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# College Athletes as Employees: An Overflowing Quiver

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# College Athletes as Employees: An Overflowing Quiver

STEVEN L. WILLBORN\*

*This article discusses whether college athletes should be considered employees under a broad range of employment statutes. The central thesis is that, if college athletes are persistent, it is inevitable that some of them, somewhere, sometime, will be found to be employees. A major reason for this is that the basic rules for determining who is an employee lean in college athletes' favor across a broad range of employment statutes, including private- and public-sector collective bargaining laws and laws protecting individual employment rights. College athletes are also likely to be classified as employees at some point because there are literally hundreds of different employment statutes. College athletes will have many independent opportunities to present their claims. Finally, claims by the NCAA and its member institutions to a special exemption for coverage under all these statutes are weak. The analogy to antitrust law, where the NCAA has been treated favorably, is inapt. Moreover, the courts will be reluctant to create non-statutory exceptions to important state and federal labor protections where the legislature has failed to do so.*

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## I. INTRODUCTION

Kain Colter, a football player at Northwestern University, is currently at the center of the discussion about whether college athletes<sup>1</sup> are

\* Judge Harry A. Spencer Professor of Law, University of Nebraska. Thanks to John Burton, Rick Edwards, Tim Glynn, John Lenich, Michael Miranda, Richard Moberly, Ramona Paetzold, Harvey Perlman, Jo Potuto, and Charlie Sullivan.

1. The National Collegiate Athletic Association's ("NCAA") preferred term is "student athletes," but in this context that tends to skew the discussion (which is undoubtedly one reason

employees. He has filed a petition with the National Labor Relations Board (“Board”) to recognize the College Athletes Players Association (“CAPA”) as the union representative of football players at Northwestern.<sup>2</sup> Since the National Labor Relations Act (“NLRA” or the “Act”)<sup>3</sup> governs only “employees” who want to organize,<sup>4</sup> the Board will have to determine whether Northwestern football players fit within that category as it decides whether to proceed with Colter’s petition. He won the first skirmish in this battle when a regional director for the Board found that the players were employees and ordered a union election.<sup>5</sup>

Colter’s petition threatens the long-standing position of the National Collegiate Athletic Association that college athletes are students, not employees.<sup>6</sup> That contention is a fundamental feature of the structure of college athletics; if it fails, the organizational structure of all college athletics would have to be changed in many important ways. Perhaps most significantly, a decision that college athletes are employees would likely mean that the entire financial structure of college athletics would have to be rethought and reconstructed.<sup>7</sup>

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the NCAA prefers the term). WALTER BYERS WITH CHARLES HAMMER, UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES 69 (1995). Walter Byers, long-term executive director of the NCAA, in his memoirs, said the term “student athlete” was crafted in response to fears that college athletes might be classified as employees by courts and others. I plan to use the more accurate term “college athlete.” The people I am discussing participate in intercollegiate athletics, so they are “college” “athletes.” Whether they are primarily students or employees, or some combination, is the issue I am addressing.

2. Petition, Northwestern Univ., N.L.R.B. No. 13-RC-121359 (Jan. 28, 2014), available at <http://www.employerlaborrelations.com/files/2014/02/Northwestern-RC-petition1.pdf> (last visited Sept. 18, 2014) [hereinafter *Northwestern Univ. Petition*].

3. 29 U.S.C. §§ 151–169 (2012).

4. *Id.* §§ 152(3), 158 (defining “employee” and specifying employee rights protected under the Act).

5. Northwestern Univ., N.L.R.B. No. 13-RC-121359, at 2 (Mar. 26, 2014) (decision finding that players receiving scholarships are employees and ordering election within the bargaining unit) [hereinafter *Northwestern Univ. Decision*]. The National Labor Relations Board has since agreed to review the Regional Director’s decision and has invited interested parties to file amicus briefs to inform its decision. Northwestern Univ., N.L.R.B. No. 13-RC-121359 (Apr. 24, 2014) (order granting Northwestern’s request for review of the decision); Northwestern Univ., N.L.R.B. No. 13-RC-121359 (May 12, 2014) (invitation to file briefs, listing six questions the Board would like interested parties to address).

6. See BYERS WITH HAMMER, *supra* note 1, at 69 (“[A] serious, external threat . . . prompted most of the colleges to unite and insist with one voice that, grant-in-aid or not, college sports still were only for ‘amateurs.’ That threat was the dreaded notion that NCAA athletes could be identified as *employees*.”).

7. See, e.g., RAMOGI HUMA & ELLEN J. STAUROWSKY, THE \$6 BILLION HEIST: ROBBING COLLEGE ATHLETES UNDER THE GUISE OF AMATEURISM 3 (2012), available at [http://www.ncpanow.org/news/articles/body/6-Billion-Heist-Study\\_Full.pdf](http://www.ncpanow.org/news/articles/body/6-Billion-Heist-Study_Full.pdf) (noting that the average annual fair market value of men’s college football and basketball players is \$114,153 and \$265,827, respectively; currently, they receive 17% and 8% of those amounts, respectively); Karl Borden, *College Football Players Deserve a Share of the Spoils*, WALL ST. J. (Jan. 23, 2014, 7:13 PM), <http://online.wsj.com/news/articles/SB10001424052702303848104579308401524906962>

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Despite its significance, Colter's petition is quite narrow. It raises the issue in one narrow circumstance—whether football players at a major private university are “employees” under the NLRA.<sup>8</sup> This is one arrow in Colter's and CAPA's quiver, but if they ultimately lose on this claim, then they have many other arrows in reserve. The “employee” issue can be raised in a myriad of other ways. For example, football players at public universities could seek union representation under state collective bargaining laws,<sup>9</sup> any athlete could claim compensation for overtime under the Fair Labor Standards Act,<sup>10</sup> an injured athlete could seek compensation under a state workers' compensation statute,<sup>11</sup> an athlete subject to sexual or racial harassment could file a claim under a state or federal employment discrimination law,<sup>12</sup> or an athlete could claim a violation of the state's wage payment laws.<sup>13</sup> A determination by the National Labor Relations Board in Northwestern's favor (or Colter's) would have virtually no legal effect on the outcome in any of these other areas.<sup>14</sup> Instead, the “employee” issue could be raised independently in each of these areas (and many others). And, of course, in those areas that are subject to state law, there is no logical or legal reason that the result in one state must match the result in another state. Because of

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(proposing that universities contribute 25% of gross football revenues to a trust fund authorized to make post-eligibility payments to players); Joe Nocera, *Let's Start Paying College Athletes*, N.Y. TIMES (Dec. 30, 2011), <http://www.nytimes.com/2012/01/01/magazine/lets-start-paying-college-athletes.html> (proposing minimum salaries of \$25,000/year for players and other changes to narrow the discrepancies between returns to players and returns to others, including coaches and universities).

8. See *Northwestern Univ. Decision*, *supra* note 5, at 2 (“The Petitioner contends that football players . . . receiving . . . scholarships . . . are ‘employees’ within the meaning of the Act . . . . The Employer, on the other hand, asserts that its football players receiving . . . scholarships are not ‘employees’ under the Act.”).

9. See *infra* Part IV.

10. See *infra* Part V.A.

11. See *infra* Part V.B.

12. See *infra* Part V.

13. See *infra* Part V.

14. For several reasons, a decision under the NLRA would have especially limited legal effect in other areas. First, the NLRA has a unique set of statutory and non-statutory exclusions from its circular definition of “employee.” See National Labor Relations Act, 29 U.S.C. § 152(3) (2012). Second, the policy reasons underlying the determination are different for collective rights than for individual rights. See *id.* § 151. And, third, the National Labor Relations Board has broader discretion in deciding the issue than courts would in other contexts. See *id.* § 160.

Two caveats, however. First, in other areas, the particular statutory definitions of “employee” are often based on the common-law definition. When that is the case, decisions in one area may well influence decisions in other areas, but there would still be differences at the margins given differences in statutory language and statutory purpose. See *infra* Part III, V.B. Second, in college sports, treating college athletes as non-employees is part of the foundation for an entire cultural and financial infrastructure. This may make courts wary about finding employee status, given the ramifications. As a result, individual courts may be reluctant to be the first mover, which could encourage more uniform opinions.

Colter's highly publicized petition, most of the commentary about whether college athletes are employees has focused on unionization and the NLRA. But there are many other arrows in this quiver.

Because so many arrows are in the quiver, if they pursue it persistently, Colter and CAPA (or others) are likely to get some college athletes labeled as employees for some purposes, somewhere, sometime. This article is about why that is likely to be true. This article is not about how the NCAA should or will respond when one or more college athletes are determined to be employees.<sup>15</sup> That is another article, and a longer one. The main point of this article, however, is that the NCAA should plan for that day because it is likely to arrive sooner or later.

## II. COLLEGE ATHLETES AS EMPLOYEES—ORGANIZING THE WILDERNESS

The employment relationship is regulated by literally thousands of different local, state, and federal laws.<sup>16</sup> As a result, the issue of whether college athletes are employees can arise in many different contexts. Although influential commentators have called for a uniform definition of employee,<sup>17</sup> that has never occurred. And for good reason. The precise coverage of an employment statute depends on the particular pur-

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15. An interesting aspect of the current changes within the NCAA, however, is that while they respond to certain pressing issues within the organization, on the narrow issue of whether college athletes are employees, they do not tend to cut in any particular direction. *See infra* note 314.

16. For example, hundreds of laws apply in the relatively narrow area of employment discrimination alone. At the federal level, Title VII of the Civil Rights Act of 1964 is the central statute. 42 U.S.C. §§ 2000e to e-17 (2012). It prohibits discrimination because of race, color, religion, sex, and national origin. But a number of other federal statutes prohibit other types of discrimination, such as discrimination based on age, genetic information, or disability. Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–634 (2012); Genetic Information Nondiscrimination Act of 2008, 42 U.S.C. §§ 2000ff to ff-10 (2012); Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2012). Other federal statutes overlap with Title VII in substance but differ in procedure and remedy. *See, e.g.*, Equal Pay Act of 1963, 29 U.S.C. § 206(d) (2012); Civil Rights Act of 1866, 42 U.S.C. § 1981 (2012); Ku Klux Klan Act of 1871, 42 U.S.C. § 1983 (2012). In addition to these federal statutes, literally hundreds of state and local laws prohibit employment discrimination. These laws often increase the types of statuses protected (many prohibit discrimination based on sexual orientation and marital status, unlike Title VII) and the number of employers covered (many cover employers with fewer than fifteen employees, unlike Title VII). In addition, these state and local laws always provide their own procedures and remedies.

Ironically, the failure of the NLRA is one of the main reasons there are so many laws regulating the employment relationship. In a classic article, Professor Clyde Summers pointed out that the main goal of the NLRA was to protect workers through collective bargaining instead of legislation. But when collective bargaining failed to achieve that goal, the courts and legislatures began to step in to guard worker rights. Clyde W. Summers, *Labor Law as the Century Turns: A Changing of the Guard*, 67 NEB. L. REV. 7, 9–11 (1988).

17. COMM'N ON THE FUTURE OF WORKER-MGMT. RELATIONS, THE DUNLOP COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS: FINAL REPORT 63 (1994) (“The definition of

pose of that statute; a statute that is intended primarily to ensure a basic income for low-wage workers may well define “employee” differently than a statute designed to provide for unpaid leaves of absence.<sup>18</sup>

This results in an unruly wilderness of rules for determining who is an employee, but this article will not examine every tree in that wilderness. Instead, it will provide a rough guide through the wilderness by dividing the territory into state and federal laws governing collective employee rights and state and federal laws providing individual employee rights.

The part of the woods being explored by Kain Colter, federal law governing collective rights, is the least complicated category. The National Labor Relations Act is a preemptive federal law governing collective employee rights in the private sector.<sup>19</sup> The meaning of employee under the NLRA will be discussed in Section III below.

State laws that govern collective rights are more diverse. Most states have laws that provide a bargaining structure for state and local public employees.<sup>20</sup> Although these laws tend to be based on the National Labor Relations Act,<sup>21</sup> they differ in many important ways, including in their definition of “employee.” Section IV below will consider possible coverage of college athletes under state collective bargaining laws.

Finally, local, state, and federal laws protecting individual employee rights are even more diverse. Some of these laws, such as those prohibiting discrimination, can be very similar at the local, state, and federal levels.<sup>22</sup> In other areas, such as ERISA, federal law may preempt the area.<sup>23</sup> Still other areas, such as wage payment and workers’

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employee in labor, employment, and tax law should be modernized, simplified, and standardized.”).

18. See *Sec’y of Labor v. Lauritzen*, 835 F.2d 1529, 1543–44 (7th Cir. 1987) (Easterbrook, J., concurring) (arguing that the purposes of the Fair Labor Standards Act should drive the definition of “employee”).

19. Federal employees also have collective rights and those rules may apply to college athletes at the military academies. See Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. § 7101 (2012) (finding “labor organizations and collective bargaining in the civil service [to be] in the public interest”). But I will not discuss that set of issues.

20. See *infra* Part IV.

21. *Developments in the Law—Public Employment*, 97 HARV. L. REV. 1611, 1680 (1984) (“Most states have adopted [an] . . . approach [to public sector bargaining] modeled on the NLRA.”).

22. See STEVEN L. WILLBORN ET AL., *EMPLOYMENT LAW: CASES AND MATERIALS* 395 (5th ed. 2012) (“Despite [the] multitude of [local, state, and federal employment discrimination laws,] only five basic models exist for proving employment discrimination . . .”).

23. See *Employee Retirement Income Security Act of 1974*, 29 U.S.C. § 1144 (2012) (“[T]his chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . .”).

compensation, may be governed only by state law.<sup>24</sup> There are literally thousands of laws that fall into this category. This category will be considered in Section V below.

### III. COLLEGE ATHLETES AS EMPLOYEES UNDER THE NLRA

Kain Colter wants to be represented by a union.<sup>25</sup> He has invoked the processes of the NLRA to get his union recognized and, in turn, to force Northwestern University to bargain with it.<sup>26</sup> But the NLRA only governs relationships between employers and employees.<sup>27</sup> So a preliminary and central question is whether Colter and his football teammates are “employees” within the meaning of the NLRA.<sup>28</sup>

The Regional Director<sup>29</sup> in the *Northwestern* case found, first, that Colter was an employee within the meaning of the NLRA and, second, that he was not excluded from coverage because he was “primarily” a student.<sup>30</sup> These are the two issues in the case and, although the Regional Director’s decision will not be the final word,<sup>31</sup> the opinion presents the issues well.

The first issue addressed by the Regional Director was whether Colter was an employee within the meaning of the NLRA. As is common in employment statutes, the definition of “employee” within the NLRA is not very helpful. The main part of the definition is completely circular: “The term ‘employee’ shall include any employee . . . .”<sup>32</sup> Although this language does not provide much traction, the Board and the courts have interpreted it to call on the common-law definition of employee: A worker is an employee when she “performs services for another, under the other’s control or right of control, and in return for

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24. See generally WAGE AND HOUR LAWS: A STATE-BY-STATE SURVEY (Gregory K. McGillivray et al. eds., 2d ed. 2011); ARTHUR LARSON & LEX K. LARSON, 1 LARSON’S WORKERS’ COMPENSATION LAW § 125.02 (2014 ed.) (providing an overview of how different states govern workers’ compensation disputes).

25. See *Northwestern Univ. Decision*, *supra* note 5, at 2.

26. See *Northwestern Univ. Petition*, *supra* note 2.

27. See National Labor Relations Act, 29 U.S.C. § 152(3) (2012).

28. From now on, I use “Colter” as shorthand for the entire group of football players.

29. Pursuant to section 3(b) of the NLRA, the Board has delegated most issues involving union elections to its twenty-six regional directors. 29 U.S.C. § 153(b); NAT’L LABOR RELATIONS BD., NLRB RULES AND REGULATIONS MANUAL pt. 101, § 101.20, available at <http://www.nlr.gov/sites/default/files/attachments/basic-page/node-1717/Manual-Part%20101%20.pdf> (last visited Sept. 18, 2014) [hereinafter NLRB RULES].

30. *Northwestern Univ. Decision*, *supra* note 5, at 2.

31. In rare cases, the Board reviews the decisions of regional directors; this is one of those rare cases. See *infra* note 98.

32. 29 U.S.C. § 152(3).

payment.”<sup>33</sup> The Regional Director in Colter’s case relied on this definition to find that Colter was an employee:<sup>34</sup> he performed valuable services for Northwestern,<sup>35</sup> under “strict and exacting control,”<sup>36</sup> and he received compensation in return.<sup>37</sup>

The Regional Director also found that Northwestern football players who were not on scholarship (the “walk-ons”) were *not* employees.<sup>38</sup> The main reason for this finding was that the walk-ons did not receive compensation for their athletic services.<sup>39</sup> This part of the decision is important because it means that college athletes at most private universities are *not* employees under the NLRA and, hence, would not be able to unionize.<sup>40</sup> For example, athletic scholarships are not permitted at some NCAA Division I institutions<sup>41</sup> or at any NCAA Division III institutions.<sup>42</sup> This part of the decision means that much of the concern about the effect of this opinion is misplaced; the *Northwestern* decision is actually favorable to most universities opposed to unionization efforts by college athletes. Of the 611 private colleges and universities in the NCAA,<sup>43</sup> about sixty percent are in Division III, which does not award

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33. N.Y. Univ., 332 N.L.R.B. 1205, 1205–06 (2000); *see also* NLRB v. Town & Country Elec., Inc., 516 U.S. 85, 90 (1995).

34. *Northwestern Univ. Decision*, *supra* note 5, at 13–18.

35. *Id.* at 14 (the Northwestern football team generated about \$235 million in revenues between 2003–2012, in addition to the “immeasurable positive impact” on alumni giving and student applications).

36. *Id.* at 15.

37. *Id.* at 14 (“[T]he monetary value of [the] scholarships totals as much as \$76,000 per calendar year [resulting] in . . . total compensation in excess of one quarter of a million dollars” for players who were on the team for the full four or five years.).

38. *Id.* at 17.

39. *Id.* The Regional Director also noted that the walk-ons were subject to less control. *Id.*

40. In a letter to all presidents of NCAA Division I football schools, the President of Northwestern said that, if the Regional Director’s opinion was ultimately upheld, “‘scholarship athletes at any private institution could similarly be represented by a union for the purposes of collective bargaining.’” Melanie Trotman, *5 Things Northwestern is Telling Other Football Schools About Unions*, WALL ST. J. BLOG (Apr. 15, 2014, 8:29 AM), <http://blogs.wsj.com/washwire/2014/04/15/5-things-northwestern-is-telling-other-football-schools-about-unions>. That is incorrect. As indicated in the article, under the ruling, college athletes at most private institutions would not be employees under the NLRA. *See infra* notes 41–44 and accompanying text.

41. Most notably, athletic scholarships are not permitted at the eight Division I institutions in the Ivy League. *See Prospective Student-Athletes Information*, IVY LEAGUE, <http://www.ivyleaguesports.com/information/psa/index> (last visited Sept. 18, 2014).

42. NCAA, 2013–14 NCAA DIV. III MANUAL art. 15.01.3 (2013) (“A member institution shall not award financial aid to any student on the basis of athletics leadership, ability, participation or performance.”).

43. The NLRA applies only to private employers. *See* National Labor Relations Act, 29 U.S.C. § 152(2) (2012).



scholarships.<sup>44</sup> As a result, college athletes at those institutions would not be able to unionize under the reasoning of *Northwestern*. Of course, the furor is not about *most* of the institutions in the NCAA, but rather about the relatively few institutions, like Northwestern University, where college athletics is big business. There is some irony within that narrower category too, however; about ninety percent of the universities in that category are public institutions that are not governed by the NLRA or the Regional Director's decision at all.<sup>45</sup>

The second issue addressed by the Regional Director was whether Colter was "primarily" a student and thus exempted from the normal definition of employee under the NLRA.<sup>46</sup> The NLRA explicitly excludes several categories of workers who might otherwise be thought to be employees, including agricultural workers, independent contractors, and supervisors.<sup>47</sup> In addition, the Board has carved out several non-statutory exceptions to the Act's coverage. Managers and confidential employees, for example, have been excluded from the NLRA's definition of "employee" even though they are clearly common-law employees and are not specifically excluded by the statutory definition.<sup>48</sup> Students are another of the non-statutory exceptions to the Act's coverage.

In *Brown University*, the National Labor Relations Board held that graduate students at the university who worked as teaching assistants, research assistants, and proctors were not "employees" under the NLRA.<sup>49</sup> The Board held that they were "primarily students [with] a primarily educational, not economic, relationship with their univer-

44. The membership in the NCAA, as of 2009, is as follows:

	Public	Private
Division I	220	113
Division II	154	137
Division III	89	357
TOTAL	463	607

NCAA, 2008–09 NCAA MEMBERSHIP REPORT 15, 17, 21 (2009), available at <http://www.ncaa.com/publications/p-3877-2008-09-ncaa-membership-report.aspx> (last visited Sept. 19, 2014). This overcounts the private institutions that would be subject to unionization efforts under *Northwestern* because the private institutions include the members of the Ivy League. See *supra* note 41.

45. See *infra* notes 152–53 and accompanying text.

46. *Northwestern Univ. Decision*, *supra* note 5, at 18–20.

47. 29 U.S.C. § 152(3).

48. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974) (managerial employees are not "employees" under the NLRA); *NLRB v. Hendricks Cnty. Rural Elec. Membership Corp.*, 454 U.S. 170, 190 (1981) (confidential employees are not "employees" under the NLRA).

49. *Brown Univ.*, 342 N.L.R.B. 483, 493 (2004). From now on, I will use "teaching assistants" as shorthand for the entire group at issue in *Brown University*.

sity.”<sup>50</sup> Kain Colter and his teammates are all students, so the question was whether they, too, would fit within the *Brown University* exception for those whose relationship with a university is “primarily educational.”<sup>51</sup>

In *Brown University*, several aspects of the relationship between the teaching assistants and the university led the Board to conclude that the relationship was “primarily educational.”<sup>52</sup> First, the Board emphasized that one had to be a student enrolled in the university to be a teaching assistant.<sup>53</sup> The Board also noted that the time the teaching assistants devoted to teaching was “limited” and that their “principal time commitment” was focused on obtaining a degree.<sup>54</sup> Second, the Board found that teaching assistant duties were “part and parcel of the core elements” of their degree program.<sup>55</sup> For most of the teaching assistants, the Board found, they would not get their degrees until they had successfully completed their duties as teaching assistants.<sup>56</sup> Third, and similarly, the Board found that the teaching assistants were closely and personally supervised by faculty members; this close and “intensely personal” relationship between student and faculty member supported the conclusion that the duties were primarily educational in nature.<sup>57</sup> Fourth, the Board relied on two aspects of the funding for teaching assistants: (1) the funds came from the university’s financial aid budget rather than its instructional budget, and (2) teaching assistants generally received the same amount as other graduate students who had fellowships but did not teach.<sup>58</sup> Finally, the Board worried that unionization might infringe on the academic freedom of teaching assistants; the Board worried about the right to speak freely in the classroom and about other issues that intertwined with academic freedom, such as class size, time, and location.<sup>59</sup>

The Regional Director in *Northwestern* held that the non-statutory exclusion for students simply did not apply to Colter and his teammates because “the players’ football-related duties are unrelated to their academic studies unlike the graduate assistants whose teaching and research duties were inextricably related to their graduate degree requirements.”<sup>60</sup>

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50. *Id.* at 487.

51. See *Northwestern Univ. Decision*, *supra* note 5, at 18–20.

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

53. *Id.* at 488.

54. *Id.*

55. *Id.* at 488.

56. *Id.*

57. *Id.* at 489–90.

58. *Brown Univ.*, 342 N.L.R.B. at 489.

59. *Id.* at 490.

60. *Northwestern Univ. Decision*, *supra* note 5, at 18.

Nevertheless, the Regional Director went on to consider the *Brown* factors and concluded that they would not exclude Colter from coverage under the NLRA even if they did apply.<sup>61</sup>

On the first factor, the Regional Director recognized that Colter had to be a student to be a football player,<sup>62</sup> but noted that *Brown* required the teaching assistants to be “primarily” students.<sup>63</sup> Based on the evidence before him, the Regional Director estimated that Colter devoted about twice as much time to football as he did to attending classes.<sup>64</sup> Based on that, he said that Colter was not “primarily” a student who “‘spen[t] only a limited number of hours performing [his] athletic duties.’”<sup>65</sup> The Regional Director’s comparison of time devoted to football versus time “attending classes” does not seem quite fair. The time students spend on academics is not limited to time spent in the classroom. The Regional Director noted this, but still concluded that Northwestern football players spend “many more hours” on football than they do on their studies.<sup>66</sup> This more balanced and modest claim is supported by NCAA statistics, which show that, during the season, football players at the major college programs spend 43.3 and 38.0 hours on football and academics, respectively.<sup>67</sup>

On this factor, like the others, college athletes vary widely in the actual number of hours spent on athletics. Although the NCAA has rules

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61. *Id.*

62. Although not noted by the Regional Director, the NCAA has rules which may require college athletes to be more connected to academics than other students who are not athletes. For example, college athletes have to meet initial eligibility standards that may be higher than a university’s normal admission standards, and it requires progress toward a degree that may not be required of other students. NCAA, 2013–14 NCAA DIVISION I MANUAL art. 14.3–.4 (2013) [hereinafter NCAA DIVISION I MANUAL].

63. *Northwestern Univ. Decision*, *supra* note 5, at 18.

64. *Id.* at 18.

65. *Id.* (quoting *Brown Univ.*, 342 N.L.R.B. 483, 488 (2004)).

66. *Id.* One reviewer noted that many of the hours football players devote to their sport are voluntary. Under NCAA rules, Northwestern must limit the hours it can demand of football players for athletically related activities. *See infra* notes 68–72 and accompanying text. This distinction, however, has no traction in employment law. If an “employer knows or has reason to believe that the work is being performed, he must count the time as hours worked.” 29 C.F.R. § 785.12 (2013).

[I]t is the duty of the management to exercise its control and see that the work is not performed if it does not want it to be performed. It cannot sit back and accept the benefits without compensating for them. The mere promulgation of a rule against such work is not enough. Management has the power to enforce the rule and must make every effort to do so.

*Id.* § 785.13.

67. NCAA RESEARCH, DIVISION I RESULTS FROM THE NCAA GOALS STUDY ON THE STUDENT-ATHLETE EXPERIENCE 17–21 (2011), available at [http://www.ncaa.org/sites/default/files/DI\\_GOALS\\_FARA\\_final\\_1.pdf](http://www.ncaa.org/sites/default/files/DI_GOALS_FARA_final_1.pdf) (the research also shows that seventy percent of football players report spending as much or more time on football during the off-season).

that provide a uniform maximum across sports and institutions on the time that can be spent on “countable athletically related activities,”<sup>68</sup> the rules have so many exceptions and loopholes that they have little practical impact on the actual number of hours college athletes devote to athletics.<sup>69</sup> Instead, in practice, major-college football players are at the upper end of a broad range in time commitment to their sport, while college athletes in different sports<sup>70</sup> and at different universities<sup>71</sup> vary considerably on this factor. Many, like Colter, probably devote sufficient time to have this factor cut in favor of employee status under the NLRA, but other college athletes may more closely resemble the teaching assistants in *Brown*.<sup>72</sup> It is, of course, the actual time spent on athletics that will govern this result, not the formal NCAA rules.<sup>73</sup>

68. “Countable athletically related activities” are limited to no more than twenty hours per week during a sport’s season and eight hours per week out of season. NCAA DIVISION I MANUAL, *supra* note 62, art. 17.1.6.1–6.2.

69. This occurs because the NCAA has narrow definitions of what “counts” as “athletically related activities.” For example, a game day counts as three hours no matter how long it takes (and it generally takes more than that). *Id.* art. 17.1.6.3.2; *see Northwestern Univ. Decision, supra* note 5, at 7–9 & n.17 (describing time spent by Northwestern football players on a game day and the day before; total time actually spent was more than 24 hours, but the NCAA counted only 4.8 of them as “athletically related”). Many intensive activities, such as preseason practices and voluntary weight training, do not count at all. NCAA DIVISION I MANUAL, *supra* note 62, art. 17.1.6.3.5 (the hour limitations do not apply when the preseason practice occurs before the first day of classes or the first scheduled contest); *id.* art. 17.02.1 (only “required” athletic activities count toward the hour limitations); *id.* art. 17.02.13 (defining non-required “voluntary” athletically related activities).

70. NCAA research reports that while football players at major college programs spend 43.3 hours per week on football during the season, male athletes in sports other than football, baseball, and basketball spend approximately 32.0 hours on athletic activities (or ten hours fewer per week). NCAA RESEARCH, *supra* note 67, at 17. This average, of course, conceals variance within those other sports; athletes in some sports devote even less time to their sport.

71. For example, football players at Division III colleges and universities spend about ten hours fewer each week on athletic activities than their peers at major-college football institutions (33.1 hours vs. 43.3 hours, in season). *Id.* On the athletics vs. academics comparison more directly, while major-college baseball, (male) basketball, and football players all spend more time on athletic activities than on academics, the reverse is true for *all* college athletes at Division III colleges and universities. *Id.* at 19 (Division III college athletes spend up to 14.1 hours more each week during the season on academics than on athletic activities).

72. Even under the NCAA’s rules, when the maximums are approached, the time devoted to athletics is more than “limited,” although it would still be possible to have a “principal time commitment” elsewhere. But, as indicated in the text, it is certainly possible that college athletes in some sports at some institutions fall on the other side of this divide.

73. *See, e.g.,* RESTATEMENT (THIRD) OF EMP’T LAW § 1.01 cmt. g (Proposed Final Draft, April 8, 2014) [hereinafter RESTATEMENT OF EMP’T LAW] (“The underlying economic realities of the relationship, rather than any designation . . . of the relationship in an agreement . . . , determine whether a particular individual is an employee.”); *id.* § 1.01 reporters’ notes cmt. g (“The test for employee status is a functional one; it ordinarily does not turn on how the parties characterize their relationship.”). In *Northwestern*, the Regional Director followed the courts in looking at the college athletes’ actual experience rather than formal rules in determining this aspect of Colter’s case. *See Northwestern Univ. Decision, supra* note 5, at 18:

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On the second factor, the Regional Director found that Colter's duties as a football player were not as closely related to academics as the duties of the teaching assistants in *Brown*.<sup>74</sup> In contrast to *Brown*, football players did not receive academic credit for playing football, nor was football a requirement for obtaining a degree.<sup>75</sup> Rather, the Regional Director said that, given the large scholarships received by the players, the relationship was primarily economic, rather than academic.<sup>76</sup> The Regional Director also found that Colter was different than teaching assistants because his interaction with faculty was more limited.<sup>77</sup> Faculty members did not oversee Colter's football activities at all; football coaches are not members of the academic faculty.<sup>78</sup> This meant both that Colter was less student-like than teaching assistants and that there was not likely to be any adverse effect on academic freedom and academic decisions because of classification as an employee,<sup>79</sup> which was one of the worries in *Brown*.<sup>80</sup>

On these factors, the Regional Director focused on Colter's particular experience as a college athlete.<sup>81</sup> While the NCAA and its member colleges and universities certainly pitch the experience of college athletics as an important part of a student's overall educational experience,<sup>82</sup> the Regional Director paid no attention to those general claims and,

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The players spend 50 to 60 hours per week on their football duties . . . prior to the start of the academic year and an additional 40 to 50 hours per week . . . during the . . . football season. Not only is this more hours than many undisputed full-time employees work at their jobs, it is also many more hours than the players spend on their studies. . . . [I]t cannot be said that they are 'primarily students' . . . .

74. *Northwestern Univ. Decision*, *supra* note 5, at 19.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* This result seems justified because Colter's role simply does not involve much academic freedom. But if the general concept does apply, it would seem to cut in the opposite direction than in *Brown*. The primary reason Colter gives for seeking unionization is to have a greater voice in the debates about college athletics. Thus the goal, and probably the result if he is successful, is to permit him to speak more freely and openly on these issues.

80. *Brown Univ.*, 342 N.L.R.B. 483, 490 (2004).

81. *Id.*

82. *See, e.g.*, NCAA DIVISION I MANUAL, *supra* note 62, art. 1.3 ("The competitive athletics programs of member institutions are designed to be a vital part of the educational system. A basic purpose of [the NCAA] is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body . . . ."); Robert J. Sternberg, *College Athletics: Necessary, Not Just Nice to Have*, BUSINESS OFFICER, [http://www.nacubo.org/Business\\_Officer\\_Magazine/Business\\_Officer\\_Plus/Bonus\\_Material/College\\_Athletics\\_Necessary\\_Not\\_Just\\_Nice\\_to\\_Have.html](http://www.nacubo.org/Business_Officer_Magazine/Business_Officer_Plus/Bonus_Material/College_Athletics_Necessary_Not_Just_Nice_to_Have.html) (last visited Sept. 18, 2014); *see also* Rohith A. Parasuraman, *Unionizing NCAA Division I Athletics: A Viable Solution?*, 57 DUKE L.J. 727, 744-45 (2007) (positing that "[i]f the NLRB were to view participation in sports as part of the academic experience, [it] might then find that an athlete is a student rather than an 'employee,'" because if one views the purpose of attending college as advancing into some profession, participation in sports with the hope of

instead, focused on the specific experience of Colter as a football player at Northwestern.<sup>83</sup> That focus indicates, again, that there will be variance across different sports and different universities. For example, at some universities, coaches are actually faculty (professors) and athletes can earn academic credit for participating in their sports.<sup>84</sup>

Finally, the Regional Director considered how Colter was paid.<sup>85</sup> In *Brown*, the Board noted that the teaching assistants were paid out of the financial aid budget and received the same amount as others who did not teach.<sup>86</sup> In addition, their compensation did not depend on the quality of their work.<sup>87</sup> The Regional Director distinguished Colter's compensation on each of these points.<sup>88</sup> Colter was paid only because he had agreed to play football; if he did not play football, his compensation would be revoked; and diligent attendance was required to retain his scholarship.<sup>89</sup>

Again, this result for Colter does not signal the same result for all athletes at all schools. For example, since 2011, the NCAA has permitted member schools to offer multi-year scholarships.<sup>90</sup> That weakens the tie between money and athletic performance and, thus, weakens the claim for employee status. That being said, there are differences both within schools and across schools in how multi-year scholarships function.<sup>91</sup> As a result, there will certainly be differences between schools in how they fare on this factor and often there will be differences at the same school for athletes participating in different sports or even for different athletes in the same sport.<sup>92</sup> Moreover, at the vast majority of

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becoming a professional athlete "is only superficially different than the pursuit of medicine or law as a profession").

83. See *Northwestern Univ. Decision*, *supra* note 5, at 3.

84. MICHAEL A. MIRANDA & THOMAS S. PASKUS, NCAA, ROLES, RESPONSIBILITIES AND PERSPECTIVES OF NCAA FACULTY ATHLETICS REPRESENTATIVES 24 (Feb. 2013), available at [http://www.ncaa.org/sites/default/files/FAR\\_STUDY\\_Report\\_final.pdf](http://www.ncaa.org/sites/default/files/FAR_STUDY_Report_final.pdf) (fifteen to sixteen percent of NCAA Division I institutions permit academic credit for participating in athletics; about one-quarter of Division II and III institutions do so).

85. *Northwestern Univ. Decision*, *supra* note 5, at 20.

86. *Brown Univ.*, 342 N.L.R.B. at 489.

87. *Id.* at 490 n.27.

88. *Northwestern Univ. Decision*, *supra* note 5, at 20.

89. *Id.*

90. NCAA DIVISION I MANUAL, *supra* note 62, art. 15.3.3.

91. Mark Dent, *Colleges, Universities Slow to Offer Multiyear Athletic Scholarships*, PITTSBURGH POST-GAZETTE (May 19, 2013, 4:00 AM), <http://www.post-gazette.com/sports/Pitt/2013/05/19/Colleges-universities-slow-to-offer-multiyear-athletic-scholarships/stories/20130519-0222>. Of 82 NCAA Division I universities responding to a survey, 16 offered more than ten multiyear scholarships, 32 offered between one and ten, and 34 offered none; only one university offered four-year scholarships to all of its athletes.

92. In Colter's case, Northwestern did offer four-year scholarships, but the promise was not firm. The scholarship could be revoked for a variety of reasons. *Northwestern Univ. Decision*, *supra* note 5, at 4 (listing seven reasons for revocation of the scholarship). Ironically, the Regional Director relied on the revocability of the scholarships to support his finding that they constituted

colleges, athletics is not funded solely from athletic department funds; funds may also be provided from elsewhere in the university.<sup>93</sup> Thus, at most schools, the extent of the tie between funding and the particular task performed is stronger than it was in *Brown University*, but weaker than it was in *Northwestern*, where Colter's entire scholarship came from athletic department funds.

In sum, the Regional Director held, first, that *Brown* simply did not apply because Colter's football duties were so unrelated to his academic studies.<sup>94</sup> For that reason alone, Colter the football player was not "primarily" a student. Second, the Regional Director found that, even if *Brown* did apply, Colter would properly be classified as an employee because all four of the *Brown* factors pointed in that direction.<sup>95</sup> Yet, the *Northwestern* decision is quite nuanced. Its rationale excludes more college athletes from employee status than it includes.<sup>96</sup> Additionally, its holding is closely limited to the facts in Colter's case; even for athletes within the general universe occupied by Colter—at private universities in major conferences—the Regional Director's rationale will have varying effects.<sup>97</sup>

*Northwestern* appealed the Regional Director's decision to the full National Labor Relations Board.<sup>98</sup> The outcome there is uncertain. On the one hand, Colter's claim is even stronger before the Board than it was before the Regional Director. The Regional Director was bound to follow the *Brown* decision, which is current Board precedent. The Board is not bound by *Brown*, and there is strong reason to believe that the

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compensation; their revocability supported his finding that the scholarships were "in exchange for athletic services." *Id.* at 15.

93. See Steve Berkowitz et al., *Most NCAA Division I Athletic Departments Take Subsidies*, USA TODAY (July 1, 2013, 12:48 PM), <http://www.usatoday.com/story/sports/college/2013/05/07/ncaa-finances-subsidies/2142443/> (twenty-three of 228 NCAA Division I athletic departments generated enough money to cover all athletic expenses; only seven athletic departments reported no revenue from non-athletic sources).

94. *Northwestern Univ. Decision*, *supra* note 5, at 18.

95. *Id.* at 18–20.

96. See *supra* notes 40–44 and accompanying text.

97. *Northwestern* also claimed that Colter was a temporary employee and, thus, not eligible to unionize. The Regional Director rejected this claim without extended discussion. *Northwestern Univ. Decision*, *supra* note 5, at 20–21. Given the length and extent of service to the University (four or five years, more than 40 hours per week), the claim of temporary employment was quite weak on the facts. It was also weak legally. See, e.g., *Bos. Med. Ctr. Corp.*, 330 N.L.R.B. 152, 166 (1999) (finding that workers with set terms of from three to seven years were not temporary employees).

98. *Northwestern Univ.*, N.L.R.B. No. 13-RC-121359 (Apr. 9, 2014) (request for review of decision). The Board rarely reviews regional director decisions in election cases. NLRB RULES, *supra* note 29, § 102.67(c) (the Board will grant review only for "compelling reasons"). But in this case, it exercised its discretionary authority to review the decision.

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current Board may be inclined to return to an analysis that would be more favorable to Colter than *Brown*.

*Brown* overturned a prior decision that found that teaching assistants at New York University were employees under the NLRA.<sup>99</sup> In *New York University*, the Board emphasized the basic facts of their employment—that they “perform services under the control and direction of the Employer, and they are compensated for these services by the Employer”<sup>100</sup>— and it rejected the argument that they should not be considered employees because their work was “primarily educational.”<sup>101</sup> Most of the discussion was the mirror image of the discussion in *Brown*. The Board emphasized that the teaching assistants fit within the generous common-law definition of employee and did not fall within any of the explicit exclusions in the NLRA itself.<sup>102</sup> The Board recognized that the teaching assistants would receive educational benefits from their work, but pointed out how that was not inconsistent with employee status.<sup>103</sup> In any event, the Board noted that working as a teaching assistant was not a requirement to obtain a degree nor a part of the formal curriculum.<sup>104</sup>

The *New York University* result and analysis is more than mere history because the Board recently found “compelling reasons for reconsideration of the decision in *Brown University*,” suggesting that it might return to the more generous (for Colter) *New York University* approach to the issue of employee status.<sup>105</sup> Although the Board signaled its intention to reconsider *Brown*, it has not yet had occasion to do so.<sup>106</sup> Thus, under current Board doctrine, Colter has a strong claim that he should be classified as an employee of Northwestern University; the Regional Director issued a careful opinion finding as much. Additionally, his claim would be strengthened if the Board were to revert back to the *New*

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

100. *N.Y. Univ.*, 332 N.L.R.B. 1205, 1206 (2000).

101. *Id.* at 1207.

102. *Id.* at 1206.

103. *Id.* at 1207.

104. *Id.* The Board did exclude some graduate assistants from the bargaining unit. It held that graduate research assistants who were funded solely by external grants were not employees. *Id.* at 1209 n.10. Although interesting, this should not have any effect on college athletes because they all receive compensation directly from the university and not from outside sources.

105. *N.Y. Univ.*, 356 N.L.R.B. No. 7, 1 (Oct. 25, 2010). In this case, the Regional Director relied on *Brown* to dismiss a petition without a hearing from graduate teaching and research students. *Id.* The Board signaled its intent to reconsider *Brown* when remanding the case to the Regional Director for a hearing. *Id.* at 2.

106. This reconsideration has taken quite some time in part because of the political controversy over the Board’s membership. *See Canning v. NLRB*, 705 F.3d 490, 507 (D.C. Cir. 2013), *aff’d*, 134 S. Ct. 2550 (2014) (holding that the NLRB lacked a quorum to act because three members were improperly appointed by the President under the Recess Appointments Clause of the Constitution).



*York University* analysis, which it has hinted it may do.<sup>107</sup>

On the other hand, although *Brown* and *New York University* are the best Board precedent on the issue now, the Board could carve out an entirely new non-statutory exception for college athletes. Analytically, the Board could point to significant differences between teaching assistants and college athletes that call for a different analysis and, maybe, for a broad exception. Teaching assistants were graduate students; almost all college athletes are undergraduates. The financial structures are enormously different. The potential disruption to the existing systems—financial, regulatory, etc.—would be greater for college athletics. Historically, a new exception from employee status would not be unprecedented. The Board has already created exceptions for managers and confidential employees<sup>108</sup> and, indeed, that is one way to view *Brown* itself. Finally, the Board may feel political pressure to create such a new exception. Classifying college athletes as employees would create a firestorm that will be fed by universities and the NCAA, but also by many others with significant financial interests in the current system.<sup>109</sup> The Board has recent, unpleasant experience with politically unpopular decisions.<sup>110</sup> Obviously, the Board could craft such an exception broadly to exempt virtually all college athletes at all universities. Or it could craft an exception to apply more narrowly to Colter's claim. If the latter, then CAPA and college athletes at other universities could pull another arrow from the quiver and try again under the NLRA.

For those unfamiliar with the NLRA, it is worth noting that doctrin-

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107. See *N.Y. Univ.*, 356 N.L.R.B. at 1 (“Petitioner . . . offered to present evidence of collective-bargaining experience in higher education as well as expert testimony demonstrating that, even giving weight to the considerations relied on by the Board in *Brown University*, the graduate students are appropriately classified as employees under the Act.”).

108. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974) (excluding ‘managerial’ employees from bargaining units); *NLRB v. Hendricks Cnty. Rural Elec. Membership Corp.*, 454 U.S. 170, 190 (1981) (excluding confidential employees from bargaining units). In its invitation to interested parties to file briefs, the Board signaled that it might consider treating college athletes as it treats confidential employees. *Northwestern Univ.*, N.L.R.B. No. 13-RC-121359 (May 12, 2014) (Invitation to File Briefs) (“[S]hould the Board recognize [college athletes] as ‘employees’ under the Act, but [treat them as it treats] confidential employees under Board law?”).

109. Prominent examples are cable and over-the-air television networks and coaches’ organizations. All have significant financial stakes in the status quo. See Andy Staples, *How Television Changed College Football—and How It Will Again*, *SPORTS ILLUSTRATED* (Aug. 6, 2012), <http://www.si.com/college-football/2012/08/06/tv-college-football> (“ESPN will pay a reported \$80 million to broadcast the Rose Bowl on Jan. 1, 2015.”).

110. See Steven Greenhouse, *In Boeing Case, House Passes Bill Restricting Labor Board*, *N.Y. TIMES*, Sept. 15, 2011, at B3, available at <http://www.nytimes.com/2011/09/16/business/house-approves-bill-restricting-nlr.html> (House passes a bill to restrict National Labor Relations Board jurisdiction after the Board’s acting general counsel filed an unfair labor practice complaint challenging the legality of a proposed move of a Boeing production plant from Washington to South Carolina).

al changes based on Board sensitivity to the legal and political environment are a feature of the system, not a bug. There are many well-known examples of the Board changing labor policy when a new President's appointees took their seats on the Board.<sup>111</sup> Indeed, on this issue, not only did *Brown* reverse the *New York University* decision, but *New York University* itself reversed earlier decisions which had held that graduate students were not employees under the NLRA.<sup>112</sup> Several aspects of the structure and evolution of the NLRA indicate that the Board is designed to occupy a middle ground between judicial insulation from political influence and legislative responsiveness to it.<sup>113</sup> Doctrinal shifts like these are a feature of that middle ground.

Thus, the ultimate outcome of the appeal to the Board is uncertain. But for now, assume that Colter succeeds in convincing the Board that he and his teammates are employees under the NLRA. (Again, the Regional Director's decision in *Northwestern* was faithful to current Board doctrine; a finding of employee status is the likely outcome under current doctrine.<sup>114</sup>) One curious aspect of Colter's decision to pull the unionization arrow from his quiver is that even if he succeeds on the employee issue, he will not have won much unless he can also win on several other issues. This is in contrast to other possible routes Colter might have taken where a win on the employee issue would have translated more directly into a positive ultimate result.<sup>115</sup> A possible explanation for Colter's choice is that if he can overcome all the hurdles, unionization gives him what he says he wants most: a seat at the table.<sup>116</sup>

Determining the appropriate bargaining unit is one of the additional hurdles. The bargaining unit defines both who would get to vote in a union election and who the union would represent if it were selected.<sup>117</sup>

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111. The Board's shifting rules on factual misrepresentations during union election campaigns is the most famous example. See *Midland Nat'l Life Ins. Co.*, 263 N.L.R.B. 127, 129–130 (1982) (discussing the Board's various practices in the past regarding the determination of the "truth or falsity of campaign propaganda").

112. For a review of that history, see *Brown Univ.*, 342 N.L.R.B. 483, 486–87 (2004).

113. For good discussions, see Joan Flynn, *A Quiet Revolution at the Labor Board: The Transformation of the NLRB, 1935–2000*, 61 OHIO ST. L.J. 1361, 1363–66 (2000); Daniel P. O'Gorman, *Construing the National Labor Relations Act: The NLRB and Methods of Statutory Construction*, 81 TEMP. L. REV. 177, 235 (2008).

114. See *supra* text accompanying notes 94–95.

115. See *infra* Part V.A.

116. *Northwestern QB Colter Starts Movement to Form College Players' Union*, GAZETTE (Jan. 28, 2014, 5:29 PM), <http://thegazette.com/2014/01/28/northwestern-qb-colter-starts-movement-to-form-college-players-union/> (quoting Colter as saying, "A lot of people will think this is all about money; it's not. . . . We're asking for a seat at the table to get our voice heard."). The union supporting Colter, CAPA, forwards more traditional, primarily economic goals, such as better health insurance coverage and increased compensation. See *What We're Doing*, COLL. ATHLETES PLAYERS ASS'N, <http://www.collegeathletespa.org/what> (last visited Sept. 19, 2014).

117. National Labor Relations Act, 29 U.S.C. § 159(b) (2012).

Colter's petition to the National Labor Relations Board identified the unit as "all football players receiving grant-in-aid scholarships from Northwestern University."<sup>118</sup> The Regional Director found that to be an appropriate unit.<sup>119</sup> Colter estimated that there were about eighty-five players in that unit,<sup>120</sup> and he certified, as required to have his petition considered, that at least thirty percent of those players had signed cards supporting the petition.<sup>121</sup> If the Board were to find that Colter and his teammates were employees, it would still have to determine if scholarship football players constituted the appropriate bargaining unit.<sup>122</sup>

The appropriate bargaining unit is also a contested issue in the *Northwestern* case. A bargaining unit is not "appropriate" if it excludes employees who share an "overwhelming community of interest" with employees in the unit.<sup>123</sup> Northwestern claimed that walk-ons shared that "overwhelming community of interest," so Colter's proposed unit was inappropriate.<sup>124</sup> The Regional Director rejected this both because walk-ons were not employees at all, which made the possibility of a fractured unit of employees impossible, and because they did not share an "overwhelming community of interest" since they were not paid.<sup>125</sup> The Board will review this determination.

However, the possibility of including walk-ons in the unit is only one of many possible complications in specifying the appropriate bar-

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118. *Northwestern Univ. Petition*, *supra* note 2. The petition specifies that the unit shall not include "guards." *Id.* This may have been a bit of lawyer humor. "Guards" are treated specially under the NLRA. 29 U.S.C. § 159(b). Guards are defined as individuals employed to protect an employer's property or safety; while they can join and form unions, their unions must be separate from unions for other employees. *Id.* Guards under the NLRA are a distinct species from guards in football, who are tasked with various non-ball handling roles as part of the offensive line.

119. *Northwestern Univ. Decision*, *supra* note 5, at 21–22. The Regional Director excluded from the unit players who had exhausted their playing eligibility. *Id.* at 23. Ironically, this means that Kain Colter himself was not able to vote in the election.

120. *Northwestern Univ. Petition*, *supra* note 2. Seventy-six Northwestern football players were determined to be eligible to vote on the election that was held on April 25, 2014. Alejandra Cancino & Teddy Greenstein, *Northwestern Football Players Cast Ballots in Union Vote*, CHI. TRIB. (Apr. 25, 2014), <http://articles.chicagotribune.com/2014-04-25/business/chi-northwestern...-ohr-college-athletes-players-association-northwestern-football-players>.

121. NLRB RULES, *supra* note 29, § 101.18. The cards could have said that the players wanted the union to represent them or they could have said merely that the players wanted an election to determine if the union had majority support. Thirty percent of either type of card is required to support an election petition. *Id.*

122. See National Labor Relations Act, 29 U.S.C. § 159(b) (2012) ("The Board shall decide in each case whether . . . the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof . . .").

123. Specialty Healthcare & Rehab. Ctr. of Mobile, 357 N.L.R.B. No. 83, 1 (Aug. 26, 2011), *enforced sub nom.* Kindred Nursing Ctrs. E., LLC v. NLRB, 727 F.3d 552 (6th Cir. 2013); *see also* Odwalla, Inc., 357 N.L.R.B. No. 132, 5 (Dec. 9, 2011).

124. *Northwestern Univ. Decision*, *supra* note 5, at 21.

125. *Id.* at 21–22.

gaining unit, and one of the least controversial because they are probably not employees at all. For example, why limit the bargaining unit to football players? Under Colter's argument, every scholarship athlete at Northwestern is potentially an employee. Why not include men's basketball players, too, who operate in a very similar, high-profile environment to Colter and his teammates?<sup>126</sup> Why not include all scholarship athletes at Northwestern since all are subject to similar levels of control, time commitment, etc.? Northwestern sponsors nineteen men's and women's sports.<sup>127</sup> In theory, the bargaining unit could include any one or any combination of these teams. Thus, within the athletic program alone, there are about 185,000 different possible bargaining unit configurations.<sup>128</sup> And who is to say that the athletes should be in a separate unit from others who are similarly situated at the University, such as teaching assistants, if the Board returns to the analysis of *New York University*? Or others?

The Board is empowered to make bargaining unit determinations,<sup>129</sup> but it does so with exceedingly mushy standards. The overall standard is that the Board groups together employees who share a "community of interest" considering factors such as similarity in the kinds of work performed, in qualifications and skills required, in hours worked, and in wage and benefit levels.<sup>130</sup> The Board is required only to deter-

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126. Alicia Jessop, *College Basketball Revenue and Game Attendance*, BUS. COLL. SPORTS (Mar. 5, 2012), <http://businessofcollegesports.com/2012/03/05/college-basketball-revenue-and-game-attendance/> ("While the majority of the most profitable programs were football programs, some were surprised to learn that 41 of the top-100 most profitable programs were basketball programs.")

127. NORTHWESTERN WILDCATS, <http://www.nusports.com> (last visited Sept. 20, 2014).

128. My good friend and statistical expert, Ramona Paetzold, tells me that the number of possible combinations of nineteen separate items where order does not matter is 184,757. As a practical matter, of course, the number of reasonable and likely bargaining units is much fewer than this. But combinatorials are fun.

129. The Board has delegated this authority to its regional directors, so the presumption is that the initial determinations will be made by them. Regional directors, however, may redirect cases back to the Board when they involve "novel or complex" issues. NLRB RULES, *supra* note 29, § 101.20. The decisions are based on a record developed before a hearing officer who considers and summarizes evidence submitted by the parties, but makes no recommendation. *Id.* §§ 101.20–101.21. An interesting aspect of this procedure is that the parties cannot normally obtain judicial review of bargaining-unit determinations (or other issues in representation proceedings) until after an election has been held. *Am. Fed'n of Labor v. NLRB*, 308 U.S. 401, 404, 411–12 (1940) (the NLRA provides for judicial review only of "final orders"; decisions of the Board in representation proceedings are not "final orders"). Judicial review is delayed "to prevent obstructive recourse to the courts at various stages of the representation proceeding and long delay in the determination of employee preferences on the matter of unionization." ARCHIBALD COX ET AL., *LABOR LAW: CASES AND MATERIALS* 76 (15th ed. 2011). Even when judicial review of bargaining-unit determinations is obtained later, the courts tend to defer greatly to the Board's expertise. *Id.* at 267.

130. For a good discussion, see *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 421 (D.C. Cir. 2008).

mine “an” appropriate unit and is not charged with selecting the best or most optimal one.<sup>131</sup> Thus, in most cases before the Board, the bargaining unit determination is not contentious because the parties agree or the precedents are clear.

Easy resolution of the bargaining unit issue is not likely to be the case for Colter for two reasons. First, there is little precedent and no custom to guide the Board in this area. When Congress extended the Board’s jurisdiction to non-profit hospitals in 1974, the result was an extended period of uncertainty and vacillation about appropriate bargaining units in hospitals, which eventually resulted in a rare instance of Board rulemaking.<sup>132</sup> The situation with college athletes is similar; the novelty of the setting, lack of guidance, and plethora of possible bargaining units all make it unlikely that the issue could be decided quickly and easily. Second, the answer on this issue need not be the same at all universities. It could be that a bargaining unit of all scholarship athletes would be appropriate at one university, while separate units for each sport would be appropriate at another university.<sup>133</sup> Many arrows.

Quick and easy resolution of the bargaining unit issue is also unlikely because the stakes are high. As mentioned above, if Colter cannot demonstrate support from at least thirty percent of the bargaining unit, his election petition will be dismissed.<sup>134</sup> In his election petition, Colter certified that he had support from thirty percent of Northwestern’s football players.<sup>135</sup> But, if the appropriate unit is all Northwestern athletes, then he may not be able to demonstrate that support and his petition would be dismissed. His attempt at unionization would be over. Similarly, even if he can demonstrate thirty percent support with a broader unit, he may have difficulty winning an election.<sup>136</sup> After all,

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131. See *id.* (citing *Serramonte Oldsmobile, Inc. v. NLRB*, 86 F.3d 227, 236 (D.C. Cir. 1996)).

132. For a brief description, see *COX ET AL.*, *supra* note 129, at 244–48.

133. A couple of points on this. First, some have indicated that bargaining units might extend across different universities or even extend across the entire NCAA. See Parasuraman, *supra* note 82, at 747–49. This will not occur. Multiemployer units occur only if all parties agree and only after individual employer units have already been properly formed. Steven L. Willborn, *A New Look at NLRB Policy on Multiemployer Bargaining*, 60 N.C. L. REV. 455, 457 (1982) (I’ve been waiting for thirty years to cite this article). At the initial organizing stage, multiemployer units are simply not possible. *Id.* Second, others have argued that unionization may provide antitrust protection for the NCAA under the labor antitrust exemption enjoyed by professional sports teams. See Nicholas Fram & T. Ward Frampton, *A Union of Amateurs: A Legal Blueprint to Reshape Big-Time College Athletics*, 60 BUFF. L. REV. 1003, 1075 (2012). This will also not occur. The NCAA would enjoy the labor exemption only if all member institutions were a part of the same multiemployer unit, and that is not possible. Among many other reasons, private and public institutions in the NCAA are governed by different labor regimes.

134. NLRB RULES, *supra* note 29, § 101.18.

135. *Northwestern Univ. Petition*, *supra* note 2.

136. Even within the football team, the vote would not be unanimous. Some football players testified against unionization at the Colter hearing. Kevin Trahan, *At Final Hearing, Former*

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most college athletes are not Kain Colter and football players; college athletes in other sports may prefer the current system to one that increases the power and influence of well-known athletes in high-profile sports. Union election campaigns can be contentious; unions often lose them.<sup>137</sup>

So the ultimate outcome of Colter's election petition with the National Labor Relations Board is highly uncertain and, at the end of the day, may not be very definitive, even within the relatively narrow domain governed by the NLRA. The current status of the case is that the full National Labor Relations Board has agreed to review the Regional Director's decision that Colter is an employee within an appropriate bargaining unit.<sup>138</sup> On April 25, 2014, the Board conducted an election in the unit found appropriate by the Regional Director, but it impounded the results pending the Board's review.<sup>139</sup> At this point, there are three possible end points for the case.<sup>140</sup> First, the Board could reverse the Regional Director's decision. The impounded ballots would then be destroyed and the case terminated. Because of the limits on judicial review in election proceedings, there would be no judicial review of the

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*Northwestern Players Back School*, USA TODAY (Feb. 26, 2014, 4:37 PM), <http://www.usatoday.com/story/sports/ncaaf/2014/02/25/college-football-northwestern-wildcats-capa-labor-union-hearing/5816639/>. An interesting side issue in the case could be whether Northwestern or its coaches played any role in soliciting this statement. If so, they may have engaged in conduct that violated the NLRA. See *A.O. Smith Auto. Prods. Co.*, 315 N.L.R.B. 994, 994 (1994) (holding that it is improper for an employer to pressure employees to make an observable choice or open acknowledgement of union sentiments). For the classic discussion of the issue, see Derek C. Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 38, 107–112 (1964).

137. In fiscal year 2013, 1,986 election petitions like Colter's were filed with the National Labor Relations Board, 1,330 elections were held, and unions won 852 of those elections. *Representation Petitions—RC*, NAT'L LABOR RELATIONS BD., <http://www.nlr.gov/news-outreach/graphs-data/petitions-and-elections/representation-petitions-rc> (last visited Sept. 19, 2014). Thus, unions prevailed on 43% of all petitions filed and in 64% of elections held.

138. *Northwestern Univ.*, N.L.R.B. No. 13-RC-121359 (Apr. 24, 2014) (order granting Northwestern's request for review of the decision).

139. Cancino & Greenstein, *supra* note 120.

140. There are also many possible way stations. For example, in opposing the unionization effort, Northwestern University has done things that could give rise to unfair labor practice charges, such as providing players with new iPads the day after the Regional Director's initial decision and conducting one-on-one meetings between players and coaches. Ben Strauss, *At Northwestern, a Blitz to Defeat an Effort to Unionize*, N.Y. TIMES (Apr. 23, 2014), <http://www.nytimes.com/2014/04/24/sports/ncaaf/football/at-northwestern-a-blitz-to-defeat-an-effort-to-unionize.html>. See *NLRB v. Exch. Parts Co.*, 375 U.S. 405, 409 (1964) (conferring benefits on employees with intent to influence union vote is improper); *Blue Flash Express*, 109 N.L.R.B. 591, 594 (1954) (individual interrogation of employees is unlawful if coercive in light of time, place, information sought, and employer's conceded preference). See also Trahan, *supra* note 136 (some Northwestern University football players testified against the union, saying they were grateful for what the university had provided them).

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Board's decision.<sup>141</sup> Second, the Board could uphold the Regional Director's decision and then open the ballots, but find that Colter had lost the election. Again, that would end the case with no judicial review.<sup>142</sup> Finally, the Board could uphold the Regional Director's decision, open the ballots, and find that Colter had won the election. In that case, the Board would certify CAPA as the union representative of Northwestern football players, but Northwestern University would then likely refuse to bargain with the union. In that circumstance, CAPA would file a refusal-to-bargain unfair labor practice charge with the Board,<sup>143</sup> which would begin a process that would result in judicial review of the Board's decision.<sup>144</sup> In sum, the ultimate outcome in Colter's case is still quite uncertain, and some of the possible outcomes will not result in a definitive resolution of the issues raised by Colter.

A principal point so far—and the principal point of this article—is that Colter's case represents only one arrow in an overflowing quiver. Colter may fail for a variety of reasons—because the Board rules that he is not an employee, because the bargaining unit turns out to be inappropriate, because he loses the election—but those outcomes will not determine the outcome for all college athletes everywhere.<sup>145</sup> Similarly, he may win and have that outcome affirmed in the courts, but again there are many varieties of college athletes and not all will fall into the relatively narrow category presented by Colter and Northwestern University. In sum, there are many arrows even in the small pocket of the quiver that covers collective rights of college athletes at private universities.

Finally, an interesting aspect of this particular arrow is that, even if Colter survives this entire gauntlet and prevails, his victory would not necessarily require a complete rethinking of the structure of college athletics.<sup>146</sup> After all, what Colter would win would be an opportunity to

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141. *See supra* note 129.

142. *Id.*

143. National Labor Relations Act, 29 U.S.C. § 158(a)(5) (2012).

144. SECTION OF LABOR & EMP'T LAW, AM. BAR ASS'N, 2 THE DEVELOPING LABOR LAW 2835 (John E. Higgins, Jr., ed., 5th ed. 2006) (“[A]n employer desiring to contest a certification must refuse to bargain and then assert its position by way of defense in an unfair labor practice proceeding and subsequently on judicial review.”). The judicial review could include consideration both of the Board's decision about employee status and its bargaining unit determination.

145. As discussed above, it is possible that the Board could carve out a broad, new non-statutory exemption for college athletes. *See supra* note 108 and accompanying text. Even then, however, it is unlikely the exclusion would cover all college athletes everywhere, say at the smallest liberal arts colleges, or community colleges, or junior colleges. But resolution of Colter's claim in that way would result in a relatively broad impact.

146. On the other hand, some things would need to be rethought immediately. Northwestern, for example, like many universities, has established a Student-Athlete Advisory Committee to

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talk about certain things with the university.<sup>147</sup> A victory would not mean that Colter is entitled to more compensation, better benefits, less practice time, or anything else. Thus, in theory, it would be possible that nothing Colter would request—or be able to get<sup>148</sup>—would violate any current NCAA rules governing college athletics. This is not the case with some of the other arrows in the quiver, which I will discuss later.

#### IV. COLLEGE ATHLETES AS EMPLOYEES UNDER STATE COLLECTIVE BARGAINING LAWS

Northwestern University is a private employer. As a result, Kain Colter's request for unionization fell under the jurisdiction of the NLRA, as would the claims of almost all college athletes at private universities.<sup>149</sup> Even though there are many reasons for thinking that the results under the NLRA would be diverse even within that universe, the situations are at least governed by the same basic set of organizing principles. That is not the case with college athletes at public institutions. Those institutions are governed by state public-sector collective bargaining laws that vary enormously.<sup>150</sup> As a result, the possibility of divergent results—and, hence, the possibility that college athletes will be recog-

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“promote[ ] communication between the athletic administration and student-athletes at Northwestern.” *Student-Athlete Advisory Committee*, NORTHWESTERN UNIV. ATHLETIC DEP'T, <http://www.northwestern.edu/academicservices/cats-lifeskills/saac/index.html> (last visited Sept. 19, 2014). If Northwestern's college athletes are employees governed by the NLRA, this type of employer-established consultation group would probably be a violation of Sections 8(a)(1) and 8(a)(2) of the NLRA. *See* *Electromation, Inc.*, 309 N.L.R.B. 990, 990 (1992), *enforced*, 35 F.3d 1148 (7th Cir. 1994).

147. The “certain” things are mandatory subjects of bargaining under the NLRA. Generally, mandatory subjects are “wages, hours and other terms and conditions of employment.” 29 U.S.C. §§ 158(d), 159(a); *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958). There is a deep and complex body of law articulating what must be bargained about. *See generally* SECTION OF LABOR & EMP'T LAW, AM. BAR ASS'N, 1 THE DEVELOPING LABOR LAW 1246–1399 (John E. Higgins, Jr., ed., 5th ed. 2006). In this context, in broad terms, Northwestern would have to talk about things like at scholarship levels and practice times, but would not have to bargain about things like media contracts and stadium expansion plans.

148. Again, all Colter would win would be the right to discuss mandatory subjects of bargaining with Northwestern University. Northwestern would not have to agree to any of Colter's requests. For an early statement of this basic principle of labor law, see *NLRB v. Ins. Agents' Int'l Union*, 361 U.S. 477, 488 (1960) (“Congress intended that the parties should have wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution of their differences.”).

149. The NLRA may not apply to college athletes at a few private universities, such as those at some religious schools. *See NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 504–07 (1979) (excluding lay teachers at Catholic high schools from the jurisdiction of the NLRA on First Amendment grounds).

150. Fram and Frampton have carefully documented this in the context of college athletics. *See* Fram & Frampton, *supra* note 133, at 1038–68 (“provid[ing] the first detailed survey of state laws regarding the collective bargaining rights of students at public universities”). Kearney and Mareschal have also done so, but with a broader frame. RICHARD C. KEARNEY & PATRICE M.



nized as employees somewhere, sometime—is much greater under state public-sector collective bargaining laws than under the NLRA.

Nicholas Fram and T. Ward Frampton have done a wonderful recent survey of the states on this issue, and I will not repeat it here.<sup>151</sup> However, I do want to call on their research to support the principal thesis of this article—that there are so many arrows in the quivers of college athletes that a persistent effort to attain employee status is likely to succeed.

The universe of athletes who could raise the issue of union representation under public-sector bargaining laws is large. Fifty-four of the sixty-two universities in the top five conferences are public institutions;<sup>152</sup> therefore, most are governed by public-sector bargaining laws.<sup>153</sup> As a result, at the major schools for athletics, there are many more college athletes who might be able to raise unionization issues under state-level public-bargaining laws than there are Kain Colters who can raise the issues under the NLRA.

The rules for determining employee status vary greatly across the state bargaining laws.<sup>154</sup> The rules in some states would be quite favorable to representation claims by college athletes; in others, the rules would prohibit such efforts or be quite unfavorable; and in still other states, it is largely unexplored territory.<sup>155</sup> There is also variance in how the rules within a state might apply to college athletes at different institutions within that state or even to different teams or different athletes within a particular institution.

First, in some states, this issue is exceedingly easy. Some states do not permit bargaining by any public employees,<sup>156</sup> and some permit bargaining only for narrow classes of public employees, which do not

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MARESCHAL, LABOR RELATIONS IN THE PUBLIC SECTOR 64–85 (5th ed. 2014). Their conclusions are largely consistent, but their counts of states vary some.

151. See Fram & Frampton, *supra* note 133, at 1038–68.

152. *11 College Football Conferences and Their 120 Teams*, PROCON.ORG, <http://collegefootball.procon.org/view.resource.php?resourceID=003290> (last updated Sept. 11, 2012).

153. For this count, the top five athletic conferences are the Atlantic Coast Conference, the Big Ten Conference, the Big Twelve Conference, the Pacific Twelve Conference, and the Southeastern Conference. My count was done in February 2014. Given the pace of conference realignments, the counts may change by the time this article is published. But the general allocation between public and private universities will be about the same. See *Northwestern Univ. Decision*, *supra* note 5, at 3 n.2 (noting that 17 of the 120 to 125 universities sponsoring football teams at the highest level within the NCAA are private institutions).

154. See *supra* note 150.

155. *Id.*

156. Fram and Frampton count thirteen of these states. Fram & Frampton, *supra* note 133, at 1068. Kearney and Mareschal count eight of them. KEARNEY & MARESCHAL, *supra* note 150, at 67–68.

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include college athletes.<sup>157</sup> Arrows for this purpose are not lying around in any of these states.

On the other hand, although no state has yet held that college athletes can organize under these laws (in large part, because Colter-like petitions have not been filed), the chances for successful recognition seem quite good in some states. As under the NLRA, the closest analogy is to graduate assistants.

In Florida, for example, college athletes could call on the state constitution to support their right to organize. In 1979, the Florida Public Employee Relations Commission (“PERC”) permitted graduate assistants at two public schools to unionize.<sup>158</sup> In response, in 1981, the legislature amended the public bargaining statute to exclude graduate students from its definition of “public employee.”<sup>159</sup> In *United Faculty of Florida v. Board of Regents*,<sup>160</sup> the Florida First District Court of Appeal held that the exclusion violated a provision of the Florida Constitution, which provides that the rights of employees “to bargain collectively shall not be denied or abridged.”<sup>161</sup>

The *United Faculty* decision is highly favorable to college athletes attempting to unionize at public universities in Florida for several reasons. First, the court rejected the Board’s claim that graduate assistants “were more student than employee” for reasons that would generally support the claims of college athletes.<sup>162</sup> Those reasons generally track those I have previously discussed.<sup>163</sup> The court concluded that “a person

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157. Fram & Frampton identify this category but do not specify how many states fit within it. Fram & Frampton, *supra* note 133, at 1068. Kearney & Mareschal count ten states in this category. KEARNEY & MARESCHAL, *supra* note 150, at 65–66 tbl. 3.2 (listing states that permit bargaining for public employees other than state employees).

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158. *See* Bd. of Regents v. Pub. Emps. Relations Comm’n, 368 So. 2d 641, 642 (Fla. Dist. Ct. App. 1979) (affirming PERC order “finding that graduate assistants are both students and public employees”).

159. *See* Fram & Frampton, *supra* note 133, at 1048 (“In response to the PERC decision, the Florida Legislature hastily amended the definition of ‘public employee’ to exclude students.”). Before 1981, the statute excluded from the definition of “public employee”:

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Those persons enrolled as graduate students in the State University System employed as graduate assistants, graduate teaching assistants, graduate teaching associates, graduate research assistants, or graduate research associates and those persons enrolled as undergraduate students in the State University system who perform part time work for the State University System.

*See* Act effective July 6, 1981, ch. 81-305, 1981 Fla. Laws 1456, amended by Act effective Jan. 7, 2003, ch. 387, § 1006, 2002 Fla. Laws 4130. The 2003 amendment to this statute deleted the above quoted portion excluding graduate students so that it complied with the Florida First District Court of Appeal’s decision, *United Faculty of Fla. v. Bd. of Regents*, 417 So. 2d 1055, clarified by 423 So. 2d 429 (Fla. Dist. Ct. App. 1982).

160. 417 So. 2d at 1055.

161. FLA. CONST. art. I, § 6.

162. *United Faculty of Fla.*, 417 So. 2d at 1058.

163. The reasons the court gave that would support the claims of college athletes were that

who works as an employee remains an employee even if his principal focus is on obtaining an education rather than on earning a full living.”<sup>164</sup>

Second, the court noted and rejected the National Labor Relations Board’s position at that time that graduate students were not employees under the NLRA.<sup>165</sup> The court said that collective rights under the NLRA were not based on a constitutional guarantee.<sup>166</sup> Thus, unlike the National Labor Relations Board, the court said that it could not deny employee status “on the basis of policy.”<sup>167</sup> Third, and perhaps most significantly, the court said that the State could deny bargaining status to graduate students only if it could “demonstrate a compelling interest justifying that abridgment.”<sup>168</sup> Finally, the court rejected the Board’s claims that compelling reasons existed to deny bargaining status to graduate students.<sup>169</sup> The Board argued that denying bargaining status was justified because the graduate students were already receiving a subsidy (education at a state university) and because there was a danger that costs would go up if bargaining were allowed.<sup>170</sup> The court held that neither of those reasons was compelling while emphasizing that granting bargaining rights did not determine any actual practices;<sup>171</sup> it would merely require the Board to bargain.<sup>172</sup>

The same court later made clear that its opinion applied only to graduate students.<sup>173</sup> The statutory provision at issue in the case also

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graduate students work under the direction of a faculty member; that the work could be unrelated to the student’s academic area; that the work did not usually fulfill any degree-related requirements; that the students did not receive academic credit for the work; and that the primary beneficiaries of the work were the faculty and university. *Id.* at 1058–59. College athletes would be on firmer ground than graduate students in that they are generally not supervised by faculty, so the disconnect between work and study is greater. On the other hand, the court noted that the graduate students worked “for regular pay,” which would not be the case for college athletes. *Id.* at 1058.

164. *Id.* at 1059.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.* Proving compelling interests, of course, is exceedingly difficult. *See, e.g.,* *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498 (1989) (indicating that a state may need to be able “to determine the precise scope of the injury it seeks to remedy” to show that a compelling interest exists).

169. *United Faculty of Fla.*, 417 So. 2d at 1059.

170. *Id.*

171. *Id.*

172. *Id.* at 1060. Although *United Faculty* is only a Florida Court of Appeal decision, the Florida Supreme Court later cited the case approvingly in holding that an attempt to preclude bargaining by attorneys employed by the State was unconstitutional. *Chiles v. State Emps. Attorneys Guild*, 734 So. 2d 1030 (Fla. 1999).

173. *United Faculty of Fla. v. Bd. of Regents*, 423 So. 2d 429, 430–31, *clarifying* 417 So. 2d 1055 (Fla. Dist. Ct. App. 1982).

excluded from the definition of public employee “persons enrolled as under-graduate students in the State University System who perform[ed] part-time work for the State University System.”<sup>174</sup> The court made clear that its decision applied only to graduate students and did not affect the part of the statute excluding part-time undergraduate students from coverage.<sup>175</sup>

This twist would weaken a claim by college athletes at public universities in Florida that they should have bargaining rights. Most college athletes, after all, are undergraduate students. But college athletes should be able to sidestep this obstacle. First, the statutory provision excluding part-time undergraduate students may be unconstitutional. The *United Faculty* decision did not consider that issue.<sup>176</sup> The court’s clarification did not rule that the exclusion for part-time undergraduate students was constitutional; it merely limited the court’s order to the parties in the case.<sup>177</sup> But the court’s reasoning would certainly place the exclusion at high risk of unconstitutionality. Part-time undergraduate cafeteria workers would seem to be on stronger ground than the graduate students considered in *United Faculty*. Second, college athletes may not fit within the exclusion. Kain Colter’s testimony was that college football was much more than a part-time enterprise for him.<sup>178</sup> But that may not be the case for all college athletes in Florida. Thus, some college athletes might fall within the exclusion; others may not. Third, not all college athletes are undergraduates. So there is a class of college athletes who would clearly not fall within the exclusion as written and, hence, would have a constitutional right to organize in Florida.

In sum, college athletes at public universities in Florida have strong claims of a constitutional right to organize. Those who are graduate students fall directly under *United Faculty*.<sup>179</sup> A much larger group of college athletes who can demonstrate that they are not part-time would also have a right to organize under the statutory language.<sup>180</sup> Even part-time athletes would have a strong claim based on the rationale of *United*

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174. *Id.* at 431. The Legislature later amended the statute to comply with this order. *See supra* note 159.

175. *Id.* at 430–31 (“Section 447.203(3)(1), Florida Statutes (1981) . . . shall now provide . . . ‘public employee’ means any person employed by a public employer except . . . persons enrolled as undergraduate students . . . who perform part-time work for the State University System.”).

176. *See id.*

177. *Id.*

178. *See* Alejandra Cancino & Teddy Greenstein, “*It Truly is a Job*,” *College Quarterback Tells Labor Board*, CHI. TRIB. (Feb. 18, 2014), [http://articles.chicagotribune.com/2014-02-18/business/ct-northwestern-nlrh-hearing-0219-biz-20140219\\_1\\_northwestern-football-players-labor-board-football-practice](http://articles.chicagotribune.com/2014-02-18/business/ct-northwestern-nlrh-hearing-0219-biz-20140219_1_northwestern-football-players-labor-board-football-practice) (“‘It truly is a job,’ Colter said. ‘There is no way around it.’ Colter spoke of 50- to 60-hour workweeks for players.”).

179. *See United Faculty of Fla.*, 423 So. 2d. at 430–31.

180. *See id.*

*Faculty.*<sup>181</sup>

Constitutional protection, like that in Florida, may not be available in other states. But in some states, college athletes will have strong claims that the state's public-sector bargaining law covers them. In California, for example, the public-sector collective bargaining law has specific language to guide the Public Employment Relations Board ("PERB") in deciding whether student workers are employees who can unionize under the law:

[S]tudent employees whose employment is contingent on their status as students are employees only if the services they provide are unrelated to their educational objectives, or that those educational objectives are subordinate to the services they perform and that coverage under this [law] would further the purposes of this [law].<sup>182</sup>

PERB has interpreted this to require an intricate three-part test.<sup>183</sup> The key to the analysis for college athletes will be in the third part of the test: Are the educational objectives furthered by their participation in college athletics "subordinate" to the service provided.<sup>184</sup> In two leading decisions, PERB applied this balancing test to teaching assistants and held that educational objectives were subordinate to the service provided.<sup>185</sup> PERB said that being a teaching assistant was not vital to achieving educational objectives.<sup>186</sup> Teaching did not meet any academic requirement, it often involved little interaction with faculty members, and students who were not teaching assistants were able to achieve their educational outcomes anyway.<sup>187</sup> On the other hand, PERB noted that the teaching assistants were vital to the university's ability to provide instruction.<sup>188</sup> The university would have great difficulty in providing instruction without this large pool of academically-qualified people willing to work at "relatively modest" wages.<sup>189</sup> And the universities would have to provide that instruction (and those services) even if students did not perform them.<sup>190</sup>

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181. *See id.*

182. Higher Education Employer-Employee Relations Act, CAL. GOV'T. CODE § 3562(e) (West 2010) [hereinafter HEERA].

183. *See* Regents of the Univ. of Cal., 22 P.E.R.C. ¶ 29084, 6 (1998); Regents of the Univ. of Cal., 23 P.E.R.C. ¶ 30025, 1998 WL 35395605, at \*3 (1998). For a discussion of the PERB ruling, see Fram & Frampton, *supra* note 133, at 1041-45.

184. *Regents of the Univ. of Cal.*, 22 P.E.R.C. at 6.

185. *Id.* at 7; *Regents of the Univ. of Cal.*, 1998 WL 35395605, at \*11.

186. *Regents of the Univ. of Cal.*, 22 P.E.R.C. at 24-25 ("Employment as an associate meets several education objectives . . ." However, the small number of associate positions indicates that being a teaching associate is not vital to achieving one's educational objectives.).

187. *See id.*

188. *Id.* at 22.

189. *Id.*

190. *Id.*

College athletes would be on stronger ground than teaching assistants on both parts of this balancing. Most of the grounds cited by PERB for a weak connection between services and educational objectives for teaching assistants are also true for college athletes: the services themselves do not meet academic requirements; there is little interaction between faculty and college athletes on athletic matters; and others are able to achieve the same educational objectives without participating in college athletics. But the connection was stronger for teaching assistants who at least were working within their academic fields.

The other part of the balance weighs how important the services are to the university.<sup>191</sup> PERB found that the services of teaching assistants were “vital” to the university even while recognizing that non-students could be hired to teach.<sup>192</sup> Without the services of college athletes, on the other hand, the university simply could not participate in intercollegiate athletics. Unless a university would want to argue that college athletics is not important to the university’s objectives,<sup>193</sup> its need for the services of college athletes is very high. Thus, the connection between services and educational objectives is weaker for college athletes than for teaching assistants, and the university’s need for college athlete services is greater than its need for teaching assistants. Overall, if educational objectives are subordinate to service for teaching assistants, then that should be the case *a fortiori* for college athletes.<sup>194</sup>

These examples from Florida and California illustrate that college athletes at public universities will have strong claims for organizational rights under some public-sector bargaining laws. But they also illustrate that the analysis in each state is likely to be highly particular to that state. The Florida Constitution is the only one with its particular language protecting bargaining rights.<sup>195</sup> The California decisions—and the

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191. *Id.*

192. *Id.*

193. Universities would be loath to do this for many reasons. For example, it would conflict with the basic purpose of the NCAA. NCAA DIVISION I MANUAL, *supra* note 62, art. 1.3.1. (“The competitive athletics programs of member institutions are designed to be a vital part of the educational system.”). Maybe even more importantly, it may jeopardize their tax-exempt status. See Richard Schmalbeck, Amateur Athletics: Two Strikes Against the Sweetheart Deal Between Big-Time College Sports and the Tax System 3–26 (Oct. 14, 2013) (unpublished manuscript), available at [http://www1.law.nyu.edu/ncpl/resources/documents/REVISED\\_Schmalbeck-Final\\_Conferencepaper.pdf](http://www1.law.nyu.edu/ncpl/resources/documents/REVISED_Schmalbeck-Final_Conferencepaper.pdf) (discussing whether revenue produced by college sports is incidental to, or unrelated to, the tax exempt purpose of universities, and the tax implications therein).

194. See Fram & Frampton, *supra* note 133, at 1045 (“If academic student employees (tutors, graduate student instructors, etc.) prevail in [this] balancing, it is difficult to see how college athletes would not.”).

195. A Westlaw search of the state constitution database (ST-CONST) yielded only Florida as a match for its constitutional language protecting bargaining rights. See FLA. CONST. art. 1, § 6 (“rights of employees . . . to bargain collectively shall not be denied or abridged”).

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complex analyses they require—are based on statutory language that is unique to California.<sup>196</sup> As mentioned, some states deny bargaining rights to all public employees, while in many others there is little guidance on the issue.<sup>197</sup> Thus, consistent with the theme of this article, the decision in any particular state on whether college athletes at public institutions can bargain with the university is likely to have limited influence elsewhere. There are lots of arrows, and they come in many different lengths and colors.

If college athletes were determined to be covered by a particular state's public-sector bargaining laws, then the subsequent analysis would be very similar to the issues that would arise if Kain Colter is successful. The state bargaining board would have to determine the appropriate bargaining unit,<sup>198</sup> the players would have to win an election,<sup>199</sup> and even then bargaining would be permitted only on a limited set of subjects.<sup>200</sup> As in Colter's situation, the range of possible outcomes on these issues is broad; obviously, the range is even broader here than for private universities since the underlying statutes are more diverse.

But determining that college athletes are subject to these laws and permitting them to bargain about certain issues does not necessarily upend the current structure of college athletics. As under the NLRA, and as emphasized by the Florida court in *United Faculty*,<sup>201</sup> the right granted under these state laws would be the opportunity to talk about a limited range of topics. Some of the most sensitive topics would almost certainly fall outside the range of what the university would be required even to talk about, such as the financial arrangements with its conference and media outlets. And even within the mandatory topics, nothing would necessarily require the university to accede to any demands that

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196. A Westlaw search of the state statutes database (STAT-ALL) yield only California as a match for its statutory language on student workers. *See* CAL. GOV'T CODE § 3562(e) (West 2013) ("students are employees only if the services they provide are unrelated to their educational objectives").

197. Fram & Frampton put thirty-four states in this category because there are no precedents in those states involving graduate or undergraduate students. Fram & Frampton, *supra* note 133, at 1067. R

198. KEARNEY & MARESCHAL, *supra* note 150, at 76. R

199. Or be recognized voluntarily, but that seems unlikely in this context.

200. KEARNEY & MARESCHAL, *supra* note 150, at 77 ("[M]ost comprehensive policies follow the NLRA in mandating a broad scope over wages, hours, and other terms and conditions of employment."). Permitted bargaining subjects may be even more limited for public-sector employees under state bargaining laws than for private-sector employees under the NLRA. SETH D. HARRIS ET AL., *MODERN LABOR LAW IN THE PRIVATE AND PUBLIC SECTORS: CASES AND MATERIALS* 703–750 (2013). R

201. *United Faculty of Fla. v. Bd. of Regents*, 417 So. 2d 1055, 1060, *clarified by* 423 So. 2d 429 (Fla. Dist. Ct. App. 1982).

might place its membership in the NCAA in jeopardy.<sup>202</sup>

## V. COLLEGE ATHLETES AS EMPLOYEES UNDER LAWS PROTECTING INDIVIDUAL RIGHTS

College athletes might also seek to be classified as employees under laws protecting individual rights. This section will outline some of the many types of claims that might be made and discuss the basic analytical structure for thinking about the employee-status issue in this context. But it is important to note that, for several reasons, these types of claims—alleging violations of laws protecting individual employee rights—pose the greatest challenge to the current structure of college athletics. First, and maybe most importantly, under many of these laws, if a college athlete is found to be a covered employee, compliance with the law may be in direct conflict with one of the basic pillars of the current NCAA structure. For example, coverage under a state wage payment law may require that the college athlete be paid in cash rather than through a scholarship.<sup>203</sup>

Second, a very large number of state and federal statutes protect a diverse array of individual employment rights, and they vary greatly in their coverage rules. With a persistent attempt, the odds are high that some college athlete will succeed in being classified as an employee under some statute somewhere. There are many arrows in this particular part of the quiver, exponentially more than in the parts relating to collective rights.

Third, in contrast to collective rights, under laws protecting individual rights, college athletes do not have to rely on claims about some set of college athletes generally. For example, they would not have to demonstrate, as Kain Colter must, that college football players at Northwestern generally spend forty hours per week in season on football and, thus, they should all be classified as employees. Instead, under these laws, college athletes can pick out the best plaintiff (say a one-and-done

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202. The public-sector process for resolving disputes may be more threatening to universities than the one under the NLRA. Under the NLRA, as already noted, the law is clear that an employer need never accede to a bargaining demand. *See* National Labor Relations Act, 29 U.S.C. § 158(d) (2012). In the public sector, on the other hand, some states have binding interest arbitration procedures to resolve disagreements that could impose requirements on universities without their acquiescence. *See* HARRIS ET AL., *supra* note 200, at 853–902.

203. *See, e.g.*, KY. REV. STAT. ANN. § 337.010 (West 2011) (“[W]ages shall be payable in legal tender of the United States or checks on banks convertible into cash on demand . . . .”); VA. CODE ANN. § 40.1-28.9(C) (2013) (defining wages to mean “legal tender of the United States or checks or drafts on banks negotiable into cash on demand or upon acceptance at full value”). *See generally* MARK ROTHSTEIN ET AL., EMPLOYMENT LAW § 4.13 (3d ed. 2005). While compliance with wage payment laws would conflict directly with current NCAA rules, that would not be true for all individual-rights statutes. *See infra* note 231.



college basketball player<sup>204</sup> or a severely injured player<sup>205</sup>) and attempt to prove that that one player—the one with the best set of facts—is an employee. This both increases the possibility of success on each individual claim and makes it possible to mount many more challenges. If Kain Colter's claim fails, the claim of the entire Northwestern football team fails. If Kain Colter failed in an attempt to get workers' compensation coverage for his injury,<sup>206</sup> that individual rights claim would not necessarily preclude a claim from a basketball player or even another football player.

Fourth, in cases involving individual rights, the law will mean more and general policy considerations will mean less.<sup>207</sup> As noted above, the National Labor Relations Board is structured to engage in developing national labor policy and to be politically responsive. As such, it has a history of creating non-statutory exceptions to employee coverage under the NLRA.<sup>208</sup> In contrast, courts deciding coverage under individual employment rights statutes do not enjoy such flexibility. They are neither policy-making nor politically-responsive entities and, as a result, ought to be quite hesitant to carve out non-statutory exceptions. For example, the Fair Labor Standards Act provides a generous definition of "employee"<sup>209</sup> and includes a large number of exceptions.<sup>210</sup> It would be

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204. A "one-and-done" college basketball player is one who plays in college for only one year before entering the National Basketball Association draft. These players could present strong cases for employee status because the link between them and academics is weaker and, correspondingly, their ties to commercialism are stronger. See John Feinstein, *One-and-Done College Basketball Players Aren't 'Student Athletes'*, JOHN FEINSTEIN SHOW (Oct. 16, 2013, 3:07 PM), <http://feinstein.radio.cbssports.com/2013/10/16/john-feinstein-blog-one-and-done-college-basketball-players-arent-student-athletes> (noting that a major shoe company announced that it would be willing to enter into a \$180 million endorsement deal with a recent one-and-done basketball player as soon as he completed his first year). See also Kevin Clark, *NFL Draft: College Football's NFL Problem*, WALL ST. J. (Mar. 2, 2014, 10:24 PM), <http://online.wsj.com/news/articles/SB10001424052702304585004579415241023161788> (noting that college football players are increasingly leaving college early to enter the NFL draft).

205. See generally *Waldrep v. Tex. Emp'rs Ins. Ass'n*, 21 S.W.3d 692, 695 (Tex. Ct. App. 2000).

206. Chris Johnson, *What Will Former Northwestern Quarterback Kain Colter's Legacy Be?*, INSIDENU (Mar. 28, 2014, 10:33 AM), <http://www.insidenu.com/2014/3/28/5908779/what-will-former-northwestern-quarterback-kain-colters-legacy-be> (Colter claims that he was not reimbursed for expenses for a necessary medical examination).

207. I argue later that, even when they are relevant, the policy arguments against coverage by employment laws are not as powerful as some claim. See *infra* Part VII.

208. See *supra* notes 111–13 and accompanying text. In general, public-sector bargaining agencies are more similar to the National Labor Relations Board on this dimension than they are to courts.

209. Fair Labor Standards Act, 29 U.S.C. § 203(e) (2006).

210. See *id.* § 213 (listing eleven employee categories exempted from both the minimum wage and maximum hour requirements; twenty-two categories exempted from the maximum hour requirements only; and five categories exempted from the child labor requirements).

extremely odd for a court to carve out a non-statutory exception.<sup>211</sup>

In this same vein, it would be more difficult for the powerful forces opposing employee status to use their political influence to resist and counter adverse judicial decisions. For the NLRA and state public-sector bargaining laws, it might be possible for those forces to influence the tribunals themselves or to get bills enacted that would reverse adverse decisions.<sup>212</sup> But that would be more difficult for laws protecting individual rights both because some exemptions would be quite difficult politically (for example, an attempt to exclude college athletes from laws prohibiting sexual or racial harassment) and, again, because there are just so many laws and decisionmakers in this universe. With a persistent effort by college athletes, it could essentially become a game of whack-a-mole.

A. *An Introduction to the Universe of Individual Employment Laws that Might Apply to College Athletes*

The universe of laws protecting individual employee rights that might be used by college athletes to further their interests (and that may disrupt the current system) is very large. Let's begin by considering the effect these laws might have on college athletes and universities, *assuming the athletes are employees and the laws apply*. After that, I will discuss whether the laws apply to college athletes. I will not attempt to provide a complete listing of all the laws that might fit into this category.<sup>213</sup> But this partial listing will provide a sense of the many possibilities.

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211. A court might do so for constitutional reasons. *Cf., e.g.,* NLRB v. Catholic Bishop of Chi., 440 U.S. 490, 499 (1979) (excluding lay teachers at Catholic high schools from the jurisdiction of the NLRA on First Amendment grounds). But no such reasons exist in this context.

212. The Colter/Northwestern controversy has sparked some interest in legislatures to change the normal employment rules for college athletes. *See, e.g.,* H.B. 483, 130th Gen. Assem., Reg. Sess. (Ohio 2013–2014) (“[A] student attending a state university . . . is not an employee of the state university based upon the student’s participation in an athletic program offered by the state university.”). The professional sports leagues have had success in some state legislatures in limiting their exposure to certain types of employment claims. *See* Tom Pelissero, *NFLPA May Block Playoff Expansion Due to Saints’ Workers Comp Issues*, USA TODAY (May 19, 2014, 8:21 PM), <http://www.usatoday.com/story/sports/nfl/2014/05/19/nflpa-playoff-expansion-saints-workers-compensation/9288645> (reporting that Louisiana, California, and Arizona had recently enacted statutes to limit workers’ compensation benefits for professional athletes). On the other hand, the involvement of state and local legislatures is a two-edged sword. *See* Jon Solomon, *Boston Tries to be First City with ‘College Athlete Bill of Rights’*, CBSSPORTS.COM (May 19, 2014, 6:30 PM), <http://www.cbssports.com/collegefootball/writer/jon-solomon/24567279/boston-tries-to-be-first-city-with-college-athlete-bill-of-rights> (discussing local ordinance requiring certain benefits to be provided to college athletes).

213. For example, I do not consider unemployment compensation laws, drug-testing laws, laws regulating employee benefits, occupational safety and health laws, or laws requiring employee leaves. There are many other laws that are not on even this expanded list.

A college athlete might claim minimum wages and overtime premiums under federal or state law. In his case, Kain Colter estimated that he received benefits from Northwestern of about \$75,000,<sup>214</sup> and Northwestern presented testimony about an array of benefits that make that estimate seem conservative.<sup>215</sup> If averaged out over a year, the total amount would easily exceed the minimum wage.<sup>216</sup> Even at universities much less expensive than Northwestern, the total amount of benefits provided would probably exceed the minimum wage.<sup>217</sup> But that is not how the wage-and-hour laws work. First, the wage-and-hour laws require week-by-week accounting.<sup>218</sup> As a result, when Northwestern has preseason practices before the academic year begins, the athletes are working long hours and getting few benefits. That would be a violation of the wage-and-hour laws. Second, if Northwestern players worked more than forty hours in any week, which the rules specifically permit during preseason practices,<sup>219</sup> then Colter would be entitled to a bonus of one-half his regular rate for each overtime hour.<sup>220</sup> Northwestern does not make such a calculation or payment. Third, the wage-and-hour laws generally disfavor in-kind and other forms of non-cash payments.<sup>221</sup> Most of Northwestern's payments are in those forms. If non-cash payments are excluded from the calculation, Northwestern may violate both the minimum wage and overtime provisions of these laws. Finally, it is quite unlikely that Northwestern complies with the recordkeeping requirements of the wage-and-hour laws.<sup>222</sup>

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214. Cancino & Greenstein, *supra* note 178.

215. Jeremy Fowler, *The New Pay-for-Play: CFB Union Could Get Slammed with Tax Bill*, CBSSPORTS.COM (Feb. 20, 2014, 3:17 PM), <http://www.cbssports.com/collegefootball/writer/jeremy-fowler/24449896/the-new-pay-for-play-cfb-union-could-get-slammed-with-tax-bill> (estimating the value of the strength and conditioning program alone at \$9,300 per year).

216. The federal minimum wage is \$7.25 per hour. Fair Labor Standards Act, 29 U.S.C. § 206(a)(1)(c) (2006). If athletes worked twenty hours per week year-round (which exceeds the NCAA maximums), the minimum wage total would be \$7,540. I will cite to the Federal Fair Labor Standards Act in this paragraph, but these same principles also apply under most state wage-and-hour laws.

217. Obviously, this is because of the interaction of relatively low minimum wage rates and the relatively high cost of attendance at colleges and universities. Because of this interaction, most universities, like Northwestern, should not violate the minimum wage laws in gross terms. But some states and localities have much higher minimum wages and some universities have low costs of attendance, so it is possible that a few universities could brush up against a violation.

218. See 29 C.F.R. § 778.104 (2013) ("The Act takes a single workweek as its standard and does not permit averaging of hours over 2 or more weeks."); *Marshall v. Sam Dell's Dodge Corp.*, 451 F. Supp. 294, 301-03 (N.D.N.Y. 1978) ("Having established the week as the applicable pay period, defendants cannot now argue that any other time period measures compl[y] with the act.").

219. NCAA DIVISION I MANUAL, *supra* note 62, art. 17.1.6.3.5 (daily and weekly hour limitations do not apply to preseason practices).

220. See Fair Labor Standards Act, 29 U.S.C. § 207(a).

221. 29 C.F.R. § 531.27 (2013) ("Payment in cash or its equivalent required.").

222. 29 C.F.R. § 516 (2013).

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Second, a college athlete might challenge the form in which she is paid under a state wage payment statute. Most states have wage payment statutes that require wages to be paid in cash (rather than script or employer credits, for example), on a regular basis, with only specified deductions, etc.<sup>223</sup> If college athletes were classified as employees under these statutes, university practices would conflict with a number of these requirements.

Third, a college athlete might seek damages from the university for discrimination, such as racial or sexual harassment.<sup>224</sup> For racial or sexual harassment, the athlete could also seek recourse under Title VI<sup>225</sup> or Title IX<sup>226</sup> and, hence, avoid the issue of whether she is an employee. But the liability and damage rules are more favorable under state and federal laws prohibiting this form of discrimination against employees, so she may prefer those options.<sup>227</sup> For other types of discrimination (such as discrimination on the basis of sexual orientation), state or local employment law may provide the only protection available.<sup>228</sup>

Fourth, a college athlete might seek workers' compensation benefits for injuries suffered in a game or practice. If he is considered an employee, the athlete would likely qualify for benefits under these state laws, even without any showing of negligence. This issue could also arise with the parties switching sides on the issue of whether the college athlete is an employee. If a college athlete filed a tort action against a university claiming that his injuries were the result of university negligence (say in protecting him from concussions<sup>229</sup>), then the university

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223. See *supra* note 203 and accompanying text.

224. See Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e–2(b) (2012) (prohibiting employment discrimination on the basis of race or sex).

225. See Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (2012) (prohibiting race or national origin discrimination under any program or activity receiving federal financial assistance).

226. See Title IX of the Educational Amendment Act of 1972, 20 U.S.C. § 1681 (2012) (prohibiting sex discrimination under any education program or activity receiving federal financial assistance).

227. Compare, e.g., *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 650–51 (1999) (to prove sexual harassment under Title IX, the plaintiff must prove that the defendant was “deliberately indifferent” to harassment that is “severe, pervasive and objectively offensive”), with *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775, 786 (1998) (to prove sexual harassment under Title VII, the plaintiff must prove that the harassment was “severe or pervasive,” and then defendant is liable unless it can demonstrate that it acted reasonably in preventing and correcting the harassment) (emphasis added) (internal quotation marks omitted).

228. See, e.g., *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757 (6th Cir. 2006) (discrimination based on sexual orientation not prohibited by Title VII); see *Employment Non-Discrimination Laws*, MOVEMENT ENHANCING PROJECT, [http://www.lgbtmap.org/equality-maps/employment\\_non\\_discrimination\\_laws](http://www.lgbtmap.org/equality-maps/employment_non_discrimination_laws) (last updated Oct. 21, 2014).

229. See, e.g., Kelly A. Heard, Note, *The Impact of Preemption in the NFL Concussion*

might *defend* by claiming that the athlete *was* an employee. If successful, this would mean the university would be liable to the athlete for workers' compensation, but it could avoid the potentially higher tort damages.<sup>230</sup> This is an interesting twist on the many-arrows theme of this article. While most universities will undoubtedly favor excluding college athletes from workers' compensation laws, it may be in the economic interest of some universities in some circumstances to defect. It is possible, then, that a university could shoot one of these arrows.<sup>231</sup>

Again, this is not a comprehensive listing of the possibilities. But each of these presents an opportunity for a college athlete to raise the issue of whether she should be treated as an employee. In total, there are hundreds of independent opportunities to raise the issue of employee status—under separate state laws in each area (and almost all states have laws in all these areas), as well as under federal laws for wage-and-hour or discrimination claims.<sup>232</sup>

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*Litigation*, 68 U. MIAMI L. REV. 221, 245–47 (2013) (discussing proposed settlement agreement between NFL and class of players with concussion injuries).

230. The basic trade-off of workers' compensation systems is that employees get more certain coverage in exchange for lower levels of compensation for injuries. The coverage is more certain because employees do not have to prove negligence and employers cannot use tort defenses such as assumption of the risk. In return, the level of compensation is intentionally set at a level that leaves the worker worse off than he would have been had he never been injured. See Richard A. Epstein, *The Historical Origins and Economic Structure of Workers' Compensation Law*, 16 GA. L. REV. 775, 800 (1982). Exclusivity is one doctrine that enforces this trade-off. If a worker is covered by workers' compensation, that is her exclusive remedy; she cannot sue in tort. See WILLBORN, *supra* note 22, at 882–907. Thus, one classic type of workers' compensation case is an attempt by employers to fall *within* the workers' compensation system to preclude a tort suit, which could entail substantially higher damages. See *Millison v. E.I. du Point de Nemours & Co.*, 501 A.2d 505, 517 (N.J. 1985) (employer seeking to be covered by workers' compensation to avoid higher tort damages from asbestos exposure). In the context of college athletics, it might be in a university's interest to try to fit within workers' compensation against a claim that it was negligent in treating a severe sports injury or in protecting against concussions.

231. It may be possible for college athletes to be covered by state workers' compensation laws without violating NCAA rules. Those rules permit institutions to provide "medical and related expenses and services to a student athlete." NCAA DIVISION I MANUAL, *supra* note 62, art. 16.4. In essence, workers' compensation provides a form of health insurance without any deductibles or copayments. Although not every aspect of workers' compensation aligns perfectly with the NCAA rules, article 16.4 indicates that this type of coverage is not in serious conflict with the goals and principles of the NCAA. It may be possible for workers' compensation and the NCAA regulatory system to be accommodated.

232. Classification as "employees" may not always benefit college athletes, even those in high-profile sports. Some have noted, for example, that if college athletes were classified as employees by the Internal Revenue Service, they would have to begin paying taxes on the benefits they receive. See Fowler, *supra* note 215. There are several points about this. First, in line with the main point of this article, classification as an employee under a particular employment law does not automatically translate into classification as an employee under the Internal Revenue Code. The Internal Revenue Service has its own twenty-factor test for making that determination. See Rev. Rul. 87-41, 1987-1 C.B. 296. Second, even if the tax consequences meant that college athletes would prefer not to be classified as employees, that would not matter legally. The "employee" determination is made objectively. See, e.g., *Sec'y of Labor v. Lauritzen*, 835 F.2d

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B. *College Athletes as Employees Under Employment Laws Protecting Individual Rights*

A foundational question for all these potential arrows is whether the college athlete is an employee. Consistent with the main theme of this paper, since there are many possible laws at issue, there are also many potential answers to the foundational question. No uniform definition of employee exists across all these statutes. States make different policy choices about the applicability of their statutes; some statutes call for broader or narrower coverage. Some of the statutes in these areas have only the barest definition of who is an employee; some have long, highly specific definitions. Again, all the possibilities will not be surveyed here. But this section will give a flavor of the nature of the argument.

The starting point for determining who is an employee is the common-law test, sometimes known as the right-to-control test.<sup>233</sup> Where a statute is especially vague on the issue, the common-law test may be controlling.<sup>234</sup> Even where statutes provide more guidance, the common-law test is often influential.<sup>235</sup>

The American Law Institute (“ALI”) has recently considered all the case law and restated the common-law test.<sup>236</sup> The parts that are relevant to the issue of whether college athletes are employees read as follows:

- § 1.01 General Conditions for Existence of Employment Relationship  
 (1) Subject to § 1.02 . . . ,<sup>237</sup> an individual renders services as an employee of an employer if  
     (a) the individual acts, at least in part to serve the interests of the employer, [and]  
     (b) the employer consents to receive the individual’s services . . . .<sup>238</sup>

1529, 1532, 1538 (7th Cir. 1987) (holding that migrant workers were employees even though some of them would have preferred not to be); *Tony & Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290, 293, 306 (1985) (holding that associates of a religious foundation are employees even though the associates “vigorously protested the payment of wages, [and] assert[ed] that they considered themselves volunteers”). Third, playing this tune backwards, the current non-coverage of college athletes under the tax laws constitutes a substantial tax subsidy to college athletics.

233. See RESTATEMENT OF EMP’T LAW, *supra* note 73, ch. 1, intro. note cmt. a (“In addition [to delineating the rules for the common law], these rules help inform the interpretation of statutes that limit their coverage to ‘employees’ or the ‘employment relationship’ without defining those terms.”).

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234. See *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992) (“ERISA’s nominal definition of ‘employee’ . . . is completely circular and explains nothing. . . . Thus, we adopt a common-law test for determining who qualifies as an ‘employee’ . . . .”).

235. *Id.* at 324–25.

236. See RESTATEMENT OF EMP’T LAW, *supra* note 73, §§ 1.01–03.

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237. The Restatement also lists section 1.03 as an exception to the basic rule. See *id.* § 1.01(1) (“[s]ubject to . . . § 1.03”). That section exempts controlling owners of an enterprise from the definition of employee. See *id.* § 1.03. It is not relevant to college athletes.

238. *Id.* § 1.01(1)(a)–(b). Section 1.01(1)(c) also requires that the employer’s relationship

## § 1.02 Volunteers

An individual is a volunteer and not an employee if the individual renders uncoerced services without being offered a material inducement.<sup>239</sup>

College athletes are clearly employees under the basic rule of section 1.01. Although the black letter rule is not very specific on this point, the comments make clear that section 1.01(1)(a) is met when an employer exercises control over the physical details of how an individual is to perform the services.<sup>240</sup> College athletes are subject to highly detailed control over how they perform their services.<sup>241</sup> There is no doubt that section 1.01(1)(b) is also met; the university clearly consents to receive the services of college athletes. The Restatement discusses nineteen examples that might present close calls on these two elements of the basic definition.<sup>242</sup> None of those examples remotely suggests that college athletes would not meet the basic test.

College athletes would still not be employees, however, if instead they were volunteers under section 1.02. A volunteer is an individual who renders uncoerced services without being offered a material inducement.<sup>243</sup> Although the Restatement does not discuss college athletes in particular, its discussion clearly indicates that they fit within the category of individuals who receive a material inducement. A material inducement is defined broadly to include any type of material gain, including insurance and in-kind payments.<sup>244</sup> Scholarship college ath-

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prevents the employee from exercising entrepreneurial control over the manner and means by which the services are performed. *Id.* § 1.01(1)(c). The employee would exercise such entrepreneurial control if she could do things like hire and assign assistants and purchase and deploy equipment. College athletes always meet this requirement for being classified as an employee because they cannot exercise entrepreneurial control over the enterprise.

239. *Id.* § 1.02.

240. *Id.* § 1.01 cmt. d.

241. For a detailed description of the nature of this control, see Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71, 155 (2006) (concluding, somewhat more emphatically than I do, that college athletes are employees under the NLRA).

242. See RESTATEMENT OF EMP'T LAW, *supra* note 73, § 1.01 illus. 1–19.

243. *Id.* § 1.02.

244. *Id.* § 1.02 cmt. e. In the leading Supreme Court case on the issue, the Court considered whether “associates” in a rehabilitation program run by a nonprofit religious organization were “employees” under the Federal Fair Labor Standards Act. Most of the associates had been addicts, derelicts, or criminals before their entry into the program. The Court held that “in-kind” benefits, such as food, clothing, and shelter, were sufficient compensation (or “inducement” in the Restatement’s formulation) to make them “employees” under the Act, even though the associates themselves protested coverage. *Tony & Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290, 304 (1985). For a similar case finding employee status under the NLRA, see *Seattle Opera Ass’n v. NLRB*, 292 F.3d 757, 763–65 (D.C. Cir. 2001) (ten tickets to dress rehearsal performances and modest one-time compensation to defray parking and transportation expenses sufficient compensation to support employee status).

letes would easily meet this requirement. For example, in his case, Colter testified that he received more than \$75,000 worth of inducements, and Northwestern claimed that the inducements were far greater than that.

In Comment g to section 1.02, the ALI addresses whether interns and student assistants should be treated as volunteers or employees.<sup>245</sup> The comment says that interns and student assistants should not be treated as employees if they “work without compensation or a clear promise of future employment” or if their work is uncompensated and designed to satisfy requirements for graduation.<sup>246</sup> But the comment says that students are employees when they work for “more than educational benefits” so that their work “benefits the institution.”<sup>247</sup> To illustrate this, the comment provides the following example:

A is a graduate student in biochemistry at university P. In order to complete the degree requirements, A must work in a laboratory under P’s auspices, either for pay or as a volunteer. A works in the laboratory of a professor, for which A is paid a yearly stipend and given full tuition remission. The professor has secured grants to support the research that A is assisting. A is an employee of P. P is providing A with significant benefits both in order to further A’s education and also to obtain A’s services on P’s funded research.<sup>248</sup>

Applying this lesson to college athletes means that they are employees, not volunteers. Like A in the example, college athletes receive a yearly stipend and tuition remission.<sup>249</sup> Also, like A, college athletes are doing work that “benefits the institution” beyond any educational benefits. Indeed, college athletes are more clearly in the employee category than A. For A, the work had to be completed to fulfill academic requirements. That generally is not true for the services provided by college athletes.<sup>250</sup>

The Restatement makes clear that it is only attempting to restate the

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245. RESTATEMENT OF EMP’T LAW, *supra* note 73, § 1.02 cmt. g.

246. *Id.*

247. *Id.*

248. *Id.* § 1.02 cmt. g, illus. 10.

249. Cancino & Greenstein, *supra* note 178.

250. One paragraph of the Reporters’ Notes is inconsistent with this. This paragraph says that the courts have not found college scholarship athletes to be employees where their aid is limited to the costs of their education. RESTATEMENT OF EMP’T LAW, *supra* note 73, § 1.02 reporters’ notes cmt. g. This statement is both confusing and wrong. The statement is confusing because it is inconsistent with the Restatement’s own example discussed above, which indicates that college athletes are employees. *See supra* notes 248–49 and accompanying text. The statement is also wrong because “the” courts have not decided this. As discussed below, the courts are split. *See infra* notes 252–55 and accompanying text. Given these problems with the Restatement, it is perhaps fortunate that Reporters’ Notes are the least authoritative of the three types of statements in Restatements, following black-letter law and comments.

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principles the common law uses to determine employee status; the legislature can change the underlying principles and, if it does, those principles would apply.<sup>251</sup> This article cannot begin to survey all the tweaks legislatures have made to these principles in every state across the broad range of statutes protecting individual employment rights, and the outcomes will not be the same everywhere under every statute. But, in general, the first cut leans in favor of employee status for college athletes. Under the common-law rule, as interpreted by the American Law Institute, college athletes are employees.

To illustrate, consider coverage of college athletes under workers' compensation laws.<sup>252</sup> Sometimes, coverage of college athletes under a state's workers' compensation law will be clear and not dependent on the common-law definition of employee. For instance, some state workers' compensation statutes contain language that expressly excludes college athletes from the statutory definition of employee.<sup>253</sup> Conversely, Nevada once expressly included scholarship athletes as covered workers under its statute.<sup>254</sup>

Most states, however, do not fall into either of those categories. *Waldrep v. Texas Employers Insurance Association* provides a good illustration of the uncertainties and complexities that arise when courts have to grapple with this issue in the absence of explicit guidance.<sup>255</sup> Alvis Kent Waldrep, Jr., was severely injured in 1974 while playing football for Texas Christian University ("TCU").<sup>256</sup> In 1993, he filed a claim for workers' compensation.<sup>257</sup> The Texas Workers' Compensation Commission heard the case and awarded benefits to Waldrep.<sup>258</sup> That decision was appealed to a court and the issue of whether Waldrep was

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251. RESTATEMENT OF EMP'T LAW, *supra* note 73, ch. 1, intro. note cmt. a.

252. For a more comprehensive review, see Frank P. Tiscione, *College Athletics and Workers' Compensation: Why the Courts Get It Wrong in Denying Student-Athletes Workers' Compensation Benefits When They Get Injured*, 14 SPORTS LAW. J. 137, 151–152 (2007).

253. For a clear exclusion, see CAL. LAB. CODE § 3352(k) (West 2013) ("'Employee' excludes the following: . . . [a]ny student participating as an athlete in amateur sporting events sponsored by any . . . university or school, who receives no remuneration for the participation other than the use of athletic equipment, uniforms, transportation, travel, meals, lodgings, scholarships, grants-in-aid, or other expenses incidental thereto."). For an exclusion that probably does the trick, see HAW. REV. STAT. § 386-1(3) (2012) ("'[E]mployment' does not include . . . [s]ervice for a school, college [or] university . . . if performed by a student who is enrolled and regularly attending classes and in return for board, lodging or tuition furnished, in whole or in part.").

254. NEV. REV. STAT. ANN. § 616B.182 (West 1997) (repealed 1999).

255. 21 S.W.3d 692, 697–98 (Tex. Ct. App. 2000).

256. *Id.* at 696.

257. An interesting aspect of the case is that it was not time-barred. The statute of limitations in effect at the time did not begin to run until the employer filed an injury report with the workers' compensation board. Since TCU never considered Waldrep an employee, it never filed an injury report, so the statute of limitations never began to run. *Id.* at 696 n.7.

258. *Id.* at 696.

an employee of TCU was presented to a jury.<sup>259</sup> The jury found that Waldrep had failed to prove that he was an employee.<sup>260</sup> The Texas Court of Appeals upheld the jury's determination, holding that Waldrep had failed to demonstrate that he was an employee as a matter of law.<sup>261</sup> In its conclusion, the court said, "we are aware college athletics has changed dramatically over the years since Waldrep's injury. Our decision today is based on facts and circumstances as they existed almost twenty-six years ago. We express no opinion as to whether our decision would be the same in an analogous situation arising today."<sup>262</sup>

*Waldrep* is a good illustration of the limited influence that any particular decision of employee status has in a case involving individual employee rights. Although the case has been cited for the proposition that courts have found college athletes not to be employees,<sup>263</sup> that is inaccurate because the actual holding is much narrower. The *Waldrep* court only decided that the jury did not err in finding that Waldrep was not an employee.<sup>264</sup> It is possible that a jury verdict finding that Waldrep was an employee would also have been upheld.<sup>265</sup> Even so, the Court of Appeals explicitly noted that its decision was based on college athletics as they existed decades ago when Waldrep was injured, which, of course, have changed dramatically since the time of the *Waldrep* decision.<sup>266</sup> Moreover, consider earlier stages of the case. The Workers' Compensation Commission itself held that Waldrep was an employee entitled to benefits.<sup>267</sup> And the trial court decided that Waldrep was not excluded from coverage as a matter of law<sup>268</sup> and, therefore, submitted the issue of whether he was an employee to a jury.<sup>269</sup> Thus, the ultimate message from *Waldrep* is actually quite mixed and uncertain.

But even if the court had held that Waldrep was a non-employee as a matter of law under the Texas workers' compensation law, *Waldrep's* influence would still be limited. The court in *Waldrep* applied the definition of "employee" from the Texas workers' compensation statute.<sup>270</sup> To

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259. *Id.* at 696–97.

260. *See id.* at 697.

261. *Id.* at 702.

262. *Id.* at 707.

263. RESTATEMENT OF EMP'T LAW, *supra* note 73, § 1.02 reporters' notes cmt. g.

264. *See Waldrep*, 21 S.W.3d at 702.

265. The Court emphasized the stringent standards for reviewing a jury award—that it would view the record in the light most favorable to the jury's verdict and uphold the verdict if it was supported by "more than a mere scintilla of evidence." *Id.* at 697.

266. *Id.* at 707.

267. *Id.* at 659.

268. The trial court had to hold this either implicitly or explicitly or the issue of employee status would not have been submitted to the jury.

269. *Waldrep*, 21 S.W.3d at 696–97.

270. *Id.* at 698.

be covered under that statute at the time, the work had to be performed pursuant to a contract of hire under which the employer closely directs the work.<sup>271</sup> State workers' compensation statutes vary in how they define "employee." In a different state, under a different statute, *Waldrep* would be largely irrelevant. Definitions of "employee" vary even more widely if we consider the entire range of statutes protecting individual employee rights. *Waldrep* provides even less guidance on whether a college athlete should be classified as an employee under a wage-and-hour statute or a state discrimination statute.

The limited impact of *Waldrep* also applies to other decisions determining employee status of college athletes under statutes protecting individual employment rights. There are many arrows in the quivers of those claiming employee status for college athletes under laws protecting individual employee rights. One misfired arrow—as in *Waldrep*—will tell us little about where the next arrow will land.

## VI. IS COLLEGE ATHLETICS SPECIAL?

The standard definitions in employment statutes lean in favor of classifying many college athletes as "employees." However, universities and the NCAA<sup>272</sup> will claim that college athletics are different. They will assert that even if the normal rules indicate coverage, applying those rules to college athletes would create such havoc that special exceptions should be carved out.<sup>273</sup>

Under antitrust law, the NCAA has had some success in forwarding the claim that it is special. The NCAA is viewed leniently under antitrust laws because college athletics is "an industry in which horizontal restraints on competition are essential if the product is to be available at all."<sup>274</sup> In the leading case on this issue, the Supreme Court explained:

As Judge Bork has noted: "[S]ome activities can only be carried out jointly. Perhaps the leading example is league sports. When a league of professional lacrosse teams is formed, it would be pointless to declare their cooperation illegal on the ground that there are no other professional lacrosse teams." What the NCAA and its member institutions market in this case is competition itself—contests

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271. *Id.*

272. The claim of special status would be forwarded by the putative employer, which, in this case, is the universities. But they will be supported by the NCAA. In this section, for ease of explication, I will use the NCAA to represent both.

273. See, e.g., *Big Labor on College Campuses: Examining the Consequences of Unionizing Student Athletes: Hearing Before the H. Educ. & the Workforce Comm.*, 113th Cong. 3-4 (2014) (statement of Bradford L. Livingston, Partner, Seyfarth Shaw LLP) (arguing that unionization of college athletes is "unworkable").

274. *NCAA v. Bd. of Regents*, 468 U.S. 85, 101 (1984).

between competing institutions. Of course, this would be completely ineffective if there were no rules on which the competitors agreed to create and define the competition to be marketed. A myriad of rules affecting such matters as the size of the field, the number of players on a team, and the extent to which physical violence is to be encouraged or proscribed, all must be agreed upon, and all restrain the manner in which institutions compete. Moreover, the NCAA seeks to market a particular brand of football—college football. The identification of this “product” with an academic tradition differentiates college football from and makes it more popular than professional sports to which it might otherwise be comparable, such as, for example, minor league baseball. In order to preserve the character and quality of the “product,” athletes must not be paid, must be required to attend class, and the like. And the integrity of the “product” cannot be preserved except by mutual agreement; if an institution adopted such restrictions unilaterally, its effectiveness as a competitor on the playing field might soon be destroyed. Thus, the NCAA plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable. In performing this role, its actions widen consumer choice—not only the choices available to sports fans but also those available to athletes—and hence can be viewed as procompetitive.<sup>275</sup>

The general rationale here is that sometimes collaboration is necessary, and necessary collaboration does not violate antitrust laws. The case notes at least three aspects of necessary collaboration for college athletics.<sup>276</sup> First, on issues such as the size of the field and the number of players on a team, a basic agreement must be reached to “create and define the competition.”<sup>277</sup> Second, collaboration may also be necessary to ensure good and fair competition—to create a level playing field.<sup>278</sup> Third, collaboration may be necessary to preserve the particular product being marketed, which is a product tied to the academic tradition—college football as opposed to minor league baseball.<sup>279</sup>

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275. *Id.* at 101–02 (citation omitted). For more recent cases, see *Smith v. NCAA*, 139 F.3d 180, 185, 187 (3d Cir. 1998) (finding that the NCAA eligibility rules are not subject to antitrust challenge because they are not commercial and because they were necessary for “survival of the product” and an “even playing field”); *McCormack v. NCAA*, 845 F.2d 1338, 1344–1345 (5th Cir. 1988) (eligibility rules survive rule of reason analysis because they are necessary to “create the product” of college football). *But see Agnew v. NCAA*, 683 F.3d 328, 332 (7th Cir. 2012) (holding that NCAA policy on multi-year scholarships is subject to antitrust challenge, although plaintiffs failed to make out a claim).

276. *NCAA v. Bd. of Regents*, 468 U.S. at 101–02.

277. *Id.* at 101.

278. *Id.* at 102 (explaining that an institution that did not agree to the general rules might soon find that “its effectiveness as a competitor on the playing field might be destroyed”).

279. *Id.* at 101–02.

The first aspect is the easiest: Nothing—or at least almost nothing—in employment law limits the ability of the NCAA to establish rules that “create and define the competition.”<sup>280</sup> We know this because many sports leagues with employees exist, and they manage to create and define their competitions just fine. The major professional leagues, such as the National Football League and Major League Baseball, would be obvious examples of this, but the examples extend down to the least of the minor leagues. Moreover—keeping in line with the main thesis of this article—even if it were possible to identify an employment law somewhere that would interfere with this interest, an exemption from that one employment law may be justified, rather than a global exemption from all employment laws.<sup>281</sup>

Collaboration may also be necessary to create a level playing field. But, of course, there are many possible level playing fields.<sup>282</sup> Again, we know from the professional leagues that level playing fields can be created in athletics even if the athletes are covered by the employment laws. In general, application of employment laws has no necessary effect on this. If all Big Ten universities are required to pay college athletes the minimum wage, then there is a level playing field just as there is if all are restricted to providing scholarships and stipends. Indeed, employment laws may contribute to a more level playing field than currently exists. For example, uniform application of a minimum wage could *reduce* current disparities in the benefits received by college athletes between NCAA divisions or between the haves and have-nots of college athletics.<sup>283</sup>

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280. *Id.* at 101.

281. The Americans with Disabilities Act (“ADA”) of 1990 may be an example of a law that could require reconsideration of some of the rules of the game. *See* 42 U.S.C. §§ 12101–12213 (2012). But the Supreme Court has held that even that Act does not require any changes that would “fundamentally alter” the nature of the game. *See* *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 683 (2001) (holding that the ADA required a professional golf association to permit a golfer with a disability to use a golf cart during competitions because this did not fundamentally alter the game of golf). As this illustrates and as noted in the text, other major sports organizations have been able to maintain the integrity of their games even though they are governed by employment laws.

282. I have not consulted Ramona Paetzold on this, but I have no doubt that the possibilities exceed even those of possible bargaining units at Northwestern. *See supra* note 128.

283. The NCAA forwarded competitive balance as a defense in the current antitrust action against it over the use of the names and likenesses of college athletes in video games. Although the judge did not grant summary judgment against the NCAA on the issue, she was highly skeptical of the claim:

While [the NCAA] has asserted generally that allowing Division I schools to pay student-athletes would lead to recruiting disparities between high-revenue and low-revenue schools, . . . [it] has not provided any evidence to suggest that this is the case. It has not explained, for instance, why the restriction on student-athlete compensation would deter high-revenue schools from using their resources to gain a

The third aspect of the collaboration rationale is the most difficult. College athletics are, without question, a particular product that was created and molded by the NCAA and its complex set of rules. It is true that the application of some employment laws may interfere with the maintenance of that particular product.<sup>284</sup> However, even this claim does not justify a global exclusion from employment laws. Some laws, such as the minimum wage, may well interfere with the product.<sup>285</sup> Classifying college athletes as employees under other laws, however—such as the NLRA—has no necessary effect on that product.<sup>286</sup> But more pointedly, employment laws often limit the products that can be offered. A league defining its product as offering only white players would undoubtedly be acting illegally regardless of how central the league claimed that feature was to its product.<sup>287</sup>

Even beyond these particulars, the analogy to antitrust law as a basis for an exemption from employment laws is weak. These rationales under the antitrust laws are not really “exceptions”; instead, they are applications of antitrust law.<sup>288</sup> The claim is not that the NCAA is exempt, but rather that the NCAA’s rules do not violate the basic prohibitions of antitrust law.<sup>289</sup> For employment laws, the claim would be for an exception.

But if the antitrust analogy is inapt, then what should we make of

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recruiting advantage in other ways, such as by building superior athletic facilities or hiring better coaches. Nor has the NCAA explained why it could not use less restrictive means of maintaining competitive balance, such as those used by professional sports leagues.

*In re* NCAA Student-Athlete Name & Likeness Licensing Litigation (*NCAA Name & Likeness Case*), No. C 09-1967 CW, 2014 WL 1410451, at \*14 (N.D. Cal. Apr. 11, 2014).

284. The Supreme Court noted, for example, that not paying players is an important part of the product being marketed by the NCAA. *See Bd. of Regents*, 468 U.S. at 102. More recently, however, the judge in the *Name & Likeness Case* has been skeptical of this and similar defenses to antitrust claims. *NCAA Name & Likeness Case*, 2014 WL 1410451, at \*12–13 (expressing skepticism that the NCAA’s limits on player compensation could be justified by its interests in preserving amateurism or the integration of education and athletics; in protecting other sports, especially women’s sports; or in increasing outputs such as the number of teams, players, scholarships, and games).

285. *NCAA v. Bd. of Regents*, 468 U.S. at 101.

286. Or at the least, the NCAA would have to bear the heavy burden of proving an adverse effect on its product definition. *See* Richard T. Karcher, *The Battle Outside the Courtroom: Principles of “Amateurism” vs. Principles of Supply and Demand*, 3 *MISS. SPORTS L. REV.* 47, 47–49 (2013) (discussing how the NCAA’s own varying definitions of “amateurism” make it hard to say whether particular payments violate “principles of amateurism”).

287. A well-known case on this point is *Wilson v. Southwest Airlines Co.* 517 F. Supp. 292, 304 (N.D. Tex. 1981) (holding that an airline could not hire only female flight attendants even though that was central to its positioning as the sexy “love” airline).

288. More particularly, they are justifications for evaluating the legality of collaboration in league sports differently than in other industries.

289. It is worth noting that, in the leading case, the Supreme Court found that the NCAA was violating antitrust laws. *Bd. of Regents*, 468 U.S. at 98–101.

the claim on its own merits—that the NCAA should not be covered by employment laws because it would upend the entire NCAA regulatory structure.<sup>290</sup> Again, the first cut should be to investigate the consequences of each particular claim of employee status. Recognizing a union of Northwestern football players has no necessary effect on NCAA compliance.<sup>291</sup> Similarly, given that the NCAA permits health insurance and encourages safety, workers' compensation coverage is mostly consistent with what is already permitted.<sup>292</sup> While coverage under some employment laws undoubtedly would have large effects on the NCAA regulatory structure, coverage under others would not.<sup>293</sup> A global statement that any finding of employee status anywhere will upset the whole apple cart is simply incorrect. To understand whether the claim should be given credence, one needs to closely analyze the specific requirements of each particular employment law.

Having said that, however, coverage under some employment laws clearly would conflict with the NCAA regulatory structure. How should we think about those situations? I think the complications that arise should be considered and treated seriously, especially by decision-makers such as the National Labor Relations Board who are empowered to make policy-based decisions. (This is much less true for courts.)<sup>294</sup> The global exception claim, though, considered in a broad context, is a weak one. The sets of laws we are talking about are central to American society. Laws protecting collective labor rights, wage-and-hour laws, and wage-payment laws are the present-day product of enormous social upheaval and discussion in the first half of the twentieth century.<sup>295</sup> Other laws—such as discrimination laws—are also indispensable pillars of the social contract that we have constructed over the past half century. Creating new exceptions to these important laws should be done very

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290. In Colter's case, for example, Northwestern has argued that recognizing a union would interfere with the university's ability to comply with Title IX while destroying the structure of the Big Ten Conference and the NCAA and eliminating competitive balance in Division I football and men's basketball. Lester Munson, *NU Might Be Protesting Too Much: Massive Effort to Discredit Football Players' Attempt to Unionize Seems Like Overkill*, ESPN (Feb. 20, 2014, 11:28 PM), [http://espn.go.com/espn/otl/story/\\_/id/10493443/massive-effort-northwestern-discredit-football-players-attempt-unionize-seems-overkill](http://espn.go.com/espn/otl/story/_/id/10493443/massive-effort-northwestern-discredit-football-players-attempt-unionize-seems-overkill).

291. See *supra* note 148 and accompanying text.

292. See *supra* note 231.

293. *Id.*

294. See *supra* notes 111–13, 207–11 and accompanying text.

295. See, e.g., DANIEL T. RODGERS, *ATLANTIC CROSSINGS: SOCIAL POLITICS IN A PROGRESSIVE AGE* 235–38 (1998); DAVID R. ROEDIGER & PHILLIP S. FONER, *OUR OWN TIME: A HISTORY OF AMERICAN LABOR AND THE WORKING DAY*, at vii (1989); JOHN FABIAN WITT, *THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW* 2–4 (2004).

cautiously, and not by the courts.<sup>296</sup>

Further, problems complying with employment laws are not unique to the NCAA and college athletics. Compliance is complicated and expensive for everyone. For better or worse, we as a society have decided that those complications and expenses are worth it. Again, carving out an exception to avoid these complications for college athletics should be done cautiously. It could be that the NCAA can prove that it is a special case, which ought to be exempted from some of these laws. Even then, the case would have to be made convincingly and individually for each particular employment law (and, again, generally before legislatures rather than courts). But a global claim of exemption steps too far.

VII. CONCLUSION

The main thesis of this article is that with a persistent effort, college athletes are likely to be classified as employees sometime, somewhere. The main reason for this is that there are simply so many arrows in the quivers of those seeking employee status for college athletes. There are literally hundreds of different statutory claims that could be made by thousands of potential plaintiffs. A secondary reason is that the doctrine in each of the major areas of employee rights—collective rights and individual rights in both the private and public sectors—leans in favor of those seeking employee status. These decisions are not likely to be driven by doctrine alone, and doctrine can be modified, especially in the face of powerful forces. However, doctrine is unlikely to be overridden under every statute in every jurisdiction.<sup>297</sup>

An interesting aspect of this discussion about employee status for college athletes is that the legal arguments do not depend on the broad public policy claims made by either side.<sup>298</sup> On the one hand, the outcome of this issue does not depend on the often and loudly voiced claims of those seeking employee status that the athletes bring in millions of dollars of revenue for universities, but are not paid much.<sup>299</sup> The level of revenue generated by college athletics<sup>300</sup> and the amount of

296. See *supra* text accompanying notes 207–11.

297. See *supra* note 251 and accompanying text.

298. Richard Karcher has recently documented the extent of the increased revenues. For example, between 2004 and 2012, football revenues at the top ten universities (in 2012 dollars) increased by an average of ninety-eight percent. See Karcher, *supra* note 286, at 21–22.

299. *Id.*

300. The level of revenue generated by college athletics is irrelevant to the employee-status issue because it focuses on the wrong flow of money. The employee-status issue depends on the flow of money from university to student athlete. See *supra* notes 37–39, 243–50 and accompanying text. But the level of revenue received by universities depends on a different flow of money—the flow to universities for the product of college athletics. Just as the profit or loss at

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compensation the college athletes receive<sup>301</sup> are both largely irrelevant to the legal issue of whether they should be classified as employees. On the other hand, the claims and fears of those opposed to employee status that such a finding would upend all of college athletics as we know it are also largely irrelevant. As I have discussed, some findings of employee status, including the one forwarded by Kain Colter, do not present any direct conflict with the current structure of college athletics.<sup>302</sup> Other kinds of claims, such as wage payment or minimum wage claims, could have a large effect.<sup>303</sup> But in either event, those consequences are not central to the legal issue of employee status under current doctrine.

The state of affairs that I describe has been present for decades. So my claim raises the issue of why there might be a persistent effort now when there has not been one in the past. Looking back, college athletes have always been dissuaded from pursuing Colter-like claims by a complex and powerful set of disincentives: college athletes are young and inexperienced; the culture is one of cooperation and teamwork; the opposing forces—both the universities and the NCAA—are large and seemingly impervious; and each potential Colter is a college athlete only for a short time. While those factors are still all present, they are beginning to be outweighed by significant change in other aspects of college athletics. This change is being driven by two main developments. First, although largely irrelevant legally,<sup>304</sup> the explosion of revenues into the coffers of universities participating in big-time college athletics has caused discontent. College athletes simply do not see themselves as getting their fair share.<sup>305</sup> Second, there is increasing concern about the long-term health effects of athletic participation, particularly in football.<sup>306</sup> In combination, these developments mean that college athletes

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General Motors does not affect whether its workers are employees or not, this flow of money does not affect the employee status of college athletes.

301. As noted above, to be an employee rather than a volunteer, one must receive a “material inducement.” See *supra* notes 243–44 and accompanying text. But this sets a very modest lower-bound amount, not a higher-bound one as suggested by the comparison with the significant revenues generated for universities by college athletics.

302. See *supra* notes 147–48, 201–02, 285 and accompanying text.

303. See *supra* note 147 and accompanying text.

304. See Karcher, *supra* note 286, at 21–22.

305. This is consistent with the findings of behavioral economics that people are motivated by concern about the fair division of revenues. In the “ultimatum” game, for example, A is given a set amount of money and can offer as much as she wishes to B. If B agrees to the division, both get to keep their sums; if B does not agree, neither gets anything. This oft-repeated experiment demonstrates that B’s in this experiment will turn down “unfair” small shares of money even though it means they will end up with nothing. See Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1489–90 (1998). In our context, these results imply that college athletes may be increasingly inclined to reject the offer made to them by universities because their shares of the total revenue are declining.

306. See, e.g., U.S. CTRS. FOR DISEASE CONTROL & PREVENTION, HEAD’S UP: CONCUSSIONS IN

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are increasingly a less satisfied lot than they have been in the past.

Regardless of whether for these reasons or others, college athletes are beginning to forward their interests more aggressively. Kain Colter's union election petition is only one of many examples. Andrew Oliver, a former baseball player at Oklahoma State University, won a case challenging an NCAA rule.<sup>307</sup> Ryan Hart, a former quarterback at Rutgers University, filed a suit seeking compensation for the use of his likeness and biographical information in a video game.<sup>308</sup> Similar suits were filed by Sam Keller, a former football quarterback at the University of Nebraska, and Ed O'Bannon, a former basketball player at the University of California, Los Angeles ("UCLA").<sup>309</sup> In 2011, more than 300 then-college athletes at five schools (Arizona, Georgia Tech, Kentucky, Purdue, and UCLA) signed a petition asking the NCAA to allocate more of the revenues from its television contracts directly to college athletes.<sup>310</sup> At least two national organizations (CAPA and the National College Players Association ("NCPA"))<sup>311</sup> are actively seeking to organize college athletes. All of these activities occur in the midst of growing concerns—and litigation—over the long-term health effects of athletic participation.<sup>312</sup>

Colter is in the first wave of this new activism by college athletes. His actions will encourage others to come forward. Organizations like CAPA and NCPA can organize these efforts and increase the likelihood that they will be successful. However, strategic organization is not nec-

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FOOTBALL, available at [http://www.cdc.gov/concussion/HeadsUp/pdf/Football\\_Fact\\_Sheet\\_Coaches-a.pdf](http://www.cdc.gov/concussion/HeadsUp/pdf/Football_Fact_Sheet_Coaches-a.pdf) (last visited Sept. 20, 2014) (stating that all concussions are serious and, "[w]hen in doubt, sit [it] out"); Christopher C. Giza et al., *Summary of Evidence-Based Guideline Update: Evaluation and Management of Concussion in Sports*, 80 AM. ACAD. OF NEUROLOGY 2250, 2251–53 (2013) (football is a risk factor for concussions and no evidence exists that any treatment enhances recovery or reduces long-term consequences). See also Jeanne Marie Laskas, *Game Brain*, GQ (Oct. 2009), <http://www.gq.com/sports/profiles/200909/nfl-players-brain-dementia-study-memory-concussions> (describing problem of concussions in professional football).

307. *Oliver v. NCAA*, 920 N.E.2d 203, 218–19 (Ohio Com. Pl. 2009). The court enjoined enforcement of the NCAA rule, but later vacated its order when the parties settled.

308. *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 145 (3d Cir. 2013).

309. The suits were consolidated. See *In re NCAA Student-Athlete Name & Likeness Licensing Litigation*, 724 F.3d 1268, 1271 (9th Cir. 2013). The video game producer recently settled, but the case continues against the NCAA. See generally *NCAA Name & Likeness Case*, 2014 WL 1410451.

310. Dan Wetzel, *Bowl Boycott Would Shock Unfair System*, YAHOO! SPORTS (Oct. 24, 2011, 11:35 PM), <http://sports.yahoo.com/news/bowl-boycott-shock-unfair-system-033500454—ncaaf.html>.

311. The home page of the National College Players Association is at <http://www.ncpanow.org>.

312. See *Judge Fears \$765 Million Not Enough*, ESPN (Jan. 15, 2014, 7:31 PM), [http://espn.go.com/nfl/story/\\_id/10292549/judge-rejects-preliminary-approval-765-million-nfl-settlement-concussion-case](http://espn.go.com/nfl/story/_id/10292549/judge-rejects-preliminary-approval-765-million-nfl-settlement-concussion-case) (reporting that judge failed to approve a proposed settlement of concussion claims by 20,000 retired professional football players).

essary; the only necessity is persistence. And since any individual college athlete anywhere can make a claim for overtime pay, workers' compensation coverage, or union representation, persistence can occur naturally and haphazardly. These waters are going to continue to rise.<sup>313</sup>

The NCAA's current strategy in the face of these developments is to make changes at the margins, in the hope that it can maintain the general structure of the current system,<sup>314</sup> while staunchly resisting the efforts of Colter and others in an effort to stave off transformational change.<sup>315</sup> This article suggests that the NCAA strategy should also include careful consideration of how to react when some college athletes

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313. The size of potential damage awards could also keep the waters rising. Under the Fair Labor Standards Act, for example, college athletes could recover double any wages that would be due for a period of two or three years before filing suit. Since the compensation provided by universities probably does not qualify as "wages," this would mean a recovery of double the minimum wage for every hour worked up to forty hours in any week, and triple the minimum wage for every overtime hour. These numbers can add up pretty fast. Considering only Northwestern football players and using very conservative estimates (no overtime, time worked within NCAA limits, etc.), a successful suit would yield damages exceeding \$700,000, not including attorneys' fees. Suits under the Fair Labor Standards Act have resulted in large damage awards and, because of that, have been an area targeted by plaintiff-side labor attorneys. See GERALD L. MAATMAN, JR., SEYFORD SHAW LLP, ANNUAL WORKPLACE CLASS ACTION LITIGATION REPORT 3-4 (2014), available at <http://www.seyfarth.com/publications/2014-class-action-report> (reporting on a rising tide of wage-and-hour class actions).

314. The changes under consideration by the NCAA in response to these developments are not well directed at the employee-status issue. Some of the suggested changes merely increase the benefits flowing to college athletes, which makes them seem more like employees and less like other scholarship students. See, e.g., *NCAA Committee Approves Expanded Meal Allowances for Athletes*, NCAA.COM (Apr. 15, 2014, 9:32 PM), <http://www.ncaa.com/news/ncaa/article/2014-04-15/ncaa-committee-approves-expanded-meal-allowances-athletes> (permitting universities to provide unlimited meals and snacks to college athletes). At the same time, other changes under consideration do tend to re-emphasize their status as students rather than athletes. Jeff Barker, *NCAA Considering Adding 'Dead Periods' to Help Students Focus on School, President Says*, BALTIMORE SUN (Mar. 5, 2014, 6:38 PM), <http://www.baltimoresun.com/sports/terps/bs-sp-terps-ncaa-mark-emmert-0306-20140305,0,117176.story> (reporting the NCAA President's announcement that NCAA may require universities to provide college athletes with periods where no athletic activities can occur, even informal ones). Still other changes would seem to have no effect one way or the other on the employee-status issue. *Student-Athlete, AD, Faculty Rep Would Have Votes on Proposed New Board*, NCAA.ORG (Mar. 25, 2014, 2:52 PM), <http://www.ncaa.org/about/resources/media-center/news/student-athlete-ad-faculty-rep-would-have-votes-proposed-new-board> (proposing a new governance structure that would increase the autonomy of the major athletic conferences). The NCAA is a large and multi-faceted organization facing a set of pressures that extend well beyond the *Northwestern* case, so this lack of focus on the employee-status issue is understandable. However, it does complicate their strategy.

315. One interpretation of baseball history is that a major transformation occurred because of a strategy of legal mobilization analogous to that being pursued by Colter, CAPA, and others. See Christopher W. Schmidt, *Explaining the Baseball Revolution*, 45 ARIZ. ST. L.J. 1471, 1473 (2013); see also Donald H. Yee, *In the 2020 College Football Season, Will Your Favorite Team Still Exist?*, WASH. POST (Apr. 4, 2014), [http://www.washingtonpost.com/opinions/in-the-2020-college-football-season-will-your-favorite-team-still-exist/2014/04/04/f24a5c16-b9d9-11e3-96ae-f2c36d2b1245\\_story.html](http://www.washingtonpost.com/opinions/in-the-2020-college-football-season-will-your-favorite-team-still-exist/2014/04/04/f24a5c16-b9d9-11e3-96ae-f2c36d2b1245_story.html) (speculating that Colter's litigation and similar efforts could lead to the development of a minor league football system, similar to the system used in professional

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somewhere are recognized as employees for some purposes. Because someday, sooner or later, one of these arrows is likely to hit the bull's eye, and the NCAA should be prepared.

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baseball, where football players leaving high school would have an option to forgo college and move directly into professional football).