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WORK, STUDY, ORGANIZE!: WHY THE NORTHWESTERN UNIVERSITY FOOTBALL PLAYERS ARE EMPLOYEES UNDER THE NATIONAL LABOR RELATIONS ACT

César F. Rosado Marzán & Alex Tillett-Saks[*]

INTRODUCTION

As we come marching, marching, unnumbered women dead
Go crying through our singing their ancient cry for bread.
Small art and love and beauty their drudging spirits knew.
Yes, it is bread we fight for—but we fight for roses, too!
James Oppenheim, "Bread and Roses."[1]

Workers toil in more precarious conditions each day in the United States and abroad.[2] Such precarious conditions are in important respects created by increased nonstandard relations of employment where employers release themselves from their employer obligations while getting most of the benefits of workers' work.[3] Some of these strategies include subcontracting and hiring part-time workers and temporary

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1. James Oppenheim, Bread and Roses (1911), *in Bread and Roses (1910s)*, FOLKARCHIVE, http://www.folkarchive.de/breadrose.html (last visited Mar. 2, 2015).

2. *See* Arne Kalleberg, *Precarious Work, Insecure Workers: Employment Relations in Transition*, 74 AM. SOC. REV. 1, 2, 6-8 (2009); GUY STANDING, THE PRECARIAT: THE NEW DANGEROUS CLASS 47-49, 52-58 (2011).

3. *See* STANDING, *supra* note 2, at 52-76 (describing tactics employers use to exploit the needs of certain vulnerable employees, ultimately paying them less than their true value).

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workers.[4] Others may include disguising employment relationships, consciously or not, as something else–as pedagogic, rehabilitative, familial, as independent contractors, or otherwise "non-employee" relationships.[5] As such, many workers today work intermittently and without the basic rights of employment.[6] Pension and health benefits, rights to sick days and holidays, vacation time, expectations of promotion and career-building ladders, and other job characteristics associated with a middle class standard of living and the so-called "American dream" are dissipating.[7]

Against this background, we have the recent plight of college athletes in revenue-generating sports who are attempting to secure better compensation, health care, protections against catastrophic injury and death, rights to profit from their names, images, and likenesses, among other rights that they currently do not have because the National Collegiate Athletic Association (NCAA)[8] rules forbid them.[9] While college athletes likely live under better conditions than most nonstandard

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4. Katherine V.W. Stone & Harry Arthurs, *The Transformation of Employment Regimes: A Worldwide Challenge, in* RETHINKING WORKPLACE REGULATION: BEYOND THE STANDARD CONTRACT OF EMPLOYMENT 1, 4, 7 (Katherine V.W. Stone & Harry Arthurs, eds., 2013).

5. *See* Julia Tomassetti, *Who Is a Worker? Partisanship, the National Labor Relations Board, and the Social Content of Employment*, 37 LAW & SOC. INQUIRY 815, 817-18 (2013) (discussing how Republican-majority National Labor Relations Board decisions have denied labor rights to graduate students, disabled janitors and many other nonstandard employees, or about twenty-five percent of the U.S. workforce under the guise that they are not employees but something else); *see also* AM. RIGHTS AT WORK, THE HAVES AND THE HAVE-NOTS: HOW AMERICAN LABOR LAW DENIES A QUARTER OF THE WORKFORCE COLLECTIVE BARGAINING RIGHTS 3 (2008); JENNIFER JIHYE CHUN, ORGANIZING AT THE MARGINS: THE SYMBOLIC POLITICS OF LABOR IN SOUTH KOREA AND THE UNITED STATES, at xi-xiv (2011) (discussing how employee classification serves to marginalize groups of workers).

6. AM. RIGHTS AT WORK, *supra* note 5, at 2.

7. Stone & Arthurs, *supra* note 4, at 1-2; *see also* Marianne Page, *Are Jobs the Solution to Poverty?*, PATHWAYS, Summer 2014, at 9, 12, *available at* http://web.stanford.edu/group/scspi/_media/pdf/pathways/summer_2014/Pathways_Summer_2014_Page.pdf (arguing that the social science research shows that in today's economy where most job growth is in low skill, low paying jobs, job growth is no longer sufficient to eliminate poverty in the U.S.).

8. The NCAA self-defines itself as "a membership-driven organization dedicated to safeguarding the well-being of student-athletes and equipping them with the skills to succeed on the playing field, in the classroom and throughout life." *About the NCAA*, NCAA, http://www.ncaa.org/about (last visited Aug. 21, 2014). Its members are mostly colleges and universities. *Id.*

9. *See* Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71, 84 (2006) [hereinafter *The Myth of the Student-Athlete*] (arguing that the NCAA coined the term "student-athlete" to mask the fact that athletes are employees, in an attempt to deny the employee rights); O'Bannon v. NCAA, 7 F. Supp. 3d 955, 970 (N.D. Cal. 2014).

employees, such as maintenance employees hired through temp agencies[10] or low-skilled immigrants,[11] college athletes face similar legal and social challenges. The NCAA, its member universities, and its conferences deny college athletes labor and other rights under the veil of amateurism, essentially arguing that college athletes play for "the love of the game" and to pursue academic fields of study at their university.[12] In this regard, these putative employers, the universities, use the same argument that, for example, a health institution made to a Bush II-era National Labor Relations Board (hereinafter referred to as "NLRB" or "Board") when its janitors, who were also its disabled "clients," tried to unionize: that the janitors were not employees because they were in a "primarily rehabilitative" relationship with the employer, not in an employment one.[13] The employer prevailed and the disabled janitors were left bereft of labor rights.[14]

But perhaps things are changing. The amateur condition of "student-athletes"–a term that we eschew in this article and substitute with the more accurate "college athlete"–in revenue-generating sports is facing serious scrutiny by Congress, the courts, and government agencies and the popular media.[15] After decades of public discomfort over the commercialization of these sports, the exploitation of the players, and the marginalization of the educational goals of colleges and

10. *See* H.S. Care L.L.C., v. N.Y. Health & Hum. Serv. Union, 343 N.L.R.B. 659, 663 (2004) (Liebman and Walsh, dissenting) ("The Board . . . effectively bars . . . another group of employees—the sizeable number of workers in alternative work arrangements—from organizing labor unions, by making them get their employers' permission first.").

11. *See* JENNIFER GORDON, SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS 10-19 (2005) (describing how immigrant workers live in far poorer conditions than most, due to the current employment law system).

12. *See* discussion *infra* Part III.

13. Brevard Achievement Ctr. Inc., v. Transp. Workers Union Am., 342 N.L.R.B. 982, 986 (2004).

14. *See id.*; *see also* Tomassetti, *supra* note 5, at 818 ("[The Brevard majority] equated 'primarily economic' with contractual relations consummated in a self-regulating market . . . . [It] reconstructed and located the relationships at issue in a nonmarket sphere where the Act was inapplicable. By discursively exploiting the assimilation of status to contract in common law employment, [the Brevard majority] interpreted indicia in these cases consistent with employer property rights as incidents of status authority and the parties' mutual interests. By denying [an employment relationship] they suppressed employment's class dimension and negated the Act as an instrument to curb employer property rights . . . .").

15. *See, e.g.*, Taylor Branch, *NCAA to Congress: Change is Coming*, THE ATLANTIC (July 24, 2014), *available at* http://www.theatlantic.com/entertainment/archive/2014/07/the-ncaa-tells-congress-its-going-to-reform-itself/374948/; O'Bannon v. NCAA, 7 F. Supp. 3d 955, 989 (N.D. Cal. 2014) (noting that revenue-generating sports of the NCAA are subject to anti-trust laws because, *inter alia*, they are no longer merely amateur in nature, but are commercial).

universities, the veil may be dropping.[16] Among the agencies that seem to have finally looked under the veil of amateurism is the NLRB.[17] In May, 2014, Region 13 of the NLRB issued a decision stating that Northwestern University's grant-in-aid football players are employees under the National Labor Relations Act (hereinafter referred to as "NLRA" or "Act").[18] If Region 13's decision stands, these college athletes can vote for union representation.[19] As of this writing, the case was granted review before the NLRB.[20]

The response from the NCAA, Northwestern University, and the management bar has been typical. They have argued that the football players are primarily students, not employees.[21] As such, the college athletes have no rights to bargain collectively with Northwestern University despite the obvious commercialization of college football.[22] Some commentators, including Professor Zev Eigen of Northwestern University Law School, rejected that college athletes are employees

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16. Branch, *supra* note 15; *see* MARK YOST, VARSITY GREEN: A BEHIND THE SCENES LOOK AT CULTURE AND CORRUPTION IN COLLEGE ATHLETICS 5, 9-10 (2010) (arguing that the high monetary stakes in college sports, including those created by television rights and sneaker contracts, have usurped the goals of higher education); MURRAY SPERBER, BEER AND CIRCUS: HOW BIG-TIME COLLEGE SPORTS IS CRIPPLING EDUCATION 216, 221 (2000) (arguing that colleges and universities should focus on undergraduate education and set aside large athletic programs, which have commercialized and usurped the pedagogical goals of higher education); ANDREW ZIMBALIST, UNPAID PROFESSIONALS: COMMERCIALISM AND CONFLICT IN BIG-TIME COLLEGE SPORTS 199-204 (1999) (arguing that college football and basketball are all but amateur due to their intense commercialization, and that there needs to be a revamping of college sports, including banning freshmen from participation, banning coaches from making "sneaker money," and permitting non-students to play in college leagues); ALLEN J. SACK AND ELLEN J. STAUROWSKY, COLLEGE ATHLETES FOR HIRE: THE EVOLUTION AND LEGACY OF THE NCAA'S AMATEUR MYTH 6 (1998) (claiming that the NCAA has instilled since its beginning a myth that it serves to promote amateurism while practically professionalizing college sports and commercializing it, along the way transforming "some of America's most prestigious universities into centers of fraud and hypocrisy"); on the conflicts between college athletes, their universities and colleges, and the NCAA; *see generally* RONALD A. SMITH, PAY FOR PLAY: THE HISTORY OF BIG-TIME COLLEGE ATHLETIC REFORM 186 (Benjamin G. Rader & Randy Roberts eds., 2011) (asserting that college sports have crowded out the educational mission of colleges despite failed attempts to reform college sports).

17. *See, e.g.*, Nw. Univ. v. Coll. Athletes Players Ass'n (CAPA), Case No. 13-RC-121359 (N.L.R.B. Mar. 26, 2014), *petition dismissed*, 362 N.L.R.B. No. 167 (Aug. 17, 2015), *available at* http://www.nlrb.gov/case/13-RC-121359.

18. *Id.* at 2, 17.

19. *Id.* at 2.

20. Nw. Univ. v. Coll. Athletes Players Ass'n (CAPA), Case No. 13-RC-121359 (N.L.R.B. Apr. 24, 2014).

21. Brian Bennett, *Northwestern Players Get Union Vote*, ESPN.COM http://espn.go.com/college-football/story/_/id/10677763/northwestern-wildcats-football-players-win-bid-unionize (last visited Mar. 2, 2015).

22. *Id.*

under the terms that they have with universities and colleges today.[23] Others, including a former college football coach, supported the athletes.[24]

This article argues that Region 13 of the NLRB was correct to hold that Northwestern University's college athletes are employees under the Act. The NLRB and the Courts should sustain Region 13's decision because the grant-in-aid college athletes of Northwestern University meet the three rules normally used to determine employee status under the NLRA: the "right of control test," the "economic realities test," and the "primary purpose test."[25] In essence, Northwestern University very clearly retains a right to control the college athletes in activities that lie outside of academics.[26] We argue below that the college athletes provide a valuable service, athletics, which has nothing to do with their academic degrees and is subject to the supervision and control of Northwestern University while being performed.[27] Moreover, the college athletes are dependent on Northwestern University to cover their basic living expenses and degree costs at the University because they receive scholarships,[28] perhaps also stipends,[29] and Northwestern University severely limits their capacity to make any money from other sources.[30] Finally, the college athletes' relationship with Northwestern

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23. Zev Eigen, *Why College Athletes Aren't Really Employees – But Should Be*, HUFFINGTON POST (March 31, 2014), http://www.huffingtonpost.com/zev-j-eigen/why-college-athletes-aren_b_5063073.html. Professor Eigen argues that college athletes are not employees under the Act because they are primarily students. The fact that a university profits from the college athletes' feats is irrelevant. Otherwise, not-for-profits could easily escape NLRA coverage by arguing that they make no profits. However, he argues that universities should create two tracks for college athletes– a student and an athlete track–which would provide labor rights to college athletes. *Id.* However, the issue of not-for-profits has been decided by the Board. It presently excludes, under its discretion, not-for-profit employers from NLRA coverage if they generate revenue under certain limits and are thus not significantly involved in interstate commerce; *see* MATTHEW FINKIN & ROBERT GORMAN, BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING 30 (2d. ed. 2008) (citing YMCA Pikes Peak Region, Inc. v. NLRB, 914 F.2d 1442, 1448-49 (10th Cir. 1990)). Moreover, the university may not create or destroy labor rights through contract, which lies at the essence of Professor Eigen's "two-track" suggestion. The "two tracks" must be, in real terms, different tracks, and it is uncertain whether any of "employee" track players will have any terms that differ from those that they have today. Eigen, *supra*.

24. *See* Brad Wolverton, *Amateurism May be Dead, but a New Educational Model is Born*, THE CHRONICLE OF HIGHER EDUCATION (Aug. 10, 2014), http://chronicle.com/article/Amateurism-May-Be-Dead-but-a/148345/.

25. *Nw. Univ.*, at 13-14, *petition dismissed*, 362 N.L.R.B. No. 167.

26. *Id.* at 10-13.

27. *See* discussion *infra* Part II.

28. *Nw. Univ.*, at 3, 14, *petition dismissed*, 362 N.L.R.B. No. 167.

29. *Id.*

30. *Id.* at 16.

University is not primarily one of "student" because their athletic duties are completely unrelated to their academic duties.[31] They are both students and athletes–subordinated and exploited, that is. In fact, the college athletes' capacity to curb further commercialization of their sport and protect their status as bona fide students may well hinge on their capacity to organize and bargain collectively against the much better organized university. Other scholars have argued that college athletes in revenue-generating sports, generally speaking, meet these three tests.[32] However, this article analyzes the first real case of college athlete unionization that reaches the shores of the NLRB. We show that, based on the specific facts of the case, these college athletes are employees under the Act. Therefore, the NLRB and the courts should sustain the decision of Region 13.

Moreover, in case there were lingering doubts as to the employee status of these college athletes, the purposes of the NLRA compel us to answer the question of employee status in no other way but in the affirmative. The NLRA aims to provide employees, weaker parties in employment relationships, with bargaining rights in order to preserve industrial peace.[33] Here, we have a case of a weaker party, the college athletes, who have been attempting to secure better terms and conditions with Northwestern University, including protections from catastrophic injuries and adequacy of compensation, among others, leading to

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31. *Id.* at 11, 18-19.

32. Robert A. McCormick & Amy Christian McCormick, *A Trail of Tears: The Exploitation of the College Athlete*, 11 FLA. COASTAL L. REV. 639, 646-55 (2010); *see also The Myth of the Student-Athlete, supra* note 9, at 71, 79 (arguing that NCAA Division I, grant-in-aid college athletes playing in revenue sports are employees); Nicholas Fram & T. Ward Frampton, *A Union of Amateurs: A Legal Blueprint to Reshape Big-Time College Athletics*, 60 BUFF. L. REV. 1003, 1032-36 (2012) (asserting that NCAA Division I, grant-in-aid college athletes playing in revenue sports are employees under the NLRA pursuant to both the right of control and primary purpose tests). Many other legal articles and notes that have supported the unionization of college athletes, as well; *see, e.g.*, Leroy D. Clark, *New Directions for the Civil Rights Movement: College Athletics as a Civil Rights Issue*, 36 HOW. L.J. 259, 278 (1993); Stephen L. Ukeiley, *No Salary, No Union, No Collective Bargaining: Scholarship Athletes Are An Employer's Dream Come True*, 6 SETON HALL J. SPORT L. 167, 193 (1996); Nathan McCoy & Kerry Knox, Comment, *Flexing Union Muscle—Is it the Right Game Plan For Revenue Generating Student-Athletes in Their Contest for Benefits Reform with the NCAA?*, 69 TENN. L. REV. 1051, 1063 (2002); J. Trevor Johnston, *Show Them The Money: The Threat of NCAA Athlete Unionization in Response to the Commercialization of College Sports*, 13 SETON HALL J. SPORT L. 203, 231 (2003); Jonathan L.H. Nygren, *Forcing the NCAA to Listen: Using Labor Law to Force the NCAA to Bargain Collectively with Student-Athletes*, 2 VA. SPORTS & ENT. L.J. 359, 362 (2003); Amy Christian McCormick & Robert A. McCormick, *The Emperor's New Clothes: Lifting the NCAA's Veil of Amateurism*, 45 SAN DIEGO L. REV. 495, 497 (2008).

33. *See* 29 U.S.C. § 151 (2012) (discussing findings and policy under the National Labor Relations Act (NLRA)).

significant strife with Northwestern University in the way of lawsuits and an organizing campaign.[34] The NLRA attempts to ameliorate precisely these sorts of disputes through collective bargaining.[35] Therefore federal labor policy, in addition to the black letter rules, compels us to find the college athletes in this case to be employees under the NLRA.

However, this article is novel in that it goes further than Region 13 and scholars who have argued for the employee status of college athletes. We argue that walk-on college athletes, or those in revenue-generating sports who do not receive scholarships, can potentially also be employees under the NLRA. Region 13 argued that these players were not employees because they did not receive compensation from Northwestern University.[36] However, walk-ons likely have a "fundamentally economic relationship" with Northwestern University–the key principle undergirding the NLRB's compensation requirement for employee status[37]–and, as such, may also be subject to the NLRB's jurisdiction.

We also take note that the case of Northwestern University's football players is significant beyond college sports. If college athletes in revenue-generating sports are seen for what they are, employees that are also students, other groups of workers in more precarious conditions, but in similar nonstandard contracts of employment, may fare better when they seek the aid of the law. Disabled janitor "clients" working for their rehabilitation institutions,[38] graduate students working as teaching assistants and research assistants,[39] franchise employees seeking to bargain with the franchisors, and not just their direct employers, the franchisees,[40] and a slew of other nonstandard employees, may have a

34. *See, e.g.*, Tom Farrey, *Kain Colter Starts Union Movement*, ESPN OUTSIDE THE LINES, http://espn.go.com/espn/otl/story/_/id/10363430/outside-lines-northwestern-wildcats-football-players-trying-join-labor-union (last updated Jan. 28, 2014).

35. *See* 29 U.S.C. § 151.

36. *Nw. Univ.*, at 1, 22, *petition dismissed*, 362 N.L.R.B. No. 167.

37. *Id.* at 22.

38. Brevard Achievement Ctr. Inc., v. Transp. Workers Union Am., 342 N.L.R.B. 982, 986 (2004).

39. *See* Brown Univ. v. Int'l Union, 342 N.L.R.B. 483 (2004).

40. Dozens of unfair labor practice claims [hereinafter ULPs] by McDonald's employees against the parent corporations are pending before the NLRB. *See NLRB Office of the General Counsel Authorizes Complaints Against McDonald's Franchisees and Determines McDonald's, USA, LLC is a Joint Employer*, NLRB (July 29, 2014), http://www.nlrb.gov/news-outreach-news-story/nlrb-office-general-counsel-authorizes-complaints-against-mcdonalds. In a recent determination by NLRB's General Counsel, the ULPs may proceed against the franchisor, the parent corporation McDonald's, as a joint employer. *See id.* Whether or not the joint employer

better chance to meet justice in the future.

This article proceeds in the following way: Part I argues that Northwestern University's college athletes are employees under existing NLRB rules. Part II argues that a finding that college athletes are employees under the Act is squarely backed by the general purposes of the NLRA to protect weaker parties and foment collective bargaining to reduce industrial strife. The commercialization of college football is intense.[41] The vast amounts of revenue that the NCAA, the universities, the Conferences, the television networks, and many other parties make is also substantial and contrasts with the feeble revenue that the main stars in this industry, the college athletes, make.[42] Some college athletes make no money at all.[43] Many get temporarily or permanently injured and disabled.[44] Naturally, these inequities have led to industrial strife.[45] The NLRA was designed to deal precisely with such disputes through collective bargaining.[46]

Finally, Part III argues that walk-on college athletes could also potentially be employees under the Act because they may be in a "fundamentally economic relationship" with Northwestern University despite not receiving a scholarship. While they do not receive a scholarship initially, ten percent of them eventually get a scholarship.[47] Therefore, playing for Northwestern University may be a way to secure a scholarship in the future.[48] Moreover, walk-ons are compensated, broadly defined, by being permitted to play college football and therefore may get a chance to play professionally in the National

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determination will stand remains to be seen.

41. *See* O'Bannon v. NCAA, 7 F. Supp. 3d 955, 988-89 (N.D. Cal. 2014).

42. *See id.*; *see, e.g.*, Chris Smith, *College Football's Most Valuable Teams*, FORBES (Dec. 22, 2011, 11:43 AM), http://www.forbes.com/sites/chrissmith/2011/12/22/college-footballs-most-valuable-teams/ (demonstrating how universities and their affiliates profit from college football teams).

43. *See* Nw. Univ. v. Coll. Athletes Players Ass'n (CAPA), Case No. 13-RC-121359, at 3 (N.L.R.B. Mar. 26, 2014), *petition dismissed*, 362 N.L.R.B. No. 167 (Aug. 17, 2015), *available at* http://www.nlrb.gov/case/13-RC-121359 (explaining that the only form of compensation that college athletes can make is in the form of a scholarship and not all students receive scholarship funding); Ukeiley, *supra* note 32, at 168-69.

44. Jeffrey Eisenband, *Who is Kain Colter? Former Northwestern QB Takes Spotlight On Larger Stage*, THE POST GAME (Jan. 29, 2014, 1:01 AM), http://www.thepostgame.com/blog/men-action/201401/kain-colter-northwestern-football-college-sports-union.

45. *See* Brief for Labor Law Professors et al. as Amici Curiae Supporting Petitioner [hereinafter Labor Law Professors' Brief] at 3, *Nw. Univ.* Case No. 13-RC-121359 (N.L.R.B. Mar. 26, 2014) (No. 13-RC-121359).

46. *See id.* at 3, 18.

47. *See* discussion *infra* pp. 334-35.

48. *See* discussion *infra* pp. 334-35.

Football League (NFL).[49] In return for the chance, even if slight, of compensation through a scholarship, and the future chance to play for the NFL, the walk-ons subject themselves to the almost identical limitations of the grant-in-aid college athletes, including those regarding the number of hours they must dedicate to football and serious limits on their capacity to obtain gainful employment or to profit from their image while playing for the team.[50] The article then concludes by arguing not only in favor of the employee status of college athletes in order to meet the strictures of the NLRA, the NLRB's rules, and federal labor policy, but also to refract back some hope to other groups hired through nonstandard employment contracts, who likely live much more precarious lives and, therefore, need the aid of the law.

I. THE COLLEGE ATHLETES ARE EMPLOYEES UNDER THE NLRB'S EXISTING RULES

There is no bright line rule that can be used to answer whether or not college football players are employees under the NLRA; the Act says nothing explicit about the employee or non-employee status of college football players.[51] Rather, the NLRA's Section 2(3), very broadly but circularly defines "employee" as "any employee, and shall not be limited to the employees of a particular employer . . . ."[52] The statute provides a number of exceptions, such as agricultural and domestic employees, but college football players, or "student-athletes," as the employer claims the college football players are, are not in those stated exceptions.[53]

Lacking further statutory guidance, the NLRB and the courts have primarily used the common law "right of control test" to determine employee status.[54] Two other tests complement the "right of control test": the "economic realities test" and the "primary purpose test."[55] Professors Robert McCormick and Amy Christian McCormick have argued that college athletes in revenue-generating sports meet all three

49. *See* Labor Law Professors' Brief, *supra* note 45, at 24.

50. *See* Nw. Univ. v. Coll. Athletes Players Ass'n (CAPA), Case No. 13-RC-121359, at 4-9 (N.L.R.B. Mar. 26, 2014), *petition dismissed*, 362 N.L.R.B. No. 167 (Aug. 17, 2015), *available at* http://www.nlrb.gov/case/13-RC-121359.

51. *See* 29 U.S.C. § 152(3) (2012).

52. *Id.*; *see also Nw. Univ.*, at 13, *petition dismissed*, 362 N.L.R.B. No. 167.

53. *See* 29 U.S.C. § 152 (3).

54. *See The Myth of the Student-Athlete*, *supra* note 9, at 91-92.

55. *See id.* at 92; Fram & Frampton *supra* note 32, at 1033.

tests and therefore, should be considered employees under the NLRA.[56] Here we find that the Northwestern University grant-in-aid college football players clearly and unmistakably meet all three criteria. Region 13 was correct to find the college athletes to be employees under the Act. The NLRB and the Courts should sustain that conclusion.

A. *Northwestern University Has a Right to Control the College Athletes in Tasks Unrelated to the College Athletes' Education*

Because the Act is silent on who is a statutory employee, other than its circular definition of "employee of any employer," the Board and the courts have referred to the "right of control" test of the common law.[57] The NLRB has stated that, "an employee is a person who performs services for another under a contract of hire, subject to the other's control or right of control, and in return for payment."[58] Northwestern University clearly exerts considerable control over the college athletes on the field, as the grant-in-aid scholarships that the college athletes receive only remain in effect if the college athletes satisfy the demands of Northwestern University on the field, outside the purview of academic life.[59]

First, the college athletes sign a contract, which Northwestern University calls a "tender," that explicitly sets out the terms and conditions that the college athletes must abide by.[60] As part of this tender, the college athletes agree to work only for Northwestern University unless otherwise granted permission.[61] However, no permission for other work shall ever be granted by Northwestern University if the other work is related to the college athlete's athletic ability and/or reputation as a football player.[62] Northwestern University,

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56. *The Myth of the Student-Athlete*, *supra* note 9, at 92.

57. The Restatement (Second) of Agency § 2 (1958) defines a servant, e.g., employee, as "an agent employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master."; *see also* NLRB v. United Ins. Co. of Am., 390 U.S. 254, 256-59 (1968); Roadway Package Sys. Inc., 326 N.L.R.B. 842, 849-50 (1998).

58. Brown Univ. v. Int'l Union 342 N.L.R.B. 483, 490 at n.27 (quoting NLRB v. Town & Country Elec., 516 U.S. 85, 94 (1995)).

59. Nw. Univ. v. Coll. Athletes Players Ass'n (CAPA), Case No. 13-RC-121359, at 13-16 (N.L.R.B. Mar. 26, 2014), *petition dismissed*, 362 N.L.R.B. No. 167 (Aug. 17, 2015), *available at* http://www.nlrb.gov/case/13-RC-121359.

60. *Id.* at 14-15.

61. *Id.* at 16.

62. *Id.* at 4, 14.

third parties such as the NCAA, the Conferences,[63] and the coaches, have rights to profit off of the college athlete's athletic feats, but the athlete himself does not retain such rights.[64] Northwestern University's coach, Pat Fitzgerald, for example, has an annual salary worth about $1.8 million.[65]

The coaches, who serve as supervisors over the college athletes, mandate what positions the college athletes will play, how they will play the game, how they will train for the game, and how they will stay in shape during the off-season.[66] The control is even more apparent in how the college athletes must live their lives off the field.[67] Northwestern University controls the college athletes' use of alcohol and drugs, gambling, and what they may say to the media or post on the Internet.[68] Even more controlling is how Northwestern University supervises the college athletes' living arrangements, and suppresses their ability to apply for outside employment, to drive personal vehicles, and even to travel off campus.[69] Northwestern University strictly sets the college athletes' itinerary during both the season and the off-season, at times controlling their schedule from the time they wake up to the time they go to bed.[70] This itinerary consists of forty to fifty hours of training and other demands–i.e., valuable services–during the season, and fifty to sixty hours during training camp, well over the traditional forty-hour work week.[71] Professors McCormick and McCormick reported that this same type of control existed in at least four teams, suggesting that it is typical of college football and men's basketball.[72]

There is no question whatsoever that Northwestern University controls college athletes' activities on the field, as well as in activities

63. The NCAA is comprised of different conferences, and teams compete more frequently with teams in their conference. *See generally*, NCAA, http://www.ncaa.org (last visited Mar. 2, 2015).

64. *See Nw. Univ.*, at 4-5, *petition dismissed*, 362 N.L.R.B. No. 167; *see also The Myth of the Student-Athlete*, *supra* note 9, at 156.

65. Teddy Greenstein, *Fitzgerald Deal Worth $1.8 Million a Year Coach Says He Hopes to be a Northwestern Lifer*, CHI.TRIB. (May 10, 2011), http://articles.chicagotribune.com/2011-05-10/sports/ct-spt-0511-northwestern-football-pat20110510_1_ryan-field-pat-fitzgerald.

66. *Nw. Univ.*, at 5-9, *petition dismissed*, 362 N.L.R.B. No. 167.

67. *Id.* at 16.

68. *Id.* at 4-5

69. *Id.* at 16.

70. *Id.* at 6.

71. *Id.* at 6-8.

72. *The Myth of the Student-Athlete*, *supra* note 9, at 97-108 & 97 n.124, 99 n.127 (describing interviews of athletes from four different teams to obtain qualitative data regarding athletes' daily lives and describing published accounts regarding other athletes corroborating such descriptions).

totally unrelated to the college athletes' academic duties and obligations—the activities where University faculty and staff normally have control over students. In fact, there are perhaps few other principal-agent relationships where the agents are, in effect, so directly controlled every breathing minute of their time by the hiring principal.

The college athletes receive a scholarship valued at up to $76,000 per year.[73] College athletes who are granted permission to live off campus receive an additional stipend.[74] This scholarship provided by Northwestern University to the college athletes unmistakably constitutes payment for valuable services rendered, in spite of what Northwestern University argued to the Region.[75] Region 13 correctly determined that although "the players do not receive a paycheck in the traditional sense, they nevertheless receive a substantial economic benefit for playing football."[76] In fact, it is not only payment, but also likely an inadequate one, which explains why the college athletes want to form a union. Professors McCormick and McCormick generally call the compensation received by college athletes a "scrip," in allusion to coupons given to workers of the company towns of a former era, as consideration for work, to be used only in the company stores to buy things at inflated prices.[77]

Northwestern University argues that the scholarship given to college athletes is not payment for services rendered but "financial aid."[78] To sustain its argument, Northwestern University argues that the college athletes' scholarship is not determined by their performance on the field.[79] Rather, it is merely an incentive that allows the college athletes to pursue an academic degree while playing football for Northwestern University.[80] In this manner, Northwestern University argued that college athletes are similar to graduate student research and teaching assistants under *Brown University*.[81] In *Brown*, a Bush II-era Board decided that graduate student research and teaching assistants were not employees under the Act because they were "primarily

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73. *Nw. Univ.*, at 14, *petition dismissed*, 362 N.L.R.B. No. 167.

74. *Id.*

75. Employer-Appellant's Brief to the Board on Review of Regional Director's Decision and Direction of Election at 34, Nw. Univ. v. Coll. Athletes Players Ass'n (CAPA), Case No. 13-RC-121359 (N.L.R.B. Mar. 26, 2014) [hereinafter Employer's Brief to Board].

76. *Nw. Univ.*, at 14, *petition dismissed*, 362 N.L.R.B. No. 167.

77. *The Myth of the Student-Athlete*, *supra* note 9, at 78 n.27 (2006).

78. Employer's Brief to Board, *supra* note 75, at 35-36, 42-43.

79. *Id.* at 35.

80. *Id.*

81. *See id.*; Brown Univ. v. Int'l Union, 342 N.L.R.B. 483, 487 (2004).

students" in pursuit of an academic degree.[82] The Board reached this determination in part because the graduate students received fellowships and stipends to pursue academic studies.[83] Their teaching or research assistance work was part of their academic degree requirements.[84] In this case, however, the football services the athletes provide in exchange for their scholarships are unrelated to their degree requirements and courses of study.[85] Those valuable services on the football field are completely outside of and unrelated to any classroom obligations the athletes have.[86] Moreover, as already argued by other scholars, *Brown's* focus on the academic relevance of the services rendered by graduate teaching and research assistants actually bolsters the college athletes' claims stating that they are employees.[87] The Board in *Brown* focused on the minimal amount of time that the graduate students spent on teaching and research assistantships, in contrast to their time working in pursuit of their degrees, which contrasts starkly with the excessive time college athletes spend on the field and not in the classroom.[88] Moreover, in *Brown*, financial assistance was provided in exchange for work that the graduate students needed for completion of their degrees, while playing football lies totally outside college athletes' degree requirements.[89] In fact, no college faculty member supervises the athletic services provided by the college athletes, a fact true generally as in the case at hand at Northwestern University.[90] Finally, and most damaging to Northwestern University's claim that the scholarship is not consideration for athletic services, is that the college athletes can lose their scholarship if they voluntarily stop playing football for Northwestern University.[91] The fact that playing football for Northwestern University is a term of their scholarship completely undermines the university's claim that the scholarship is not compensation for playing football. Finally, while the scholarships are unconnected to the college athletes' performance on the field during

82. *Brown Univ.*, 342 N.L.R.B. at 487.
83. *Id.* at 488.
84. *Id.*
85. Nw. Univ. v. Coll. Athletes Players Ass'n (CAPA), Case No. 13-RC-121359, at 18 (N.L.R.B. Mar. 26, 2014), *petition dismissed*, 362 N.L.R.B. No. 167 (Aug. 17, 2015), *available at* http://www.nlrb.gov/case/13-RC-121359.
86. *Id.*; *see* Fram & Frampton, *supra* note 32, at 1035-36.
87. Fram & Frampton, *supra* note 32, at 1035-36.
88. *Id.*
89. *Id.*
90. *Id.* at 1036; *Nw. Univ.*, at 19, *petition dismissed*, 362 N.L.R.B. No. 167.
91. *Nw. Univ.*, at 4, 11, 20, *petition dismissed*, 362 N.L.R.B. No. 167.

their college years, Northwestern University offered the scholarship based on the promise of great athletic potential and prior achievements on the field during high school.[92] Moreover, merely missing practices could be considered a voluntary withdrawal from the team, which can lead to revocation of the scholarship.[93]

The fact that the college athletes are receiving payment mostly in kind, rather than in money, is also irrelevant in this case. When "compensation" is discussed by the Supreme Court's labor jurisprudence, for example, it is only described as "financial or other compensation."[94] Separating "other compensation" from "financial" clearly suggests that the compensation need not be in money. Employees can be compensated in multiple forms, such as with a scholarship or "scrip."[95] In fact, in *Seattle Opera*, the NLRB determined that a group of 100-200 auxiliary choristers were employees under the NLRA even though they were merely opera aficionados called in for occasional rehearsals and performances.[96] The Board determined that the key element that compensation establishes is whether or not the putative employee has a "fundamentally economic relationship" with the employer.[97] In *Seattle Opera*, the choristers were paid with two dress rehearsal performance tickets and $214 per performance to defray parking and transportation expenses.[98] To continue with the company town analogy, no one would question that company town employees are not employees under the Act because they are paid in scrip. In fact, if there are any employees being paid illegally with scrip,[99] they likely deserve, more than most other employees, union representation under federal labor policy.[100]

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92. *Id.* at 9-10.

93. *Id.* at 16.

94. *See* NLRB v. Town & Country Elec. Inc., 516 U.S. 85, 90 (1995); Seattle Opera v. NLRB, 292 F.3d 757, 762 (D.C. Cir. 2002); Brown Univ. v. Int'l Union, 342 N.L.R.B. 483, 496 (2004).

95. *See supra* text accompanying note 77.

96. Seattle Opera Ass'n v. Am. Guild Musical Artists, 331 N.L.R.B. 1072, 1073 (2000).

97. *Id.* at 1074 (citing WBAI Pacifica Found. v. United Elec., Radio & Mach. Workers Am. (UE), 328 N.L.R.B. 1273, 1275 (1999)).

98. Seattle Opera Ass'n, 331 N.L.R.B. at 1072.

99. The Department of Labor has stated in its regulations that: "Scrip, tokens, credit cards, 'dope checks,' coupons, and similar devices are not proper mediums of payment under the Act. They are neither cash nor 'other facilities' within the meaning of section 3(m) [of the Fair Labor Standards Act]." 29 C.F.R. § 531.34; *see also* 29 U.S.C. § 203 (m) (2012) (defining wages under the Fair Labor Standards Act as payments in the form of cash, and, to the extent customary, in the form of "board, lodging, or other facilities . . . .").

100. *See* discussion *infra* Part II.A.

B. *The College Athletes are Economically Dependent on the University*

The NLRB has also looked at the "economic realities" to determine employee status.[101] The economic realities test entails determining "the degree to which putative employees are economically dependent upon an employer."[102] The economic realities test, in this fashion, complements the right of control test.[103] The college athletes in this case are without a doubt economically dependent on Northwestern University, as they are entirely reliant on the university scholarship to attend school, live in a dorm, and eat at the school cafeteria.[104] If they live off campus and receive a stipend, they are also at the mercy of the university-provided stipend to pay for personal necessities, such as housing.[105]

University rules that ban any compensation for the college players related to their athletic abilities leave college athletes further dependent upon Northwestern University.[106] The control exerted over almost every minute of their lives while playing for Northwestern University makes college athletes incapable of realistically seeking any other type of employment. Especially given the modest background of most college athletes, college athletes cannot, in all likelihood, secure food, housing, clothing, and any other basic necessities that they may require without their university scholarships and stipends.[107] They are as "dependent" as workers may come.

Moreover, the scholarship is directly tied to the college athlete's status as a football player: if the player decides to quit the football team or if the coaching staff decides that the player is not following the university's mandated team rules, the college athlete will lose his scholarship.[108] Having lost the means to compensation, the college athlete will then have to find employment elsewhere to support himself and/or to continue his education at Northwestern University. Undoubtedly, the grant-in-aid college athletes are dependent on the university.

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101. *The Myth of the Student-Athlete*, *supra* note 9, at 91-92.

102. *Id.* at 92.

103. *Id.* (citing A. Paladini, Inc., 168 N.L.R.B. 952, 952 (1967)).

104. Nw. Univ. v. Coll. Athletes Players Ass'n (CAPA), Case No. 13-RC-121359, at 3 (N.L.R.B. Mar. 26, 2014), *petition dismissed*, 362 N.L.R.B. No. 167 (Aug. 17, 2015), *available at* http://www.nlrb.gov/case/13-RC-121359.

105. *Id.*

106. *Id.* at 4.

107. *Id.* at 14.

108. *Id.* at 4.

C. *College Athletes Relationship with Northwestern University is not one that is Primarily Educational*

A third test to determine employee status is the "primary purpose test," which entails establishing whether the employee in question has primarily an economic relationship with the employer or has some other kind of relationship, such as that of "student."[109] This "primary purpose test" tends to become more salient in educational settings where the putative employees are students of an institution and, concurrently, work for it.[110] Because of this rather different setting from that of the traditional industrial one, the Supreme Court has held that "principles developed for use in the industrial setting cannot be 'imposed blindly on the academic world.'"[111]

One of the most recent and most salient NLRB decisions dealing with the question of students who are also putative employees is *Brown University*.[112] The question in *Brown* that triggered the need to apply this primary purpose test was whether graduate student research and teaching assistants and proctors were employees under the NLRA.[113] Reversing *New York University*[114] (*NYU*), where the Board had determined that graduate students could be considered employees under the Act, and applying earlier Board law[115]–prior to *NYU*–the Board determined that the graduate students in question were not employees under the Act because they had a primarily educational, not economic, relationship with their university.[116] The Board based its decision in

109. *See The Myth of the Student-Athlete*, *supra* note 9, at 95 (citing Brown Univ. v. Int'l Union 342 N.L.R.B. 483, 488-89 (2004)).

110. *Id.* at 95-96.

111. NLRB v. Yeshiva Univ., 444 U.S. 672, 680-81 (1980) (citing Syracuse Univ. v. Syracuse Univ. Ch., Am. Ass'n Univ. Professors 204 N.L.R.B. 641, 643 (1973)).

112. *Brown Univ.*, 342 N.L.R.B. at 483 (2004).

113. *See id.*

114. *Id.* at 487.

115. *See* N.Y. Univ. v. Int'l Union, 332 N.L.R.B. 1205, 1208-09 (2000), *overruled by Brown Univ.*, 342 N.L.R.B. 483 (2004); *see, e.g.*, St. Clare's Hosp. v. Health Ctr., 229 N.L.R.B. 1000, 1002 (1977), *overruled by* Bos. Med. Ctr. Corp. v. House Officers' Ass'n/Comm. of Interns & Residents, 330 N.L.R.B. 152 (1999); Cedars-Sinai Med. Ctr. v. Cedars-Sinai Housestaff Ass'n, 223 N.L.R.B. 251, 251 (1976), *overruled by Bos. Med. Ctr. Corp.*, 330 N.L.R.B. 152 (1999); Leland Stanford Junior Univ. v. Stanford Union of Research Physicists, 214 N.L.R.B. 621, 623 (1974); Adelphi Univ. v. Adelphi Univ. Chapter, Am. Ass'n of Univ. Professors, 195 N.L.R.B. 639, 639-40 (1972) (illustrating that these cases held, even before *Brown Univ.* was decided, that students would not be considered employees under the Act, in line with the decision reached in *Brown* years later; the two cases which were overruled are used here just to show that cases before *Brown* ruled in a similar manner).

116. *Brown Univ.*, 342 N.L.R.B. at 487.

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Brown on the grounds that the graduate students must first be enrolled at their university to be awarded a teaching or research assistance position, or to be proctors.[117] The graduate students also only spent a limited number of hours performing their teaching, research or proctor duties; they spent most of their time being a "student."[118] Also, their assistance or proctor duties were "core elements of the Ph.D. degree."[119] Finally, the money they received was not "consideration for work" but financial aid to pursue their degrees, including that related to teaching assistance, research assistance and proctoring.[120]

Region 13 determined that *Brown* is inapplicable to the Northwestern University case because football is simply unrelated to the degree requirements of the college athletes.[121] Different from *Brown*, the college athletes are not pursuing any academic pursuits when playing on the field or practicing for it 40-60 hours per week.[122] Region 13 was correct in reaching this determination.

Even if *Brown* applied, the college athletes must be considered employees under the Act, for reasons already argued.[123] The athletic activities of the college athletes are not academic.[124] They are part of an economic arrangement with Northwestern University, as stated in their "tender" to play football and be supervised and controlled by Northwestern University in very specific and totalizing ways in return for a scholarship.[125] College athletes' relationship to their student duties in this case is essentially the same as that of the student cafeteria workers to their academic activities. There is universal consensus that students who work for a college or university dining hall are not pursuing academic activities through their dining hall work and, as such, are statutory employees.[126] Playing football has no more relationship to students' aspirations to become doctors or lawyers than working in the dining hall.

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117. *Id.* at 488.

118. *See id.*

119. *Id.*

120. *Id.*

121. *See* Nw. Univ. v. Coll. Athletes Players Ass'n (CAPA), Case No. 13-RC-121359, at 18, (N.L.R.B. Mar. 26. 2014), *petition dismissed*, 362 N.L.R.B. No. 167 (Aug. 17, 2015), *available at* http://www.nlrb.gov/case/13-RC-121359.

122. *See id.*

123. *See* discussion *supra* Part I.

124. *See Nw. Univ.*, at 18, *petition dismissed*, 362 N.L.R.B. No. 167.

125. Employer's Brief to Board, *supra* note 75, at 6-7; *Nw. Univ.*, (N.L.R.B. Mar. 26, 2014), at 4-9.

126. *See* Martin H. Malin, *Student Employees and Collective Bargaining*, 69 KY. L.J. 1, 5 (1980-81).

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One could argue that the case at hand would be a closer case if the college athletes were majoring in physical education and playing football was explicitly part of their academic requirements. But even there, they would be considered employees under the NLRA under *Boston Medical Center Corporation*.[127] In *Boston Medical Center Corporation*, the Board determined that medical residents and interns were employees even though their work was explicitly tied to their education and training as doctors.[128] Therefore, *Brown* not only does not preclude finding the college athletes to be employees under the Act, but Board law, such as *Boston Medical Center*, provides for a finding of employee status in the case at hand.

II. THE ACT'S PURPOSE TO EQUALIZE BARGAINING RELATIONSHIPS AND MAINTAIN INDUSTRIAL PEACE WOULD BE FRUSTRATED IF THE COLLEGE ATHLETES ARE NOT GRANTED EMPLOYEE STATUS

While the college athletes in this case are employees under the common law control test, the economic realities test, and the primary purpose test, they are also the kinds of individuals that the Act more generally aims to protect: those who are providing a valuable service to a more powerful party, and are engaged in disputes over the terms and conditions of their work with that more powerful party, leading to industrial strife.[129] First, it is transparent from the facts determined by Region 13, prior studies, and from general knowledge of contemporary college football that commercial relationships have usurped traditional roles in universities, principally in college football, even as college athletes attempt to obtain an education from their university.[130] In fact, by extending employee status to the college athletes, the NLRB would enable the college athletes not only to bargain with Northwestern over

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127. Bos. Med. Ctr. Corp. v. House Officers' Ass'n 330 N.L.R.B. 152, 152 (1999).

128. *Id.*

129. Seattle Opera Ass'n v. Am. Guild Musical Artists, 331 N.L.R.B. 1072, 1074 (2000) ("[T]he Act addresses the 'fundamentally economic relationship' between employers and employees, and states as policy that equality of bargaining power in this relationship, through collective bargaining, 'safeguards commerce from the harm caused by labor disputes.'").

130. Tomassetti, *supra* note 5, at 816 ("In performing the same activities, the worker simultaneously produces saleable services for an organization (patient care, undergraduate teaching, and building cleaning) and receives services from that organization (medical training, graduate education, and rehabilitation). In the act of consuming labor power that the university has purchased from students, for example, the university 'sells' graduate students education, both as a social service—in its status as a public goods provider—and as a commodity enhancing students' lifetime earning capacity.").

the terms and conditions of their duties on the field, but also the extent of such status with the university so that they have enough time in their day to really be "students."[131] In this manner, collective bargaining can actually help to strengthen the college athlete's student status and the NCAA's purported educational goals. Second, the kinds of concerns that the college athletes have been voicing, which have led to strife in the industry, e.g., inadequacy of compensation, hours of work, medical insurance, and health and safety, are precisely the kinds of issues that the Act aims to resolve through collective bargaining.[132] Such issues impact not only the careers of college athletes during their relationship with Northwestern University, but also, as will be more fully explained below, after the relationship ends and the college athletes seek professional employment. Finally, if the Board or the courts dismissed the college athletes' petition for a union election because they are non-employees, it would leave these young people to bargain individually and in an abysmally asymmetrical relationship with the university against the clear strictures of broadly conceived federal labor policy.

A. *The College Football Industry is a Multi-Billion Dollar Industry Full of Labor-Management Conflicts Deserving of NLRA Coverage*

The U.S. Supreme Court stated in 1980 that "principles developed for use in the industrial setting cannot be 'imposed blindly on the

131. *Id.* at 819 ("[C]ontemporary labor struggles over nonstandard work represent a synchronous double movement, as struggles not only about the terms of commodification but also over the extent of commodification."). Princeton University sociologist Viviana Zelizer has pioneered sociological studies demonstrating that hard dichotomies between market and non-market activities are difficult to discern empirically because people integrate market and non-market activities in their lives and sometimes use market activities to sustain non-market aspects of their lives. VIVIANA ZELIZER, THE PURCHASE OF INTIMACY 28 (Princeton Univ. Press eds., 2005). For example, in one of her landmark books, Zelizer showed how life insurance for children, which during its initial years was seen as abominable by middle class sectors who thought insurance would lead parents to kill their children to collect the money, was mostly popular among working class parents who wanted to be able to afford a decent burial for their children, in the case that they died – a real possibility in those times. VIVIANA ZELIZER, PRICING THE PRICELESS CHILD: THE CHANGING SOCIAL VALUE OF CHILDREN 114-15 (Princeton Univ. Press eds.,1985).

132. JOHN E. HIGGINS, JR., THE DEVELOPING LABOR LAW 1342-43 (6th ed. 2012) (explaining that compensation is a mandatory subject of bargaining under the NLRA); *id.* at 1352 (stating that health and welfare and insurance plans are mandatory subjects of bargaining under the NLRA); *id.* at 1374 (explaining that hours are mandatory subjects of bargaining under the NLRA); *id.* at 1390-92 (stating that plant rules are discipline are mandatory subjects of bargaining under the NLRA); *id.* at 1400-03 & n.419 (stating that safety and health are mandatory subjects of bargaining under the NLRA).

academic world.'"[133] However, a lot has changed in American universities since 1980, particularly in college football, which has become a multi-billion dollar industry with many stakeholders, including the college athletes.[134] This multi-billion dollar industry is fraught with industrial disputes, big and small. The Act was designed to encompass industries like football, as NFL players have long been unionized.[135] 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. In fact, one law student's note equates the arrangements between universities and individual college athletes as "unconscionable contracts" given the procedural and substantive vices they contain.[136] Similar to other industries, the college football industry provides a product (college football) where employers (the universities) facilitate the making of the product, the college athletes produce the product, marketers (the NCAA and conferences) promote the product, and distributors (broadcasting companies including conferences) make the product widely available to customers (the fans). Northwestern University has even organized with other employers to form conglomerate organizations, such as the NCAA and conferences (the Big Ten in the case of Northwestern University), which helps represent their interests.[137] In order to realize the purpose of the Act, the college athletes must be able to exercise their right to organize.

It is no secret that college football is a highly lucrative industry with gross revenue totaling in the billions of dollars.[138] Many books and

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133. NLRB v. Yeshiva Univ., 444 U.S. 672, 680-81 (1980) (citing Syracuse Univ. v. Syracuse Univ. Ch., Am. Ass'n Univ. Professors 204 N.L.R.B. 641, 643 (1973)); *see also* Brown Univ. v. Int'l Union 342 N.L.R.B. 483, 487 (2004).

134. *The Myth of the Student-Athlete*, *supra* note 9, at 76; Sperber, *supra* note 16, at 216 (noting that college sports should be called "College Sports MegaInc."); Yost, *supra* note 16, at 13 (identifying college athletes as an "entertainment product").

135. *See Company Overview of National Football League Players Associaiton*, BLOOMBERG BUSINESS (Feb. 16, 2015, 2:52 PM), http://www.bloomberg.com/research/stocks/private/snapshot.asp?privcapId=4291220.

136. Robert John Givens, *"Capitamateuralism": An Examination of the Economic Exploitation of Student Athletes by the National Collegiate Athletic Association*, 82 UMKC L. REV. 205, 218-22 (2013).

137. *See The Myth of the Student Athlete*, *supra* note 9, at 83-86 (arguing that the "veil of amateurism" surrounding collegiate sports has enabled revenue generating sports such as college football to become the money making machines that they are, while leaving the athletes with little or no monetary benefit from their labors).

138. Sean Gregory, *Should This Kid Be Making $225,047 A Year for Playing College*

articles have already described the intense commercialization of college sports, from economists such as Andrew Zimbalist, who wrote *Unpaid Professionals*,[139] to legal scholars such as McCormick and McCormick, who wrote *The Myth of the Student Athlete.*[140] Much more recently, Judge Claudia Wilken of the Federal District Court for the Northern District of California held in *O'Bannon* that the NCAA is not exempt from antitrust regulations and, therefore, cannot ban players from profiting from their names, images, and likenesses.[141] In *O'Bannon*, "The NCAA assert[ed] that the challenged restrictions on student-athlete compensation are reasonable because they are necessary to preserve its tradition of amateurism, maintain competitive balance among FBS football and Division I basketball teams, promote the integration of academics and athletics, and increase the total output of its product."[142] However, citing the work of professional economists who have studied college sports, the court disagreed with the NCAA, including its arguments regarding amateurism, because the commercial realities of the sports simply did not jibe with the stated amateur purposes of the NCAA.[143]

The facts establishing the commercialization of revenue-generating sports such as college football are indisputable. In 2010, college football generated over $2 billion in revenue and $1.1 billion in profit.[144] A recent *Time* magazine article reported that college football players could be paid about $225,000 by their respective universities.[145] However, NCAA rules forbid such payment.[146] In the case at hand, all that the

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Football?, TIME, Sep. 16, 2013, at 36.

139. ZIMBALIST, *supra* note 16, at 92 ("Princeton president Harold Dodds criticized Yale's deal as 'unfortunate' for submitting to the 'commercial atmosphere which already surrounds intercollegiate athletics to a troublesome degree.'").

140. *The Myth of the Student-Athlete*, *supra* note 9, at 71 ("In addressing the statutory definition of the term employee, we demonstrate that the relationship between these athletes and their universities is not primarily academic, but is, instead, undeniably commercial.").

141. *See* O'Bannon v. NCAA, 7 F. Supp. 3d 955, 1009 (N.D. Cal. 2014).

142. *Id.* at 973.

143. *Id.* at 1000 (citing Banks v. NCAA, 977 F.2d 1081, 1099 (7th Cir. 1992)) (Flaum, J., concurring in part and dissenting in part) ("The NCAA continues to purvey, even in this case, an outmoded image of intercollegiate sports that no longer jibes with reality. The times have changed."). "Accordingly, the Supreme Court's incidental phrase in *Board of Regents* does not establish that the NCAA's current restraints on compensation are precompetitive and without less restrictive alternatives." *O'Bannon*, 7 F. Supp. 3d at 1000.

144. DOUG J. CHUNG, THE DYNAMIC ADVERTISING EFFECT OF COLLEGIATE ATHLETICS 5 (2013).

145. Gregory, *supra* note 138, at 36.

146. Nw. Univ. v. Coll. Athletes Players Ass'n (CAPA), Case No. 13-RC-121359, at 14, (N.L.R.B. Mar. 26. 2014), *petition dismissed*, 362 N.L.R.B. No. 167 (Aug. 17, 2015), *available at*

university provides to the college athletes is a scholarship worth up to $76,000 a year.[147]

The lopsided bargain between the players and the universities have led to a number of high profile disputes, including that between Texas A&M University and one of its star players, Johnny Manziel, who was suspended for one half-game for allegedly accepting money for signing autographs, a violation of NCAA rules.[148]

College football is huge business. The total fan base of college football is 103 million people, which represents approximately one-third of the United States population.[149] College football is currently the third most popular sport in the United States, more popular than professional basketball and professional hockey.[150] Eleven percent of Americans claim college football is their favorite sport.[151] This number is even higher in certain parts of the country: seventeen percent of the U.S. South claims college football as its favorite sport.[152] In fact, nine college football teams are considered even more popular than their professional counterparts in the same region.[153] Like other industries, the college football system works hard to maintain its massive and dedicated fan base through television and other media. More than 213 million people watched college football on television during the 2011 season, and approximately 127 million viewers watched at least one of the thirty-five bowl games.[154] College football games are televised on every major

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http://www.nlrb.gov/case/13-RC-121359.

147. *See id.*

148. *Half-game Penalty for Johnny Manziel*, ESPN (Aug. 29, 2013), http://m.espn.go.com/ncf/story?storyId=9609389&localId=dal&lang=ES&wjb=.

149. Chung, *supra* note 144, at 6.

150. Regina A. Corso, *As American as Mom, Apple Pie and Football?*, HARRIS POLLS (Jan. 16, 2014), http://www.harrisinteractive.com/NewsRoom/HarrisPolls/tabid/447/mid/1508/articleId/1365/ctl/ReadCustom%20Default/Default.aspx.

151. *Id.*

152. *Id.*

153. Amy Daughters, *7 Teams That Are More Popular Than Their NFL Counterparts*, BLEACHER SPORTS (June 16, 2011), http://bleacherreport.com/articles/737969-college-football-7-teams-that-are-more-popular-than-their-nfl-counterparts/page/2 (listing Tennessee, Arizona/Arizona State, Michigan, Ohio State, Georgia, Florida, North Carolina/South Carolina as the regions in which college football teams are considered even more popular than their professional counterparts).

154. *College Football Maintains Impressive Ratings and Attendance Figures*, NAT'L FOOTBALL FOUND. (Mar. 8, 2012, 7:53 PM), http://www.footballfoundation.org/tabid/567/article/51405/College-Football-Maintains-Impressive-Ratings-and-Attendance-Figures.aspx. A "bowl game" is a college football playoff game. *Id.* Teams must qualify to play in a bowl game, and can only play in one per season. *Id.*

national sports network, including ESPN, NBC, ABC, CBS, and Fox, as well as regional and local outlets.[155] The separate football conferences have even created their own networks, including Northwestern University's conference, the Big Ten.[156] The university's football team was the twentieth most watched football team in 2013, with almost 2.7 million viewers per game.[157] This included the most watched game for the week of October 3, when Northwestern University's football team played Ohio State and attracted 7,360,000 viewers.[158] The immense television popularity of college football shows that the college football industry utilizes the traditional media outlets that other industries do, and that multiple media companies profit off of the college athletes in this case, as from all college athletes.

The marketing campaigns also succeed in bringing in large crowds of spectators. In 2011, nearly fifty million spectators purchased tickets to watch college athletes play in the many college football stadiums across the country.[159] That same year, the bowl games alone attracted 1,765,224 fans to the stadiums.[160] The highest-attended bowl, the Rose Bowl, sold 91,245 tickets, continuing its sell-out streak dating back to 1947.[161] The bowl games paid out a total of $282 million to all the schools and their respective sports conferences.[162] Also, an estimated $1.6 billion was generated from travel and tourism because of the college football bowl games.[163]

On December 31, 2011, Northwestern University's football team played Texas A&M's football team in the Meineke Car Care Bowl of Texas at the Reliant Stadium in Houston.[164] Nearly 70,000 tickets were sold; this was the sixth highest attendance of all thirty-five bowl games.[165] Nearly four million viewers tuned in to watch the game on television.[166] The university was paid $1.7 million for having its college athletes play in the Meineke Car Care Bowl, despite losing the game and

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155. *See id.*

156. *See id.*

157. *See College Football TV Ratings*, SPORTS MEDIA WATCH (2014), http://www.sportsmediawatch.com/college-football-tv-ratings/2/.

158. *Id.*

159. *College Football Maintains Impressive Ratings and Attendance Figures*, *supra* note 154.

160. *See id.*

161. *See id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

finishing with a mediocre six wins and six losses for the season.[167]

Northwestern University also generates revenue and school publicity from selling numerous types of football merchandise.[168] The University's "official school store" is not on the school's non-profit website, but instead on CBS Sports College Network's for-profit site.[169] At that site, a consumer can purchase anything from Northwestern University's football jerseys ($89.95), helmets ($299.99), t-shirts ($45), and even Northwestern child football jerseys ($59.95).[170] Consumers can also buy numerous other types of paraphernalia, such as football flags ($34.99), dog treats ($6.98), and mouse pads ($9.99).[171] All items sold prominently display "Northwestern Football" on them.[172] Other major companies, such as Under Armour and Fanatics, also advertise and sell Northwestern University's football merchandise directly through their websites.[173]

There are even video games made featuring the likeness of the college athletes.[174] The NCAA and EA Sports, a major video game company, recently settled a lawsuit with college basketball and football players for profiting off the likeness of the employees in NCAA-branded video games.[175] EA Sports paid $40 million to the players, while the NCAA paid $20 million under the settlement agreements.[176] *O'Bannon v. NCAA et al*, referenced above, also dealt with the issue of college athletes' inability to profit from their image.[177] The university's college athletes have been featured in such games in the past; the most recent video game features Kain Colter, one of the key leaders of the College Athletes Players Association (CAPA), performing his "signature football

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167. Patrick Vint, *2013 Texas Bowl, Minnesota v. Syracuse: TV Time, Team Profiles and More*, SBNATION, http://www.sbnation.com/college-football/2013/12/8/5053242/texas-bowl-2013-syracuse-minnesota-tv-schedule (last visited Mar. 2, 2015).

168. *The Official Online Store of the Northwestern Wildcats*, CBS SPORTS, http://shop.cbssports.com/CBS_Northwestern_Wildcats (last visited Mar. 2, 2015).

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *See Northwestern Wildcats Shop*, FANATICS, http://www.fanatics.com/COLLEGE_Northwestern_Wildcats (last visited Mar. 2, 2015); *Northwestern Wounded Warrior Uniforms*, UNDER ARMOUR, https://www.underarmour.com/en-us/college-fan-gear/northwestern (last visited Mar. 2, 2015).

174. Ben Strauss & Steve Eder, *N.C.A.A. Settles One Video Game Suit for $20 Million as a Second Begins*, N.Y. Times, June 10, 2014, at B11.

175. *Id.*

176. *Id.*

177. O'Bannon v. NCAA, 7 F. Supp. 3d 955, 955 (N.D. Cal. 2014).

move."[178] These massive settlements and the *O'Bannon* case show that other large corporations, like EA Sports, are willing to pay the college athletes tremendous amounts of money, generating further possibilities of industrial disputes over pay and terms and conditions of employment in revenue-generating college sports.

B. *The College Athletes' Demands are Typical of Statutory Employees and are Suitable for Resolution through Collective Bargaining*

The college athletes, employees in an admittedly non-standard relationship, have similar workplace demands as employees in standard employment contracts. However, they have limited opportunities to have their voices heard, absent "labor strife."[179] The Act was enacted with the purpose of allowing employees to have a voice without necessarily resorting to such labor strife.[180] Nearly every potential demand is something that has already been bargained for in other professions, particularly by the NFL players' union (NFLPA).[181] In fact, one of the driving forces behind the college athletes demanding a union–having protection from football-related injuries that are not felt until later in life, such as concussions–is also the biggest issue that the NFLPA currently has with the NFL.[182] The schools have organized their power via the NCAA, expanding their already great power.[183] The college athletes must be allowed to have an answer to Northwestern University's organization with one of their own.[184]

The college athletes are subject to traditional disciplinary measures, and must be able to bargain over what the terms of discipline are.[185] The

178. Rodger Sherman, *Keeping it Real with EA Sports: Venric Mark, Kain Colter, and the Option*, SBNATION (July 19, 2013), http://www.sippinonpurple.com/northwestern-wildcats-football/2013/7/19/4537598/venric-mark-kain-colter-option-northwestern-wildcats-football.

179. *See* Nw. Univ. v. Coll. Athletes Players Ass'n (CAPA), Case No. 13-RC-121359, at 15-17 (N.L.R.B. Mar. 26. 2014), *petition dismissed*, 362 N.L.R.B. No. 167 (Aug. 17, 2015), *available at* http://www.nlrb.gov/case/13-RC-121359.

180. *See* 29 U.S.C. § 151 (2012).

181. *See* Eisenband, *supra* note 44.

182. *Id.*

183. *See supra* note 16.

184. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33 (1937) ("That is a fundamental right. Employees have as clear a right to organize and select their representatives for lawful purposes as the respondent has to organize its business and select its own officers and agents.").

185. *See* Nw. Univ. v. Coll. Athletes Players Ass'n (CAPA), Case No. 13-RC-121359, at 2, 4, 14 (N.L.R.B. Mar. 26, 2014), *petition dismissed*, 362 N.L.R.B. No. 167 (Aug. 17, 2015), *available at* http://www.nlrb.gov/case/13-RC-121359.

team handbook and the tender signed by the college athletes lay out strict guidelines that determine what they can be punished for and what the punishment may be.[186] The punishments could result in loss of compensation, suspension from the team, or even being terminated.[187] These are common disciplinary measures in traditional employment relationships. If a college athlete is tardy or fails to show up, discipline will result.[188] College athletes may even be disciplined for "embarrassing" the team.[189] Such blanket, vague terms are a major reason why employees bargain for more explicit terms in collective bargaining contracts; employees generally want to know what they can and cannot do so they may avoid being disciplined.[190] Just to name one prominent example, former Texas A&M quarterback Johnny Manziel was suspended for half a game for allegedly accepting money for signing autographs, a violation of NCAA rules.[191] This punishment came despite the NCAA, which is entirely self-regulated, having no evidence to support the charge.[192] The university's ability to discipline mirrors that of other industries, and the college athletes here must have the right to voice concern over what disciplinary action can be instituted for and the measures imposed.

The college athletes are also subjected to stringent work schedules, and like other employees, should have a say in their hours worked.[193] Being able to bargain over hours and schedules is a major and common subject of collective bargaining.[194] The hours that the college athletes are subjected to are a major point of contention.[195] The college athletes must work, during certain parts of the year, up to sixty hours per

186. *Id.* at 14.

187. *Id.* at 4, 15-17.

188. *Id.* at 4.

189. *Id.*

190. *See* Alan Ritchey, Inc. v. Warehouse Union Local 6, 354 N.L.R.B. 628, 629 (illustrating that an employer must bargain with union no-talking rules that impinge on discipline); N.K. Parker Transport, Inc. v. Local 283, International Brotherhood of Teamsters, 332 N.L.R.B. 547, 551 (2000) (internal citations omitted) (establishing that an employer must bargain with union rules regarding termination and reinstatement).

191. *See Half-game Penalty for Johnny Manziel*, *supra* note 148.

192. *Id.*

193. *See* Nw. Univ. v. Coll. Athletes Players Ass'n (CAPA), Case No. 13-RC-121359, at 4-8 (N.L.R.B. Mar. 26, 2014), *petition dismissed*, 362 N.L.R.B. No. 167 (Aug. 17, 2015), *available at* http://www.nlrb.gov/case/13-RC-121359.

194. Alan Ritchey, 354 N.L.R.B. at 629 (establishing that an employer must bargain scheduling issues with the union).

195. *See Nw. Univ.*, at 9, *petition dismissed*, 362 N.L.R.B. No. 167.

week.[196] The college athletes have little say in when they must work; Northwestern University schedules the games, and besides having minimal say in moving practices because of classes, the college athletes work at the whim of the management-imposed schedule.[197] The team handbook states that academics will take precedence over athletic employee duties.[198] However, in most cases, Northwestern University refuses to relax training and other schedules because of classes.[199] In refusing to grant the college athletes any say in their schedule, this clause in the handbook is severely diluted. The college athletes should have a mechanism available to enforce this handbook provision. Like statutory employees with standard employment contracts, the college athletes should have the right to negotiate with Northwestern University the amount of time that they spend in football-related activities. Both items fall squarely under the "terms and conditions of employment" for employees.

Moreover, there is the key issue of compensation. As we have argued elsewhere, compensation is:

> one of the more traditional terms and conditions of employment that employees have a right to bargain over. Here, the issue is not simply the amount of compensation they will receive, but whether they have the right to receive compensation at all, even if from third parties. [Northwestern University] may have the right to restrict who the [college athletes] can do business with, but [the university] should not be able to prohibit *all* business without first having to meaningfully negotiate [with the players]. For example, in collective bargaining negotiations, the [college athletes] may agree not to do business with Nike because the [university] has an endorsement deal with Under Armour.[200]

A full prohibition on any kind of compensation with anyone is overly restrictive, and almost promises labor strife, as we have seen in the video game and signature disputes.[201] College athletes should have a

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196. *See id.* at 4-9.
197. *See id.* at 5-9.
198. *Id.* at 12.
199. *Id.* at 11.
200. Labor Law Professors' Brief, *supra* note 45, at 22. The content of this quotation is the original work of the authors, César F. Rosado Marzán and Alex Tillett-Saks, and can also be found in the cited source.
201. *See* Strauss & Eder, *supra* note 174, at B11 (discussing video game disputes); *see also* *Half-game penalty for Johnny Manziel*, *supra* note 148 (discussing a dispute involving a college

say in how restrictive such policies can be. Furthermore, the penalties for profiting from their football abilities and activities can be very severe.[202] Northwestern University's college athletes must be able to negotiate how they may obtain compensation for their skills. There is obviously a huge market for the college athletes' images and likeness, and the University and other universities are collectively profiting off of such images and likeness.[203] Coaches certainly make lots of money off the ventures they sign with sneaker brands and others.[204] College athletes currently have no meaningful ability to negotiate such terms and conditions of their employment.[205]

Football is also an inherently dangerous sport, and players must have the ability to negotiate issues that affect their safety, such as health insurance, equipment, reduction in the number of full-contact practices, and rule changes. Concussions are an ever-increasing worry with football, and the NCAA has simply passed the buck to the schools.[206] Two hundred concussions were reported in college football last season, and this number would likely be higher if all concussions were actually reported.[207] After Kain Colter suffered a concussion last season, his coach was extremely lax about getting him rest.[208] Only three days after Colter was concussed, the coach stated, "I doubt he's going to get any reps today, but he'll be out there at practice and from there we'll see how the week progresses."[209] It is important for the college athletes to

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athlete signing autographs).

202. Adario Strange, *Judge Rules NCAA Can't Stop Athletes From Profiting From College Sports*, MASHABLE (Aug. 9, 2014), http://mashable.com/2014/08/09/ncaa-athletes-profit/.

203. *See* Chung, *supra* note 144, at 5 (stating that in 2010, college football generated over $2 billion in revenue and $1.1 billion in profit).

204. *See* Matthew Kish, *5 Examples of How Nike, Adidas Own College Athletics*, PORTLAND BUS. JOURNAL (Aug. 30, 2013, 7:13 AM), http://www.bizjournals.com/portland/blog/threads_and_laces/2013/08/five-surprises-ncaa-nike-adidas-contract.html?page=all (mentioning Michigan State Men's basketball coach Tom Izzo's $400,000 per year Nike deal as an example).

205. *See supra* text accompanying note 200.

206. Ken Reed, *NCAA's Approach to Concussions is Barbaric*, HUFFINGTON POST (Oct. 14, 2013, 5:12 AM), http://www.huffingtonpost.com/ken-reed/ncaa-football-concussions_b_3757585.html.

207. Timothy Bella, *NCAA Head Games: The 'Very Skewed' Concussion Data in College Football*, ALJAZEERA AMERICA (Jan. 9, 2014, 5:30 PM), http://america.aljazeera.com/watch/shows/america-tonight/america-tonight-blog/2014/1/9/ncaa-head-games-theveryskewedconcussiondataincollegefootball.html.

208. *See* Patrick Stevens, *Northwestern Football: Quarterback Kain Coulter Remains Day-to-Day with Concussion*, SYRACUSE.COM (Sept. 3, 2013, 3:11 PM), http://www.syracuse.com/patrick-stevens/index.ssf/2013/09/northwestern_football_quarterb.html.

209. *Id.*

have the right to negotiate with Northwestern University regarding issues pertaining to their health and safety. In fact, being protected from such injuries is perhaps the college athletes' most urgent bargaining subject.[210] According to Kain Colter, one of the leading college athletes who tried to organize the Northwestern University team, the concern is not just when the concussions happen, but also fear over the lasting effects of playing football; as he publicly stated:

> There needs to be a guarantee that players aren't stuck with medical bills after they leave with long-lasting injuries that they suffer from football . . . . Essentially, they're hurt on the job and then they're stuck with the medical bills if they do need a surgery down the line. That's one of the biggest things.[211]

Concern at Northwestern University ran so high that one of the school's former college athletes was one of two named plaintiffs in a class action lawsuit against the NCAA for its lack of concussion policies.[212] This former player claims he suffers concussion-like symptoms from taking numerous hits while playing football for Northwestern University from 2004-08.[213] When the risks to the college athletes are so high, they must have the ability to protect themselves by negotiating with the university about what can be done. This type of protection strikes at the college athletes' right to bargain for a safe workplace, and thus strikes at a core purpose of the Act.

C. *The College Athletes Must be Protected Because their Employment with Northwestern University Has an Indelible Mark on their Ability to Get Hired by the NFL*

The Division I college football system that the university and college athletes belong to serves to funnel players into the NFL. How the players perform while playing for Northwestern University has a drastic effect on whether, and in what order, they may be drafted into the NFL, and what their starting salary will be.[214] For example, the first

210. *See* Eisenband, *supra* note 44 (explaining how a system, such as a trust, should be put in place to compensate the athletes down the road).

211. *Id.*

212. Philip Rossman-Reich, *Former Northwestern Lineman at Front of NCAA Concussion Battle*, LAKE THE POSTS (Sept. 30, 2011), http://www.laketheposts.com/2011/09/30/northwestern-concussion-battle-092911.

213. *Id.*

214. *See* Jason Belzer, *2014 NFL Draft 1st Round Rookie Salary Projections*, FORBES (May 9,

overall pick of the 2014 NFL draft is projected to sign a four-year deal worth $22,272,988, the player selected tenth overall is projected to sign a $12,249,149 deal, and the player selected thirty-second overall (the end of the first round) is projected to sign a deal worth $6,849,502.[215] Players are drafted based, in large part, on how they performed in college. Thus, the amount of compensation college athletes ultimately receive for football-related activities post-college is directly tied to their performance in the college system, over which the university has control, as discussed earlier.[216]

Furthermore, a college athlete can drop significantly in the NFL draft based on the university's disciplinary determinations or general reports of the player's "character."[217] As the gateway to the NFL, Northwestern University's evaluation of a college athlete has a considerable effect on his draft status.[218] For example, one college athlete from Oklahoma, Stacy McGee, was recruited as a top high-school player in the country at his position.[219] However, due to multiple suspensions issued by his university, one as vague as "for violating university rules in the preseason," his draft prospects sank.[220] NFL.com's scouting report cited his weaknesses as "multiple off-the-field incidents; suspensions," and his "bottom line [was]: McGee has all the physical attributes to be a contributor . . . . However, between a lack of production throughout his career, multiple off the field incidents, and suspensions, he is unlikely to be drafted."[221] McGee, once a perennial recruit, dropped to the sixth round in the draft.[222] However, he later became a central part of his NFL team's defensive line rotation.[223] He "was a controversial selection [due to college suspensions] for breaking team rules," but has shown to be a good example of a player whose

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2014, 7:55 AM), http://www.forbes.com/sites/jasonbelzer/2014/05/09/2014-nfl-draft-1st-round-rookie-salary-projections.

215. *Id.*

216. *See* discussion *supra* Part II.

217. *See* Jerry McDonald, *NFL Draft: Character a Major Part of Equation*, SAN JOSE MERCURY NEWS (May 6, 2014, 3:16 PM), http://www.mercurynews.com/raiders/ci_25709276/nfl-draft-character-major-part-equation.

218. *See id.*

219. *See id.*; *see also 2013 Draft Prospects: Stacy McGee*, NFL, http://www.nfl.com/draft/2011/profiles/stacy-mcgee?id=2539285 (last visited Mar. 3, 2015).

220. *2013 Draft Prospects: Stacy McGee*, *supra* note 219.

221. *Id.*

222. McDonald, *supra* note 217.

223. Jerry McDonald, *Raiders' Stacy McGee Hitting his Stride*, SAN JOSE MERCURY NEWS (Nov. 22, 2013, 4:29 PM), http://www.mercurynews.com/raiders/ci_24582937/raiders-stacy-mcgee-hitting-his-stride.

employer-imposed disciplinary measures affected his draft status, but who proved to be an asset to his professional team.[224] Such pre-professional disciplinary action against college athletes, which may cost college athletes their careers, only promises labor-management strife that could be diminished through NLRA coverage and collective bargaining.

Also, when Manziel was being investigated for receiving compensation for autographs, it was unclear what his punishment would be, if any.[225] If a player is prohibited from showcasing his talent due to a long suspension, it will have a dire effect on that player's draft status. When the NCAA announced that Manziel would only be receiving a one-half game suspension, his odds of winning the Heisman Trophy (most valuable player in college football) increased dramatically from 12-1 to 6-1.[226] Winning the Heisman and thus being considered the best player in college football would obviously affect his NFL draft status. Being mostly absolved of any serious wrongdoing, Manziel was drafted in the first round of the NFL draft.[227] Employer-imposed rules can often, as Forbes has described, "cost[] both millions in current and future incomes, revenues, and reputational namesake."[228] Particularly because the college athletes' future career and ability to be compensated later on in life are at stake, the college athletes must be able to negotiate for more job security while providing their services to the university. Again, these conflicts only promise more labor strife between a powerful and organized employer group on one side and a non-organized voiceless college athlete on the other side. NLRA coverage in this case is thus warranted.

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224. *Id.*

225. *Half-game Penalty for Johnny Manziel*, *supra* note 148.

226. *Id.*

227. Pat McManamon, *Johnny Manziel Drafted by Browns*, ESPN (May 9, 2014, 12:43 PM), http://espn.go.com/nfl/draft2014/story/_/id/10903195/2014-nfl-draft-johnny-manziel-drafted-cleveland-browns-no-22-overall-pick.

228. Patrick Rishe, *Cam-ibalized: The Financial Repercussions of the Cam Newton Scandal*, FORBES (Nov. 10, 2010, 11:52 AM), http://www.forbes.com/sites/sportsmoney/2010/11/10/cam-ibalized-the-financial-repercussions-of-the-cam-newton-scandal.

D. *The Act Must be Interpreted Broadly in Favor of Granting Employee Status*

The Supreme Court and Board's "broad and historic interpretation of the Act" requires an inclusive interpretation of the statute, which would include the college athletes under the protection of the Act.[229] As noted above, Section 2(3) of the Act defines an employee as "any employee," with certain specific exceptions; "student" is not one of those exceptions.[230]

Furthermore, the Congressional intent of the Act is explicit in desiring its broad coverage.[231] The Act was passed with the intention of having significant impact on labor relations by compelling employers to bargain with employees.[232] These goals have been understood namely to be industrial peace, collective bargaining, and rearrangement of relative bargaining power, among others.[233] There are likely over ten thousand football players receiving scholarships at one hundred and twenty universities.[234] Denying college athletes employee status would thus exclude a significant number of individuals from statutory labor protections.

Despite employer control, the economic realities and primary purpose for which the university recruits football players–which is to provide a valuable service–and the policies of the NLRA to protect weaker parties to preserve industrial peace, Northwestern University persists in its position that its college athletes are "student-athletes," merely students who happen to also be athletes.[235] The term "student-athlete" instills a sense of innocence, and attempts to remind us that college athletes are not workers but are amateur players. However, this

229. NLRB v. Town & Country Elec., 516 U.S. 85, 90-92 (1995); Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 178, 192 (1941).

230. *See supra* text accompanying note 52; Boston Med. Ctr. Corp., 330 N.L.R.B. 152, 160 (1999) ("[N]othing in the statute suggests that persons who are students but also employees should be exempted from the coverage and protection of the Act.").

231. *Id.*

232. Karl Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265, 295 (1977).

233. *Id.* at 292-93.

234. Ryan Wood, *Crunching the Numbers: Football Scholarships*, ACTIVE, http://www.active.com/football/articles/crunching-the-numbers-football-scholarships.%20Note,%20however,%20that%20most (last visited Mar. 3, 2015). Note, however, that most college athletes in revenue generating sports play for state colleges and universities, which means that they are covered by state labor laws, not the NLRA. See NLRB v. Yeshiva Univ., 444 U.S. 672, 704 n.17 (1980); see also 29 U. S. C. § 152 (2) (2012).

235. Employer's Brief to Board, *supra* note 75, at 7, 11.

term was invented in the 1950s by the NCAA as a formulaic strategy to fight against worker's compensation insurance claims for injured football players, many of whom were hurt, or died, while playing college football.[236]

The term has worked so well for the NCAA because it has served the dual purpose of subordinating college athletes, convincing them to follow the rules and orders of the university, while giving the impression to the rest of the world that they are merely students. In response to the college athletes' attempts to unionize and exercise their statutory rights, the NCAA has described the college athletes' organizing drive as a "union-backed attempt to turn student-athletes into employees."[237] The university has stated that the college athletes should vote "no" during the union election to "get back to being students."[238] But the terms "student" and "employee" are not mutually exclusive; one can be both simultaneously.[239] In fact, as stated above, many students are. It is extremely common for students to work jobs, including ones in the campus cafeteria, for example.[240] The difference between the student school cafeteria worker and the football player is that there are immense profits in college football, and Northwestern University will continue to try to convince society that these players are "student-athletes" who have no statutory rights. We would be naïve to think that the university, its peers, and the NCAA will not fight tooth and nail to keep the "myth of the student-athlete" alive. The economic stakes are too high for all the parties involved.[241] Unfortunately, the college athletes, who do all the real work in this industry and produce the profits, are in a very unfair fight to pursue their interests both as students and as exploited college

236. *The Myth of the Student Athlete*, *supra* note 9, at 84-85.

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

238. Nick Bromberg, *Document Shows Northwestern's Anti-union Responses to Questions from Players*, YAHOO! SPORTS (Apr. 20, 2014, 10:41 PM), https://sports.yahoo.com/blogs/ncaaf-dr-saturday/document-shows-northwestern-s-anti-union-responses-to-questions-from-players-024103369.html.

239. *See* Tomassetti, *supra* note 5, at 818 (arguing that Democrats in the NLRB recognize the market and non-market dimensions of employment relations and understand that labor law can help individuals enmeshed in such contradictory relations to navigate the contradictions, in essence to curb the more destructive aspects of commodification).

240. *See Beyond the Cafeteria: Finding Fun and Educational Jobs on Campus*, COLLEGEVIEW, http://www.collegeview.com/articles/article/beyond-the-cafeteria-finding-fun-and-educational-jobs-on-campus (last visited May 20, 2015) (listing "dishing out pizza at the cafeteria" as a standard job on campus for college students to hold).

241. *See supra* note 203.

athletes. They should be covered by the Act so they may organize and be better able to play and to study.

III. THE WALK-ONS COULD ALSO BE CONSIDERED STATUTORY EMPLOYEES

Region 13 decided that while the grant-in-aid college athletes were employees under the Act, the walk-ons, or those college athletes who do not receive scholarships, are not employees under the Act.[242] Region 13 required the existence of financial compensation in order to find employee status.[243] In this section we argue that Region 13 likely erred in finding that the walk-ons were not compensated. At a minimum, the issue of their employee status should be further studied and analyzed.

First, as stated previously, in *Seattle Opera* the Board determined that choristers who were paid only with parking reimbursements and free tickets to opera performances were employees under the Act.[244] The Board determined that the underlying principle behind payment was that there was a relationship that was "fundamentally economic."[245] While Region 13 and Northwestern University argued that the walk-ons are merely playing for their "love of the game," there are facts that strongly suggest the contrary.[246] It is common for walk-ons to earn scholarships.[247] In fact, over the last seven years, twenty-one walk-ons have earned scholarships from Northwestern University.[248] The employer's football team contains twenty-seven walks-ons.[249] Thus, over ten percent of walk-ons seem to be awarded scholarships (three out of every twenty-seven players). This rate gives significant hope to walk-ons that Northwestern University will exercise its right to award them scholarships. As in *Seattle Opera*, where the choristers hoped to get a formal position with their employer,[250] here most if not all of the walk-ons aspire to become grant-in-aid scholarship college athletes. Therefore, walk-ons are not merely playing for their "love of the game,"

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242. Nw. Univ. v. Coll. Athletes Players Ass'n (CAPA), Case No. 13-RC-121359, at 17 (N.L.R.B. Mar. 26, 2014), *petition dismissed*, 362 N.L.R.B. No. 167 (Aug. 17, 2015), *available at* http://www.nlrb.gov/case/13-RC-121359.

243. *See id.*

244. *See supra* pp. 314-15.

245. Seattle Opera Ass'n v. Am. Guild Musical Artists, 331 N.L.R.B. 1072, 1074 (2000).

246. *Nw. Univ.*, at 17, *petition dismissed*, 362 N.L.R.B. No. 167.

247. *See id.* at 3 n.3.

248. *Id.*

249. *See id.* at 3.

250. *Seattle Opera Ass'n*, 331 N.L.R.B. at 1072.

but also for a chance to receive better compensation—a scholarship.

Moreover, Northwestern University severely limits the walk-ons' ability to earn compensation in the same way it limits the grant-in-aid college athletes.[251] Walk-ons can be forbidden by the university to earn compensation through any means outside of its control.[252] Even though Northwestern University does not compensate walk-ons with a scholarship, walk-ons are strictly forbidden from earning any kind of compensation by way of their football abilities or reputation as a football player.[253] Just like the grant-in-aid college athletes, walk-ons are forbidden from profiting off of their own image and signatures.[254] Walk-ons must even obtain permission from the employer to gain employment engaging in non-football activities.[255] These clearly economic terms in the relationship between walk-ons and Northwestern University further indicate that there is a fundamental economic relationship between the walk-ons and the University.

We should also underline that, as previously described, the Board and the courts have applied the common law right of control test to specify employee status.[256] Citing *Brown University*, Region 13 specified that "an employee is (1) a person who performs services for another under a contract of hire, (2) subject to the other's control or right of control, and (3) in return for payment."[257] However, the Restatement

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251. *Nw. Univ.*, at 15, *petition dismissed*, 362 N.L.R.B. No. 167.

252. *Id.* at 16.

253. *Id.* at 4-5.

254. *Id.* at 5.

255. *Id.* at 4.

256. Roadway Package Sys. Inc., 326 N.L.R.B. 842, 849-50 (1998).

257. *Nw. Univ.*, at 13 (citing Brown Univ. v. Int'l Union, 342 N.L.R.B. 483, 490 n.27 (2004); NLRB v. Town & Country Elec., 516 U.S. 85, 94 (1995)), *petition dismissed*, 362 N.L.R.B. No. 167. Region 13 relies on *Town and Country* and *Brown* to argue that compensation is required to find employee status. *Id.* at 13 (citing *Brown Univ.*, 342 N.L.R.B. at 490 n.27; *Town & Country Elec.*, 516 U.S. at 94). *Brown* cites to *Town and Country* in determining that the common law definition of employee requires that the services be done "in return for financial or other compensation." *Brown Univ.*, 342 N.L.R.B. at 496 (citing *Town & Country Elec.*, 516 U.S. at 90). However, *Town and Country* does not classify compensation as a requirement for employee status. *Town & Country Elec.*, 516 U.S. at 90. In defining employee, the Court in *Town and Country* cites the American Heritage Dictionary, which mentions compensation, and the Black's Law Dictionary, which says nothing about payment or compensation and only requires there to be "any contract for hire, express or implied, oral or written, where the employer has the power or right to control." *Id.* (citing BLACK'S LAW DICTIONARY 525 (6th ed. 1990)). The Court then goes on to emphasize that the term employee shall be interpreted broadly and in accordance with furthering the purpose of the Act. *Town & Country Elec.*, 516 U.S. at 91. To read in to *Town and Country* an imposed requirement for compensation would be to argue that the Court relied on the American Heritage Dictionary over the Black's Law Dictionary, the language of the NLRA, and the language of the Restatement. Therefore, *Brown*, on which Region 13 relies in requiring payment, simply wrote in to

(Second) of Agency, Section 2, says nothing about compensation.[258] The Restatement's definition of master and servant states:

> (1) A master is a principal who employs an agent to perform service in his affairs and *who controls or has the right to control* the physical conduct of the other in the performance of the service.
>
> (2) A servant is an agent employed by a master to perform service in his affairs whose physical conduct in the performance of the service *is controlled or is subject to the right to control* by the master.[259]

The Restatement (Second) of Agency Section 220 further defines servant (employee), listing ten factors.[260] Most of the factors relate to control and right of control, such as control over details of the work, the length of time employed, and whether equipment is furnished.[261] Only one factor–"the method of payment, whether by the time or by the job"–mentions anything related to compensation.[262] This lone factor only suggests that being paid "by the time" supports employee status and being paid "by the job" supports independent contractor status, presumptively because the employer's control is more limited; it states nothing concerning compensation as a prerequisite to employee status on its own.[263]

The issue of compensation type and amount is really the only major difference between walk-ons and the grant-in-aid college athletes.[264] In all other respects, the walk-ons and the grant-in-aid college athletes are essentially identical.[265]

Northwestern University controls the walk-ons in a way similar to that of the grant-in-aid college athletes.[266] While Region 13 found that the walk-ons "appear" to be permitted greater flexibility than the grant-in-aid college athletes with regard to academic endeavors,[267] this

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the definition of employee a requirement that was not laid out in the precedent case it relies on. *See Brown Univ.*, 342 N.L.R.B. at 496.

258. RESTATEMENT (SECOND) OF AGENCY: MASTER; SERVANT; INDEP. CONTRACTOR § 2 (1958).

259. *Id.* (emphasis added).

260. §§ 220(2)(a)-(j).

261. *Id.*

262. § 220(2)(g).

263. § 220(1) cmt. e.

264. *Nw. Univ.*, at 20, *petition dismissed*, 362 N.L.R.B. No. 167.

265. *Id.* at 4-5.

266. *Id.*

267. *Id.* at 17.

appearance now screams for more facts. Some college athletes may simply be less crucial to the team's success, suggested by the coaches' emphasis on winning football games. Flexibility is based on football ability and capacity to help the team win football games rather than on scholarship status. A walk-on who is deemed critical to the team's success may be granted less flexibility; conversely, a grant-in-aid college athlete who is not deemed critical may be granted more flexibility. Although there is often a correlation between football ability and scholarship status, this may not be necessarily true. Therefore, we cannot assume walk-ons are granted more flexibility merely because they do not have a scholarship.

Even assuming that walk-ons were granted greater flexibility, such flexibility would merely be one factor to consider when determining employee status. In light of the total factual context, which the Board must consider, Northwestern University may still exercise pervasive control over the walk-ons.[268] Like the grant-in-aid college athletes, the walk-ons must check with the university before they purchase and drive certain vehicles, travel off campus during certain times, use social media, or speak to the press, and they must also submit to drug testing.[269] Furthermore, the walk-ons are subject to the same rigorous forty to sixty-hour schedule that the grant-in-aid college athletes are subject to.[270] In fact, walk-ons may have to put forth more time to show the proper commitment necessary to secure a spot on the team. Whereas Northwestern University has already invested time and money in the grant-in-aid college athletes, a walk-on must work extra hard to prove to the university that he deserves a roster spot.

Also, the walk-ons seem to abide by an implied contract. Although the walk-ons do not sign a so-called "tender" with the University, the walk-ons must abide by the same rules as the grant-in-aid college athletes.[271] This very likely implied contract, by which the walk-ons must abide, places the same restrictions on walk-ons as it does grant-in-aid college athletes.[272] The walk-ons must even formally sign a release allowing Northwestern University to utilize their "name, likeness and

268. NLRB. v. United Ins. Co. of Am., 390 U.S. 254, 258 (1968).

269. *Nw. Univ.*, at 5, *petition dismissed*, 362 N.L.R.B. No. 167.

270. *Id.* at 6.

271. *Id.* at 4.

272. *Id.* at 16 ("The football coaches are able to maintain control over the [walk-on and scholarship] players by monitoring their adherence to NCAA and team rules and disciplining them for any violations that occur.").

image for any purpose."[273] The walk-ons also subject themselves to drug testing.[274] These rules, which mimic those for grant-in-aid college athletes, can be breeding grounds for industrial strife. In fact, walk-ons have started their own litigation to combat alleged NCAA monopolistic practices, which limit scholarships and keep the compensation of walk-ons at almost nothing.[275] Based on these factors, it is evident that Northwestern University has significant control over how the walk-ons perform their services for the university and even how they live their lives when not engaging in football activities.

Furthermore, Northwestern University significantly controls the ability for walk-ons to play professionally later in the NFL. Because players must be three years removed from high school to play in the NFL under the NFL-NFLPA collective bargaining agreement,[276] playing college football has, in effect, become a requirement to play in the NFL. There are currently only two NFL players who did not play college football out of nearly one thousand seven hundred professional football players, both of which are foreign-born rugby players.[277] In essence, by deciding whether the walk-ons will continue to earn a spot on the team, the employer is also controlling the walk-ons' future ability to play professional football. For the walk-on player to have a chance to profit from his football ability after college, he will have to continue to provide his services to Northwestern University, even if they must be provided free of charge. This exhibits substantial employer control over the walk-on's ability to earn compensation later in life and demonstrates the economic nature of the relationship between the university and the walk-on player.

The ability for walk-ons to become successful NFL players is a real possibility, further showing that walk-ons are not merely playing for their "love of the game."[278] In fact, some of the most recognized names in the NFL, such as J.J. Watt and Clay Matthews, were at one time college walk-ons.[279] Because the employer has substantial control over

273. *Id.* at 5.

274. *Id.*

275. *See In re* NCAA Student-Athlete Name & Likeness Licensing Litig., 990 F.2d 996, 998 (N.D. Cal. 2013).

276. *Eligibility Rules: Eligibility of New Players*, NATIONAL FOOTBALL LEAGUE (2014), *available at* http://www.nflregionalcombines.com (last visited Mar. 2, 2015). However, a college athlete may play in the NFL after three years of playing in college football in exceptional circumstances. *Id.*

277. *NFL Players by College*, ESPN, http://espn.go.com/nfl/college (last visited Mar. 2, 2015).

278. *See Nw. Univ.*, at 17, *petition dismissed*, 362 N.L.R.B. No. 167.

279. Mike Huguenin, *J.J. Watt Among Players to go From College Walk-on to NFL Star*, NFL

the walk-ons' ability to play later in the NFL and earn compensation, they further exhibit a right of control over the walk-ons, strongly suggesting the walk-ons are statutory employees.[280]

It is also apparent that the walk-ons are economically dependent on the university. Even though they do not receive scholarships, if they aspire to play professional football, they are dependent on Northwestern University for their future careers. Here, that future career is not contingent on the academic performance of the college athlete, but on his performance on the field, which is in many important ways dependent on the university.

Similarly, that relationship of an aspiring professional athlete playing for Northwestern University, under its supervision and control, is not one where the college athlete is primarily a student, but an athlete.[281]

In effect, walk-ons resemble grant-in-aid college athletes in fundamental aspects that should be further explored in this and in other cases.

CONCLUSION

This article argues that Region 13 of the NLRB was correct to hold that Northwestern University's grant-in-aid football players, the first college athletes to file formally for a union election under the NLRA, are employees under the NLRA. The NLRB and the courts should uphold Region 13's decision and let these players choose a collective bargaining representative, if they want one. The college athletes are employees under the Act because they squarely meet the broad definition of "employee" and the three tests normally used by the NLRB to determine employee status: the "right of control test," the "economic realities test," and the "primary purpose test." Moreover, we have argued that the walk-ons, or at least some of them, are likely also employees under the Act. At least some of the walk-ons seem to maintain a "fundamentally economic relationship" with the university because they want to be compensated with a scholarship and play in the NFL. Walk-ons also provide all kinds of exclusive economic rights to the universities, including those that enable the universities to profit from their image and

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(Feb. 14, 2014, 11:25 AM), http://www.nfl.com/news/story/0ap2000000323409/article/jj-watt-among-players-to-go-from-college-walkon-to-nfl-star.

280. *See supra* note 257.

281. *See supra* note 140.

likeness, and which limit the walk-ons abilities to work in other employment during the time they play for the universities' teams.[282] Their economic relationship should be further assessed in this case and in others to determine their employee status. Moreover, we argue that the policies of the Act to protect weaker parties and preserve industrial peace through collective bargaining call for the extension of labor rights to college athletes in revenue-generating sports, such as those in this case.

Recognizing the labor rights of nonstandard employees such as the Northwestern University football players would be a step in the direction of furthering the labor rights of other groups with nonstandard working arrangements. The problem with not recognizing the labor rights of nonstandard employees is rampant in the U.S. and around the globe.[283] For example, Professor Indira Gartenberg, an Indian scholar-activist, has detailed some of the contemporary challenges of organizing informal women workers in India.[284] Informal workers are workers who are not legally recognized by their employers and are not covered by fiscal, health and labor laws.[285] Despite the fact that the women workers were laboring in difficult, "male" occupations, such as construction, employers argued that the women were merely killing time (known in India as "timepass") and were not considered to be performing "work" or to be "workers."[286] One could say, borrowing the American labor law frame that employers perceived these female workers as "primarily women," or "primarily wives," or "primarily mothers," or "primarily daughters," not "employees," despite the back-breaking, dangerous, and profitable services that they provided to construction contractors. Eventually, and after much struggle, at least some of these women have secured worker identity cards that make it possible for them to secure welfare assistance.[287] According to sociologist Rina Agarwala, worker recognition cards also give women workers social legitimacy, which is

282. *See supra* p. 335.

283. *See* RINA AGARWALA, INFORMAL LABOR, FORMAL POLITICS, AND DIGNIFIED DISCONTENT IN INDIA 1 (2013) ("In most developing countries, informal labor – labor that is not formally protected – represents the majority of the labor force.").

284. Indira Gartenberg, New Dynamics in Collective Bargaining in the Informal Sector: Impressions from India, Paper Presented at the XVIII International Sociological Association World Congress of Sociology in Yokohama, Japan (July 18, 2014) (noting that author, Cesar Rosado, attended the conference).

285. AGARWALA, *supra* note 283, at 1.

286. *Id.* at 60-62.

287. *See id.*

important to sustain their roles as mothers, daughters, and wives.[288] As Professor Agarwala recounts in her book on informal Indian labor movements: "The biggest benefit of the union for Badhrunisa [a female informal worker] has been the identity card: 'This card proves that I am a good worker. I show it at the municipal office, when I have to ask for water. I show it when I register my daughter at the school. I show it at the bidi workers' hospital, so I can get help faster than at the corporation hospital. With this card, everyone knows I work.'"[289] Because Badhrunisa was recognized as a worker, she could better meet her gendered familial obligations.[290]

We bring up the case of female Indian informal workers to underline the deeply cultural and shifting nature of legal employee status. From an American perspective, the fact that a worker is a woman is irrelevant to determine employee status. We think that the same will apply to college athletes as they, like Indian female workers, struggle to obtain such recognition. The employment status of "student-athletes," may later change as these putative employees publicize and air the realities that they provide and are trying to change.

Collective bargaining cannot only help college athletes receive better compensation and better terms and conditions of employment, but it can also help them fulfill their role as *students*, which the university claims college athletes "primarily" are. Through collective bargaining, the college athletes can negotiate more flexible and less demanding athletic schedules to attend class, labs, group discussions, and other academic activities. Through collective bargaining, the college athletes can get better guarantees from the university to protect their safety and remain physically and cognitively healthy for calculus, history and organic chemistry. Similarly, other nonstandard, precarious workers to whom the Republican-era NLRBs have denied labor rights will be better able to perform their roles if they are granted employee status. Disabled janitors who are "clients" and employees of rehabilitative institutions will be better able to protect their client status if their janitorial time and duties are balanced. Graduate students can better attend to their own academic work and research if they do not have to spend excessive hours teaching and doing research for someone else, either because their teaching and research terms are too onerous, or because they must do so to pay rent and buy food.

288. *Id.*
289. *Id.* at 61.
290. *See id.* at 61-62.

Finding that college athletes are employees under the NLRA not only makes the most sense under the federal statute, it will also provide better chances for all nonstandard employees, who today account for one quarter of the U.S. workforce,[291] to organize and improve their lot while preserving industrial peace, as United States federal policy requires. In terms of historical labor movement demands, recognizing that nonstandard employees such as college athletes have labor right helps them get bread, yes, but roses too.

EPILOGUE

As this article was going to press, the NLRB declined to assert jurisdiction to determine the employment status of the Northwestern University football players, effectively preventing the college athletes from unionizing only at Northwestern University under the NLRA.[292] The NLRB's decision did not hinge on the issue of whether or not the college athletes are employees under the NLRA, but rather on its determination that the Board would not promote stable industrial relations under the NLRA even if it viewed the college athletes as statutory employees.[293]

Even if the NLRB was reasonable in determining that collective bargaining would not provide for stable industrial relations in college football, such a determination could have been better reached by the parties themselves, particularly the college athletes. According to the Board, collective bargaining in college football would require league-wide bargaining, including with those units with putative public sector employees who are beyond the reach of the NLRB's jurisdiction–the college athletes who play for state schools.[294] The arrangement of college football proved too complex for the NLRA's model of collective bargaining, according to the NLRB.[295]

The Board limited its decision to the facts of the case.[296] However, this decision could be used by those in management positions to justify further instances of non-recognition of employees in other non-standard

291. Tomassetti, supra note 5, at 817.

292. *See* Nw. Univ. v. Coll. Athletes Players Ass'n (CAPA), 362 N.L.R.B. No. 167, at 1 (Aug. 17, 2015).

293. *See id.* at 3.

294. *See id.* at 5.

295. *See id.* at 3.

296. *Id.* at 6.

forms of employment.[297] The response to such attempts of non-recognition will thus necessarily remain the good old fashion one: workers will have to fight for recognition despite the law, through their collective efforts.

297. *See id.* at 6 n.28. ("The Board also has discretion pursuant to [Section] 14(c)(1) of the Act to 'decline to assert jurisdiction over any labor dispute involving any class or category of employees' where the Board concludes that 'the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of jurisdiction.'"). *Id.* (quoting Council 19, Am. Fed'n of State Emp. v. NLRB, 296 F. Supp. 1100, 1104 (N.D. Ill. 1968)).