

# THE FUTURE OF COLLEGE ATHLETE PLAYERS UNIONS: LESSONS LEARNED FROM NORTHWESTERN UNIVERSITY AND POTENTIAL NEXT STEPS IN THE COLLEGE ATHLETES' RIGHTS MOVEMENT

Marc Edelman<sup>†</sup>

*On January 28, 2014, the Northwestern University football players filed a petition with the National Labor Relations Board (NLRB) seeking to become the first group of college athletes to form a union. Although the NLRB's Thirteenth Region concluded that Northwestern University grant-in-aid college football players constituted "employees" under the National Labor Relations Act, the NLRB Board Members nevertheless declined to assert jurisdiction because they believed the proposed bargaining unit would not "promote stability in labor relations."*

*This Article explores the future prospects for organizing Football Bowl Subdivision football players and Division I men's basketball players after the NLRB's decision in Northwestern University. Part I of this Article provides a brief overview of U.S. labor law and introduces the unique labor dynamics of big-time college sports. Part II explores labor organizers' recent attempts to unionize the grant-in-aid football players on the Northwestern University college football team. Part III describes potential strategies for unionizing alternative bargaining units of elite college athletes. Finally, Part IV analyzes the interplay between unionizing college athletes and challenging the NCAA's restraints on college athlete pay under section 1 of the Sherman Act.*

## TABLE OF CONTENTS

INTRODUCTION .....	1628
I. A BRIEF PRIMER ON EMPLOYEE UNIONS AND COLLEGE SPORTS.....	1629

---

<sup>†</sup> Professor Marc Edelman (Marc@MarcEdelman.com) is a tenured Professor of Law at the Zicklin School of Business, Baruch College, City University of New York. He is also an adjunct professor at Fordham University School of Law and a columnist for *Forbes SportsMoney*. Professor Edelman advises numerous businesses on legal issues related to antitrust, gaming, intellectual property, collective bargaining, and sports law. He thanks Baruch College graduate student Caroline Porter for her research assistance.

A.	<i>Brief Overview of U.S. Labor Law</i> .....	1629
B.	<i>Labor Dynamics in Big-Time College Sports</i> .....	1630
C.	<i>Early Attempts to Create a College Athletes Union</i> .....	1633
II.	THE NORTHWESTERN UNIVERSITY FOOTBALL PLAYERS' ATTEMPT TO UNIONIZE .....	1635
A.	<i>Factual Overview of the Northwestern Football Players' Attempts to Unionize</i> .....	1635
B.	<i>The National Labor Relations Board, Region 13 Decision</i> .....	1637
C.	<i>Appeal to the National Labor Relations Board</i> .....	1639
D.	<i>Objective Critique of the NLRB Ruling</i> .....	1640
III.	POTENTIAL FUTURE COLLEGE ATHLETE BARGAINING UNITS.....	1642
A.	<i>Football Players or Men's Basketball Players at a Private University Other than Northwestern University</i> .....	1643
B.	<i>Football Players and Men's Basketball Players at a Public University</i> .....	1645
C.	<i>Multi-Employer Bargaining Unit Consisting of Numerous Private Colleges</i> .....	1648
D.	<i>All FBS Football and Division I Men's Basketball Players at Public and Private Schools</i> .....	1649
E.	<i>Bargaining Units Broader than All FBS Football and Division I Men's Basketball Players at Public and Private Schools</i> .....	1652
IV.	THE INTERPLAY BETWEEN EFFORTS TO UNIONIZE COLLEGE ATHLETES AND ANTITRUST LITIGATION AGAINST THE NCAA.....	1653
A.	<i>Current and Potential Antitrust Lawsuits by Athletes Against the NCAA</i> .....	1653
B.	<i>Impact of College Athlete Unionization on the O'Bannon, Alston, and Jenkins Antitrust Lawsuits</i> .....	1655
	CONCLUSION.....	1661

## INTRODUCTION

On January 28, 2014, the Northwestern University football players filed a petition with the National Labor Relations Board (NLRB) seeking to become the first group of college athletes to form a union.<sup>1</sup> Although the NLRB's Thirteenth Region (Region 13) concluded that Northwestern

---

<sup>1</sup> See Ben Strauss, *In a First, Northwestern Players Seek Unionization*, N.Y. TIMES (Jan. 28, 2014), [http://www.nytimes.com/2014/01/29/sports/ncaafotball/northwestern-players-take-steps-to-form-a-union.html?\\_r=0](http://www.nytimes.com/2014/01/29/sports/ncaafotball/northwestern-players-take-steps-to-form-a-union.html?_r=0).

University grant-in-aid college football players constituted “employees” under the National Labor Relations Act (NLRA or the Act), the NLRB Board Members nevertheless declined to assert jurisdiction because they believed the proposed bargaining unit would not “promote stability in labor relations.”<sup>2</sup>

This Article explores the future prospects for organizing Football Bowl Subdivision (FBS) football players and Division I men’s basketball players after the NLRB’s decision in *Northwestern University*. Part I of this Article provides a brief overview of U.S. labor law and introduces the unique labor dynamics of big-time college sports. Part II explores labor organizers’ recent attempts to unionize the grant-in-aid football players on the Northwestern University college football team. Part III describes potential strategies for unionizing alternative bargaining units of elite college athletes. Finally, Part IV analyzes the interplay between unionizing college athletes and challenging the NCAA’s restraints on college athlete pay under section 1 of the Sherman Act.

## I. A BRIEF PRIMER ON EMPLOYEE UNIONS AND COLLEGE SPORTS

### A. *Brief Overview of U.S. Labor Law*

Congress passed the NLRA in May 1935 to grant private employees the right to self-organize and “engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection.”<sup>3</sup> The Act arose “out of the necessities of . . . [a labor] situation . . . that a single employee was helpless in dealing with an employer” based on fundamental differences in size and bargaining power between the parties.<sup>4</sup> The Act’s goal was “to give laborers opportunity to deal on . . . [equal footing] with their employer.”<sup>5</sup>

---

<sup>2</sup> See *Nw. Univ.*, 362 N.L.R.B. No. 167, 2015 WL 4882656, at \*1 (Aug. 17, 2015). More broadly than these qualms related particularly to the nature of Northwestern University’s conference affiliation, the NLRB cautioned that “of the roughly 125 colleges and universities that participate in [Football Bowl Subdivision (FBS)] football, all but 17 are state-run institutions,” which lie outside the scope of the NLRB’s jurisdiction. *Id.* at \*5.

<sup>3</sup> National Labor Relations Act, ch. 372, § 7, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. § 157 (2012)). See generally Michael H. LeRoy, *Courts and the Future of “Athletic Labor” in College Sports*, 57 ARIZ. L. REV. 475, 504 (2015) [hereinafter LeRoy, *Courts and the Future of “Athletic Labor”*] (explaining that the NLRA “applies only to private-sector employment”); Steven L. Willborn, *College Athletes as Employees: An Overflowing Quiver*, 69 U. MIAMI L. REV. 65, 69 (2014) (describing the NLRA as “a preemptive federal law governing collective employee rights in the private sector”).

<sup>4</sup> *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937).

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

Since 1935, the right to unionize under federal (and later, state) labor law has changed workplace dynamics across many industries.<sup>6</sup> Under the NLRA, employers in a unionized workplace incur the affirmative duty to bargain collectively with their workers over the mandatory terms and conditions of bargaining—hours, wages, and working conditions.<sup>7</sup> Employers also must bargain over disciplinary procedures, such as the right to discipline for “just cause.”<sup>8</sup>

To a large extent, the values advanced by U.S. labor laws conflate with the broader values of the U.S. Civil Rights movement—equality, equity, and procedural fairness.<sup>9</sup> Some of the most prominent Civil Rights leaders in the United States, including the revered Dr. Martin Luther King Jr., have even gone as far as to describe workers’ rights as an important component of the broader pursuit for social justice.<sup>10</sup>

### B. *Labor Dynamics in Big-Time College Sports*

University of California, Berkeley sociology professor Dr. Harry Edwards often describes efforts to change the labor dynamics in big-time college sports as “the civil rights movement in sports of our time.”<sup>11</sup> Big-time college sports represent a more than \$11 billion

---

<sup>6</sup> See generally Bashar H. Malkawi, *Labor and Management Relationships in the Twenty-First Century: The Employee/Supervisor Dichotomy*, 12 N.Y.C. L. REV. 1, 3 (2008) (discussing the “revolutionary impact of the NLRA”).

<sup>7</sup> See *First Nat’l Maint. Corp. v. NLRB*, 452 U.S. 666, 674 (1981) (“Although parties are free to bargain about any legal subject, Congress has limited the mandate or duty to bargain to matters of ‘wages, hours, and other terms and conditions of employment.’” (quoting 29 U.S.C. § 158(d))).

<sup>8</sup> See HARRY C. KATZ ET AL., *AN INTRODUCTION TO COLLECTIVE BARGAINING & INDUSTRIAL RELATIONS* 261 (4th ed. 2008) (explaining that when employers implement discipline only for just cause, employees gain freedom from “arbitrary discipline, discharge, or denial of benefits”); see also Wendi J. Delmendo, *Determining Just Cause: An Equitable Solution for the Workplace*, 66 WASH. L. REV. 831, 831 (1991) (explaining that a majority of courts now recognize that an employer’s promise to discharge an employee only for just cause represents an exception to the typical employment-at-will doctrine).

<sup>9</sup> See KATZ ET AL., *supra* note 8, at 254–55 (“[Studies have shown] [u]nions have a greater positive effect on the wages of blacks, and particularly black men, than on whites.”); MICHAEL MAUER, *THE UNION MEMBER’S COMPLETE GUIDE: EVERYTHING YOU WANT—AND NEED—TO KNOW ABOUT WORKING UNION* 10 (2001).

<sup>10</sup> See MAUER, *supra* note 9, at 10 (quoting Dr. Martin Luther King Jr.’s speech in support of striking sanitation workers in Memphis, Tennessee on April 3, 1968).

<sup>11</sup> Dave Zirin, *It’s the Racism, Stupid: Meet the Press’s Epic NCAA Fail*, NATION (Mar. 24, 2014) (quoting Dr. Harry Edwards), <https://www.thenation.com/article/its-racism-stupid-meet-press-epic-ncaa-fail/>; cf. Robert A. McCormick & Amy Christian McCormick, *Major College Sports: A Modern Apartheid*, 12 TEX. REV. ENT. & SPORTS L. 13, 14 (2010) [hereinafter McCormick & McCormick, *Major College Sports: A Modern Apartheid*] (describing the big-time college sports enterprise as an “apartheid system” because the unpaid work product in revenue-generating sports is provided primarily by African-American men).

industry in the United States.<sup>12</sup> At present, forty-nine college athletic departments earn annual revenues that exceed \$70 million.<sup>13</sup> Meanwhile, twenty-four athletic departments earn annual revenues that exceed \$100 million.<sup>14</sup>

NCAA member colleges use the revenues derived from college sports not only to operate their athletic programs, but also for “windfall payments” to administrators, athletic directors, and coaches.<sup>15</sup> In 2013, NCAA member colleges paid their association president, Mark Emmert, a salary of \$1.8 million.<sup>16</sup> Colleges also paid the commissioners of the five largest collegiate athletic conferences salaries ranging between \$2.1 million and \$3.5 million.<sup>17</sup>

---

<sup>12</sup> See *NCAA Finances: 2014–15 Finances*, USA TODAY, <http://sports.usatoday.com/ncaa/finances> (last visited Apr. 21, 2016); see also Jay D. Lonick, Note, *Bargaining with the Real Boss: How the Joint-Employer Doctrine Can Expand Student-Athlete Unionization to the NCAA as an Employer*, 15 VA. SPORTS & ENT. L.J. 135, 138 (2015) (estimating the revenue generated by the college sports industry to be even higher, at “\$12 billion per year”); LeRoy, *Courts and the Future of “Athletic Labor”*, *supra* note 3, at 489 (stating that the NCAA’s annual revenues have reached \$16 billion per year).

<sup>13</sup> See *NCAA Finances: 2014–15 Finances*, *supra* note 12.

<sup>14</sup> *Id.* The primary sources of these athletic revenues include ticket sales, alumni donations, brand merchandising, and media rights. See *College Athletics Revenues and Expenses—2008*, ESPN, <http://espn.go.com/ncaa/revenue> (last visited Apr. 21, 2016); see also Nw. Univ., 362 N.L.R.B. No. 167, 2015 WL 4882656, at \*4 (Aug. 17, 2015) (explaining that revenues from big-time college football emerge from “gate receipts, concessions and merchandise sales, and broadcasting contracts”). See generally Amber Jorgensen, *Why Collegiate Athletes Could Have the NCAA, Et Al. Singing a Different Tune*, 33 CARDOZO ARTS & ENT. L.J. 367, 372 (2015) (“Rising television and marketing rights fees have primarily contributed to the economic growth of the NCAA and its member institutions over the past 25 years, as together such fees accounted for 81% of the NCAA’s total revenue in 2012.”).

<sup>15</sup> Marc Edelman, *The Future of Amateurism After Antitrust Scrutiny: Why a Win for the Plaintiffs in the NCAA Student-Athlete Name & Likeness Licensing Litigation Will Not Lead to the Demise of College Sports*, 92 OR. L. REV. 1019, 1031 (2014) [hereinafter Edelman, *The Future of Amateurism*]; see also Nicholas Fram & T. Ward Frampton, *A Union of Amateurs: A Legal Blueprint to Reshape Big-Time College Athletics*, 60 BUFF. L. REV. 1003, 1020 (2012) (“Unable to offer financial inducements to players, athletic departments invest heavily in marquee coaches, whose reputations can ensure the recruitment of top-level talent.”); Ellen J. Staurowsky, “A Radical Proposal”: Title IX Has No Role in College Sport Pay-for-Play Discussions, 22 MARQ. SPORTS L. REV. 575, 578 (2012) (“While college-player labor costs are essentially zero, compensation packages for top-tier college football and men’s basketball coaches are competitive or exceed those of coaches working in the National Basketball Association (NBA) and [National Football League (NFL)].”). See generally Marc Edelman, Note, *Reevaluating Amateurism Standards in Men’s College Basketball*, 35 U. MICH. J.L. REFORM 861, 864 (2002) [hereinafter Edelman, *Reevaluating Amateurism*] (explaining how the NCAA maintains the wealth of college sports “in the hands of a select few administrators, athletic directors, and coaches”).

<sup>16</sup> See Jon Solomon, *Inside College Sports: Mark Emmert’s Pay, NCAA Legal Fees Increase*, CBS SPORTS (June 30, 2015), <http://www.cbssports.com/collegefootball/writer/jon-solomon/25229481/inside-college-sports-mark-emmersts-pay-ncaa-legal-fees-increase>.

<sup>17</sup> See *id.* (listing the salaries of Big 5 conference coaches as follows: “Pac-12’s Larry Scott (\$3.5 million), Big Ten’s Jim Delany (\$3.4 million), Big 12’s Bob Bowlsby (\$2.5 million), ACC’s John Swofford (\$2.1 million) and SEC’s Mike Slive (\$2.1 million)”).

By contrast, colleges share little, if any, of their athletic revenue with the athletes.<sup>18</sup> According to statistics provided by the U.S. Department of Education, eighty-five percent of college athletes live below the poverty line.<sup>19</sup> Meanwhile, a typical FBS football or Division I men's basketball player amasses several thousand dollars of debt before graduating from college.<sup>20</sup> In the worst cases, this debt has led to revenue-generating athletes lacking enough money to even buy groceries or afford late-night snacks.<sup>21</sup>

Beyond these financial inequities of big-time college sports, many colleges further disadvantage their athletes by monopolizing their time with sports-related activities.<sup>22</sup> Most colleges require their Division I men's basketball and FBS football players to devote upwards of forty hours per week to their sport, notwithstanding academic and personal

---

<sup>18</sup> See *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1055 (9th Cir. 2015) (explaining that under the NCAA's bylaws "an athlete is prohibited—with few exceptions—from receiving *any* 'pay' based on his athletic ability, whether from boosters, companies seeking endorsements, or would-be licensors of the athlete's name, image, and likeness"), *cert. denied*, 137 S. Ct. 277 (2016). See generally LeRoy, *Courts and the Future of "Athletic Labor"*, *supra* note 3, at 498 (describing the NCAA's purported model of amateurism as "a model that seems outdated and uniquely adapted to thwart meaningful compensation for the labor [athletes] supply to generate this immense wealth"); McCormick & McCormick, *Major College Sports: A Modern Apartheid*, *supra* note 11, at 14 ("Major college sports . . . are amateur only in the pernicious sense that the very persons who are most responsible for creating this product are denied all but a sliver of the great wealth they create.").

<sup>19</sup> See Ivan Solotaroff, *The Athlete Advocate: After 15 Years Fighting for NCAA Athletes, Ramogi Huma Is Finally Breaking Through*, SB NATION (Apr. 23, 2014), <http://www.sbnation.com/longform/2014/4/23/5640402/the-athlete-advocate-ramogi-huma>.

<sup>20</sup> See 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>; see also Darren Heitner, *College Athletes Are Not Immune to America's Student Debt Dilemma*, FORBES (June 3, 2014, 8:34 AM), <https://www.forbes.com/sites/darrenheitner/2014/06/03/college-athletes-are-not-immune-to-americas-student-debt-dilemma/#609721d0412e> (providing the example of several college students on academic scholarship who still needed loans to pay off reasonable debt).

<sup>21</sup> See Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71, 118–19 (2006) [hereinafter McCormick & McCormick, *The Myth*] ("[P]layers whose families cannot afford to provide them with extra money struggle financially throughout their college experience."); Chris Isidore, *College Athletes Finally Getting Some Cash*, CNN (Sept. 4, 2015, 1:43 PM), <http://money.cnn.com/2015/09/04/news/companies/extra-cash-college-athletes/> ("Some star athletes have complained about going to bed hungry at night because they couldn't afford to buy extra food while burning up extra calories during training and competition.").

<sup>22</sup> See Michael H. LeRoy, *An Invisible Union for an Invisible Labor Market: College Football and the Union Substitution Effect*, 2012 WIS. L. REV. 1077, 1099 (noting that the typical Division I college football player devotes upwards of forty-three hours per week to his sport); Robert A. McCormick & Amy Christian McCormick, *A Trail of Tears: The Exploitation of the College Athlete*, 11 FLA. COASTAL L. REV. 639, 652 (2010) [hereinafter McCormick & McCormick, *A Trail of Tears*] ("[E]xtensive practice and playing schedules monopolize [big-time college athletes'] lives, leaving little time for academic pursuits.").

time commitments.<sup>23</sup> Colleges with big-time football and men's basketball programs also may compel their athletes to select academic majors that minimize classroom duties, and encourage athletes to enroll in courses that do not meet during the coach's preferred practice schedules.<sup>24</sup>

### C. *Early Attempts to Create a College Athletes Union*

In response to these extraordinary inequities, former UCLA football player Ramogi Huma founded the Collegiate Athletes Coalition (CAC) in 2001.<sup>25</sup> The CAC began as an informal trade association with general support from the United Steelworkers of America, the largest industrial labor union in North America.<sup>26</sup> The coalition's long-term goal was "to establish a national players association in Division I football and basketball."<sup>27</sup>

---

<sup>23</sup> See Jake New, *What Off-Season?*, INSIDE HIGHER ED (May 8, 2015), <https://www.insidehighered.com/news/2015/05/08/college-athletes-say-they-devote-too-much-time-sports-year-round> (according to an NCAA study, "[o]n average, football, men's basketball, women's basketball and baseball players in Division I spend about 40 hours a week on athletic activities"); Steve Wieberg, *Study: College Athletes Are Full-Time Workers*, USA TODAY (Jan. 13, 2008, 1:45 PM), [http://usatoday30.usatoday.com/sports/college/2008-01-12-athletes-full-time-work-study\\_N.htm](http://usatoday30.usatoday.com/sports/college/2008-01-12-athletes-full-time-work-study_N.htm) (according to a 2007 NCAA study, "[f]ootball players in the NCAA's Division I Bowl Subdivision (formerly known as Division I-A) said they spent an average of 44.8 hours a week on their sport—playing games, practicing, training and in the training room—compared with a little less than 40 hours on academics"); see also Decision and Direction of Election at 16, *Nw. Univ. v. Coll. Athletes Players Ass'n (CAPA)*, No. 13-RC-121359 (N.L.R.B. Mar. 26, 2014), <http://apps.nlr.gov/link/document.aspx/09031d4581667b6f> (finding specifically that the Northwestern University football players "devote 40 to 50 hours per week to their football duties all the way through to the end of the season"), *petition dismissed*, 362 N.L.R.B. No. 167 (Aug. 17, 2015); cf. *O'Bannon*, 802 F.3d at 1053 (explaining that in college football, the approximately 350 Division I schools are divided into two subdivisions; the subdivision that allows for more full scholarships to football players and generally includes a higher level of competition is FBS).

<sup>24</sup> See, e.g., Decision and Direction of Election, *supra* note 23, at 18 (contrasting the status of college football players with that of graduate school assistants). See generally *id.* at 16 (explaining that sometimes college athletes are even required to miss class time due to conflicts with their games, as mandated by their coaches); McCormick & McCormick, *A Trail of Tears*, *supra* note 22, at 649 (explaining that college athletes are often precluded from taking afternoon classes due to their mandatory practice schedules).

<sup>25</sup> See Jon Solomon, *NCAA Protest: How the NCPA Became College Football Players' Leading Voice*, ALA. MEDIA GROUP (Sept. 24, 2013, 12:27 PM), [http://www.al.com/sports/index.ssf/2013/09/how\\_the\\_national\\_college\\_playe.html](http://www.al.com/sports/index.ssf/2013/09/how_the_national_college_playe.html).

<sup>26</sup> *Id.*; see also Christopher Davis, *United Steelworkers Lend a Helping Hand to Frustrated NCAA Athletes*, PITTSBURGH BUS. TIMES (Jan. 28, 2002, 12:00 AM), <http://www.bizjournals.com/pittsburgh/stories/2002/01/28/story8.html> ("The Collegiate Athletes Coalition . . . has enlisted the United Steelworkers of America to help it organize Division I-A college athletes into a national players association.").

<sup>27</sup> *Collegiate Athletes Coalition Working to Establish Union*, SPORTS BUS. DAILY (Jan. 7, 2002) (quoting Ramogi Huma), <http://www.sportsbusinessdaily.com/Daily/Issues/2002/01/>

Most college presidents initially opposed their athletes joining an organized coalition to promote systematic reform.<sup>28</sup> Nevertheless, an enlightened minority of former college presidents, perhaps with less at stake personally, have adopted a more favorable view of the college athletes' rights movement.<sup>29</sup> Former University of Michigan president James Duderstadt, for example, stated in a 2002 news article that “[m]aybe collective bargaining, or at least the threat of it, is the way to get the attention of these [big-time college sports] programs and these institutions.”<sup>30</sup> Meanwhile, former Princeton University president William Bowen and Macalester College president Michael S. McPherson have suggested that if college athletes exert their legal rights, it could lead to “a bifurcation” among colleges, where a few colleges pay their athletes a fair market wage, while others abandon big-time college sports entirely.<sup>31</sup>

With growing support for the college athlete reform movement, Huma's coalition eventually expanded into advocating on behalf of athletes' health.<sup>32</sup> In 2008, Huma “designed a grading system that rates each [college] athletic program's medical policies.”<sup>33</sup> He also began to

---

Issue-76/Collegiate-Sports/Collegiate-Athletes-Coalition-Working-To-Establish-Union.aspx.

<sup>28</sup> See *id.* (quoting Ohio State University President Brit Kirwan as stating he “would be very disappointed” if the college athletes form a union because it would lead to “the ruination of intercollegiate athletics”); Robert Lipsyte, *Backtalk; In College Athletics, You Have to Follow the Money*, N.Y. TIMES (Jan. 27, 2002), <http://www.nytimes.com/2002/01/27/sports/backtalk-in-college-athletics-you-have-to-follow-the-money.html> (quoting extensively Ohio State University President William E. Kirwan as one of the college sports traditionalists who alleged a parade of horrors associated with unionized college athletes).

<sup>29</sup> See, e.g., WILLIAM G. BOWEN & MICHAEL S. MCPHERSON, LESSON PLAN: AN AGENDA FOR CHANGE IN AMERICAN HIGHER EDUCATION 119–20 (2016) (expressing this more enlightened position).

<sup>30</sup> *Collegiate Athletes Coalition Working to Establish Union*, *supra* note 27 (quoting former University of Michigan President James Duderstadt).

<sup>31</sup> See BOWEN & MCPHERSON, *supra* note 29, at 120 (stating that “[w]e have come . . . to believe that the only realistic paths to [colleges] saving serious amounts of money . . . are through legal challenges to the ‘system,’” and suggesting that a successful legal challenge by college athletes under either labor or antitrust law could lead to “a bifurcation between universities willing to spend whatever it takes to field the best teams in the country and others reluctant to see even greater divides in the treatment afforded recruited athletes versus students at large”).

<sup>32</sup> See Press Release, Nat'l Coll. Players Ass'n, NCPA Exposes Medical Policies at D-1 NCAA Colleges (Nov. 6, 2008) [hereinafter NCPA Press Release], <http://www.ncpanow.org/news/releases-advisories/ncpa-exposes-medical-policies-at-d-1-ncaa-colleges-grading-system-will-help-recruits-avoid-abuse> (discussing organizational initiatives); see also Jon Solomon, *Bluffton Resident Marc Bailey Battling for NCAA Athletes*, BEAUFORT GAZETTE (Apr. 3, 2011, 1:05 AM), <http://www.islandpacket.com/news/local/community/beaufort-news/article/33414231.html> (noting that the NCPA “helped win a 2008 class-action lawsuit against the NCAA that led to a \$228 million settlement covering unmet educational expenses”).

<sup>33</sup> NCPA Press Release, *supra* note 32.



advocate for broader health insurance protections and better testing protocols for concussions.<sup>34</sup>

In 2013, Huma (along with former University of Massachusetts men's basketball player Luke Bonner) then formed the College Athlete Players Association (CAPA), to directly represent college football and men's basketball players in their attempts to unionize and engage in collective bargaining with their universities.<sup>35</sup> The first college athletes that CAPA sought to unionize were the Northwestern University grant-in-aid football players, who were led by their star quarterback, Kain Colter.<sup>36</sup> These efforts marked an important step toward promoting practical change in the labor dynamics underlying big-time college sports.<sup>37</sup>

## II. THE NORTHWESTERN UNIVERSITY FOOTBALL PLAYERS' ATTEMPT TO UNIONIZE

### A. *Factual Overview of the Northwestern Football Players' Attempts to Unionize*

Ramogi Huma first came into contact with Kain Colter in the summer of 2013 when Colter reached out to him by email.<sup>38</sup> Colter had been taking a course at Northwestern University entitled "Field Studies in the Modern Workplace," which led him to begin thinking about college athletes as an unrepresented class of workers.<sup>39</sup> Colter and Huma spent months discussing whether it would be practical for the

---

<sup>34</sup> See generally Solotaroff, *supra* note 19 (expressing Ramogi Huma's concern about head injuries among college football players, and his desire to represent them after the NCAA denied such duty in the legal briefs to *Sheely v. National Collegiate Athletic Association*).

<sup>35</sup> Ben Strauss, *As Northwestern Players Pursue Unionization, a Voice in the Wilderness Gains a Chorus*, N.Y. TIMES (Feb. 8, 2014), [http://www.nytimes.com/2014/02/09/sports/ncaaf-football/as-northwestern-players-pursue-unionization-voice-in-the-wilderness-gains-a-chorus.html?\\_r=0](http://www.nytimes.com/2014/02/09/sports/ncaaf-football/as-northwestern-players-pursue-unionization-voice-in-the-wilderness-gains-a-chorus.html?_r=0); see also Henry Bushnell, *Colter, CAPA, and the Northwestern Unionization Movement*, INSIDE NU (Aug. 17, 2015, 11:40 AM), <http://www.insidenu.com/2015/8/17/7405209/northwestern-union-timeline-capa-kain-colter-nlr-ruling> (listing January 28, 2014 as the date when Ramogi Huma, Luke Bonner, and Kain Colter officially founded CAPA).

<sup>36</sup> See Strauss, *supra* note 35; see also Tom Farrey, *Kain Colter Starts Union Movement*, ESPN (Jan. 28, 2014), [http://espn.go.com/espn/otl/story/\\_/id/10363430/outside-lines-northwestern-wildcats-football-players-trying-join-labor-union](http://espn.go.com/espn/otl/story/_/id/10363430/outside-lines-northwestern-wildcats-football-players-trying-join-labor-union).

<sup>37</sup> See Marc Edelman, *How Antitrust Law Could Reform College Football: Section 1 of the Sherman Act and the Hope for Tangible Change*, 68 RUTGERS U. L. REV. 809, 824-25 (2016) [hereinafter Edelman, *How Antitrust Law*].

<sup>38</sup> See Rohan Nadkarni, *Kain Colter's Union Battle Cost Him More than He Ever Expected*, DEADSPIN (Aug. 18, 2015, 3:55 PM), <http://deadspin.com/kain-colters-union-battle-cost-him-more-than-he-ever-ex-1724831203>.

<sup>39</sup> See *id.*

Northwestern University football players to unionize in light of current societal dynamics.<sup>40</sup> Then, on January 26, 2014, Huma and Colter formally asked the Northwestern University football players to sign union cards.<sup>41</sup> Two days later, they announced to the media the plan to form an NLRB-recognized union consisting of members of Northwestern University's college football team.<sup>42</sup>

Upon learning about Huma and Colter's press conference, Northwestern University was at first silent.<sup>43</sup> Leadership in the National College Athletic Association (NCAA), however, responded vociferously.<sup>44</sup> In a formal statement issued almost immediately after Colter and Huma's press conference, Donald Remy, the Chief Legal Officer for the NCAA, stated that the "union-backed attempt to turn student-athletes into employees undermines the purpose of college: an education," and that "[s]tudent-athletes are not employees . . . [because] their participation in college sports is voluntary."<sup>45</sup>

Thereafter, Northwestern University, perhaps feeling pressure from the NCAA, announced plans to contest their football players' attempt to unionize.<sup>46</sup> Northwestern University's announcement led to an immediate schism between many of the Northwestern University football players and their coaches.<sup>47</sup> Eventually, Northwestern University—an acclaimed institution of higher education—emerged as the newfound enemy of the college athletes' rights movement.<sup>48</sup>

---

<sup>40</sup> See *id.*

<sup>41</sup> *Id.*

<sup>42</sup> See *id.*; see also Chip Patterson, *Northwestern Players Start Union Movement in College Athletics*, CBS SPORTS (Jan. 28, 2014), <http://www.cbssports.com/collegefootball/eye-on-college-football/24422752/northwestern-players-start-union-movement-in-college-athletics>.

<sup>43</sup> Cf. Patterson, *supra* note 42 (noting that Northwestern University did not respond to their college athletes' efforts to unionize until after the NCAA did so).

<sup>44</sup> See *id.* (quoting NCAA chief legal officer Donald Remy's statement).

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

<sup>46</sup> Cf. Sheldon D. Pollack & Daniel V. Johns, *Northwestern Football Players Throw a "Hail Mary" but the National Labor Relations Board Punts: Struggling to Apply Federal Labor Law in the Academy*, 15 VA. SPORTS & ENT. L.J. 77, 106 (2015) (quoting Northwestern University athletics director Jim Phillips as stating, upon learning of the Region 13 ruling, that "Northwestern believes that our student-athletes are not employees and collective bargaining is therefore not the appropriate method to address these concerns").

<sup>47</sup> See Adam Rittenberg, *Pat Fitzgerald Urges against Union*, ESPN (Apr. 5, 2014), [http://espn.go.com/chicago/college-football/story/\\_/id/10734087/pat-fitzgerald-urges-northwestern-wildcats-players-vote-union](http://espn.go.com/chicago/college-football/story/_/id/10734087/pat-fitzgerald-urges-northwestern-wildcats-players-vote-union) (noting that Northwestern University football coach Pat Fitzgerald wrote a letter to the football team and their parents, discouraging the Northwestern University football players from unionizing).

<sup>48</sup> See *infra* notes 50–77 and accompanying text (discussing the litigation that ensued between Northwestern University and the CAPA on behalf of the Northwestern University college football players); see also *National Universities Rankings*, U.S. NEWS & WORLD REP., <http://colleges.usnews.rankingsandreviews.com/best-colleges/rankings/national-universities/page+2> (last visited Feb. 22, 2017) (ranking Northwestern University as tied for the twelfth best college in the country).

B. *The National Labor Relations Board, Region 13 Decision*

On January 28, 2014, Ramogi Huma filed the Northwestern University football players' petition to unionize with the NLRB's Region 13 in Chicago, Illinois.<sup>49</sup> Less than a month later, both Northwestern University and CAPA submitted their opening briefs.<sup>50</sup> In CAPA's opening brief, the association asserted that the NLRB should recognize Northwestern University's scholarship football players as employees within the meaning of section 2(3) of the NLRA because the Northwestern University football players performed work for the benefit of their school, under the school's control.<sup>51</sup> By contrast, Northwestern University argued that their football players were not employees under the NLRA because of "[t]he predominantly academic relationship between student-athletes and universities."<sup>52</sup> Northwestern University further asserted that its relationship with its college football players was "a far cry from the employer-employee economic relationship that motivated Congress to pass the Act."<sup>53</sup>

Upon review of the respective parties' briefs, the Northwestern University football players prevailed, as Region 13 ruled that the Northwestern University football players indeed constituted employees under section 2(3) of the NLRA.<sup>54</sup> The Region 13 decision defined the term "employee" to include any person "who performs services for another under a contract of hire, subject to the other's control or right of

---

<sup>49</sup> *Northwestern Football Union Timeline*, ESPN (Aug. 17, 2015), [http://espn.go.com/college-football/story/\\_id/13456482/northwestern-football-union-line](http://espn.go.com/college-football/story/_id/13456482/northwestern-football-union-line).

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

<sup>51</sup> See Post-Hearing Brief of Petitioner College Athletes Players Association at 1, *Nw. Univ. v. Coll. Athletes Players Ass'n (CAPA)*, No. 13-RC-121359 (N.L.R.B. Mar. 17, 2014), <http://www.btlaborrelations.com/wp-content/uploads/2014/03/CAPA1.pdf>.

<sup>52</sup> Brief to the Regional Director on Behalf of Northwestern University at 8, 47, *Nw. Univ.*, No. 13-RC-121359, <http://i.usatoday.net/sports/college/2014-03-17-NU-Brief-to-RD.PDF>; see also Kevin Trahan, CAPA vs. Northwestern: *Breaking Down the Labor Briefs*, USA TODAY (Mar. 18, 2014, 7:12 PM), <http://www.usatoday.com/story/sports/ncaaf/2014/03/18/college-football-cap-northwestern-wildcats-organized-labor-unionization/6580475>.

<sup>53</sup> Brief to the Regional Director on Behalf of Northwestern University, *supra* note 52, at 8, 47; see also Trahan, *supra* note 52.

<sup>54</sup> See Decision and Direction of Election, *supra* note 23, at 2 (defining an appropriate bargaining unit to include "all football players receiving football grant-in-aid scholarship and not having exhausted their playing eligibility employed by the Employer [Northwestern University] . . . but excluding office clerical employees and guards, professional employees and supervisors as defined in the Act"); see also *id.* at 17 ("In sum, based on the entire record in this case, I find that the Employer's football players who receive scholarships fall squarely within the Act's broad definition of 'employee.' However, I find that the walk-ons do not meet the definition of 'employee' for the fundamental reason that they do not receive compensation for the athletic services that they perform.").

control, and in return for payment.”<sup>55</sup> Applying this definition, the decision concluded that the Northwestern University football players performed services for their school under a “tender,” which is an employment contract that guarantees the football players compensation in the form of both a free education and living stipends.<sup>56</sup> The decision also found that Northwestern University benefited from this “tender” because the college generated approximately \$235 million in revenue from the services of its football players during the nine year period from 2003 to 2012.<sup>57</sup>

With respect to the issue of “control,” the Region 13 decision similarly found that the Northwestern University football players met their burden.<sup>58</sup> The decision explained that during the six weeks of football training camp before the start of each academic year, coaches provided the Northwestern University football players with an hour-by-hour itinerary of their activities “from as early as 5:45 a.m. until 10:30 p.m.”<sup>59</sup> Meanwhile, during the season, the Northwestern University football players “devote[d] 40 to 50 hours per week on football related activities” including “25 hours [each week] over a two day period traveling to and from the[ir] game, attending practices and meetings, and competing in the game [itself].”<sup>60</sup>

Beyond these heavy time commitments, the Region 13 decision found that Northwestern University exercised control in more specific ways.<sup>61</sup> For example, Northwestern University coaches determined the football players’ attire when traveling to road games, and what cars the players would drive while on campus.<sup>62</sup> Northwestern University coaches also determined whether the football players could seek outside

---

<sup>55</sup> *Id.* at 13. Although the holding of a previous case involving graduate assistants at Brown University found those who functioned primarily as students would be excluded from the definition of “employee,” the Regional Director differentiated the status of Northwestern University football players from Brown University graduate students because, among other factors, the football players’ “football-related duties are unrelated to their academic studies.” *Id.* at 18–21; *see also id.* at 2.

<sup>56</sup> *Id.* at 14. To further support the conclusion that Northwestern University football players’ scholarships were in exchange for their performance as athletes, the Regional Director’s opinion points out that “scholarships can be immediately canceled if [a] player voluntarily withdraws from the team or abuses team rules.” *Id.* at 15.

<sup>57</sup> *Id.* at 14. The Regional Director further found “[t]he fact that [Northwestern University] does not treat these scholarships or stipends as taxable income is not dispositive of whether it is compensation.” *Id.*

<sup>58</sup> *Id.* at 15–17.

<sup>59</sup> *Id.* at 15.

<sup>60</sup> *Id.* at 15–16.

<sup>61</sup> *Id.* at 16–17.

<sup>62</sup> *Id.* at 16.

employment, if the players were allowed to speak with the media, and what content the players could post on the Internet.<sup>63</sup>

Finally, the decision even recognized that Northwestern University exercised control over its grant-in-aid football players by requiring them to miss classes and select course schedules built around the obligations placed upon them in their role as football players.<sup>64</sup> This particular finding entirely differentiates the Northwestern University football players from students in the general Northwestern University student body.<sup>65</sup> To some, it even more broadly substantiates their reasons for seeking to unionize.<sup>66</sup>

### C. *Appeal to the National Labor Relations Board*

Upon learning of Region 13's decision, Northwestern University swiftly appealed the ruling to the Board Members of the NLRB.<sup>67</sup> On April 24, 2014, the Board Members agreed to hear the case.<sup>68</sup> But, after listening to oral arguments, the Board Members waited an unprecedented sixteen months before issuing a ruling.<sup>69</sup> When the Board Members finally ruled on August 17, 2015, they reversed Region 13's decision, declining to assert jurisdiction over the Northwestern University grant-in-aid football players.<sup>70</sup>

The NLRB Board Members did not reject Region 13's conclusion that Northwestern University football players constituted employees,<sup>71</sup>

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

<sup>64</sup> *Id.* at 16–17.

<sup>65</sup> *Id.*

<sup>66</sup> See Marc Edelman, *21 Reasons Why Student-Athletes Are Employees and Should Be Allowed to Unionize*, FORBES (Jan. 30, 2014, 10:11 AM), <http://www.forbes.com/sites/marcedelman/2014/01/30/21-reasons-why-student-athletes-are-employees-and-should-be-allowed-to-unionize/#54020bfe2991>.

<sup>67</sup> See Ray Sanchez, *Northwestern to Ask for Board for Review of Decision Allowing Players to Unionize*, CNN (Mar. 29, 2014, 1:50 PM), <http://www.cnn.com/2014/03/29/us/northwestern-football-union> (announcing Northwestern University's decision to appeal Region 13's decision, which had recognized their grant-in-aid football players as employees eligible to unionize).

<sup>68</sup> *Nw. Univ.*, 362 N.L.R.B. No. 167, 2015 WL 4882656, at \*1 (Aug. 17, 2015).

<sup>69</sup> See Pollack & Johns, *supra* note 46, at 78 (describing the time period from when the full NLRB agreed to hear the Northwestern case to the rendering of its final decision as “seventeen months of deliberation and delay”); Michael McCann, *Breaking Down Implications of NLRB Ruling on Northwestern Players Union*, SPORTS ILLUSTRATED (Aug. 17, 2015), <http://www.si.com/college-football/2015/08/17/northwestern-football-players-union-nlr-ruling-analysis> (noting that the NLRB spent “16 months considering the question of whether football players on athletic scholarships at Northwestern University are employees under the National Labor Relations Act”).

<sup>70</sup> *Nw. Univ.*, 2015 WL 4882656, at \*1.

<sup>71</sup> Indeed, in a subsequent memorandum on the statutory rights of university faculty and students in the unfair labor practice context that was issued on January 31, 2017, the NLRB's general counsel Richard F. Griffin, Jr. wrote that “based on the record developed in

but they still found the proposed bargaining unit to be inappropriate because they determined that college sports requires a “symbiotic relationship” between the teams in a sports league.<sup>72</sup> Because Northwestern University was the only private college in the Big Ten Conference to fall under the NLRB’s direct jurisdiction (and thus the only college in their athletic conference to do so), the Board Members believed that asserting jurisdiction did not serve to support a “symbiotic relationship” or “promote stability in labor relations” within big-time college sports.<sup>73</sup>

Nevertheless, the NLRB Board Members did not outright reject the possibility of asserting jurisdiction over a different bargaining unit of college athletes.<sup>74</sup> Rather, the opinion explained that the Board Members had only addressed “the facts in the record before [it].”<sup>75</sup> Thus, the NLRB decision kept alive the possibility that union organizers could still seek to obtain NLRB jurisdiction over a different potential bargaining unit of college athletes.<sup>76</sup>

#### D. Objective Critique of the NLRB Ruling

Since the NLRB declined jurisdiction over the *Northwestern University* football players, many commentators have described the NLRB’s decision as a “punt” on the important issue of whether big-time college athletes constitute employees under the NLRA.<sup>77</sup> Some

---

*Northwestern University* [as well as the holding of subsequent Board decisions], we conclude that scholarship football players in Division I FBS private sector colleges and universities are employees under the NLRA, with the rights and protections of that Act.” Richard F. Griffin, Jr., Nat’l Labor Relations Bd., Office of the Gen. Counsel, Memorandum GC 17-01, General Counsel’s Report on the Statutory Rights of University Faculty and Students in the Unfair Labor Practice Context 16 (Jan. 31, 2017) [hereinafter NLRB Gen. Counsel Memo], <http://apps.nlr.gov/link/document.aspx/09031d4582342bfc>.

<sup>72</sup> *Nw. Univ.*, 2015 WL 4882656, at \*5.

<sup>73</sup> *Id.* More broadly than these qualms related particularly to the nature of Northwestern University’s conference affiliation, the NLRB cautioned that “of the roughly 125 colleges and universities that participate in FBS football, all but 17 are state-run institutions,” which lie outside the scope of the NLRB’s jurisdiction. *Id.*

<sup>74</sup> *Id.* at \*1; *see also id.* at \*3 (“But as the Supreme Court has stated . . . even when the Board has the statutory authority to act . . . ‘the Board sometimes properly declines to do so, stating that the policies of the Act would not be effectuated by its assertion of jurisdiction in that case.’” (quoting *NLRB v. Denver Bldg. Trades Council*, 341 U.S. 675, 684 (1951))).

<sup>75</sup> *Id.* at \*6.

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

<sup>77</sup> *See, e.g.*, Pollack & Johns, *supra* note 46, at 101 (referring to the NLRB’s decision as a “punt” in the very title of the article because “the Board avoided answering the question of whether the football players are employees of Northwestern University by refusing to assert jurisdiction over the case”); McCann, *supra* note 69 (“[T]he National Labor Relations Board has essentially punted on that question [regarding the Northwestern University football player unionization].”); Jake New, *NLRB Punts on Northwestern Union*, INSIDE HIGHER ED (Aug. 18,

commentators have additionally expressed regret about the NLRB declining jurisdiction in light of the huge discrepancy in bargaining power between colleges such as Northwestern University and their athletes.<sup>78</sup>

Among the more analytical critiques of the NLRB's *Northwestern University* decision, César Rosado Marzán, an Associate Professor at IIT Chicago-Kent College of Law, suggested in a 2015 law review article that “the NLRA aims to provide employees, weaker parties in employment relationships, with bargaining rights in order to preserve industrial peace”—the exact antithesis of the outcome of the *Northwestern University* case.<sup>79</sup> To Marzán, the NLRB's decision in *Northwestern University* was so troubling because CAPA's unionizing efforts were not just about salary, but more broadly about bargaining equity.<sup>80</sup> According to Marzán, “one of the driving forces behind the college athletes demanding a union . . . [was] protection from football-related injuries that are not felt until later in life, such as concussions”—an issue that is currently an important topic in collective bargaining within the unionized world of U.S. professional football.<sup>81</sup>

Michael McCann, a law professor at the University of New Hampshire and columnist for *Sports Illustrated*, generally agrees.<sup>82</sup> In his August 17, 2015 online column, Professor McCann conveyed the sense of “astonishment that the [B]oard would decline to exercise jurisdiction” even though the Board had previously ruled on whether

---

2015), <https://www.insidehighered.com/news/2015/08/18/national-labor-relations-board-declines-assert-role-northwestern-football-union>.

<sup>78</sup> See César F. Rosado Marzán & Alex Tillett-Saks, *Work, Study, Organize!: Why the Northwestern University Football Players Are Employees Under the National Labor Relations Act*, 32 HOFSTRA LAB. & EMP. L.J. 301, 320 (2015) (“The architects of the Act desired a more level playing field where employees could collectively organize against what was viewed as a much larger, much more powerful entity—the employer. Northwestern University in this case has become exactly this type of overpowering entity.”); see also Fram & Frampton, *supra* note 15, at 1068 (“[A]rguments against recognizing a college players’ union based on such concerns [about backlash from the NCAA, alumni, and state legislators] run contrary to the fundamental objectives of collective bargaining law: anticipated retaliatory acts by a private third-party [should] have little place in legal determinations of who is, and who is not, entitled to statutory protections.”). But see Rohith A. Parasuraman, Note, *Unionizing NCAA Division I Athletics: A Viable Solution?*, 57 DUKE L.J. 727, 752 (2007) (arguing, years before the Northwestern University football players attempted to unionize, in favor of leaving decisions about whether to recognize college athlete unions to Congress, rather than the NLRB).

<sup>79</sup> Rosado Marzán & Tillett-Saks, *supra* note 78, at 306.

<sup>80</sup> *Id.* at 325. For further support of this point, see also 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, 65–66 (2014) (“Unionization at the college level could have a dramatic impact, although instead of athlete compensation, the true focus of bargaining may turn out to be player concerns that are developing at the professional level as well, such as safety, concussions, and the abuse of painkillers.” (footnote omitted)).

<sup>81</sup> Rosado Marzán & Tillett-Saks, *supra* note 78, at 325.

<sup>82</sup> See McCann, *supra* note 69.

graduate assistants and research assistants constituted employees.<sup>83</sup> McCann's article also suggested that the NLRB "blinked under some very bright lights—namely pressure from various constituencies that did not want to see players recognized as employees."<sup>84</sup> Among these various constituencies, one group opposed to college athletes unionizing is certainly the NCAA.<sup>85</sup>

### III. POTENTIAL FUTURE COLLEGE ATHLETE BARGAINING UNITS

The NLRB's decision to decline jurisdiction over the Northwestern University football players, nevertheless, does not end all efforts to unionize college athletes. Since the NLRB's decision in *Northwestern University*, Richard F. Griffin Jr., in his capacity as General Counsel to the NLRB, issued a memorandum on the statutory rights of university faculty and students in the unfair labor practice context, in which he recognized that the Northwestern University grant-in-aid football players, as well as all other scholarship football players in Division I FBS private sector colleges, constitute "employees under the NLRA, with the rights and protections of that Act."<sup>86</sup> This memorandum helps union organizers of premier college athlete labor to overcome at least one of the obstacles to forming a recognized college athlete union.

Furthermore, new attempts to unionize college athletes will likely continue to serve as a "useful pressure tactic" for the college athletes' rights movement.<sup>87</sup> As explained by University of Illinois law professor Michael H. LeRoy, even the mere threat of litigation by college athletes "will ratchet up pressure on the NCAA to make swift and significant reforms that are responsive to player grievances."<sup>88</sup> Similarly, according to University of Nebraska law professor Steven Willborn, the *Northwestern University* decision represents "only one arrow in an overflowing quiver."<sup>89</sup>

Indeed, based upon the foregoing reasons, there are many other possibilities under which labor organizations such as CAPA could attempt to move forward with efforts to unionize college athletes, even

---

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

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

<sup>85</sup> See *supra* note 45 and accompanying text (including NCAA general counsel Donald Remy's statement in opposition to recognizing Northwestern University college football players as "employees" under the NLRA); cf. McCormick & McCormick, *The Myth*, *supra* note 21, at 79 (noting that the recognition of college athletes as eligible to unionize would have "profound implications for the NCAA").

<sup>86</sup> NLRB Gen. Counsel Memo, *supra* note 71, at 16.

<sup>87</sup> LeRoy, *Courts and the Future of "Athletic Labor"*, *supra* note 3, at 499.

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

<sup>89</sup> Willborn, *supra* note 3, at 86.



despite the *Northwestern University* decision.<sup>90</sup> Language within the *Northwestern University* decision may even serve as a reasonable roadmap for future attempts to unionize college athletes.<sup>91</sup>

A. *Football Players or Men's Basketball Players at a Private University Other than Northwestern University*

One possibility for unionizing college athletes, even after the *Northwestern University* decision, involves convincing the NLRB to assert jurisdiction over a bargaining unit that consists of football or men's basketball players at a private college that competes in an athletic conference with other private colleges.<sup>92</sup> The benefits of this approach are threefold: (1) college athlete union organizers already have some experience attempting to unionize a private college sports team, (2) attempting to organize a single sports team involves far less coordination than organizing a broader bargaining unit, and (3) this approach is least likely to implicate the antitrust rights of college athletes (a topic discussed later in this article).<sup>93</sup>

Nevertheless, the primary challenge for union organizers, if they were to adopt this approach, is sufficiently differentiating their newly proposed bargaining unit from the bargaining unit over which the NLRB declined jurisdiction in *Northwestern University*.<sup>94</sup> Perhaps the most reasonable way for union organizers to attempt to do so would entail focusing on the greater number of private colleges in the target school's athletic conference as evidence of lower instability in labor relations that would emerge from asserting jurisdiction.<sup>95</sup>

Among the NCAA's many Division I athletic conferences, one—the Ivy League—consists exclusively of private colleges, and thus, the unionizing of an Ivy League college is not likely to lead to any instability

---

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

<sup>91</sup> See generally *supra* notes 74–76 and accompanying text (discussing language in the NLRB decision that leaves open the possibility for the Board to assert jurisdiction over a different bargaining unit of college athletes, and suggesting that a bargaining unit of athletes that does not include public competitors or one that does not encompass a wide range of colleges would be more suitable).

<sup>92</sup> See *Nw. Univ.*, 362 N.L.R.B. No. 167, 2015 WL 4882656, at \*6 (Aug. 17, 2015).

<sup>93</sup> See generally Michael J. Frank, *Accretion Elections: Making Employee Choice Paramount*, 5 U. PA. J. LAB. & EMP. L. 101, 101–02 (2002) (explaining why it is generally easier to organize a bargaining unit involving a small number of workers); *infra* Section IV.B (discussing antitrust implications associated with establishing various potential bargaining units of college athletes).

<sup>94</sup> See *Nw. Univ.*, 2015 WL 4882656 (declining to assert jurisdiction over the Northwestern University college football team).

<sup>95</sup> See *id.* at \*5 (“Northwestern is the only private school that is a member of the Big Ten, and thus the Board cannot assert jurisdiction over any of Northwestern’s primary competitors.”).

in labor relations, such as the NLRB found in *Northwestern University*.<sup>96</sup> Nevertheless, union organizers would likely struggle to convince the NLRB to assert jurisdiction over an Ivy League college. This is because the Ivy League does not offer grant-in-aid scholarships,<sup>97</sup> thus making it unlikely for their athletes to be considered “employees” under federal labor law.<sup>98</sup>

Another possibility is for union organizers to target athletes at a private college in the Atlantic Coast Conference (ACC)—a conference that includes six private colleges (forty percent of the overall conference).<sup>99</sup> Among the potential ACC teams that organizers may reasonably seek to unionize include the men’s basketball team at Syracuse University—an upstate New York private college that operates the third most profitable men’s basketball program in the country.<sup>100</sup>

Syracuse University recently moved its athletics teams into the ACC entirely for business purposes, even though joining this conference meant longer travel times and more missed class days for some Syracuse University athletes.<sup>101</sup> In addition, there have been widespread

---

<sup>96</sup> See Justin Berkman, *Ivy League Rankings: What Do They Really Mean?*, PREPSCHOLAR (Dec. 30, 2015, 9:00 AM), <http://blog.prepscholar.com/ivy-league-rankings> (explaining that the eight Ivy League schools are all “extremely selective private colleges in the Northeastern United States”).

<sup>97</sup> See Ellen J. Staurowsky, “A Radical Proposal”: Title IX Has No Role in College Sport Pay-for-Play Discussions, 22 MARQ. SPORTS L. REV. 575, 591 (2012) (discussing that the Ivy League, since its formal constitution as a sports conference in 1956, has prohibited the awarding of athletic scholarships, concluding that “[a]thletes shall be admitted as students and awarded financial aid only on the basis of the same academic standards and economic need as are applied to all other students” (quoting Bernard M. Gwertzman, *Ivy League: Formalizing the Fact*, HARV. CRIMSON (Oct. 13, 1956), <http://www.thecrimson.com/article/1956/10/13/ivy-league-formalizing-the-fact-pthe>)).

<sup>98</sup> See *Nw. Univ.*, 2015 WL 4882656, at \*20 (explaining that the scholarship and additional payments to athletes, in exchange for their play, represent “tender” for purposes of establishing an employment relationship); Willborn, *supra* note 3, at 71 (explaining that under the Region 13’s decision in *Northwestern University*, athletes at schools that do not allow for athletic scholarships likely would not constitute “employees”).

<sup>99</sup> See Allen Grove, *ACC, The Atlantic Coast Conference*, THOUGHTCO (Feb. 28, 2017), <http://collegeapps.about.com/od/choosingacollege/tp/atlantic-coast-conference.htm> (noting that these private ACC colleges include Boston College, Duke University, University of Miami, University of Notre Dame, Syracuse University, and Wake Forest University); see also *Northwestern Univ.*, 2015 WL 4882656, at \*6 n.21 (noting that in football, the ACC only includes fourteen colleges, five of which are private; this is because Notre Dame University has not joined the conference for the purposes of football).

<sup>100</sup> See Chris Isidore, *Most Profitable NCAA Teams*, CNNMONEY (Mar. 16, 2015, 10:13 AM), <http://money.cnn.com/2015/03/16/news/companies/ncaa-most-profitable>.

<sup>101</sup> See Erick Smith, *Syracuse Reaches Deal with Big East to Join ACC Early*, USA TODAY (July 16, 2012, 4:54 PM), <http://content.usatoday.com/communities/campusrivalry/post/2012/07/syracuse-joining-acc-early-big-east-exit-pittsburgh/1#.V31pvLgrKM8>; see also William C. Rhoden, *Sports of the Times; A Divorce in the Big East Exposes Bitter Truths in College Sports*, N.Y. TIMES (June 11, 2003), <http://www.nytimes.com/2003/06/11/sports/sports-times-divorce-big-east-exposes-bitter-truths-college-sports.html> (discussing how college sports teams

allegations of academic fraud involving the Syracuse University men's basketball team, further differentiating the relationship between Syracuse University and its men's basketball players from that of Northwestern University and its football players.<sup>102</sup>

Nevertheless, it remains uncertain whether the partially private nature of the ACC is seen as meaningful enough to ameliorate the NLRB's concerns about maintaining "stability in labor relations" that led the NLRB to decline jurisdiction over the Northwestern University football players. Although the NLRB concluded in *Northwestern University* that the private-to-public ratio of the Big Ten Conference was enough to keep it from asserting jurisdiction over the Northwestern University football team, the NLRB provided absolutely no guidance of what private-to-public ratio would be needed to absolve its concerns.<sup>103</sup>

#### B. *Football Players and Men's Basketball Players at a Public University*

A second approach to unionizing collegiate athletes entails attempting to unionize a *public* football or men's basketball team.<sup>104</sup> This approach has all of the same strengths as the first approach of unionizing a private football or men's basketball team.<sup>105</sup> In addition, this approach alleviates the need to differentiate the new proposed bargaining unit from the one the NLRB rejected in *Northwestern University*.<sup>106</sup>

---

switching conferences is a loss for the college athletes, who often, as a result, experience longer travel times between games).

<sup>102</sup> See Jake New, *Academic Fraud at Syracuse*, INSIDE HIGHER ED (Mar. 9, 2015), <https://www.insidehighered.com/news/2015/03/09/ncaa-suspends-syracuse-u-basketball-coach-vacates-108-wins> (discussing NCAA sanctions against Syracuse University arising from the school's director of basketball operations purportedly ordering "athletics staff members to access and monitor the e-mail accounts of several players, communicate directly with faculty members as if they were the athletes, and then complete coursework for them").

<sup>103</sup> See *Nw. Univ.*, 2015 WL 4882656, at \*6 (noting, in particular, that the Board members "are declining jurisdiction only in this case involving the football players at Northwestern University . . . [and they] do not address what the Board's approach might be to a petition for all FBS scholarship football players (or at least those at private colleges and universities)").

<sup>104</sup> See Fram & Frampton, *supra* note 15, at 1038–39 (explaining that in many states there is the possibility for public university employees to unionize under the auspices of state labor laws).

<sup>105</sup> See *supra* note 93 and accompanying text (explaining that these strengths include: "(1) college athlete union organizers already have some experience attempting to unionize a private college sports team, (2) attempting to organize a single sports team involves far less coordination than organizing a broader bargaining unit, and (3) this approach is least likely to implicate the antitrust rights of college athletes").

<sup>106</sup> See generally *infra* note 107 and accompanying text (clarifying that decisions of the NLRB are not always meaningful precedent when deciding whether a bargaining unit may unionize under state law, because some state law standards for unionizing vary from the standards adopted under federal law; in addition, public policy concerns may also vary).

Nevertheless, even though public employees at the state level are not subject to the NLRB's preferences in determining whether they can unionize, public workers are generally subject to state labor laws and their limits on union recognition.<sup>107</sup> While most states model their labor laws after the NLRA, state labor laws are "more diverse" and "differ in many important ways, including in their definition of 'employee.'"<sup>108</sup>

A careful review of state labor laws indicates that Wisconsin's laws have the broadest definition of "employee."<sup>109</sup> Under Wisconsin labor law, an "employee" includes "any person who may be required or directed by any employer, in consideration of direct or indirect gain or profit, to engage in any employment, or to go or work or be at any time in any place of employment."<sup>110</sup> Recent changes to the rules for collective bargaining in Wisconsin, nevertheless, reduce the upside for college athletes attempting to unionize.<sup>111</sup> For example, Wisconsin's new rules

---

<sup>107</sup> *Nw. Univ.*, 2015 WL 4882656, at \*5; see also Fram & Frampton, *supra* note 15, at 1038–39 (“[T]he NLRA specifically exempts from its definition of employer ‘any State or political subdivision thereof.’ . . . [but] [t]his statutory exemption leaves collective bargaining rights for public employees, including those at public universities (athletic or otherwise), contingent on state law.”).

<sup>108</sup> Willborn, *supra* note 3, at 69. For a general introduction to the differences in state laws with respect to the definition of “employee,” compare WIS. STAT. ANN. § 103.001(5) (West 2012) (recognizing that persons directed by an employer, even in exchange for indirect gain, are considered employees), with CAL. LAB. CODE § 3352(k) (West 2011) (noting that the definition “employee” under California labor law excludes “[a] student participating as an athlete in amateur sporting events sponsored by a public agency or public or private nonprofit college, university, or school, who does not receive remuneration for the participation, other than the use of athletic equipment, uniforms, transportation, travel, meals, lodgings, scholarships, grants-in-aid, or other expenses incidental thereto”).

<sup>109</sup> See *infra* note 110 and accompanying text. Incidentally, Wisconsin was also the first state to formally recognize collective bargaining among public employees, beginning in 1959. See Fram & Frampton, *supra* note 15, at 1039. Some states with narrower definitions that seem to directly exclude college athletes include Georgia, North Carolina, South Carolina, Tennessee, Texas, and Virginia. See MILLA SANES & JOHN SCHMITT, CTR. FOR ECON. & POL’Y RES., REGULATION OF PUBLIC SECTOR COLLECTIVE BARGAINING IN THE STATES 4 (2014), <http://cepr.net/documents/state-public-cb-2014-03.pdf>. In addition, Mississippi does not have any statute about unionization and collective bargaining, but unionization seems to be protected under case law. See *id.* at 40–41; see also *Jackson v. Hazlehurst Mun. Separate Sch. Dist.*, 427 So. 2d 134, 137 (Miss. 1983).

<sup>110</sup> WIS. STAT. ANN. § 103.001(5). Based upon this definition, there are already unions in Wisconsin that represent student workers as diverse as teaching assistants and graduate assistants. See *Graduate Student Unionization—History of Graduate-Student Unions in the U.S.*, LIQUIDSEARCH.COM, [http://www.liquidsearch.com/graduate\\_student\\_unionization/history\\_of\\_graduate-student\\_unions\\_in\\_the\\_us](http://www.liquidsearch.com/graduate_student_unionization/history_of_graduate-student_unions_in_the_us) (last visited May 23, 2016) (noting that in 1969, the University of Wisconsin-Madison Teaching Assistants Association became the first teaching assistants association in the United States to become recognized as an independent collective bargaining unit, and, again in 1991, the University of Wisconsin-Milwaukee graduate students won union recognition).

<sup>111</sup> See Steven Greenhouse, *Wisconsin’s Legacy for Unions*, N.Y. TIMES (Feb. 22, 2014), [https://www.nytimes.com/2014/02/23/business/wisconsins-legacy-for-unions.html?\\_r=0](https://www.nytimes.com/2014/02/23/business/wisconsins-legacy-for-unions.html?_r=0) (discussing Wisconsin’s Act 10, and Governor Scott Walker’s attempts to limit public

about collective bargaining greatly restrict the topics over which public unions may bargain and include requirements that unions re-certify each year to maintain their collective bargaining status.<sup>112</sup> Neither of these requirements facilitates a long-term, complex bargaining relationship.<sup>113</sup>

Florida, meanwhile, represents another state where there is a reasonable prospect of unionizing public colleges' FBS football and Division I men's basketball players.<sup>114</sup> Florida currently uses the "right of control" test to determine whether one constitutes an "employee" under state labor law.<sup>115</sup> Pursuant to this test, Florida has long recognized that graduate assistants who are employed by the University of Florida and University of South Florida constitute a legitimate bargaining unit.<sup>116</sup> Although the Florida state legislature had attempted to change state labor laws to exclude graduate assistants from the right to collectively bargain, the Florida District Court of Appeal has since held that denying any category of "employee," under the ordinary meaning of the word, of the right to collectively bargain violates the state constitution.<sup>117</sup> Thus, it would be extraordinarily difficult for Florida to establish a carve-out to per se deny college athletes access to collective bargaining rights.<sup>118</sup>

In addition to Wisconsin and Florida, Massachusetts, Nebraska, and Oregon are three other states where it is reasonable to attempt to unionize public colleges' football or men's basketball players.<sup>119</sup> As in Wisconsin and Florida, the labor boards of Massachusetts, Nebraska, and Oregon each have adopted favorable views toward unionizing graduate assistants.<sup>120</sup> Furthermore, Nebraska passed a bill in 2003 that entitles college football players the right to "fair financial compensation for playing football" if four other states within their football conference

---

employees' collective bargaining rights in the state).

<sup>112</sup> *See id.*

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

<sup>114</sup> *See* Willborn, *supra* note 3, at 93 (concluding that examples in California and Florida illustrated how "college athletes at public universities will have strong claims for organizational rights under some public-sector bargaining laws").

<sup>115</sup> *See, e.g.,* Sarasota Cty. Chamber of Commerce v. State Dep't of Labor & Emp't Sec., 463 So. 2d 461, 462 (Fla. Dist. Ct. App. 1985) ("The principal consideration in determining whether one is working as an independent contractor or as an employee is the right of control over his mode of doing the work.").

<sup>116</sup> *See* United Faculty of Fla. Local 1847 v. Bd. of Regents, 417 So. 2d 1055, 1056–57 (Fla. Dist. Ct. App. 1982) (discussing the process by which the Public Employees Relations Commission of Florida came to recognize the graduate assistants union within the state).

<sup>117</sup> *See id.* at 1057, 1060–61.

<sup>118</sup> *See id.* (rejecting the idea that graduate students cannot be both students and employees).

<sup>119</sup> *See* Fram & Frampton, *supra* note 15, at 1053, 1059–60.

<sup>120</sup> *See id.* at 1059–60 (discussing the successful history of unionizing college graduate assistants in these respective states, and specifically the successful attempts to unionize even undergraduate resident advisors in Massachusetts).

pass a similar law.<sup>121</sup> Although this statute does not directly relate to the topic of unionizing, the statute signifies a general sentiment toward acknowledging that college athletes deserve at least some form of compensation.<sup>122</sup>

C. *Multi-Employer Bargaining Unit Consisting of Numerous Private Colleges*

A third approach to unionizing collegiate athletes entails seeking to establish a multi-employer bargaining unit that includes all of the private colleges within a single athletic conference or collection of conferences.<sup>123</sup> For example, rather than attempting to unionize just the Syracuse University men's basketball players (as proposed in Section III.A), organizers may instead seek to unionize a bargaining unit that includes all of the basketball players at the six private ACC colleges: Boston College, Duke University, University of Miami, University of Notre Dame, Syracuse University, and Wake Forest University.<sup>124</sup> Alternatively, union organizers may seek to establish a multi-employer bargaining unit that includes all seventeen private FBS football colleges, irrespective of these colleges' primary conference affiliations.<sup>125</sup>

If union organizers attempt to establish a multi-employer bargaining unit that includes all of the private colleges from within a single athletic conference (or multiple athletic conferences), the NLRB would likely have limited concern about "stability in labor relations."<sup>126</sup> Indeed, this approach would likely lead to either the separation of the unionized schools into an independent, sustainable athletic conference,

---

<sup>121</sup> See *id.* at 1054 (quoting 2003 Neb. Laws 688). As a side note, the University of Nebraska no longer competes in the Big 12 football conference, having moved to the Big Ten Conference in July 2011. See *Nebraska Approved by Big Ten*, ESPN (June 12, 2010), <http://espn.go.com/college-sports/news/story?id=5276551>.

<sup>122</sup> 2003 Neb. Laws L.B. 688.

<sup>123</sup> For example, the players in Major League Baseball, the National Basketball Association, the National Football League and the National Hockey League are all members of single, multi-employer bargaining unit that includes, under one union, the players on all of the different teams within the league. See Michael C. Harper, *Multiemployer Bargaining, Antitrust Law, and Team Sports: The Contingent Choice of a Broad Exemption*, 38 WM. & MARY L. REV. 1663, 1664 (1997) ("All major professional team sports clubs have joined with other league clubs to bargain in multiemployer units with unions representing the athletes that they employ.").

<sup>124</sup> See ACC, <http://www.theacc.com> (last visited Jan. 17, 2017); Grove, *supra* note 99 (listing which ACC colleges are private and public).

<sup>125</sup> See Kevin Trahan et al., *College Football Unionization Rankings: Which Private Schools Are Next?*, SB NATION (July, 9, 2014, 8:00 AM), <http://www.sbnation.com/college-football/2014/7/9/5880399/college-football-unions-teams-private-schools> (listing the other sixteen FBS private colleges in addition to Northwestern University).

<sup>126</sup> See *Nw. Univ.*, 362 N.L.R.B. No. 167, 2015 WL 4882656, at \*5-6 (Aug. 17, 2015).

or an agreement by the non-unionized schools to voluntarily provide their athletes with the same terms of employment as schools where the athletes have the right to collectively bargain.

Nevertheless, if the NLRB were to assert jurisdiction over a multi-employer bargaining unit of college athletes, a different set of concerns may emerge. For example, unionizing a multi-employer bargaining unit of college athletes could lead to concerns about creating a bargaining unit with divergent interests among its members.<sup>127</sup> Another risk entails the possibility that at least some courts would find the creation of a multi-employer bargaining unit to trigger the NCAA's partial exemption from labor-side antitrust lawsuits.<sup>128</sup> These antitrust concerns, in the context of antitrust law's "non-statutory labor exemption," are extremely important to preserving the broader college athletes' rights movement, and they are discussed in great detail in Part IV of this article.<sup>129</sup>

#### D. *All FBS Football and Division I Men's Basketball Players at Public and Private Schools*

A fourth approach to unionizing college athletes, meanwhile, would entail attempting to unionize both private and public FBS football and Division I men's basketball players into a single union (or perhaps two unions, one for each sport). To succeed with this approach, labor organizers would need to convince the NLRB that all FBS football and Division I men's basketball players fall within the NLRB's jurisdiction—

---

<sup>127</sup> See Frank, *supra* note 93, at 101–02. As astutely explained by Michael J. Frank in his article:

Generally unions initially prefer smaller bargaining units, for obvious reasons: the union needs a consensus among workers that adoption of the union is in their best interests, and the probability of the union achieving this consensus is inversely proportional to the number of parties involved. The smaller the unit, the fewer the employees the union needs to convince to vote for the union. The fewer the votes needed, the greater the chances of an election victory. Furthermore, it is often less expensive to proselytize a smaller group, and the union that can expand inexpensively can devote its economic resources to battling rival unions or the employer.

*Id.* (footnotes omitted).

<sup>128</sup> See *infra* Section IV.B (discussing the non-statutory labor exemption and likely interplay between unionizing college athletes and the prospect of labor-side antitrust claims against the NCAA); see also Daniel E. Lazaroff, *An Antitrust Exemption for the NCAA: Sound Policy or Letting the Fox Loose in the Henhouse*, 41 PEPP. L. REV. 229, 247 (2014) (explaining that if "student-athletes will be permitted to unionize by the National Labor Relations Board . . . the non-statutory labor exemption [perhaps] will come into play"); Fram & Frampton, *supra* note 15, at 1075 ("[C]ollective bargaining would endow universities with an ancillary benefit: potential insulation from antitrust litigation.").

<sup>129</sup> See *infra* Part IV.

even those players attending public schools.<sup>130</sup> Since public schools generally lie outside of the NLRB's jurisdiction, this approach would require union organizers to make a successful argument that the NCAA, which is a private trade association, serves as a joint employer of all college athletes.<sup>131</sup> This would be a novel argument, with little to no precedent directly on point.

Yet, even though arguing that the NCAA is a joint employer of college athletes represents a novel argument, there are myriad factors that point in favor of finding the NCAA to serve as a joint employer.<sup>132</sup> For example, the NCAA bylaws require all FBS football and Division I men's basketball players to sign an identical letter of tender, which includes their "terms of employment."<sup>133</sup> In addition, the NCAA bylaws set forth uniform rules for financially compensating college athletes.<sup>134</sup>

---

<sup>130</sup> See generally *Jurisdictional Standards*, NAT'L LAB. REL. BOARD, <https://www.nlr.gov/rights-we-protect/jurisdictional-standards> (last visited Jan. 17, 2017) ("The Board has statutory jurisdiction over private sector employers whose activity in interstate commerce exceeds a minimal level.")

<sup>131</sup> See, e.g., *Airway Cleaners, L.L.C.*, 363 N.L.R.B. No. 166, 2016 WL 1569705 (Apr. 18, 2016) (asserting jurisdiction over the employees of a cleaning and maintenance service company, even though it is a joint employer alongside a company exempt from the NLRA pursuant to the Railway Labor Act); *Mgmt. Training Corp.*, 317 N.L.R.B. 1355, 1357–58 (1995) (deciding that "jurisdiction [in cases where an employer may be exempt from the Act] should no longer be determined on the basis of whether the employer or the Government controls most of the employee's terms and conditions of employment" and instead that "the Board will only consider whether the employer meets the definition of 'employer' under Section 2(2) of the Act, and whether such employer meets the applicable monetary jurisdictional standards" (footnote omitted)).

<sup>132</sup> See generally *Browning-Ferris Indus. of Cal., Inc.*, 362 N.L.R.B. No. 186, 2015 WL 5047768, at \*12–14 (Aug. 27, 2015) (discussing the NLRB's current test for joint employer status); Lonick, *supra* note 12, at 155 (explaining that the NLRB's decision in *Browning-Ferris* "demanded a more fact-specific—rather than mechanistic—application of what is called the 'joint-employer' doctrine, thereby opening the door to a rejuvenated unionization effort for college-athletes [by arguing the NCAA is a joint employer]" (footnote omitted)).

<sup>133</sup> *Nw. Univ.*, 362 N.L.R.B. No. 167, 2015 WL 4882656, at \*20 (Aug. 17, 2015) ("[The] 'tender' serves as an employment contract and also gives the players detailed information concerning the duration and conditions under which the compensation will be provided to them. Because NCAA rules do not permit the players to receive any additional compensation or otherwise profit from their athletic ability and/or reputation, the scholarship players are truly dependent on their scholarships to pay for basic necessities, including food and shelter."); see also NCAA, 2015–16 NCAA DIVISION I MANUAL §§ 12, 15 (2015), <http://www.ncaapublications.com/productdownloads/D116.pdf>. Indeed, the concerted action to fix wages of college athletes and boycott those colleges that do not comply with such wage fixing rules serves as reasonable substance for an antitrust challenge against the NCAA (at least to the extent that the impacted athletes are not unionized), but the high antitrust risks of the concerted action is an entirely separate matter and, if anything, only enhances rather than detracts from the argument that the NCAA should be treated as a private employer of athletes when doing so is in the college athletes' interest. See *infra* Section IV.A (discussing ongoing labor-side antitrust actions against the NCAA related to concerted restraints).

<sup>134</sup> See NCAA, *supra* note 133, §§ 12, 15. See generally McCormick & McCormick, *The Myth*, *supra* note 21, at 109 ("Athletic grants-in-aid are strictly regulated by NCAA rules, and constitute a central feature in the economic regime by which the NCAA governs the university-



Finally, the NCAA even has enforced nationwide rules pertaining to academic eligibility and drug testing—evidence of the NCAA’s actual control over college athlete conduct at both private and public colleges.<sup>135</sup>

Presuming that the NLRB accepts that the NCAA serves as a joint employer of all college athletes, it would eviscerate most of the NLRB’s concerns about whether asserting jurisdiction disturbs labor stability in college sports.<sup>136</sup> This is because all FBS football and Division I men’s basketball players would fall under the same bargaining unit, thus leading to their identical treatment.<sup>137</sup> Furthermore, allowing for a multi-employer bargaining unit to represent FBS football and Division I men’s basketball players would facilitate cost efficiencies as compared to the NLRB recognizing many different single-employer bargaining units.<sup>138</sup>

However, on the other hand, even if the NLRB were to recognize a multi-employer bargaining unit that includes both private and public FBS football and Division I men’s basketball players, adopting such a broad bargaining unit still presents some concerns. Much as with unionizing other potential multi-employer bargaining units of college athletes, unionizing a multi-employer bargaining unit of both public and private college athletes may lead to divergent interests among union members, as well as concerns about triggering the “non-statutory labor exemption” defense to certain potential labor-side antitrust claims.<sup>139</sup>

---

athlete relationship.” (footnote omitted)); Pollack & Johns, *supra* note 46, at 96–97 (recognizing that the academic scholarships received by FBS football and Division I basketball member schools carry financial value); Lonick, *supra* note 12, at 159 (“[N]o one can seem to agree on the value of student-athlete labor and only one party—the NCAA—sets the terms of the contracts that student-athletes must sign.”). For example, the scholarships provided by Northwestern University football players could be monetized at “approximately \$61,000 per year, and in some cases, as much as \$76,000 per year.” Pollack & Johns, *supra* note 46, at 96–97.

<sup>135</sup> See, e.g., Lonick, *supra* note 12, at 163 (noting that, pursuant to its own bylaws, “the NCAA . . . has the power to terminate the eligibility of a player for bylaw violations, which in the cases of A.J. Green, Reggie Bush, Cam Newton, and Todd Gurley, shows the NCAA can and will control the continued employment of student-athletes at all universities”).

<sup>136</sup> See *Nw. Univ.*, 2015 WL 4882656, at \*3–6 (expressing concern over the stability of a bargaining unit including just one college sports team, given the level of “control” the NCAA exercises over college athletics in the entirety).

<sup>137</sup> *Id.* at \*5 (concluding that based upon the “symbiotic relationship among the various teams, the conferences, and the NCAA. . . ‘it would be difficult to imagine any degree of stability in labor relations’ if [the Board] were to assert jurisdiction in this single-team case” (quoting *N. Am. Soccer League*, 236 N.L.R.B. 1317, 1321–22 (1978))).

<sup>138</sup> See generally Jonathan P. West, *Unit Determination*, in *ENCYCLOPEDIA OF PUBLIC ADMINISTRATION AND PUBLIC POLICY* 1249, 1249 (Jack Rabin ed., 2003) (discussing “cost efficiencies” related to larger size and composition of a bargaining unit).

<sup>139</sup> See *supra* notes 128–29 and accompanying text (discussing these same concerns in the context of unionizing a potential bargaining unit consisting of the athletes at numerous private colleges but not necessarily the entirety of FBS football or Division I men’s basketball).

E. *Bargaining Units Broader than All FBS Football and Division I Men's Basketball Players at Public and Private Schools*

Finally, some commentators have suggested that the NLRB should recognize, even more broadly, a bargaining unit that includes all Division I college athletes from across all sports. Upon first glance, this suggestion may seem like a benevolent effort to support both gender equality and equal treatment of athletes irrespective of their sport. But, upon closer review, advocating for such a bargaining unit is likely just a veiled attempt to derail the college athletes' rights movement by overwhelming the bargaining unit with non-revenue athletes whose interests would be unaligned with the revenue-generating FBS football and Division I men's basketball players.<sup>140</sup>

Not only is such a broad bargaining unit bad for the revenue-generating athletes, but it also would likely fail under labor law's requirement that a bargaining unit maintain "community of interest."<sup>141</sup> Some of the factors to determine whether "community of interest" is present in a bargaining unit include: (1) whether the employees are organized into a single department, (2) whether the employees have distinct skills and training, (3) whether there is strong overlap between job type and classifications, and (4) whether the employees have regular contact with one another.<sup>142</sup>

A bargaining unit that includes all Division I athletes—irrespective of sport and the ability to generate revenues—would not meet any of the tests for "community of interest."<sup>143</sup> First, each individual sports team represents its own "department" with independent travel times, schedules, and coaches. In addition, the athletes in each sport compete in different seasons and exercise different skill sets.<sup>144</sup> Each sports team

---

<sup>140</sup> See Frank, *supra* note 93, at 102–03 ("Employers, never blind to their own interests . . . frequently support [union] accretions that will weaken an unpopular union, place the accreted employees safely in a unit that isn't too demanding (as opposed to a competing unit that will fight for higher wages), or result in the employer having to bargain with fewer unions (thereby decreasing expenditures of both time and money).").

<sup>141</sup> See *NLRB v. Action Auto., Inc.*, 469 U.S. 490, 494 (1985) ("A cohesive unit—one relatively free of conflicts of interest—serves the [National Labor Relations] Act's purpose of effective collective bargaining . . ."). See generally Parasuraman, *supra* note 78, at 746 (explaining that, in the context of determining an appropriate bargaining unit, "employee status ought to be limited to Division I football and men's basketball . . . because these are the sports that generate large revenues").

<sup>142</sup> See *Specialty Healthcare & Rehab. Ctr. of Mobile*, 357 N.L.R.B. 934 (2011) (showing a community of interest analysis); see also *United Operations, Inc.*, 338 N.L.R.B. 123, 123 (2002).

<sup>143</sup> See *Action Auto. Inc.*, 469 U.S. at 494.

<sup>144</sup> See, e.g., *Statistics*, NCAA, <http://www.ncaa.org/championships/statistics> (last visited Mar. 21, 2017) (providing statistical information for different sports and seasons of college sports).

has its own travel demands and its own training schedule.<sup>145</sup> Finally, athletes on different sports teams have little work-related interaction with one another, and are not working in tandem to achieve a single goal.

Moreover, in addition to the four articulated factors for “community of interest,” revenue-generating college athletes are fundamentally different from other college athletes in terms of their general responsibilities to their college.<sup>146</sup> On average, revenue-generating athletes practice more hours, have greater obligations to participate in press conferences, and compete in a higher pressure environment given their constant media scrutiny and the impact of their on-field performance on the financial status of their coaches.<sup>147</sup>

#### IV. THE INTERPLAY BETWEEN EFFORTS TO UNIONIZE COLLEGE ATHLETES AND ANTITRUST LITIGATION AGAINST THE NCAA

##### A. *Current and Potential Antitrust Lawsuits by Athletes Against the NCAA*

Beyond these practical concerns associated with determining the appropriate bargaining unit for college athletes, labor organizers also must consider the impact of different college athlete bargaining units on the likelihood of success for players in antitrust lawsuits against the NCAA.<sup>148</sup> This is because the broader goals of antitrust litigation against the NCAA often conflate with the goals of attempting to unionize college athletes.<sup>149</sup>

---

<sup>145</sup> See Wieberg, *supra* note 23 (showing meaningful differences in hours per week of service demanded from college athletes in various sports); see also McCormick & McCormick, *A Trail of Tears*, *supra* note 22, at 649 (estimating the actual time commitment of college football players at upwards of fifty hours per week—substantially more than non-revenue producing sports); Peter Jacobs, *Here’s the Insane Amount of Time Student-Athletes Spend on Practice*, BUS. INSIDER (Jan. 27, 2015, 11:44 AM), <http://www.businessinsider.com/college-student-athletes-spend-40-hours-a-week-practicing-2015-1> (showing variance in average hours per week dedicated to practice ranging from 43.3 for Division I football to 32.0 for Division I non-revenue producing men’s sports).

<sup>146</sup> See *supra* Section I.B (discussing the economics of big-time college sports and the consequent role of athletes participating in these sports); cf. *How Much Money Do College Sports Generate?*, ZACKS, <http://finance.zacks.com/much-money-college-sports-generate-10346.html> (last visited Jan. 17, 2017) (describing the sports with revenue-generating athletes).

<sup>147</sup> Cf. *Berger v. Nat’l Collegiate Athletic Ass’n*, 843 F.3d 285, 294 (7th Cir. 2016) (Hamilton, J., concurring) (describing the differences in the economic realities of athletes who participate in “so-called revenue sports like Division I men’s basketball and FBS football”).

<sup>148</sup> See *infra* Section IV.B.

<sup>149</sup> See generally Edelman, *How Antitrust Law*, *supra* note 37, at 826 (explaining that both antitrust litigation against the NCAA and attempts to unionize college athletes “promote

At present, there are at least three active labor-side antitrust lawsuits against the NCAA.<sup>150</sup> The most well-known of these lawsuits is *O'Bannon v. National Collegiate Athletic Association*, which alleges, in pertinent part, that the NCAA's members violated section 1 of the Sherman Act by conspiring "to fix the price of former student athletes' images at zero and . . . boycott former student athletes in the collegiate licensing market."<sup>151</sup> On September 30, 2015, the U.S. Court of Appeals for the Ninth Circuit upheld an injunction in *O'Bannon*, preventing the NCAA from sanctioning colleges that shared licensing revenues with college athletes in the form of athletic scholarships valued up to the full cost of their attendance.<sup>152</sup> The decision also recognized that, at least within the Ninth Circuit, the NCAA's bylaws related to college athlete pay are indeed subject to antitrust scrutiny.<sup>153</sup>

A second labor-side antitrust lawsuit against the NCAA, *Alston v. National Collegiate Athletic Association*, alleges that the NCAA and its five largest athletic conferences conspired to violate antitrust law by capping the value of athlete scholarships below the athletes' actual cost of attending college.<sup>154</sup> The plaintiffs in *Alston* sought a remedy enjoining colleges from limiting scholarship amounts to below the actual cost of attendance (this remedy largely conflates with the remedy provided in *O'Bannon*), as well as to obtain damages equal to the difference between the maximum amount allowed for grant-in-aid scholarships and the full cost of college attendance.<sup>155</sup>

Meanwhile, the third active labor-side antitrust lawsuit, *Jenkins v. National Collegiate Athletic Association*, seeks to fully overturn the

---

tangible change to the benefit of the college athletes—a stakeholder group that has long been silenced and underrepresented in the decision-making process of college sports”).

<sup>150</sup> See *infra* notes 152–58 and accompanying text.

<sup>151</sup> *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, Nos. C 09–1967 CW, C 09–3329 CW, C 09–4882 CW, 2010 WL 445190, at \*5 (N.D. Cal. Feb. 8, 2010).

<sup>152</sup> *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049 (9th Cir. 2015), *cert. denied*, 137 S. Ct. 277 (2016). Prior to the decision, the NCAA capped the amount of athletic scholarships at member schools at a “full grant in aid” rather than “cost of attendance”—leaving college athletes with between a \$2000 and \$6000 annual shortfall pertaining to transportation and reasonable personal expenses. See Fram & Frampton, *supra* note 15, at 1022 (describing the shortfall at some institutions as “more than \$6000”); Gould et al., *supra* note 80, at 45 (estimating the shortfall in nearly the \$2000 range).

<sup>153</sup> *O'Bannon*, 802 F.3d at 1064 (“In sum, we accept Board of Regents’ guidance as informative with respect to the procompetitive purposes served by the NCAA’s amateurism rules, but we will go no further than that. The amateurism rules’ validity must be proved, not presumed.”).

<sup>154</sup> Complaint at 108–13, *Alston v. Nat'l Collegiate Athletic Ass'n*, No. 4:14-cv-01011 (N.D. Cal. Mar. 5, 2014) [hereinafter *Alston* Complaint]; see also Justin Sievert, *The Forgotten Antitrust Case: How an NCAA Loss in Alston Could Impact College Athletics*, SPORTING NEWS (Nov. 4, 2015), <http://www.sportingnews.com/ncaa-football/news/ncaa-antitrust-case-shawne-alston-effects-college-athletics/1uro6chmw5naj1o6n15opblfmy>.

<sup>155</sup> *Alston* Complaint, *supra* note 154, at 115; see also Sievert, *supra* note 154.

NCAA rules that have the effect of “placing a ceiling on the compensation that may be paid to these [college] athletes for their services.”<sup>156</sup> Unlike both *O’Bannon* and *Alston*, the plaintiffs in *Jenkins* desire to create an entirely free labor market to sign college athletes.<sup>157</sup> Stated otherwise, the *Jenkins* lawsuit seeks to treat athletes who are incoming college freshman identically to free agent professional athletes, non-unionized college professors, and non-unionized college research assistants.<sup>158</sup>

B. *Impact of College Athlete Unionization on the O’Bannon, Alston, and Jenkins Antitrust Lawsuits*

Although each of the three aforementioned lawsuits is relatively strong on its merits, the unionizing of college athletes could derail the plaintiffs’ goals in each of these cases by potentially allowing the NCAA to defend its concerted conduct based upon the “non-statutory labor exemption” defense. The “non-statutory labor exemption” is a court-created exemption from antitrust law that insulates from scrutiny certain concerted conduct in labor markets.<sup>159</sup> The defense arose from numerous Supreme Court decisions that sought to reconcile the legal conflict between the need for concerted activity among members in a multi-employer bargaining unit (as well as the need for concerted

---

<sup>156</sup> Complaint and Jury Demand at 1–2, *Jenkins v. Nat’l Collegiate Athletic Ass’n*, No. 3:14-cv-01678 (D.N.J. Mar. 17, 2014).

<sup>157</sup> *Id.* at 1–4. In essence, the argument made in *Jenkins* mimics one that I had advanced back in 2013 in the law review Article: Marc Edelman, *A Short Treatise on Amateuism and Antitrust Law: Why the NCAA’s No-Pay Rules Violate Section 1 of the Sherman Act*, 64 CASE W. RES. L. REV. 61, 64 (2013) [hereinafter Edelman, *A Short Treatise*] (“It is not just the outer fringes of the NCAA rules that violate antitrust law: *it is the whole shebang.*” (emphasis added)).

<sup>158</sup> *Cf.* Edelman, *How Antitrust Law*, *supra* note 37, at 823 (comparing the desired result of the *Jenkins* lawsuit to the free market that already exists among colleges competing for professors’ services).

<sup>159</sup> See *Brown v. Pro Football, Inc.*, 518 U.S. 231, 237–38 (1996) (recognizing a non-statutory exemption from antitrust law when unionized employees bargain in good faith with their employers over hours, wages, and working conditions); see also Robert A. McCormick & Matthew C. McKinnon, *Professional Football’s Draft Eligibility Rule: The Labor Exemption and the Antitrust Laws*, 33 EMORY L.J. 375, 381 (1984) (“The [non-statutory] labor exemption attempts to accommodate inherent conflicts between national labor and antitrust policy and to protect labor-management agreements over issues of central importance to labor from antitrust interdiction.”). See generally Marc Edelman, *The District Court Decision in O’Bannon v. National Collegiate Athletic Association: A Small Step Forward for College-Athlete Rights, and a Gateway for Far Grander Change*, 71 WASH. & LEE L. REV. 2319, 2355–56 (2014) [hereinafter Edelman, *The District Court*] (discussing some of the potential implications of college athletes unionizing on the *O’Bannon* antitrust litigation).

activity between a single employer and a union) and the prohibition against concerted conduct under section 1 of the Sherman Act.<sup>160</sup>

Although antitrust law's "non-statutory labor exemption" has served as an important defense to antitrust liability for upwards of fifty years, the exemption remains "an area of law marked more by controversy than by clarity."<sup>161</sup> Most circuits agree that the "non-statutory labor exemption" only insulates from antitrust scrutiny specific conduct involving restraints related to mandatory subjects of bargaining, which primarily affect the parties to a collective bargaining relationship, and that are reached through bona fide arm's-length bargaining (Majority View).<sup>162</sup> Nevertheless, the U.S. Court of Appeals for the Second Circuit has held that the "non-statutory labor exemption" affords a defense to any labor-side antitrust lawsuit where subjecting the defendants to antitrust law would "subvert fundamental principles of our federal labor policy" (Second Circuit View).<sup>163</sup>

Consequently, the outcomes of the *O'Bannon*, *Alston*, and *Jenkins* lawsuits—as well as potential future labor-side antitrust lawsuits against the NCAA based on similar legal theories—would likely depend upon the current union status of college athletes across the nation, as well as in what particular circuit a given case was under review.<sup>164</sup> If no college athletes unionize, there would be no legal conflict between applying labor law and antitrust law, and thus the "non-statutory labor exemption" would not apply whatsoever, irrespective of whether a court were to apply the Majority View or the Second Circuit View.<sup>165</sup>

---

<sup>160</sup> *Brown*, 518 U.S. at 236–37; see also Edelman, *How Antitrust Law*, *supra* note 37, at 824 (discussing the potential implications of antitrust law's non-statutory labor exemption on an antitrust challenge against NCAA labor restraints in the presence of a players union); Marc Edelman & Brian Doyle, *Antitrust and "Free Movement" Risks of Expanding U.S. Professional Sports Leagues into Europe*, 29 NW. J. INT'L L. & BUS. 403, 415 (2009) ("The non-statutory labor exemption is a court-created exemption, resulting from judicial decisions to give aspects of collective bargaining agreements further immunity from antitrust law."); Fram & Frampton, *supra* note 15, at 1075 ("[C]ollective bargaining would endow universities with an ancillary benefit: potential insulation from antitrust litigation."). See generally Gould et al., *supra* note 80, at 29 ("[A]ll of the major leagues in all major sports are organized by unions—a phenomenon acquiesced in by professional league owners out of fear of antitrust liability [in the absence of a multi-employer labor bargaining relationship between the league and its union]."); Michael H. LeRoy, *How a "Labor Dispute" Would Help the NCAA*, 81 U. CHI. L. REV. DIALOGUE 44, 45 (2014) ("Ironically . . . the NFL players decertified their union so that they could avoid the duty to bargain under the NLRA.").

<sup>161</sup> *Wood v. Nat'l Basketball Ass'n*, 809 F.2d 954, 959 (2d Cir. 1987).

<sup>162</sup> *Mackey v. Nat'l Football League*, 543 F.2d 606, 614 (8th Cir. 1976). See generally Edelman & Doyle, *supra* note 160, at 416 ("Over the past thirty years, many courts have followed the *Mackey* test.").

<sup>163</sup> *Wood*, 809 F.2d at 959.

<sup>164</sup> See *supra* notes 159–63 and accompanying text.

<sup>165</sup> See *Brown*, 518 U.S. at 250 ("[A]n agreement among employers could be sufficiently distant in time and in circumstances from the collective-bargaining process that a rule

Similarly, if a single football or men's basketball team were to unionize, the non-statutory labor exemption is still unlikely to apply under the Majority View because the NCAA's "no pay" rules would not "primarily" affect athletes that are subject to a collective bargaining relationship (rather, it would primarily affect nonunionized athletes).<sup>166</sup> By contrast, under the Second Circuit View, the impact of unionizing a single college sports team is less certain because the Second Circuit test for the non-statutory labor exemption does not require that the restraint primarily affect the parties to a collective bargaining relationship.<sup>167</sup>

If labor organizers were instead to unionize a multi-employer bargaining unit consisting of numerous private colleges, the "non-statutory labor exemption" under the Majority View would only apply if both: (a) a majority (or perhaps super-majority) of the athletes hampered by the no-pay rules were unionized; and (b) the no-pay rules were negotiated, in good faith, between the NCAA member schools and the players' union.<sup>168</sup> Meanwhile, under the Second Circuit View, it is likely that the "non-statutory labor exemption" would apply irrespective of these factors because failure to apply the exemption would "subvert fundamental principles of our federal labor policy" that require employers and their union to negotiate over the mandatory terms and conditions of bargaining.<sup>169</sup>

Finally, if labor organizers established a multi-employer bargaining unit consisting of all of the private and public colleges in any given

---

permitting antitrust intervention would not significantly interfere with that process."); *see also* *Brown v. Pro Football, Inc.*, 50 F.3d 1041, 1057 (D.C. Cir. 1995) (suggesting that the non-statutory labor exemption cannot apply where there is no union in place, such as after a players union has decertified).

<sup>166</sup> *See Mackey*, 543 F.2d at 614 (explaining that one of the three required prongs for the non-statutory labor exemption to apply is that the restraint must primarily affect parties to the collective bargaining relationship).

<sup>167</sup> *See generally* *Clarett v. Nat'l Football League*, 369 F.3d 124, 133 (2d Cir. 2004) (explaining that the Second Circuit has "never regarded the Eighth Circuit's test in *Mackey* as defining the appropriate limits of the non-statutory exemption."); *Wood*, 809 F.2d at 959 (discussing the application of antitrust law's non-statutory labor exemption within the Second Circuit). Thus, presumably, certain restraints may fall within the scope of the Second Circuit's view of the non-statutory labor exemption even if they fail to meet the Eighth Circuit's requirement that the restraint must primarily affect the parties to the collective bargaining relationship. *See Clarett*, 369 F.3d at 133.

<sup>168</sup> *See Mackey*, 543 F.2d at 614 (finding the non-statutory labor exemption to apply only where: "[T]he restraint on trade primarily affects only the parties to the collective bargaining relationship[,] . . . the agreement sought to be exempted concerns a mandatory subject of collective bargaining[,] . . . [and] the agreement sought to be exempted is the product of bona fide arm's-length bargaining."). Whether a majority or super-majority of athletes would need to be subject to a union relationship for the restraint to "primarily" affect unionized members comes down to how one interprets the definition of the word "primarily." *See Primarily*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/primarily> (last visited Feb. 22, 2017) (defining "primarily" as "for the most part").

<sup>169</sup> *Wood*, 809 F.2d at 959.

sport, both the Majority View and the Second Circuit View would likely find the NCAA no-pay rules were insulated from antitrust scrutiny because the rules were a subject of collective bargaining involving all (or almost all) of the parties directly impacted by the restraint.<sup>170</sup> The only real argument against applying the “non-statutory labor exemption” would entail claiming that the no-pay rules were not the product of “bona fide arm’s-length bargaining” between the NCAA and the players’ union—an argument that, at best, could save the plaintiffs’ antitrust claims from preemption under the Majority View.<sup>171</sup>

---

<sup>170</sup> See *supra* notes 163–64 and accompanying text.

<sup>171</sup> *Mackey*, 543 F.2d at 614.



*Chart 1. Would Antitrust Law’s Non-Statutory Labor Exemption Likely Preempt an Antitrust Challenge to an NCAA-Wide Wage Restraint?:*

Bargaining Unit/Court	Majority View (Based on <i>Mackey</i> )	Second Circuit View
<i>No College Athlete Unions Exist</i>	No.	No.
<i>Single Football or Men’s Basketball Team—Private College</i>	Probably not. Antitrust exemption probably <i>does not</i> apply because the restraint does not primarily affect the parties to the collective bargaining relationship.	Questionable. There is no case law even remotely on point.
<i>Single Football or Men’s Basketball Team—Public College</i>	Probably not. Antitrust exemption probably <i>does not</i> apply because the restraint does not primarily affect the parties to the collective bargaining relationship.	Questionable. There is no case law even remotely on point.
<i>Multi-Employer Bargaining Unit Consisting of Numerous Private Colleges</i>	Unclear. Antitrust exemption applies only if the restraint is part of bona fide arm’s-length bargaining and the restraint involves enough schools to primarily affect parties to the collective bargaining relationship.	Probably. Case law indicates this to be a reasonable topic for bargaining.
<i>Multi-Employer Bargaining Unit Consisting of all Private and Public Colleges (FBS Football and/or Division I Basketball)</i>	Maybe. Antitrust exemption applies only if the restraint is part of bona fide arm’s-length bargaining.	Probably. Case law indicates this to be a reasonable topic for bargaining.
<i>Multi-Employer Bargaining Unit Consisting of all Private and Public Colleges (All Sports)</i>	Maybe. Antitrust exemption applies only if the restraint is part of bona fide arm’s-length bargaining.	Probably. Case law indicates this to be a reasonable topic for bargaining.

Based upon the foregoing, it is unlikely that the unionizing of a single college sports team would derail an antitrust lawsuit against the NCAA in any circuit.<sup>172</sup> Simply stated, applying the exemption would not serve its core, intended purpose of protecting collective bargaining.<sup>173</sup> Meanwhile, the greater the number of teams within any particular bargaining unit, the more likely that the “non-statutory labor exemption” would preempt antitrust litigation under both the Majority View and the Second Circuit View.<sup>174</sup>

Furthermore, while it may be possible to devise an antitrust lawsuit against the NCAA on grounds that would not trigger the “non-statutory labor exemption,” this possibility does not minimize the importance of attempting to avoid unionizing in a manner that would preempt any potential antitrust claims.<sup>175</sup> Limiting the players’ antitrust prospects to alternative theories (such as perhaps challenging restraints on college athletes’ ability to participate in third-party endorsement markets) indeed would substantially narrow the scope of college athletes’ potential recovery under the Sherman Act.<sup>176</sup>

---

<sup>172</sup> See *supra* notes 160–61 and accompanying text (explaining that the non-statutory labor exemption emerges based on a conflict between labor law and antitrust law—a conflict which naturally only occurs in the presence of a multiemployer bargaining unit).

<sup>173</sup> See *supra* notes 165–72 and accompanying text.

<sup>174</sup> See, e.g., *Mackey*, 543 F.2d at 614 (setting what has become known as the Majority View—a view that the non-statutory labor exemption to antitrust law may only apply where the restraint primarily affects parties to the collective bargaining relationship). As the number of NCAA teams within any bargaining unit increases, so too would the likelihood that any NCAA restraint would primarily affect those parties in that bargaining unit. See *id.*; cf. Edelman, *The Future of Amateurism*, *supra* note 15, at 1045–46 (“One alternative [to maintain competitive balance in college sports] would be to allow student-athletes to form a national association to collectively bargain against the NCAA in a manner similar to how professional athletes currently bargain with their sports leagues. . . . *If organized properly, this alternative would be entirely exempt from antitrust scrutiny based on antitrust law’s non-statutory labor exemption.*” (emphasis added)).

<sup>175</sup> See *infra* note 177 and accompanying text.

<sup>176</sup> For example, in a previous law review article, I suggested the potential for college athletes to bring an antitrust challenge against the NCAA’s restraints against college athletes endorsing products, arguing this type of restraint could be described as a concerted refusal to deal that leads to windfall profits for college coaches who, based on these collective restraints, do not need to compete against their school’s athletes for local sports endorsement opportunities. See Edelman, *The District Court*, *supra* note 159, at 2354. A lawsuit of this nature would almost certainly lie outside of the “non-statutory labor exemption” under the Majority View, as well as the “non-statutory labor exemption” even in the Second Circuit, irrespective of what bargaining unit exists for unionized college athletes. This is because the NCAA’s rules related to endorsing products are almost certainly not mandatory terms and conditions of bargaining as they do not relate to hours, wages, or conditions of employment with respect to their primary employer. See *supra* notes 159–64 and accompanying text.

## CONCLUSION

In the world of college sports, the NCAA Principle of Amateurism—an agreement among colleges not to pay their athletes fair market wages—remains a source of profound controversy.<sup>177</sup> While low-income college athletes continue to serve as the primary labor force behind the \$11 billion collegiate sports industry, college administrators, athletic directors and coaches continue to profit substantially from the operating of big-time college sports.<sup>178</sup>

The Northwestern University football players' attempt to form a union served as a powerful effort by athletes to transform the labor dynamics in college sports.<sup>179</sup> Nevertheless, the NLRB's refusal to assert jurisdiction over the grant-in-aid college football players at Northwestern University stymied these efforts—keeping most of the “net revenues” earned from big-time college sports in the hands of a select few administrators, athletic directors, and coaches.<sup>180</sup>

As organizers pursue new strategies to unionize college athletes, the NLRB's *Northwestern University* decision provides an important guidepost for determining how to proceed.<sup>181</sup> The NLRB's unwillingness to assert jurisdiction over Northwestern University's college football players signals to union organizers that they should consider attempting to unionize a public college rather than a private one. Similarly, the NLRB's failure to recognize a single-employer bargaining unit of college

<sup>177</sup> See *supra* Section I.B (explaining the unusual labor dynamics that have emerged under the NCAA Principle of Amateurism); see also Edelman, *A Short Treatise*, *supra* note 157, at 66 (explaining that the NCAA principle of amateurism, states that “student-athletes shall be amateurs in intercollegiate sport, and their participation shall be motivated by education and by the physical, mental and social benefits to be derived”).

<sup>178</sup> See *supra* Section I.B; see also McCormick & McCormick, *Major College Sports: A Modern Apartheid*, *supra* note 11, at 29 (“[T]he sums of money created in the college sports industry are so fantastic as to have become mind-boggling. And while athletes' remuneration is limited in both amount and character by NCAA rule, every other actor in the enterprise enjoys huge financial benefit.” (footnote omitted)); McCormick & McCormick, *The Myth*, *supra* note 21, at 76 (“Only one group of persons is denied the full financial fruit of the bountiful enterprise known as college sports—the players themselves[, and, i]ronically, these are the very individuals who create the product and its attendant riches.”).

<sup>179</sup> See Mason Levinson, *Northwestern Football Ruling May Change U.S. College Sports*, BLOOMBERG (Mar. 27, 2014, 12:04 AM), <http://www.bloomberg.com/news/articles/2014-03-26/northwestern-players-can-become-first-college-union-nlr-rules> (quoting college athlete union organizer Ramogi Huma as suggesting that unionizing college athletes is “a first step toward forever changing the balance of power and guaranteeing players have a seat at the table and the right to bargain for basic protections”).

<sup>180</sup> See *supra* Section I.B; see also Edelman, *Reevaluating Amateurism*, *supra* note 15, at 864 (“Today's NCAA maximizes profits beyond a competitive rate and maintains wealth in the hands of a select few administrators, athletic directors, and coaches.”); *NCAA Finances: 2014–15 Finances*, *supra* note 12 (valuing the college sports industry at approximately \$11 Billion).

<sup>181</sup> See *Nw. Univ.*, 362 N.L.R.B. No. 167, 2015 WL 4882656 (Aug. 17, 2015).

athletes should perhaps lead union organizers to consider a multi-employer bargaining unit, despite the antitrust concerns that may emerge from doing so.

Finally, union organizers need to work closely with antitrust attorneys to ensure that their efforts to unionize college athletes do not accidentally reduce college athletes' overall bargaining power by reducing their threat of challenging concerted NCAA practices under antitrust law. Indeed, even though language in the *Northwestern University* opinion implies that the NLRB is more likely to assert jurisdiction over a multi-employer bargaining unit of college athletes, the creation of a multi-employer bargaining unit of college athletes could derail current and future antitrust lawsuits against NCAA member colleges. While the outermost contours of antitrust law's "non-statutory labor exemption" require a close examination, preserving college athletes' full rights under antitrust law is a topic that necessitates an extreme level of care from labor organizers in their future efforts to unionize big-time college athletes.