatment should be covered by workers' compensation obtained by the schools. The original reason that athletes were labeled "student-athletes" was so they would not be considered employees for this purpose.²¹¹ The NCAA did this to prevent worker's compensation claims against universities and the NCAA.²¹² And although schools generate great revenue at the expense of athletes competing for free, athletes are liable for the

<http://www.wndu.com/home/headlines/Irish-Illustrated-Frozen-Five-unlikely-to-play-for-ND-this-season-278698391.html>.

²⁰⁹ Worker's Compensation Programs administer disability compensation for those injured while working including for wage replacement, medical treatment, and vocational rehabilitation. *Workers' Compensation*, DEP'T OF LAB., <http://www.dol.gov/general/topic/workcomp> (last visited July 9, 2017).

²¹⁰ Darren Rovell, *Georgia Paid to Insure Toddy Gurley*, ESPN (Oct. 12, 2014), http://www.espn.com/college-football/story/_/id/11682691/georgia-bulldogs-paid-more-75000-insurance-todd-gurley; Bryan Fischer, *NCAA Issues Waiver Allowing Greater Access to Insurance*, NFL (Oct. 15, 2014, 2:04 PM), <http://www.nfl.com/news/story/0ap3000000411358/article/ncaa-issues-waiver-allowing-greater-access-to-insurance>.

²¹¹ WALTER BYERS & CHARLES HAMMER, UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES 69 (1995).

²¹² *Id.*

costs when they experience life-altering injuries.²¹³ Therefore, athletes should prioritize the need for worker's compensation protection above all other interests.

Because injuries are an ever-present threat to athletes, schools should also invest in new technologies and develop new rules to ensure athlete health. With the speed and power of this generation of football and basketball athletes,²¹⁴ the public is constantly inundated with grotesque videos of terrible injuries.²¹⁵ Not all of these injuries are career ending or life impairing, but some are.²¹⁶

For example, Eric LeGrand, a former defensive tackle for the Rutgers University football team, injured his spinal cord in a game against Army in October 2010.²¹⁷ LeGrand is now paralyzed and will be in a wheelchair for the remainder of his life.²¹⁸ Even though Rutgers University, the Big East (at the time),²¹⁹ and the NCAA greatly profited, albeit at LeGrand's expense, his specialty care is

²¹³ No matter what it argues, the NCAA generates revenues approaching \$1 billion per year. Mark Alesia, *NCAA Approaching \$1 Billion per Year Amid Challenges by Players*, INDY STAR (Mar. 27, 2014, 11:06 PM), <http://www.indystar.com/story/news/2014/03/27/ncaa-approaching-billion-per-year-amid-challenges-players/6973767>.

²¹⁴ In the 40 years the size of football players at both the collegiate and professional level have increased significantly. See Anthony R. Anzell et al., *Changes in Height, Body Weight, and Body Composition in American Football Players from 1942 to 2011*, 27 J. STRENGTH & CONDITIONING RES. 277, 277 (2013).

²¹⁵ Blogs like this one make top ten lists of horrific sports injuries, rating them with a "Theismann-meter." Joe Theismann suffered his own gruesome injury and thus became this writer's rating system. Jeff Greenwell, *The 10 Most Horrific Sports Injuries Ever*, LAST ANGRY FAN, <http://lastangryfan.com/2009/10/the-10-most-horrific-sports-injuries> (last visited July 9, 2017); Bill Verigan, *Joe Theismann Suffers Gruesome Broken Leg in '85 Game vs. Giants*, N.Y. DAILY NEWS (Nov. 18, 2014, 12:48 PM), <http://www.nydailynews.com/sports/football/crunch-theismann-leg-broken-giants-fall-article-1.1994499>.

²¹⁶ See Michael Baumann, *The Martyrdom of Marcus Lattimore*, GRANTLAND (Nov. 6, 2014), <http://grantland.com/the-triangle/marcus-lattimore-retires-from-football-ncaa-lessons>; see also Jon Solomon, *Ex-Alabama Football Star Gets Help to Pay \$10,000 in Student Loans*, CBS SPORTS (July 1, 2014), <http://www.cbssports.com/collegefootball/writer/jon-solomon/24602360/ex-alabama-football-star-gets-help-to-pay-10000-in-student-loans>.

²¹⁷ Kieran Darcy, *Rutgers' Eric LeGrand Paralyzed*, ESPN (Oct. 18, 2010), <http://www.espn.com/new-york/ncf/news/story?id=5696563>.

²¹⁸ *Id.*

²¹⁹ At the time of LeGrand's injury, Rutgers belonged to the Big East Conference, which was the smaller grouping of NCAA schools against whom Rutgers regularly played. In 2014, Rutgers moved conferences and joined the Big Ten. *Rutgers Headed to Big Ten*, ESPN (Nov. 20, 2012), http://www.espn.com/new-york/ncf/story/_id/8656660/rutgers-scarlet-knights-announce-move-big-ten.

solely his responsibility because he is ineligible for worker's compensation.²²⁰

Depriving athletes of worker's compensation is one of the NCAA's most exploitive behaviors. A student-athlete can commit 60 hours each week to a football or basketball team—work that is exploited by universities to fill huge stadiums and sell jerseys—and be injured participating in what is essentially his job. As thanks, LeGrand, now paralyzed, is asked to pay for the debilitating cost of care out of his own pocket. It is essential that the NCAA develops a way to provide worker's compensation insurance to the young men who line its pockets.²²¹

IV. ADDRESSING CRITICISM

Some argue that if athletes are classified as employees and allowed to collectively bargain, the scholarships that they receive would become taxable income and create a huge burden for the athletes who claim to be short of funds already.²²² However, the definition of "employee" is less rigid for labor law purposes than it is for tax law,²²³ and being classified as an employee by the NLRB

²²⁰ See Darcy, *supra* note 215.

²²¹ The concern for student athletes has spread outside of the sports world. As a consequence of concerns about athlete's health, California has passed State Senate Bill 193, also known as the California Student-Athlete Bill of Rights. The bill requires universities (public and private) earning more than \$10 million in sports media revenue to comply with mandated financial protections for student athletes who suffer career-ending injuries. The bill provides for athlete protection in multiple ways. The law requires schools to pay all medical costs for student-athletes, including health insurance premiums for low-income student-athletes, and also requires the institutions to provide for future medical costs for on-the-field injuries. Additionally, it requires schools to provide scholarships to students for up to five years if they are cut for injuries or medical reasons. Decreasing serious injury will offset the costs of worker's compensation claims. Athletes cannot just hope that they will find themselves attending college in a state that has stumbled upon their issues. California's legislature has realized that athlete medical compensation concerns are real, and the NCAA should see the seriousness of athlete needs that are contemplated in this legislation. See CAL. EDUC. CODE § 67450 (Deering 2017).

²²² Brief for Respondent at 29-30, *Nw. Univ.*, 362 N.L.R.B. No. 167 (Aug. 17, 2015) (No. 13-RC-121359); see *Nw. Univ.*, 362 N.L.R.B. No. 167, at 8 (Aug. 17, 2015).

²²³ Due to similar taxation fears regarding graduate students, the IRS put out this revenue ruling: "Whether a person is an 'employee' under the NLRA depends upon whether Congress intended to secure to that individual 'freedom of employees' organization and collective bargaining." Rev. Rul. 78-54, 1978-1 C.B. 36 (1978). The standards used for determining whether individuals are employees for purposes of labor relations are not the same as those used for purposes of federal taxation. See *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 299-300 (1985). "The NLRB's ruling that 'housestaff' are not employees under the NLRA is not binding on the [IRS] in cases arising under the Internal

does not automatically make a person vulnerable to taxation.²²⁴ It is a possibility that a state could decide to tax athletes for their scholarships, but states have not taxed athletic scholarships for decades.²²⁵ To do so would seem petty, political and ultimately be unproductive. Some authors have even opined that any state decision to tax in response to the NLRB's decision would be unconstitutional under the Supremacy Clause.²²⁶ Accordingly, states will probably not tax college athletes on their scholarships.

Another criticism of unionization is that it will destroy amateurism in college sports.²²⁷ The increase in professional athletes' salaries since they have unionized causes great hesitation to allow college athletes the ability to collectively bargain.²²⁸ This slippery slope argument may seem powerful, but essentially the question that needs to be answered is this: what cost are we willing to pay simply to preserve the idealistic way that we view college sports? The reality is that college athletes play a professional game. These athletes commit a full workweek to their sports, study for their classes, travel around the country, and then

Revenue Code." Rev. Rul. 78-54. The IRS defines employee to include "an officer, employee, or elected official of the United States, a State, or any political subdivision thereof, or the District of Columbia, or any agency or instrumentality of any one or more of the foregoing. The term 'employee' also includes an officer of a corporation." I.R.C. § 3401(c) (2008).

²²⁴ In the 1970s, medical residents were considered employees under IRS standards, but not employees under the NLRA. In *Paseiro v. Commissioner*, 36 T.C.M. (CCH) 1432 (1977), petitioner's residency fellowship was taxable specifically because petitioner was not a candidate for an academic degree at an educational institution. Still, the NLRB found that he was not an employee. *Id.*

²²⁵ See William B. Gould IV et al., *Full Court Press: Northwestern University, A New Challenge to the NCAA*, 35 LOY. L.A. ENT. L. REV. 1, 55-56 (2014).

²²⁶ This is

based on the theory that such a decision would constitute interference with a field preempted by federal law. The NLRA and the federal law of labor relations give rise to an expansive doctrine of preemption. This doctrine encompasses the understanding that states must sometimes cede authority in order to preserve the federal scheme for labor relations, as well as the understanding that a state's withholding or granting of certain benefits under state law can unduly interfere with the federal scheme. A state decision to base its reconsideration of individuals' tax status on Board proceedings might constitute just such undue interference.

Id. at 40.

²²⁷ See Brief for Respondent, *supra* note 220, at 24-25.

²²⁸ Since professional sports unions started aggressively collectively bargaining, salaries have skyrocketed. Even in salary capped sports, salaries are in the millions of dollars. The NCAA, with thousands of athletes, would struggle to pay them real salaries. Michael Macklon, *The Rise of Labor Unions in Pro Sports*, YAHOO FIN. (July 5, 2011), <http://finance.yahoo.com/news/The-Rise-Of-Labor-Unions-In-investopedia-4149471396.html>.

perform in front of tens of thousands in stadiums and millions on national television. Yet, most of the pressing demands from athletes involve insurance and protection, not salaries. Is it possible that, in twenty years, a college athlete players union tries to bargain for salaries? Yes. But is that possibility worth leaving Saturdays' heroes unprotected against the very realistic hurdles that they may have to face? I do not believe it is.

Additionally, steps can be taken to preserve the amateur status while also protecting the athletes who generate millions of dollars in revenue for schools. Amicable negotiations can lead to better results for the NCAA. Athletes do not have much now, incrementally increasing their rights and valuing them as employees might be enough to avoid possible salary negotiations.

The most common argument against unionization is that the NCAA simply cannot afford even the basic increases, as many athletic departments operate at a loss.²²⁹ This is a concern because providing worker's compensation insurance could possibly cost an athletic department more than \$2 million dollars per year.²³⁰ Critics are quick to point out that there is a vast difference between the haves and have-nots when discussing athletic department financing.²³¹ But, by finding new sources of revenue (earmarked for this purpose) and participating in revenue sharing (like every major professional sport did to combat the rising costs of unionization in smaller markets),²³² unionization will not negatively impact the budgets of less financially successful athletic departments. A wealthier athletic department like Alabama's pays its coach \$7 million a year and paid off his mortgage as an additional gift in addition to his huge compensation.²³³ Wealthy athletic programs will survive whatever

²²⁹ Schools make revenue off of football and basketball programs and often use those funds to finance their other sports. Small programs do not make much money or can even operate at a loss. Gould IV et al., *supra* note 223, at 12.

²³⁰ *Id.* at 55-57.

²³¹ While some school's programs bring in huge revenues, others make much less. See Brief for Respondent, *supra* note 220, at 27-28.

²³² Every major American sports league requires teams that earn high revenues, most commonly in big cities, to share parts of their profits with teams that do not do as well financially. Helmut M. Dietl et al., *Competitive Balance and Revenue Sharing in Sports Leagues with Utility-Maximizing Teams*, 12 J. SPORTS ECON. 284, 285 (2011).

²³³ Scooby Axson, *Alabama Boosters Pay Off Nick Saban's \$3.1 Million Home*, SPORTS ILLUSTRATED (Oct. 27, 2014), <http://www.si.com/college-football/2014/10/27/alabama-boosters-pay-nick-saban-home>.

luxury costs are asked of them. Additionally, over the last decade athletic department revenues have grown at a surprising rate. Wisconsin and Alabama have had revenue growths of more than 80% and even less profitable schools have generally increased revenue by more than 50%.²³⁴ These increases should help offset new costs associated with athlete protection.

V. PROPOSED SOLUTION

Because grant-in-aid athletes should be considered employees under the common law factors, the NLRB's national headquarters should affirm the ruling in *Northwestern*. Rather than create ill will by continuing to fight the athletes, the NCAA should encourage a national unionization of college athletes, represented by CAPA, and use the good faith garnered from that support to encourage creative solutions. The NCAA has shown it is willing to take steps toward progress (even for non-revenue generating athletes). Granting employee status to its revenue-generating athletes will only help to further this progress. If the players and the NCAA can find common ground, the NCAA can provide the athletes better protection without bankrupting college sports. The NCAA should demonstrate to "student-athletes" and the nation that it cares about athletes' health and futures.²³⁵

The easiest solution is to grow the accomplishments of the NCAA Convention Conference. I propose that, in order to keep discussions realistic, CAPA and the NCAA agree to a system that expands the Convention Committee and uses the decisions of the Committee to draft an employment agreement, locked in for a five-year period. The Power Five would lose autonomy on issues that were pressing to the entire NCAA community (specifically scholarships, health, and safety issues) and the Committee would be expanded to include representatives from all conferences. The Committee could continue to meet every year, to alter rules and create new safety initiatives. Any athlete protection initiatives

²³⁴ Jon Solomon, *Salaries vs. Scholarships: List of Athletics Department Revenue and Spending Increases*, AL (May 15, 2013, 9:30 AM), http://www.al.com/sports/index.ssf/2013/05/scholarships_vs_salaries_list.html.

²³⁵ If the NCAA actively pursues talks, the athletes might be willing to limit the scope of negotiations to curtail any concerns about the financial destruction that unionization could bring.

that were passed after the agreement would be signed could go into place immediately.

With their employee status, athletes in revenue generating sports would be entitled to worker's compensation. Covering the insurance would not be cheap, and in order to do so I suggest that the NCAA finance it by rekindling a past financial relationship.

The NCAA should reinstate its video game license to EA Sports,²³⁶ the proceeds of which should be put into a trust fund. When the NCAA's agreement with EA Sports ended in 2013, it was being paid \$125 million per year for licensing.²³⁷ That could be devoted entirely to athletes, as it costs literally nothing to allow someone the ability to use names and likenesses. Over the last two years, the NCAA has shown that it can remain financially secure without this income (which only amounts to about 5% of its revenue). The fund would be partially supplemented by a revenue sharing scheme similar to the National Hockey League's.²³⁸ Schools with revenues exceeding a certain amount would be asked to contribute approximately 5% of their revenue to the fund in addition to the video game proceeds. The NCAA would then be in charge of paying every athlete's insurance for worker's compensation cases and the leftover funds would earn interest. Because the NCAA would be providing this service to athletes,

²³⁶ In *O'Bannon v. NCAA*, a former athlete sued the NCAA for using his likeness in video games without compensating him. Nos. C 09-1967 CW, C 09-3329 CW, C 09-4882 CW, 2010 WL 445190, at *2 (N.D. Cal. Feb. 8, 2010). When the *O'Bannon* case was filed, the NCAA and EA Sports were listed as defendants. *Id.* at *1. The NCAA pulled licensing and EA Sports ceased to produce college sports video games. For four years, no NCAA games have been made, though they were a nice revenue stream for the two decades prior. Cam Weber, *Update on College Football*, EA (Sept. 26, 2013), <https://www.ea.com/news/update-on-college-football>; Darren Rovell, *EA Sports Settles with Ex-Players*, ESPN (Sept. 26, 2013), http://www.espn.com/college-football/story/_/id/9728042/ea-sports-stop-producing-college-football-game.

²³⁷ Kristi Dosh, *Is EA Sports Revenue Worth Schools' Risk?*, ESPN (Aug. 21, 2013), http://www.espn.com/blog/nfnation/post/_/id/81020/is-ea-sports-revenue-worth-schools-risk.

²³⁸ The National Hockey League (NHL) is North America's premier professional hockey league. After a player strike, the NHL and its players union reached an agreement in January 2013. As part of the agreement, the top ten revenue earning teams are required to contribute a portion of their revenue and it is distributed to teams that earn much less. *Collective Bargaining Agreement Between National Hockey League and National Hockey League Players' Association*, AGILITY CMS, at 217-19 (Feb. 15, 2013), http://cdn.agilitycms.com/nhlpacom/PDF/NHL_NHLPA_2013_CBA.pdf; Pierre LeBrun, *Breaking Down the NHL's New CBA*, ESPN (Jan. 6, 2013), http://www.espn.com/blog/nhl/post/_/id/21176/breaking-down-the-nhls-new-cba.

athletes would be compensated for their likeness and the NCAA would not need to worry about future lawsuits.²³⁹

If the funds seem to generate a sizeable reserve, the additional funds can be committed to paying a type of unemployment insurance for revenue-generating athletes. If athletes do not get a job immediately after graduating (whether it is with the NFL or otherwise), they would be secured for some time as they looked for work. It might also serve the purpose of boosting graduation rates providing that players would not be eligible for unemployment unless they graduated, as failure to graduate would be tantamount to quitting.

By finding a new revenue source to pay for multiple athlete protections, the NCAA would be improving athlete lives without experiencing huge rising costs. This system would protect athletes against debilitating injuries, assist them when they first enter the job market, and potentially increase graduation rates, which can be startlingly low at many institutions.

Schools should understand the debt that they owe to their athletes. Too often they cut and run when a situation seems difficult or costly. Instead, to be a truly successful organization in the business of college athletics, the NCAA must make sure that it provides its athletes the best opportunities not just athletically, but also academically, financially, and physically.

CONCLUSION

Every Saturday, millions of Americans wake up early and spend their day hypnotized by college football.²⁴⁰ Every March, brackets are filled and work is skipped; March Madness enthralls the country.²⁴¹ Yet, as popular as this product is, the athletes playing

²³⁹ As showed in *O'Bannon*, the NCAA is vulnerable to lawsuits when not compensating players for their likeness in video games. However, there would be no such vulnerability if the proceeds of those video games were benefiting the players. *See generally O'Bannon*, 2010 WL 445190.

²⁴⁰ Michael Humes, *Hundreds of Millions of Fans Tune to Record-Setting College Football Coverage Across ESPN Networks*, ESPN (Dec. 10, 2013), <http://espnmediazone.com/us/press-releases/2013/12/hundreds-of-millions-of-fans-tune-to-record-setting-coverage-across-espn-networks>.

²⁴¹ Tom Van Riper, *March Madness Ratings and Revenue Keep Reaching New Heights*, FORBES (Mar. 20, 2014, 10:10 AM), <http://www.forbes.com/sites/tomvanriper/2014/03/20/march-madness-ratings-and-revenue-keep-reaching-new-heights>.

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in the games receive no real payment for their work and are not protected against the potential negative impact that being a college athlete may have on their lives. It is easy to see the life of a college athlete as glamorous—many times it may well be—but if we are comfortable allowing schools to maximize profits from college athletics, we should, as a society, call for protection of those people leaving their blood, sweat, and tears on university fields across the country.