DECLINING JURISDICTION: WHY UNIONIZATION SHOULD NOT BE THE ULTIMATE GOAL FOR COLLEGIATE ATHLETES

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Since its inception in the early twentieth century, the National Collegiate Athletic Association ("NCAA") has been charged with overseeing organized collegiate athletic competitions. Over the past century, however, the landscape of collegiate athletics has changed dramatically. What was once a non-profit organization comprised of only a few member universities, is now composed of over 1,000 universities, bringing in billions of dollars each year. As the popularity of collegiate athletics has continued to grow, the students competing on behalf of their universities have begun to question their designation as "student-athletes," which under NCAA rules prohibits them from receiving any form of monetary compensation for their athletic participation.

While there were previous attempts to challenge the NCAA's authority, it was not until the Northwestern University football players petitioned to the National Labor Relations Board ("NLRB") in 2014 that a group of student-athletes sought to be recognized as employees of their respective university. By seeking NLRB recognition as employees, the Northwestern University football players hoped to unionize, which would thereby give them the ability to collectively bargain with the university to alter the conditions of their athletic participation. Despite the football players' success in gaining recognition as employees of Northwestern University by the Regional Board, the Review Board declined to exercise its jurisdiction to decide the matter. Had the Review Board upheld the Regional Board's decision, it would have severely undermined the current structure of the NCAA.

With many questions left unanswered by the Review Board's decision, and the opportunity for recognition as employees not having been foreclosed to future collegiate athletes, this Note proposes that unionization should not be the ultimate goal for student-athletes. Rather, student-athletes, the NCAA, and individual universities should aim to create student-athlete advisory committees for each athletic conference, which would consist of student-athlete representatives

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from each university within a particular athletic conference. Doing so will provide an alternative avenue for encouraging meaningful conversations between student-athletes, their respective universities, and the NCAA. Such a model would not prohibit athletes from unionizing, thus lessening the power that the NCAA currently exerts over student-athletes, and would provide an avenue for allowing the NCAA to address the legitimate concerns of student-athletes so that unionization may be avoided altogether

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I. INTRODUCTION

"We applaud our players for bringing national attention to these important issues, but we believe strongly that unionization and collective bargaining are not the appropriate methods to address the concerns raised by student-athletes."[1] This statement by Northwestern University's Vice President for University Relations, Alan K. Cubbage, came on the heels of the National Labor Relations Board's ("NLRB") decision to decline jurisdiction in the Northwestern football player's petition to be recognized as employees of the university under the National Labor Relations Act ("NLRA").[2] By declining to exercise its jurisdiction,[3] the Review Board nullified the decision by the Regional Board, which had held that the Northwestern football players were employees of the university and could therefore hold an election to determine whether the players would be represented by a union.[4] Citing the perceived labor instability that such a decision would cause, the Review Board abstained from de-

1. Press Release, Northwestern University, Northwestern University Statement in Regard to the Decision by the National Labor Relations Board (August 17, 2015), *available at* http://www.northwestern.edu/newscenter/stories/2015/08/nlrb-statement.html.

2. *Id.*

3. *See* Northwestern Univ. & Coll. Athletes Players Ass'n (CAPA), 362 NLRB 167 (N.L.R.B. Aug. 17, 2015).

4. Northwestern Univ. & Coll. Athletes Players Ass'n (CAPA), No. 13-RC-121359, 2014 WL 1246914 (N.L.R.B., Region 13 Mar. 26, 2014).

ciding whether the student-athletes were employees of Northwestern University.[5]

While some believe that the Review Board's decision to decline jurisdiction in *Northwestern University* was the death knell for student-athlete labor challenges,[6] the Review Board made it abundantly clear that its decision was limited to the facts of the petition.[7] In doing so, the Review Board emphasized the fact that the Northwestern football players were a discrete group making up an insubstantial portion of college athletes.[8] It stands to reason that if the Northwestern football players were to petition for recognition alongside student-athletes at other private Division I Football Bowl Subdivision ("FBS") universities, the larger group of student-athletes would compel the NLRB to hear student-athlete's petition for recognition as employees of their respective universities.

The reality of the matter is that the Review Board more or less punted on the issue, deciding to prolong making a determination as to the employment relationship between student-athletes and their universities. It is only a matter of time, however, before student-athletes reorganize into a cognizable group that the NLRB is forced to recognize as a valid labor unit. For the precise reasons that the Regional Board originally found the Northwestern football players to be employees of Northwestern University,[9] any future reorganization of student-athletes would likely meet the NLRA's definition of an employee.

Given the NCAA's opposition to recognizing student-athletes as employees of their universities, any NLRB decision to the contrary will likely conclude with a fight before the United States Supreme Court.[10] The NCAA's staunch opposition is not surprising, however, as the NCAA would not be able to maintain its current structure if student-athletes were permitted to unionize.[11] Furthermore, if collegiate athletes

5. Northwestern Univ. & Coll. Athletes Players Ass'n (CAPA), 362 NLRB 167, *3 (N.L.R.B. Aug. 17, 2015).

6. *See* Mason Levinson, *Northwestern Football Players Cannot Form Union, NLRB Rules*, BLOOMBERG BUS. (Aug 17, 2015, 1:08 PM), http://www.bloomberg.com/news/articles/2015-08-17/northwestern-football-players-cannot-form-a-union-nlrb-rules (quoting Doug Allen, a labor-relations professor at Pennsylvania State University as saying, "[t]hat is it. That's a final and binding result.").

7. Northwestern Univ. & Coll. Athletes Players Ass'n (CAPA), 362 NLRB 167, *3 (N.L.R.B. Aug. 17, 2015).

8. *Id.*

9. *See* Northwestern Univ. & Coll. Athletes Players Ass'n (CAPA), No. 13-RC-121359, 2014 WL 1246914 (N.L.R.B., Region 13, Mar. 26, 2014).

10. Eddie Pells, *NCAA President Mark Emmert: Unionization a 'Grossly Inappropriate' Way to Solve Problems*, WASH. TIMES (Apr. 6, 2014), http://www.washingtontimes.com/news/2014/apr/6/ncaa-president-mark-emmert-unionization-grossly-in/. *See also* Patrick Hruby, *A More Perfect Union,* SPORTSONEARTH.COM (Apr. 24, 2014), http://www.sportsonearth.com/article/73237506/northwestern-union-student-athletes-amateurism-nlrb (discussing the potential for the Northwestern case to make it to the United States Supreme Court).

11. *See* Dan Wolken, *NCAA President Mark Emmert Decries College Union Effort*, USATODAY.COM (Apr. 6, 2014, 6:09 PM), http://www.usatoday.com/story/sports/college/2014/04/06/mark-emmert-ncaa-structure-presidents-press-conference-unionization-labor/7382025/ (quoting President of the NCAA, Mark Emmert, as saying unionization by collegiate athletes "'would blow up everything about the collegiate model of athletics.'").

were permitted to unionize and used their collective bargaining power to demand player salaries, the NCAA and its member universities would stand to lose a substantial amount of revenue.[12]

On the flipside, among other reasons collegiate athletes point to inadequate scholarships, injury concerns, and the unilateral control that universities exert over student-athletes as justifying the need for being able to unionize and collectively bargain with universities.[13] Although compensating student-athletes is not currently one of the goals of the National College Players Association ("NCPA"),[14] some believe that unionization is the first step on the path to a full-blown "pay-for-play" structure of intercollegiate sports.[15]

With the NCAA standing to lose both its structure and the revenue it has enjoyed for decades, and with collegiate athletes on the brink of being able to bargain for the rights they believe they deserve, the implications stemming from the potential unionization of student-athletes cannot be understated. While much of the literature concerning the unionization of collegiate athletes has focused on the possible consequences of allowing collegiate athletes to collectively bargain,[16] or has suggested various ways collegiate athletes may be able to successfully receive compensation,[17] very little has been written on how both the NCAA and collegiate athletes may be able to achieve their desired outcomes.

This Note proposes that a viable middle ground between all-out unionization by collegiate athletes and an unwavering prohibition against unionization exists. Creating student-athlete advisory committees for each athletic conference consisting of student-athlete representatives from each university within a conference would provide an alternative avenue for encouraging meaningful conversations between student-athletes, their respective universities, and the NCAA. Such a model would not prohibit athletes from unionizing, thus lessening the power the NCAA currently exerts over student-athletes, and would provide an av-

12. *See* Michael McCann, *Breaking Down Implications of NLRB Ruling on Northwestern Players Union*, SI.COM (Aug. 17, 2015), http://www.si.com/college-football/2015/08/17/northwestern-football-players-union-nlrb-ruling-analysis (speculating about the financial impact unionization could have on the NCAA).

13. *See Mission & Goals*, NAT'L COLL. PLAYERS ASS'N, http://www.ncpanow.org/about/mission-goals (last visited Mar. 19, 2015) (listing the mission and eleven goals that the National College Players Association is seeking to achieve through its unionization efforts) [hereinafter *Mission & Goals*].

14. The National College Players Association is an organization dedicated to advancing the interests of student-athletes and noticeably absent from its eleven goals is compensation for participating in athletic events. *See id.* (listing the mission and eleven goals that the National College Players Association is seeking to achieve through its unionization efforts).

15. *See, e.g.*, Sara Ganim, *Will Northwestern University Football Unionize?*, CNN.COM (Mar. 25, 2014, 7:58 AM), http://www.cnn.com/2014/03/25/us/northwestern-football-players-union/index.html (speculating that if Northwestern football players are able to unionize then the student-athletes "could negotiate for a cut of the [NCAA's] billion-dollar revenues.").

16. *See, e.g.*, Nicholas Fram & T. Ward Frampton, *A Union of Amateurs: A Legal Blueprint to Reshape Big-Time College Athletics*, 60 BUFF. L. REV. 1003 *passim* (2012) (discussing various implications of collegiate athletes unionizing).

17. *See, e.g.*, Nicolas A. Novy, *"The Emperor Has No Clothes": The NCAA's Last Chance as the Middle Man in College Athletics*, 21 SPORTS LAW. J. 227, 243–52 (2014) (proposing three solutions for compensating collegiate athletes).

enue for allowing the NCAA to address the concerns of student-athletes so that unionization may be avoided altogether.

Part II of this Note will draw parallels between the labor movement in the United States and the conditions facing student-athletes, and will chronical the growth of the NCAA from its inception to the commercial organization it is today. Next, Part II will discuss historical challenges to the NCAA's student-athlete structure and the cases leading to the NLRB's decision in the *Northwestern* case. Further, this Part will explore the implications of a successful petition to unionize by student-athletes and raises the questions that are left unanswered by the Board's holding in *Northwestern*.

Part III of this Note will begin by analyzing the potential consequences of any unionization attempt by student-athletes with respect to Title IX. Next, this Part will address the potential impact that successful unionization could have on student-athletes at public universities. Additionally, Part III will discuss the impact that unionization would have on current walk-on student-athletes if the Regional Board's decision were relied on moving forward. Lastly, Part III will conclude by analyzing what the preceding considerations will mean for the current structure of the NCAA.

Part IV will offer a practicable solution aimed at preserving the current structure of the NCAA, while forcing the NCAA and its member universities to recognize and address the legitimate concerns of student-athletes. Part V concludes by summarizing the issues surrounding the unionization of collegiate athletics and asserting that the NCAA would be wise to adapt before the structure upon which the organization is based crumbles beneath them.

II. BACKGROUND

Complex problems cannot be solved effectively without an understanding of the context in which the issues arise. With respect to the issues facing student-athletes, this inquiry is fourfold. First, it is important to comprehend the oppressive employment conditions traditionally motivating employees to organize and rise up against their employers. Next, a basic understanding of how the NCAA came to be the commercial organization it is today aids in giving context to the animosity between student-athletes and the NCAA. Additionally, in order to appreciate the magnitude of the *Northwestern* decision, a brief background detailing the current structure of the NCAA is necessary. Lastly, a limited understanding of the judiciary's historical deference to the NCAA's student-athlete model will help in appreciating the growing frustration by student-athletes that culminated in the *Northwestern* case.

A. History of the Labor Movement in the United States

The significance of the *Northwestern* decision and the parallels between the struggles of student-athletes and the historical road to unionization cannot be appreciated without a brief history of the labor movement within the United States. A good starting point is a quote by Thomas Donahue. "The only effective answer to organized greed is organized labor."[18] This famous quote nicely encapsulates the longstanding justification for the necessity of unions in the United States. Yet, unions have not always been a staple of the employee/employer relationship in the United States.[19] Prior to 1865, employment in the United States was characterized by individuals working for small family-owned businesses, predominantly competing in local and regional marketplaces.[20] This model of employment soon changed, however, as railroads took a grip on the United States economy.[21]

The pervasiveness of railroads throughout the United States in the mid-1800s not only represented a revolutionary change in transportation, but also in the organization of labor.[22] Prior to railroads, goods and natural resources largely remained isolated to the geographic region in which they were produced because transporting them was exceedingly expensive.[23] Railroads made transporting commodities long distances both fast and relatively economical.[24] With an abundance of raw materials and an efficient method of transporting them, manufacturing companies began employing thousands of individuals to work in factories that mass-produced goods.[25] Additionally, building a network of railroads required vast amounts of raw materials itself.[26] This necessitated mass production of goods, which, in turn, required a large employee base.[27]

Increasingly, employees were moving from small companies with a regional grip, to larger companies that dominated national industries.[28] By the late 1800s, this new form of "professionally managed labor forc-

18. Thomas Donahue, *Labor Quotes*, MASS. AFL-CIO, http://www.massaflcio.org/labor-quote (last visited May 18, 2016).

19. *See* MELVYN DUBOFSKY, THE STATE AND LABOR IN MODERN AMERICA ch. 1 (1994).

20. CHARLES PERROW, ORGANIZING AMERICA: WEALTH, POWER, AND THE ORIGINS OF CORPORATE CAPITALISM 4 (2002); DUBOFSKY, *supra* note 19, at 2.

21. *See* PERROW, *supra* note 20, at 111–13 (discussing the economic implications associated with the rise of railroads); *see also* DUBOFSKY, *supra* note 19, at 2.

22. PERROW, *supra* note 20, at 111–13.

23. *See* Chris Butler, *Railroads and Their Impact (c. 1825-1900)*, THE FLOW OF HISTORY, http://www.flowofhistory.com/units/eme/17/FC112 (last visited May 18, 2016).

24. *Id.*

25. *See* PERROW, *supra* note 20, at 111–12.

26. *See id.* at 112 (noting that by the 1850s the railroad itself "was the largest single market for iron and a major market for coal, wood, machinery, felt, glass, rubber, and brass.") (internal citation omitted).

27. *Id.* at 111.

28. This is in no small part due to the monopolistic tendencies of the privately owned railroad companies that pitted local suppliers against one another and exhibited a strong preference for large companies that had a national stronghold on their respective industries. *See id.* at 112.

es" had spread to the most dynamic sectors of the economy.[29] With a relatively small number of increasingly powerful companies employing a large segment of the United States population,[30] the economic climate was ripe for employee exploitation.[31] Small companies were forced out of business because they could not compete with the low cost of production that large companies were able to offer.[32] Unemployment increased as tradesmen were put out of business by these large companies.[33] Knowing that employees could be readily replaced, large companies decreased wages and subjected employees to unscrupulous hours and working conditions.[34]

As conditions worsened, it became evident that the only way to combat employers from exploiting worker desperation would be by employees organizing and taking a collective stand to demand better working conditions and wages.[35] It was out of this grave social and economic environment that the first meaningful unions began to emerge.[36]

Unions during the early and mid-nineteenth century were largely organized by trade and further subdivided into local regions.[37] These local unions were not effective at combating the new challenges facing employees, as employers were operating on an increasingly national scale.[38] It was only a matter of time, however, before an effective national union emerged. Although the Holy and Noble Order of the Knights ("Knights

29. *See* DUBOFSKY, *supra* note 19, at 2 ("The type of modern management pioneered by railroads between 1850 and 1870 spread by 1900 first to other transport and communications firms, then to the iron and steel industry, meatpacking, agricultural implements, and other key sectors of the economy.").

30. Although large companies dominating the most vital segments of the economy were becoming increasingly common, the traditional model of employer/employee relationship was not completely abandoned in other sectors of the economy. *Id. See also* PHILIP S. FONER, HISTORY OF THE LABOR MOVEMENT IN THE UNITED STATES: VOLUME II: FROM THE FOUNDING OF THE AMERICAN FEDERATION OF LABOR TO THE EMERGENCE OF AMERICAN IMPERIALISM 12 (1955) (stating that the number of individuals working in manufacturing swelled from 2,750,000 in 1880 to 5,880,000 in 1890).

31. *See* DUBOFSKY, *supra* note 19, at 2–4 (noting the increasing competition between firms and the persistent struggle by employers to lower production costs at the expense of employees).

32. *See id.* at 3 (noting the steadily decreasing prices of goods on the open market).

33. *See* FONER, *supra* note 30, at 14 (attributing increasing unemployment in the late-nineteenth century to machinery performing tasks that had been traditionally completed by manned labor).

34. *See, e.g.*, DUBOFSKY, *supra* note 19, at 3 (describing the "tumultuous new world" that employees had to struggle with); FONER, *supra* note 30, at 19–25 (describing the work conditions that employees were being subjected to due to the change in managerial structure); PERROW, *supra* note 20, at 84–85 ("No longer concerned with attracting a labor supply, labor policies changed and exploitation grew.").

35. *See* FONER, *supra* note 30, at 32–33 (noting that those attempting to advance worker rights placed "emphasis upon building the trade unions to enable workers to fight for the improvement of their working conditions, stressed the importance of combining trade union and political activities, and pointed out that strong trade union movement was the necessary base for successful political action.").

36. This is not to say that the unions emerging toward the end of the nineteenth century were the first of their kind, as unions had existed in the United States, in some capacity, since the late eighteenth century. *See generally* SELIG PERLMAN, A HISTORY OF TRADE UNIONISM IN THE UNITED STATES ch.1 (1922).

37. *See* DUBOFSKY, *supra* note 19, at 3 ("[B]efore the Civil War the typical workers' organization was a local trade union or at best a city wide coalition of such local unions . . . .").

38. *See id.* (recognizing the need for employees to organize in national unions to address the labor crises brought on the increasing nationalization by employers).

of Labor") had been formed as a trade union in 1869,[39] it was not until the early 1880s that the Knights of Labor gained national attention for their labor movement.[40] With membership peaking at over 700,000 in the early 1880s,[41] the Knights of Labor effectively advanced employee rights through organized national strikes aimed at particular trades.[42]

The reign for the Knights of Labor was short-lived, as the organization's membership fell to only 100,000 by 1900.[43] Yet, the Knights made their mark by showing that strikes and boycotts could be effective tools in getting employers to cede to employee demands.[44] As noted by one scholar in the early 1920s, "[t]he idea of the solidarity of labor ceased to be merely verbal and took on life!"[45] These organized strikes proved a catalyst for the labor movement and eventually necessitated federal intervention.[46]

Make no mistake, federal intervention was not good for employee rights—at least at first. The courts perceived union strikes, not as labor versus capital, but, rather, civilians versus the state.[47] As such, courts regularly issued injunctions to end labor strikes.[48] Even so, there were a few instances when injunctions proved ineffective and United States presidents[49] ordered federal troops to stamp out these strikes.[50] It was not until Theodore Roosevelt became president in 1901 that labor unions had an ear in Washington, D.C.[51]

President Roosevelt's dramatic departure from his predecessors' stance on organized labor unions can be attributed to a multitude of factors.[52] Whatever his motivation, President Roosevelt made great progress

39. *Knights of Labor: An Early Labor Organization*, UNITED STATES HISTORY, http://www.u-s-history.com/pages/h933.html (last visited May 18, 2016).

40. *See* PERLMAN, *supra* note 36, at 83 ("The labor press gave the Order great publicity, but the Knights did not rely on gratuitous newspaper publicity.").

41. *Knights of Labor*, *supra* note 39.

42. PERLMAN, *supra* note 36, at 83.

43. *Knights of Labor*, *supra* note 39. *See also* FONER, *supra* note 30, at 168–70 (attributing the fall of the Knights of Labor to internal dysfunction spurred by the leaders of the Knights changing their focus from oppressive employers to disbanding other pro-labor unions).

44. *See* DUBOFSKY, *supra* note 19, at 4 (noting that the number of national strikes increased from 695 in 1885 to 1,572 in 1886); FONER, *supra* note 30, at 48 ("[The Knights of Labor had become] the most successful boycotting agency in the history of the American labor movement.").

45. PERLMAN, *supra* note 36, at 84.

46. DUBOFSKY, *supra* note 19, at 4.

47. *Id.* at 11.

48. *Id.* at 34; PERLMAN, *supra* note 36, at 155.

49. *See* DUBOFSKY, *supra* note 19, at 41 (noting the contentious relationship between labor unions and previous United States presidents—Hayes, Harrison, Cleveland, and McKinley—because of their use of federal troops to prevent worker strikes).

50. *Id.* at 34; FONER, *supra* note 30, at 267–69.

51. *See* DUBOFSKY, *supra* note 19, at 41 (noting that as President, Theodore Roosevelt sought to distance himself from his predecessors' stance on unions, taking more of a middle ground).

52. *See id.* (speculating that President Roosevelt's recognition of labor unions stemmed from his desire to gain the support of laborers since the Republican party, with which Roosevelt was affiliated, had traditionally advanced an anti-labor platform); *see also Theodore Roosevelt*, WHITE HOUSE, http://www.whitehouse.gov/about/presidents/theodoreroosevelt/ (attributing President Roosevelt's recognition of labor unions to Roosevelt's view that "the Government should be the great arbiter of the conflicting economic forces in the Nation, especially between capital and labor, guaranteeing justice to each and dispensing favors to none.") (last visited May 18, 2016).

in advancing laborer rights by asking "for legislation to do away with the competition of convict contract labor in the open labor market, to enforce the 8-hour law, to protect women and children from excessive hours of labor, night work, and unsanitary conditions."[53] The progressive movement initiated by Theodore Roosevelt, however, soon stagnated as William Howard Taft succeeded Roosevelt as President.[54] Preferring to defer to the judiciary when labor disputes arose, in contrast to his predecessor, President Taft did not believe that it was the role of the executive branch to be activist or reformative.[55] Exaggerating the stagnation in labor reform was the fact that President Taft was able to appoint five justices to the United States Supreme Court.[56] By himself, President Taft successfully packed the Supreme Court with a court majority opposing labor reform.[57]

Despite personally choosing Taft to be his successor as the head of the Republican Party, Theodore Roosevelt ran against Taft in the 1912 presidential election.[58] Unable to receive the nomination as the Republican Party's candidate in the election with Taft running as the incumbent, Roosevelt ran as the head of the Progressive Party.[59] The schism between Taft and Roosevelt, however, proved fatal to the Republican Party.[60] Roosevelt and Taft garnered a combined 7,603,129 popular votes, but with the two candidates splitting these votes, the 6,293,454 votes Democratic Party candidate Woodrow Wilson received led to Wilson winning by a landslide.[61]

Traditionally, the Democratic Party had aligned itself with the pro-labor movement and received great support from the most influential national labor union at the time, the American Federation of Labor ("AFL").[62] Once in office, President Wilson supported legislation that, at least facially, advanced the agenda of organized labor.[63] Yet, the improvements in labor conditions that could have flowed from these legislative enactments were, in all actuality, limited because of the Supreme

53. 85 CONG. REC. S7476 (daily ed. May 22, 1957) (statement of Hon. Joseph C. O'Mahoney).

54. *See* DUBOFSKY, *supra* note 19, at 52 (stating that President Taft's appointments to the United States Supreme Court created a "firm barrier to reform in labor law and industrial relations.").

55. *Id.* at 51–52.

56. Laura Fitzpatrick, *Which Presidents Have Picked the Most Supremes?*, TIME.COM (Apr. 13, 2010) http://content.time.com/time/nation/article/0,8599,1981444,00.html. The number of Supreme Court appointments by Taft was the most ever by a president at the time, with the exception of George Washington's original appointments. *Id.* Making the number of Supreme Court appointments even more remarkable is the fact that Taft only served one term in office. *Id.*

57. DUBOFSKY, *supra* note 19, at 52.

58. *William Howard Taft*, WHITE HOUSE, http://www.whitehouse.gov/about/presidents/williamhowardtaft (last visited May 18, 2016).

59. *1912 Presidential Election*, 270 TO WIN, http://www.270towin.com/1912_Election/ (last visited May 18, 2016).

60. *See* DUBOFSKY, *supra* note 19, at 53 (noting that the rift in the Republican party played a large part in Woodrow Wilson being elected president in 1912).

61. *1912 Presidential Election*, *supra* note 59.

62. DUBOFSKY, *supra* note 19, at 53–55.

63. *See id.* at 54–60 (mentioning President Wilson's administration making amendments to the Sherman Act, passing the Clayton Act, the LaFollette Seamen's Act, the Newlands Act, the Adamson Act and the Keaton-Owens Act).

Court continuously deeming substantive portions of these acts unconstitutional.[64] Regardless, backed by AFL support, President Wilson was reelected in the 1916 election.[65]

On April 6, 1917, just over a year into President Wilson's second term, the United States entered World War I.[66] Although initially opposed to the war, labor unions soon sided with the administration and supported the United States' involvement.[67] World War I represented an opportunity for laborers to turn the tables on employers.

War increased industrial activity, which, in turn, lowered unemployment rates to previously unprecedented levels[68]—so much so that there was actually a shortage of laborers.[69] Union membership soared and President Wilson created the National War Labor Board ("NWLB") in order to facilitate settlement of any labor disputes that might otherwise stymie the industrial production needed to support wartime efforts.[70] The NWLB represented "the first time in the history of the country, a Federal labor agency set forth the right of workers to organize in trade unions and encouraged collective bargaining with employers through chosen representation."[71]

Any advancements in labor relations ushered in by World War I, however, were short-lived. With the NWLB dissolving at the conclusion of World War I, labor industries that had been compelled to collectively bargain with labor unions during wartime were no longer forced to recognize the legitimacy of these labor unions, and instead sought to restore the pre-war status quo.[72] Additionally, domestic affairs and anti-war sentiment had changed the political tide and the Republican Party dominated the 1918 midterm elections.[73] Seeking to distance himself from the pro-labor policies he perceived to have been the cause of Republican success in the mid-terms, President Wilson did little to prevent employers from reestablishing oppressive employment policies.[74] This resulted in the sharp decline in union membership, which had exceeded five million members in 1920, but by 1923 had plummeted to just over 3.5 million members.[75]

64. *Id.* at 57; GEORGE P. SCHULTZ & GEOFFREY H. MOORE, A BRIEF HISTORY OF THE AMERICAN LABOR MOVEMENT 21 (1970 ed. 1970).

65. *See* DUBOFSKY, *supra* note 19, at 60.

66. *Id.* at 61.

67. *See* BILL FLETCHER, JR. & FERNANDO GAPASIN, SOLIDARITY DIVIDED: THE CRISIS IN ORGANIZED LABOR AND A NEW PATH TOWARD SOCIAL JUSTICE 19 (2008) (noting the internal divide among labor unions on whether they should support World War I).

68. *See* DUBOFSKY, *supra* note 19, at 62–63 (noting that the decline in unemployment rates and increase in prices for goods, correlated with the increased willingness of workers to strike for their conditions of employment).

69. SCHULTZ & MOORE, *supra* note 64, at 24.

70. DUBOFSKY, *supra* note 19, at 72; SCHULTZ & MOORE, *supra* note 64, at 24.

71. SCHULTZ & MOORE, *supra* note 64, at 24.

72. *Id.* at 24–25.

73. DUBOFSKY, *supra* note 19, at 77.

74. *See id.* at 78(stating that, although the Wilson administration had not completely deserted its "union friends," they "declined to compel employers to deal with unions").

75. SCHULTZ & MOORE, *supra* note 64, at 27.

The 1918-midterm elections proved to be indicative of what was to come, as the Republican Party took control of the White House with Warren Harding's landslide victory in the 1920 presidential election.[76] Harding's term in office was cut short, however, as he unexpectedly died after only two years.[77] Calvin Coolidge took over the presidency for the final two years of the term, which led to his subsequent nomination as the Republican Party's presidential candidate in the 1924 election.[78]

With little support from either the Democratic or the Republican parties, labor union leaders gravitated to a third political party—the Progressive Party—which was dedicated to advancing the industrial and political power of the working class.[79] Led by Wisconsin Senator Robert M. LaFollette, the Progressive Party, with the support of other minority political groups,[80] set its sights on the 1924 presidential election.[81] Despite the Progressive Party's appeal to laborers, the traditional two-party system prevailed in the 1924 election with LaFollette garnering only 2.4% of the electoral vote.[82] Winning 71.9% of the electoral vote, Calvin Coolidge, the Republican Party's presidential nominee, handily won the 1924 election.[83] Following its defeat in the 1924 presidential election, the Progressive Party soon unraveled and laborers were once again left vying for support from the Republican and the Democratic parties.[84]

Support was not easy to come by, however, as the United States economy boomed during Coolidge's presidency—creating little incentive to alter the status quo.[85] Given the general prosperity and excessive lifestyles characterizing the "Roaring Twenties," the 1928 presidential election ushered in yet another anti-labor, Republican president in Herbert Hoover.[86] Taking office amid great prosperity and peace, America's future looked bright under President Hoover.[87] Alas, all good things must come to an end—and they did, abruptly.

On October 24, 1929, just seven months into Hoover's presidency, the United States stock market crashed.[88] The 1920s, characterized by

76. *Election of 1920: Republican and the Return to Normalcy*, U.S. HIST., http://www.u-s-history.com/pages/h890.html (last visited May 18, 2016).

77. *Calvin Coolidge*, HIST., http://www.history.com/topics/us-presidents/calvin-coolidge (last visited May 18, 2016).

78. *Id.*

79. *Conference for Progressive Political Action: (1922-25)*, MARXISTHISTORY.ORG, http://marxisthistory.org/subject/usa/eam/cppa.html (last visited May 18, 2016).

80. *The La Follette Progressives*, U.S. HIST., http://www.u-s-history.com/pages/h1440.html (last visited May 18, 2016).

81. *Id.*

82. *1924 Presidential General Election Results*, DAVE LEIP'S ATLAS OF U.S. PRESIDENTIAL ELECTIONS, http://uselectionatlas.org/RESULTS/national.php?year=1924 (last visited May 18, 2016).

83. *Id.*

84. *Labor Movement*, HIST., http://www.history.com/topics/labor (last visited May 18, 2016).

85. *Calvin Coolidge*, WHITEHOUSE.GOV, http://www.whitehouse.gov/1600/presidents/calvincoolidge (last visited May 18, 2016).

86. *Calvin Coolidge*, *supra* note 77.

87. *Herbert Hoover*, HIST., http://www.history.com/topics/us-presidents/herbert-hoover (last visited May 18, 2016).

88. *Id.*

prosperity and material excess, was also an era of great inequality in the distribution of wealth.[89] Technological advances led to substantial increases in the efficiency of manufacturing industries.[90] While this benefitted industry leaders, the increases in worker output were not reflected in the wages paid to laborers.[91] As a result, the market became saturated with products such as automobiles, home appliances, entertainment goods, petroleum, chemicals, processed foods, clothing, and mass merchandizing.[92] These industries were highly competitive and depended on mass consumption by consumers to keep the market afloat.[93] In order to provide these goods at the lowest possible cost, companies began slashing workers' wages.[94] What the industry leaders failed to realize, however, is that the laborers whose salaries they were cutting were the very people that these industries relied on to purchase their products.[95]

In 1929, when the stock market crashed, the top-200 companies in the United States controlled half of the nation's corporate assets, and when many of these companies began failing so did the United States economy.[96] As the Great Depression gripped the nation, causing unemployment rates to reach unprecedented levels, the prosperity of the 1920s seemed a thing of the distant past.[97] Prior to the stock market crash, unemployment rates were a miniscule three percent, but by 1931 unemployment rates had soared to twenty-three percent.[98] With nearly a quarter of the United States population out of work and millions of citizens losing their homes and material possessions, President Hoover became increasingly unpopular leading up to the 1932 presidential election.[99]

Despite the ominous socioeconomic setting surrounding the 1932 presidential election,[100] it would prove to be one of the most important elections in the history of the United States—particularly for laborers. With many placing blame for the Great Depression squarely on Hoover's shoulders,[101] President Hoover gained a mere 11.1% of the electoral vote in the 1932 presidential election.[102] Championing "relief, recovery, and

89. NELSON LICHTENSTEIN, STATE OF THE UNION: A CENTURY OF AMERICAN LABOR 23 (2002).

90. *Id.*

91. *Id.*

92. *Id.* at 22.

93. *Id.*

94. *Id.*

95. *See id.* (noting the problem with overproduction of automobiles by Chevrolet, which led to the company compensating its dealerships to destroy older vehicles in order to sell more of the newer models).

96. *Id.* at 23.

97. *The Great Depression*, U.S. HIST., http://www.u-s-history.com/pages/h1569.html (last visited May 18, 2016).

98. *Herbert Hoover*, *supra* note 87.

99. *Id.*

100. *See New Deal*, HIST., http://www.history.com/topics/new-deal (describing 1932 as "one of the bleakest years of the Great Depression") (last visited Mar. 19, 2015).

101. *Herbert Hoover*, *supra* note 87.

102. *1932 Presidential General Election Results*, DAVE LEIP'S ATLAS OF U.S. PRESIDENTIAL ELECTIONS, http://uselectionatlas.org/RESULTS/national.php?year=1932 (last visited May 18, 2016).

reform," Franklin D. Roosevelt won the Democratic Party's nomination and the 1932 presidential election.[103] Roosevelt took office dedicated to reversing the economic climate by providing "*relief* to the unemployed and those in danger of losing [their] farms and homes, *recovery* to agriculture and business, and *reform*, notably through the inception of the vast Tennessee Valley Authority (TVA)."[104]

Unlike past presidents, President Roosevelt knew that long-term American prosperity could not be achieved without a strong working class.[105] To achieve this, President Roosevelt introduced legislation aimed at attacking the economic problems at their source—big business.[106] President Roosevelt's plan was to grow the middle class by demanding that employers of each industry pay their employees living wages.[107] By growing the middle class, laborers and consumers would have more discretionary income to spend on the goods industries were producing.[108] The logic was that increased consumption of goods would result in a greater number of companies succeeding, which, in turn, would lead to more jobs and a stronger national economy.[109] The only problem, however, was the national government and its inner-agencies lacked the policing capabilities necessary to keep a watchful eye on employers.[110] Thus, to execute his economic plan, President Roosevelt would need industry specific labor unions to police their own wages and working conditions.[111]

For the first time, labor unions not only had an ear in Washington D.C., but an advocate—and a fierce one at that. President Roosevelt's various pieces of economic reformatory legislation became known as the "New Deal."[112] One of the acts passed by the Roosevelt administration was the National Industrial Recovery Act ("NIRA").[113] Passed in 1933, the NIRA marked the first time that a piece of national legislation explicitly called for collective bargaining between employees and employers.[114]

103. *Franklin D. Roosevelt*, U.S. HIST., http://www.u-s-history.com/pages/h1578.html (last visited May 18, 2016).

104. *Id.*

105. LICHTENSTEIN, *supra* note 89, at 24–25.

106. *Id.* at 24.

107. *Id.* at 25.

108. *See id.* (quoting New York Senator, Robert Wagner as saying "[t]he fruits of industry must be distributed more bounteously among the masses of wage-earners who create the bulk of consumer demand.").

109. *Id.* at 24–25.

110. *Id.* at 24.

111. *Id.* at 25.

112. *The New Deal*, U.S. HIST., http://www.u-s-history.com/pages/h1851.html (last visited May 18, 2015).

113. LICHTENSTEIN, *supra* note 89, at 25.

114. *See id.* (quoting the text of the NIRA "employees shall have the right to organize and bargain collectively through representatives of their own choosing . . . free from the interference, restraint, or coercion of employers.").

The NIRA, while sound in its aims at encouraging collective bargaining through unionization, struggled in practical application.[115] Following the passage of the NIRA, union membership quickly rose, but the effectiveness of these unions was limited, at best.[116] Internal disagreement among union leaders regarding how unions should be structured – by specific trade or by an entire industry – lessened the effectiveness of unions.[117] Furthermore, an interpretation of the NIRA by many employers, which was judicially condoned, allowed mass-production employers to fire employees based on "individual merit."[118] Not surprisingly, mass production employers used this interpretation to fire employees who actively supported unions, thereby discouraging employees from exercising their statutory rights to collectively bargain through union membership.[119] Further frustrating the purpose of the NIRA were "company unions," which were facially independent, but in reality, under the employer's control.[120]

While the aims of the NIRA were true, lack of enforcement of the Act's collective bargaining provisions only caused further discontent among workers, which led to an increased number of worker strikes.[121] In order to "plug the loopholes" in the NIRA, Congress, with the support of the Roosevelt administration, enacted the National Labor Relations Act.[122] The NLRA, which became known as the Wagner Act, not only maintained the right to collectively bargain, but also "created an independent regulatory agency, the NLRB, to administer and enforce the law."[123] Addressing the shortcomings of the NIRA, the Wagner Act sought to define the rules governing collective bargaining between employees and employers by declaring that any union supported "by a *majority* of employees in a particular bargaining unit shall be the *exclusive* representation of *all* the employees in that unit . . . ."[124]

Despite addressing the flaws of the NIRA, the Wagner Act faced its own challenges—namely, constitutional ones.[125] Given the unwillingness of some circuits to enforce the NLRB's labor decisions on the basis that the Wagner Act was an unconstitutional violation of an employee's Fifth Amendment right to contract freely, it was only a matter of time before a case challenging the Wagner Act reached the United States Supreme

115. *See* E. DAVID CRONON, BUREAU OF INDUS. REL., LABOR AND THE NEW DEAL 15 (1963) (noting the gains for union members under the NIRA "proved illusory").

116. *See id.* at 14–15 (stating that within a year after the passage of the NIRA, union membership had increased by 1,500,000 workers but that the increased membership did not equate to practical gains for union members).

117. *Id.* at 15.

118. *Id.*

119. *Id.*

120. *Id.* at 20.

121. *Id.* at 18–19.

122. *Id.* at 24.

123. *Id.* at 29.

124. *Id.* at 31.

125. *See id.* at 30–34 (discussing the constitutional challenges to the Wagner Act).

Court.[126] Such an opportunity arose in *National Labor Relations Board v. Jones & Laughlin Steel Corp.*,[127] after the Eighth Circuit refused to recognize and enforce the NLRB's determination that Jones & Laughlin Steel Corp. had violated the Wagner Act by discharging ten employees for their union participation.[128]

Although most believed the Supreme Court would deem the Wagner Act unconstitutional,[129] as the Court had done with several other key pieces of New Deal legislation,[130] the Court, in its highly anticipated decision, upheld the constitutionality of the Wagner Act.[131] The Court's sudden departure from its long-standing history of deference to big business is a discussion better suited for another venue, but it bears noting given the departure's implications for labor relations. Legal scholars have attributed the Court's dramatic departure from its precedent to President Roosevelt's "court-packing plan."[132] Frustrated by the Supreme Court stymieing his efforts at economic reform by systemically deeming key parts of his New Deal legislation unconstitutional, President Roosevelt ran for reelection on the platform that, if elected, he would push Congress to restructure the judiciary by adding an additional six justices to the United States Supreme Court. The hope was that by adding six justices who were more sympathetic to New Deal legislation, the Court would stop systemically overturning President Roosevelt's legislation aimed at resurrecting the United States economy.[133] Some scholars have speculated that Chief Justice Hughes, who held the decisive vote in a divided Court, changed his stance on labor relations and the Wagner Act in order to preserve the nine-justice structure of the Supreme Court.[134] Whatever its reason, the Court's decision in *Jones & Laughlin Steel Corp.*[135] gave hope for employee rights.[136]

With the constitutionality of the Wagner Act settled by the Supreme Court, the second biggest manufacturing company in the world,

126. *See id.* at 33.

127. 301 U.S. 1 (1937).

128. CRONON, *supra* note 115, at 33.

129. *See* Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265, 285 (1978) (noting the staunch opposition to the Wagner Act).

130. CONGRESSIONAL QUARTERLY, CONGRESS A TO Z (David R. Tarr & Ann O'Connor, eds., 3rd ed. 1999 ("Laws that were struck down included the Agricultural Adjustment Act of 1933, the National Industrial Recovery Act of 1933, and the Bituminous Coal Conservation Act of 1935.").

131. *Jones & Laughlin Steel Corp.*, 301 U.S. at 49.

132. *See, e.g.*, CRONON, *supra* note 115, at 37–38; *Roosevelt Announces "Court-Packing" Plan*, HISTORY, http://www.history.com/this-day-in-history/roosevelt-announces-court-packing-plan (last visited May 18, 2016) [hereinafter *Roosevelt Announces*].

133. Ian Millhiser, *In Defense of Court-Packing: When the Supreme Court Willfully Misreads the Constitution, FDR's Plan Doesn't Seem So Bad*, SLATE (Feb. 23, 2015, 9:33 AM), http://www.slate.com/articles/news_and_politics/jurisprudence/2015/02/fdr_court_packing_plan_obama_and_roosevelt_s_supreme_court_standoffs.html; *Roosevelt Announces*, *supra* note 132.

134. *See* CRONON, *supra* note 115, at 38.

135. *Jones & Laughlin Steel Corp.*, 301 U.S. at 49.

136. *See* Richard G. Menaker, *FDR's Court Packing Plan: A Study in Irony*, THE GILDER LEHRMAN INST. OF AM. HIST., http://www.gilderlehrman.org/history-by-era/new-deal/essays/fdr%E2%80%99s-court-packing-plan-study-irony (last visited May 18, 2016).

U.S. Steel, voluntarily raised employee wages and recognized the independent Steel Workers' Organizing Committee as the sole bargaining agent for its employees.[137] This monumental victory for labor unions increased national union membership by 2.5 million employees in 1937 alone.[138] While an important victory, the laborers' fight was not finished, as corporate leaders in other industrial sectors continued to resist the national labor movement.[139] Despite the resistance, by 1941 over nine million employees were represented by unions.[140]

As the domestic battle over labor unions persisted into 1941, international strife soon occupied the realm of public consciousness. On December 7, 1941, Pearl Harbor was attacked by Japanese forces, thereby entangling the United States in World War II.[141] Despite the undeniable atrocities associated with World War II, the United States' involvement proved to be vital for the advancement of the domestic labor movement.[142] The necessity for a strike-free industrial economy led President Roosevelt to reinstate the NWLB, which had been dissolved at the conclusion of World War I.[143] With the NWLB aiding the NLRB in enforcing compliance with the Wagner Act, industrial corporations had little choice but to recognize trade unions and to engage in collective bargaining with them.[144]

World War II not only compelled increased executive oversight on labor relations, but also necessitated the growth of industrial jobs in order to provide the resources required to support the wartime effort.[145] No longer did employees have to fear for their job security by joining a labor union.[146] Accordingly, by the end of the Second World War, labor union membership ballooned to its highest level—nearly fifteen-million workers.[147] Although union membership reached unprecedented numbers at

137. LICHTENSTEIN, *supra* note 89, at 46.

138. *Id.* at 47.

139. *Id.*

140. *Id.* at 48.

141. *See Pearl Harbor*, HIST., http://www.history.com/topics/world-war-ii/pearl-harbor (last visited May 18, 2016).

142. *See* Sarah Cole, *The Post-WWII American Labor Movement: A Struggle for Sheer Existence*, US HIST. SCENE (Sept. 27, 2013) http://www.ushistoryscene.com/uncategorized/amlaborwwii/ (noting that the Wagner Act compelled private employers to negotiate with labor unions).

143. *National War Labor Board*, U.S. HIST., http://www.u-s-history.com/pages/h4303.html (last visited May 18, 2016).

144. Joseph Shister, *The National War Labor Board: Its Significance*, 53 J. POL. ECON. 37, 38 (1945) (noting that it was not only considered unpatriotic for companies to criticize and disobey the government's actions in implementing the NWLB, but such actions could result in economic sanctions against the company).

145. *See The U.S. Home Front During World War II*, HIST., http://www.history.com/topics/world-war-ii/us-home-front-during-world-war-ii ("From the outset of the war, it was clear that enormous quantities of airplanes, tanks, warships, rifles and other armaments would be essential to beating America's aggressors. U.S. workers played a vital role in the production of such war-related materials.") (last visited May 18, 2016).

146. Shister, *supra* note 144, at 37 (noting that one of the purposes behind the NWLB was to create a harmonious relationship free of dispute through Board imposed resolutions).

147. *See* DONALD R. RICHBERG, LABOR UNION MONOPOLY: A CLEAR AND PRESENT DANGER 39 (1957) (estimating labor union membership at the end of World War II to be 14,796,000 workers);

the conclusion of World War II, similar growth in union participation had occurred during the First World War only to have the pro-business status quo restored at the conclusion of the War.[148] The rights attained by laborers during World War II, however, were here to stay.

When the United States economy failed to slip back into a depression following the War, businesses were forced to accept the presence of mass unions.[149] Unions represented stability for the labor force, which was advantageous for businesses and laborers alike.[150] Collective bargaining helped real wages in the United States double between 1940 and 1967.[151] As a result, the standard of living for workers increased substantially, and with it, the average life expectancy.[152] The "underconsumption" that had led to the Great Depression was no longer a major concern and the wage increases helped make the average worker "a middle class member of a middle class society."[153]

Despite the undeniable progress in working conditions, working hours, and wages that came from the labor movement, unions soon became highly politicized and disfavored by all but the extreme leftists.[154] By the late 1960s, unions were no longer viewed as a vehicle for progress, but rather, a powerful interest group concerned more with exerting its will and maintaining its power than achieving continued progress.[155] Unions became characterized as bureaucratic institutions based on a seniority system whereby tenured laborers were insulated from removal, irrespective of one's quality of work, or lack thereof.[156] Moreover, union membership constrained individual laborers' options for recourse when strife arose, as any action taken by a union member must be condoned by the union as a whole.[157]

Political and social power, in large part, is dependent upon support by a large number of individuals. For a variety of sociopolitical reasons, unions began losing the support of their members from the 1960s onward.[158] The scope of the NLRA, which defined who was covered by the collective bargaining provisions of the Wagner Act, was limited through

see also LICHTENSTEIN, *supra* note 89, at 48 (estimating labor union membership at the end of World War II to be an even 15 million workers).

148. *See* SCHULTZ & MOORE, *supra* note 64, at 27 (chronicling the drastic decline in union membership post-WWI).

149. *See* LICHTENSTEIN, *supra* note 89, at 50.

150. *Id.* at 51.

151. *Id.* at 56–57.

152. *Id.*

153. *Id.* at 56 (quoting RUSSELL DAVENPORT, THE PERMANENT REVOLUTION 92 (1951)) (internal quotation marks omitted).

154. *Id.* at 149.

155. *Id.* at 166 (quoting one critic of unions as noting the "inevitable current moving the trade unions toward bureaucratization and oligarchy.") (quoting Paul Jacobs, *Union Democracy and the Public Good*, COMMENTARY, Jan. 1958, at 74).

156. *Id.*

157. *See* Julie Davoren, *Labor Union Goals and Objectives*, CHRON, http://smallbusiness.chron.com/labor-union-goals-objectives-59462.html (describing how union members can file grievances against their employer through the union) (last visited Mar. 11, 2016).

158. LICHTENSTEIN, *supra* note 89, at 141–142.

a series of judicial decisions.[159] Holding that the NLRA did not apply to any laborer who had the ability to "formulate and effectuate management policies by expressing and making operative the decisions of the employer," the Supreme Court, in effect, excluded all laborers from the protection of labor laws except those who performed mundane and monotonous tasks.[160] This situation created a classic catch-22. Employees who were able to gain greater control and participation in the workplace were no longer recognized as employees under labor law and, therefore, were not protected by the very laws put in place to encourage greater employee participation in the workplace.[161]

Additionally, as technology continued to advance in various industrial sectors, the large-scale national unions were not well suited to respond to industry specific problems. Compounding the issues facing unions was the fact that racial minorities and women, who historically had been systematically discriminated against in union membership, composed a significant portion of laborers by the 1970s.[162] As laborers no longer feared for their aggregate employment rights, the focus soon turned to the rights of individual employees.[163] Responding to these concerns, numerous pieces of legislation were passed beginning in the late 1960s, which were aimed at protecting laborers from employment discrimination based on race, gender, nationality, disabilities, and the like.[164] Instead of relying on union leaders to enforce employee rights, the individualistic discrimination laws permitted employees to enforce employer compliance themselves.[165] This, combined with President Reagan's and President Nixon's commitment to deregulating the economy and hostility towards unions, proved catastrophic to unions in the 1970s and 1980s.[166] By 1991, a mere sixteen percent of the workforce belonged to a union—a thirteen-percent decrease in only eighteen years.[167]

159. *See id.* at 176 (noting the limitations imposed on what constituted an "employee" under the Wagner Act).

160. NLRB v. Bell Aerospace Co. Div. of Textron, Inc., 416 U.S. 267, 286 (1974). *See also* LICHTENSTEIN, *supra* note 89, at 176 (stating that had the managerial exception actually been stringently enforced, "all those whose jobs had not been reduced to mindless routine—would have been deprived of the Wagner Act's framework of representation").

161. LICHTENSTEIN, *supra* note 89, at 176–177.

162. *See* MORGAN O. REYNOLDS, POWER AND PRIVILEGE: LABOR UNIONS IN AMERICA 220 (1984) (noting that unions "have a history of racist and sexist practices unparalleled in other private institutions in this country"); *see also* Paul Moreno, *Unions and Discrimination*, 30 CATO J. 67, 74 (2010), *available at* http://www.cato.org/sites/cato.org/files/serials/files/cato-journal/2010/1/cj30n1-4.pdf (noting the historically discriminatory practices of labor unions).

163. *See* LICHTENSTEIN, *supra* note 89, at 200–01 (noting the shift from collective union rights to individualistic rights and the enactment of legislation reflecting this change).

164. *Id.*

165. *Id.*

166. *See Labor Movement*, HISTORY, http://www.history.com/topics/labor (last visited May 18, 2016).

167. LICHTENSTEIN, *supra* note 89, at 213.

Despite dwindling union participation in the twenty-first century,[168] the labor movement and the collective efforts of labor unions spurred monumental advancements in wages, work conditions, work hours, and employee rights. Such substantial progress over the past eighty years would not have been possible without the ability of laborers to unionize. The fact that unions have been relegated to somewhat of an afterthought in today's society does not lessen the impact that unions had in revolutionizing the relationship between employers and employees.

Born in response to employee exploitation, unions helped provide the weight necessary to tilt the scales of free labor closer to even. Facing a similarly oppressive concentration of power in the hands of those in charge, collegiate athletes have little choice but to accept the status quo or rise up against it. Yet, the status quo between student-athletes and the NCAA was not always one of exploitation. To comprehend how the NCAA came to be the powerful entity it is today, one must start at the beginning.

B. History of the National Collegiate Athletic Association

Today, many would have a difficult time distinguishing between the NCAA and other privately owned athletic organizations like Major League Baseball, the National Basketball Association, and the National Football League. Despite the fact that the NCAA now generates annual revenue in excess of eleven billion dollars off collegiate sports,[169] which totals more than the estimated league revenues of both the National Basketball Association and the National Hockey League,[170] the NCAA was not always a revenue generating organization.[171] In fact, the primary goal in forming the NCAA was to create an organization to oversee the safety of collegiate football players.[172] Amid public outcry over the death of eighteen and serious injury of 149 collegiate football players during the 1905 season,[173] President Theodore Roosevelt demanded that changes be made to the game and threatened to abolish collegiate football if they were not.[174]

In response, representatives from various schools met in what became known as the National Football Conference of Universities and

168. *See* Nicholas Kristof, *The Cost of a Decline in Unions*, N.Y. TIMES (Feb. 19, 2015), http://www.nytimes.com/2015/02/19/opinion/nicholas-kristof-the-cost-of-a-decline-in-unions.html (noting the adverse consequences associated with the decline in American union participation).

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

170. *Id.*

171. *See generally* JOSEPH N. CROWLEY, THE NCAA'S FIRST CENTURY: IN THE ARENA (2006), *available at* http://www.ncaapublications.com/productdownloads/AB06.pdf (discussing the NCAA's periods of growth from inception to its modern structure).

172. *See id.* at 9 (noting the "violence still haunted [college football] as the 20th century arrived").

173. *Id.*

174. *Id.* at 9–10.

Colleges.[175] At the conference, an organization was formed by the members of the universities in attendance.[176] The organization promulgated rules governing not only collegiate football, but also the internal structure of the organization, which would later become known as the NCAA.[177]

From the beginning, the NCAA was concerned with keeping collegiate athletics distinct from professional sports.[178] Among the first bylaws governing the early member-universities of the NCAA were rules prohibiting:

> The offering of inducements to players to enter Colleges or Universities because of their athletic abilities and of supporting or maintaining players while students on account of their athletic abilities, either by athletic organizations, individual alumni, or otherwise, directly or indirectly. The singling out of prominent athletic students of preparatory schools and endeavoring to influence them to enter a particular College or University. The playing of those ineligible as amateurs. . . . representing a college or University in any intercollegiate game or contest who has at any time received, either directly or indirectly, money, or any other consideration, to play on any team . . . representing a College or University in any intercollegiate game or contest who is paid or receives, directly or indirectly, any money, or financial concession, or emolument as past or present compensation for, or as prior consideration or inducement to play in, or enter any athletic contest.[179]

These bylaws became the NCAA's model for amateurism—a model the NCAA relentlessly defends today when arguing against the unionization of collegiate athletes.[180]

Despite bylaws prohibiting student-athletes from being compensated in any form,[181] including scholarships,[182] the NCAA lacked any enforcement mechanism necessary to force its member universities to comply with the NCAA's bylaws.[183] Rather, the NCAA relied on its member universities to adhere to the principles of amateurism set out in the or-

175. *Id.* at 10.

176. *Id.*

177. *Id.*

178. *See* PROCEEDINGS OF THE FIRST ANNUAL CONVENTION OF THE INTERCOLLEGIATE ATHLETIC ASSOCIATION OF THE UNITED STATES 33 (1906), *available at* http://www.forgottenbooks.com/readbook/Proceedings_of_the_Annual_Convention_of_the_National_Collegiate_1000727416?highlight=compensation#27 (establishing the prohibition against compensation by student-athletes) [hereinafter "1906 NCAA Bylaws"].

179. *Id.* at art. VI, §§ (a)(1)–(2), b art. VII, §§ (2)–(3).

180. *See* Byron Tau, *NCAA Hires New Lobbyists*, POLITICO (June 13, 2014, 11:54 AM), http://www.politico.com/story/2014/06/ncaa-hire-lobbyist-national-collegiate-athletic-association-107830.html.

181. *See generally*, 1906 NCAA Bylaws, *supra* note 178 (establishing the prohibition against compensation by student-athletes).

182. *See* CROWLEY, *supra* note 171, at 29 (describing the use of scholarships by universities to lure players as one of the primary justifications for the NCAA creating an enforcement system).

183. *See id.* (noting a NCAA committee member complaining about the organization having "no police powers" to enforce the NCAA's bylaws).

ganization's bylaws.[184] Recognizing the NCAA could not sanction its member universities for violations of the organization's anti-compensation bylaws, universities began offering scholarships to lure students to their schools.[185] In 1948, the NCAA responded by creating the Constitutional Compliance Committee, a three-person committee charged with investigating violations of the NCAA's bylaws.[186] Although the Constitutional Compliance Committee marked a step toward a more centralized and authoritative NCAA, the committee was not particularly effective and eventually disbanded in 1951.[187]

In order to compel compliance with the organization's bylaws, the NCAA needed greater centralized authority to sanction universities that violated its rules.[188] This authority came in 1952 with the implementation of the Membership Committee, which wielded the power to investigate claims of university violations and to impose sanctions as the committee saw fit.[189] Although there was an initial pushback by universities that were sanctioned by the NCAA,[190] member universities eventually recognized the NCAA's authority to enforce its bylaws.[191]

By the early 1950s, the membership of the NCAA had increased as collegiate sports gained popularity throughout the United States.[192] Undoubtedly, increasing press coverage by newspapers and games being broadcast on the radio were instrumental in the increased popularity of collegiate sports.[193] Despite the media's contribution to the growth of the NCAA, when the National Broadcasting Company ("NBC") sought to televise collegiate football games, there was great reluctance by some within the NCAA.[194] The critics feared that televising NCAA games would encourage fans to stay at home and watch the game on television as opposed to showing up to games in person.[195] The fear was not unfounded, as ticket sales decreased in 1953 after the NCAA came to a one-year agreement with NBC that netted the NCAA $1.72 million.[196]

184. *Id.* at 15.

185. *Id.* at 29.

186. *Id.* at 30–31.

187. *Id.* at 31 (noting that the collapse of the Constitutional Compliance Committee stemmed from the committee's only method of sanctioning universities that violated its bylaws was expulsion from NCAA membership, a move that required a majority vote by member universities—a vote which most universities were unwilling to cast against other schools).

188. *Id.* at 36 (describing the enactment of the 1952 code, which allowed delegated greater authority to the NCAA internally).

189. *Id.*

190. *Id.* (noting the University of Kentucky's initial refusal to comply with the sanctions imposed by the NCAA).

191. *Id.*

192. *See* W. Burlette Carter, *The Age of Innocence: The First 25 Years of the National Collegiate Athletic Association, 1906 to 1931*, 8 VAND. J. ENT. & TECH. L. 211, 228–29 (2006) (describing the increase in NCAA membership).

193. *Id.* at 266.

194. CROWLEY, *supra* note 171, at 38–39.

195. *Id.* at 38.

196. *Id.* at 39.

Television's threat to ticket sales did not last long, however, as ticket sales increased every year after 1954 until 1981, with the exception of 1974.[197] By 1981, the fee to televise NCAA football games for one year had dramatically increased to $31 million.[198] With universities taking a portion of the television revenues from each game in which one of their athletic teams participated, universities began pushing for more televised games.[199] Televised games not only meant greater revenue for the universities and NCAA from viewership, but also presented an unparalleled opportunity for publicity—leading to even greater revenue.[200]

With money flowing into the pockets of universities and the NCAA, and with a prohibition against compensating those athletes responsible for the influx of money, universities began reinvesting profits in greater facilities and stadiums.[201] The logic behind this is not difficult to understand. Televised collegiate sporting events bring revenue to the university; teams that consistently win are more likely to be televised; to consistently win, universities must attract the best talent; eighteen-year-old kids are attracted to bright lights and gaudy facilities; thus, universities have an incredible incentive to spend money on recruiting premier athletes through the quality of their facilities. The old adage by Plautus, "you must spend money to make money"[202] certainly holds true in the context of collegiate athletics. The kicker of it all is that the NCAA receives a portion of all profits by its member universities.[203]

While the NCAA contends that it redistributes its profits to its member schools,[204] $50-million-dollar headquarter facilities are not built without substantial financial backing.[205] Yet, without an internal structure favoring the interests of the NCAA and universities, such profits would not be possible. Many have speculated as to what unionization would mean for the current structure of the NCAA. To answer that question, a basic understanding of the NCAA's structure and governance is necessary.

197. *Id.*
198. *Id.*
199. *Id.* at 41.
200. *Id.*
201. *Id.* at 40.
202. Titus Maccius Plautus, THEBRAINYQUOTE.COM, http://www.brainyquote.com/quotes/quotes/p/plautus380741.html (last visited May 18, 2016).
203. *See* Mark Schlabach, *NCAA: Where Does the Money Go?*, ESPN.COM (July 12, 2011), http://espn.go.com/college-sports/story/_/id/6756472/following-ncaa-money.
204. *Id.*
205. Taylor Branch, *The Shame of College Sports*, THEATLANTIC.COM (Sept. 7, 2011, 11:28 AM), http://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/.

C. Current Structure and Governance of the NCAA

In its entirety, the NCAA is composed of one thousand member universities.[206] These member universities are then split into one of three athletic divisions—Division I, Division II, and Division III.[207] With respect to collegiate football, Division I universities are further divided into two sub-divisions—the Football Bowl Subdivision ("FBS") and the Football Championship Subdivision ("FCS").[208] The most athletically competitive universities are placed within the FBS, followed by the FCS, Division II, and finally Division III.[209] Each athletic division is under the general authority of the NCAA but is governed by distinct rules regarding the terms of athletic participation.[210] For the purposes of this Note, the focus will be concentrated on Division I collegiate athletics.[211]

At the top of the Division I hierarchy stands the Board of Directors.[212] Following the August 2014 NCAA governance amendments, the Board of Directors now consists of twenty president/chancellors—ten positions for universities that are members of the FBS, five positions for FCS members, and five general positions for other Division I universities.[213] The amendments also added an additional four voting-members to the Board of Directors—the chair of the Council, the chair of the Student-Advisory Committee, a faculty representative from the Faculty Athletic Representatives Association's Executive Committee, and an institutional senior woman athletics representative.[214]

Answering to the Board of Directors is the Council, which is a decision-making body comprised of forty total representatives with each of the thirty-two Division I conferences represented on the Council.[215] Of the eight remaining positions, two are given to student-athlete represent-

206. *NCAA College Athletics Statistics*, STATISTIC BRAIN (Apr. 26, 2015), http://www.statisticbrain.com/ncaa-college-athletics-statistics/.

207. *See NCAA Division I*, NCAA, http://www.ncaa.org/about?division=d1 (last visited May 18, 2016); *About NCAA Division II*, NCAA, http://www.ncaa.org/about?division=d2 (last visited May 18, 2016); *About NCAA Division III*, NCAA, http://www.ncaa.org/about?division=d3 (last visited May 18, 2016).

208. *NCAA Division I*, *supra* note 207.

209. *NCAA vs. Division I, II, and III*, SHMOOP, http://www.shmoop.com/college/ncaa-division-1-recruiting.html (last visited May 18, 2016).

210. For instance, universities in the FBS are permitted to award eighty-five full scholarships to football players but universities within the FCS are only permitted to award sixty-three full scholarships. Julita, *Difference Between FBS and FCS*, DIFFERENCE BETWEEN.NET (Dec. 25, 2010), http://www.differencebetween.net/miscellaneous/difference-between-fbs-and-fcs/.

211. The reason for this is twofold. First, Northwestern University is in the Division I FBS conference, and therefore the effects of the *Northwestern* decision are best analyzed in this context. Second, the Division I conference is the largest, most recognizable, and highest grossing conference. Accordingly, the impact of the *Northwestern* decision on Division I athletics will likely be greater than the other divisions or, at the very least, indicative of the decision's effect on other division conferences.

212. *Division I Steering Committee on Governance: Recommended Governance Model*, NCAA 5 (July 18, 2014), http://www.ncaa.org/sites/default/files/DI%20Steering%20Commitee%20on%20Gov%20Proposed%20Model%2007%2018%2014%204.pdf?division=d1 [hereinafter *2014 NCAA Amendments*].

213. *Id.* at 6.

214. *Id.* at 18.

215. *Id.* at 6.

atives, one to a commissioner of one of the FBS "Power-5" conferences, one to a commissioner of a non-Power-5 FBS conference, one to a commissioner of a FCS conference, and one to a commissioner from one of the general Division I conferences, and two to faculty representatives.[216]

Beneath the Council are three sub-Councils, each addressing specific areas of concern for the NCAA—academics, autonomous student-athlete well-being, and legislative issues concerning championship administration and policy, membership standards, and management of sports/topic-specific studies.[217] The sub-Council on Academics consists of twenty representatives from a diverse range of Division I conferences.[218] The autonomous student-athlete well-being sub-Council, consisting of one representative from each member university within the Power-5 conferences—sixty-five total—and three student-athletes from each Power-5 conference—fifteen total—has the autonomous ability to address and enact conference-specific legislation on specific areas of student-athlete well-being.[219] The final sub-Council deals with legislative issues common to all Division I conferences such as championship administration and policy, membership standards, and management of sports/topic-specific studies.[220] This final sub-Council is composed of forty members from each Division I conference and two student-athlete representatives.[221]

As it stands, the NCAA is structured much like a combination of a corporation, whereby the Board of Directors sits atop the hierarchy with oversight responsibilities and the greatest amount of power, and a legislature where power is divided among its members who, in some instances, have equal voting power with their fellow members and in other instances, have voting power proportionate to a member's contributions to the entire entity.[222]

While each Division I university is represented within the NCAA bureaucracy, when the interests of university representatives align with those of the NCAA, student-athletes are not given a meaningful voice at the table. Having seen behind what many student-athletes view as the façade of the NCAA,[223] student-athletes have, for decades, grown malcon-

216. *Id.* at 21; *see also id.* (listing the "Power-5" conferences as the ACC, Big Ten, Big 12, Pac-12, and SEC).

217. *Id.* at 6.

218. *2014 NCAA Amendments*, *supra* note 212, at 25.

219. *Id.* at 28–34.

220. *Id.* at 7.

221. *Id.*

222. *See Corporate Structure: Directors to Shareholders*, FINDLAW, http://smallbusiness.findlaw.com/incorporation-and-legal-structures/corporate-structure-directors-to-shareholders.html (describing the role of the board of directors within a corporation) (last visited May 18, 2016); *The Structure of Congress*, SPARK NOTES, http://www.sparknotes.com/us-government-and-politics/american-government/congress/section1.rhtml (noting that states have an equal vote in the United States Senate and a number of votes proportionate to the population of a state in the United States House of Representatives) (last visited Mar. 19, 2015).

223. *See* Dan Gallo, *Former NCAA Athletes Criticize Organization, Support O'Bannon Lawsuit*, FOX NEWS (Apr. 4, 2014), http://www.foxnews.com/sports/2014/04/04/former-ncaa-athletes-criticize-ncaa-support-obannon/ (discussing the law suit that Ed O'Bannon, a former UCLA star basketball

tent and have challenged the system so revered by the NCAA and its member universities alike.[224] In some instances, student-athletes turned to the judiciary for recourse when their rights were not being represented by their university or the NCAA.[225]

D. Challenges to the Structure of the NCAA

1. Early Challenges

In *University of Denver v. Nemeth*,[226] the court held that a football player at the University of Denver was entitled to workmen's compensation for a severe injury the athlete sustained while playing football.[227] Noting, "[h]igher education in this day is business, and a big one,"[228] the court was unconvinced that a football player's relationship differed significantly from any other university employee who would be eligible to file for workmen's compensation.[229] Since the plaintiff's injury occurred within the scope of his employment, the court concluded that workmen's compensation should have been given.[230]

Ten years later, in *Van Horn v. Industrial Acc. Commission*,[231] the California Court of Appeals for the Second District overturned the district court's ruling that a football player was not an employee.[232] In *Van Horn*, a football player was killed in a plane crash while returning home with the football team from a game in a different state.[233] Refusing to classify the football player's scholarship as a gift, the court found that the scholarship created an employment relationship because it represented a form of compensation for which the athlete performed his athletic duties.[234]

Although *Nemeth* and *Van Horn* recognized collegiate athletes as employees for the purposes of compensation benefits, these cases were outliers. In *Banks v. Nat'l Collegiate Athletic Ass'n*,[235] the Seventh Circuit refused to recognize collegiate athletes as employees and lambasted the dissent for taking the "cynical view" that collegiate athletes "sell[] their services" to the NCAA.[236] The *Banks* decision is in-line with a series of

player, has filed against the NCAA for using his likeness for profit in a videogame and the support he has garnered from former collegiate athletes).

224. *Id.*

225. *See* Banks v. Nat'l Collegiate Athletic Ass'n, 977 F.2d 1081 (7th Cir. 1992); Univ. of Denver v. Nemeth, 257 P.2d 423 (Colo. 1953); Van Horn v. Indus. Acc. Comm'n, 33 Cal. Rptr. 169 (Cal. Dist. Ct. App. 1963).

226. 257 P.2d 423, 430 (Colo. 1953).

227. *Id.* at 424.

228. *Id.* at 425–26.

229. *Id.*at 427.

230. *Id.*

231. Van Horn v. Indus. Accident Comm'n, 33 Cal. Rptr. 169 (Cal. Dist. Ct. App. 1963).

232. *Id.* at 175.

233. *Id.* at 170.

234. *Id.* at 175.

235. 977 F.2d 1081 (7th Cir. 1992).

236. *Id.* at 1092.

cases that have fully bought into the student-athlete distinction while refusing to recognize collegiate athletes as employees of the NCAA or the students' universities.

2. Recent Challenges to the Structure of the NCAA

Despite the judicial system's historical unwillingness to consider student-athletes as employees, several cases decided in the past fifteen years have demonstrated that courts are now at least willing to entertain the notion.[237] The first of these seminal cases was the decision handed down by the NLRB in *Brown University*.[238]

Brown University did not involve student-athletes, but rather, graduate assistants.[239] The graduate assistants at Brown University petitioned to the NLRB in an attempt to be recognized as employees.[240] Although the NLRB had recognized graduate assistants as employees for such purposes just four years earlier in *New York University*,[241] in *Brown University* the Board pointedly overturned that decision, criticizing the opinion for reversing "more than 25 years of Board precedent."[242] In reaching the conclusion that graduate assistants are not employees under the NLRA, the Board articulated four factors that are analyzed when assessing whether a relationship is one of an employer and employee.[243]

First, the Board in *Brown University* noted the graduate assistants' classification as students.[244] Since individuals are ineligible to be a graduate assistant unless they are enrolled in the university, the Board found that the relationship was educational in nature.[245] Next, the Board emphasized the role the graduate assistantships played in the student's overall education and curriculum.[246] Since the duties that graduate assistants were required to perform related to the furtherance of their academic ambitions, the Board found the function of the position to be educational.[247] Additionally, the Board analyzed the relationship between the graduate assistants and their supervising faculty; finding the relationship to be primarily educational.[248] Finally, the Board looked at the financial assistance that Brown University provided the graduate assistants.[249] Since the financial assistance was in the form of scholarships, the Board

237. *See, e.g.*, Brown Univ. & Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., 342 NLRB 483 (2004); Northwestern Univ. & Coll. Athletes Players Ass'n, No. 13-RC-121359, 2014 WL 1246914 (N.L.R.B., Region 13, Mar. 26, 2014).
238. Brown Univ., 342 N.L.R.B. at 483.
239. *Id.*
240. *Id.*
241. New York Univ., 332 N.L.R.B. 1205 (2000).
242. Brown Univ., 342 N.L.R.B. at 483.
243. *Id.*
244. *Id.* at 488.
245. *Id.*
246. *Id.*
247. *Id.*
248. *Id.* at 489.
249. *Id.*

concluded that scholarships were sufficient compensation for the duties associated with a graduate assistantship.[250] Based on the totality of the four factors, the Board overturned *New York University*[251] and refused to recognize the graduate assistants at Brown University as employees.[252]

The holding in *Brown University*[253] seemed to have direct application to the relationship between student-athletes and their respective universities. Like graduate assistants, student-athletes must be enrolled as students to participate on an athletic team; participating in collegiate athletics is often done in furtherance of a student-athlete's career ambitions; and the relationship between student-athletes and a university are typically academic in nature. Despite these apparent similarities, it would take only nine years for athletes to challenge just how similar the relationships were.

E. Northwestern University & Collegiate Athletes Players Association

Attempting to take an innovative approach to be recognized as employees, the Northwestern University football players petitioned the NLRB.[254] This was not an attempt to be recognized as employees for some tangential benefit, rather, it was an attempt to enable themselves to unionize and collectively bargain with the university.[255] The Board applied the four-factor test established in *Brown University* and concluded that the Northwestern University football players were employees of the university under the NLRA.[256]

Finding the holding in *Brown University* inapplicable to the case at hand,[257] the Board concluded that Northwestern University football players: (1) who received scholarships are not "primarily students" given the massive amount of time that student-athletes must devote to football;[258] (2) that student-athletes are not fulfilling any core element of their education by participating in football;[259] (3) that the student and faculty relationship is not primarily educational since the student-athletes are not overseen by academic staff;[260] and (4) that scholarships are not financial aid since they come with athletic-participation stipulations and can be revoked at any time.[261]

Based on these considerations, the Board determined that the Northwestern University football players are employees under the mean-

250. *Id.*
251. New York Univ., 332 N.L.R.B. 1205 (2000).
252. Brown Univ. 342 N.L.R.B. at 490.
253 *Id.*
254 Nw. Univ. & Coll. Athletes Players Ass'n, 2014–15 N.L.R.B. Dec. (West) ¶ 15781 (Mar. 26, 2014).
255. *Id.*
256. *Id.* at *15.
257. *Id.*
258. *Id.* at *16.
259. *Id.* at *16–17.
260. *Id.* at *17.
261. Northwestern Univ., 2014 WL 1246914, at *17-18.

ing of the term in the NLRA.[262] Despite this apparent victory, the *Northwestern* decision is limited in several respects: only student-athletes attending private universities are considered employees under the Board's holding, the holding may only apply to men's football teams, and walk-on student-athletes[263] are precluded from unionizing.[264] Regardless of these limitations, one thing is certain; the Northwestern University football players were able to unionize. Accordingly, the football players held an election with each grant-in student-athlete casting a vote on whether to unionize or not.[265] The votes were not tallied, however, since the NCAA immediately appealed the Regional Board's decision.[266]

The NLRB's appeals process allows a Regional Board's decision to be appealed to the National Board in Washington D.C.[267] From there, the National Board's ruling can be appealed to the applicable Federal Court of Appeals and, thereafter, the Supreme Court of the United States can grant review if it so wishes.[268] While many speculated the *Northwestern* case would make its way to the U.S. Supreme Court,[269] the Review Board issued its surprising decision on August 17, 2015.[270]

F. The NLRB Review Board's Holding in Northwestern University & Collegiate Athletes Players Association

In its much-anticipated decision, the Review Board took a stance that few, if any, saw coming. Instead of affirming or rejecting the Regional Board's reasoning, the Review Board unexpectedly declined to weigh-in on whether the Northwestern football players were employees of the university, instead opting to decline exercising its jurisdiction.[271] The Review Board's basis for doing so was predicated on several case-specific factors.

First, the Review Board emphasized the fact that the group petitioning for recognition as employees only constituted a small percentage

262. *Id.* at *21.

263. The phrase "walk-on" refers to student-athletes who are members of an athletic team but are not receiving athletic scholarship for their participation.

264. Northwestern Univ., 2014 WL 1246914, at *21–23.

265. *Id.*

266. Danny Ecker, *Northwestern Files Appeal Blasting NLRB Union Decision*, CRAIN'S CHI. BUS. (Apr. 9, 2014), http://www.chicagobusiness.com/article/20140409/BLOGS04/140409715/northwestern-files-appeal-blasting-nlrb-union-decision/.

267 Dan Hart & Dex McLuskey, *NCAA Says Northwestern Union Case Will Wind Up in Supreme Court*, BLOOMBERG (Mar. 30, 2014, 11:48 AM), http://www.bloomberg.com/news/2014-03-30/ncaa-says-northwestern-union-case-will-wind-up-in-supreme-court.html.

268 FED. R. APP. P. 15.1. *See also The Appeals Process*, UNITED STATES COURTS, http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/HowCourtsWork/TheAppealsProcess.aspx (last visited Aug. 16, 2016) ("A litigant who loses in a federal court of appeals, or in the highest court of a state, may file a petition for a "writ of certiorari," which is a document asking the Supreme Court to review the case. The Supreme Court, however, does not have to grant review. The Court typically will agree to hear a case only when it involves an unusually important legal principle, or when two or more federal appellate courts have interpreted a law differently.").

269 Hart & McLuskey, *supra* note 267.

270 McCann, *supra* note 12

271 *Id.*

of all collegiate student-athletes. Noting that of the roughly 125 universities in the NCAA Division I Football Bowl Subdivision ("FBS"), Northwestern was only one of seventeen private universities. Since the NLRB only has authority over private institutions, any holding with respect to the employment relationship of student-athletes and their universities would be limited in its practical effect.

Second, the Review Board opined that the structure and relationship between student-athletes and universities presents "novel and unique circumstances. . . . [that] do not fit into any analytical framework that the Board has used in cases involving other types of students or athletes."[272] Specifically, the Review Board pointed to the fact that it had never considered the employment relationship of a unit where the majority of others participating in the same industry were outside of the Board's jurisdiction.[273]

With the far-reaching implications that any decision regarding the employment status of collegiate athletes would have on the rest of the NCAA, the Review Board determined it would be contrary to the intent of the NLRA to exercise its jurisdiction in this instance to decide the matter. With the aim of the NLRA being stability in labor relations between employees and their employers, the Review Board determined that any decision that would apply to such a small subset of employees would only cause uncertainty with respect to labor relations. In making this determination, the Review Board continuously emphasized that the "decision to decline jurisdiction in this case is based on the facts in the record before [it], and that subsequent changes in the treatment of scholarship players could outweigh the considerations that motivate our decision today."[274]

Perhaps most importantly, the Review Board noted that the opinion does not "address what the Board's approach might be to a petition for all FBS football players (or at least those at private colleges and universities)." In making this statement, the Review Board explicitly leaves the door ajar for future challenges where the petitioning unit consists of all football players at private FBS universities. With an opportunity to reorganize and force the NLRB to decide the labor issues that the Board chose not to address in the *Northwestern* case, it is only a matter of time before student-athletes mount another challenge to the structure of collegiate athletics. With challenges likely to come in the near future, many questions remain unanswered as to what unionization would mean for collegiate athletics.

272 Northwestern Univ. & Coll. Athletes Players Ass'n, 362 N.L.R.B. No. 167, at *3 (Aug. 17, 2015).
273 *Id.* at *3–4.
274 *Id.* at *6.

G. Questions Left Unanswered by the Northwestern University and College Athletes Players Association *Decision*

"In this unprecedented decision, the Regional Director set out to alter the underlying premise upon which collegiate varsity sports is based."[275] This was the statement released by Northwestern University in response to the NLRB's determination that the university's football players were employees under the NLRA.[276] Make no mistake about it; had the Review Board upheld the Regional Board's determination, it would have been "unprecedented," marking a dramatic departure from the deference that courts had traditionally given to the NCAA's student-athlete model.[277] The exact implications that would stem from the Board ruling that student-athletes are permitted to unionize are still largely unknown.[278] In large part, because the Review Board opted against addressing the labor issues facing student-athletes.

Regardless, the pressing questions concerning the impact unionization would have on the world of collegiate athletics are left unanswered. If collegiate athletes were able to unionize and collectively bargain for benefits, what would that mean for women's athletic programs under Title IX? Given that the NLRB only has jurisdiction over private universities, how will student-athletes at public universities respond if collegiate athletes at private schools are able to collectively bargain for greater benefits? What will it mean for walk-on student-athletes since they would not be recognized as employees under the framework used in the Regional Board's Northwestern decision? The answers to these questions and the implications stemming therefrom will be addressed, followed by a recommendation for a mutually advantageous model providing student-athletes with the means to elicit substantive change without disrupting the current structure of the NCAA.

275. Ken Bradley, *Northwestern Appeals Union Ruling*, SPORTING NEWS (Apr. 9, 2014), http://www.sportingnews.com/ncaa-football/story/2014-04-09/northwestern-appeals-nlrb-union-decision-kain-colter-employees-student-athletes.

276. *Id.*

277. *See supra* Part II.B–D.

278. The true implications of the Board's determination may not be realized for several years, as Northwestern has already filed its appeal of the Regional Board's decision to the National Board in Washington D.C. and thereafter, can appeal to the National Board's decision to the Seventh Circuit Court of Appeals. *See* Alejandra Cancino & Teddy Greenstein, *Northwestern Appeals Union Ruling*, CHI. TRIB. (Apr. 9, 2014), http://articles.chicagotribune.com/2014-04-09/business/chi-northwestern-union-ruling-appeal-20140409_1_football-players-college-athletes-players-association-union-ruling (documenting Northwestern formally filing their appeal of the Regional Board's decision); Hart & McLuskey, *supra* note 267 (recognizing the likelihood that the Board's decision will make its way up to the United States Supreme Court).

III. ANALYSIS

A. Title IX Implications Stemming from Potential Unionization by Collegiate Athletes

Title IX was enacted in 1972 in order to ensure gender equality in educational programs and activities.[279] Any institution receiving federal funding is required to comply with the mandates of Title IX.[280] Since a university is considered a recipient of federal funding by accepting enrollment fees paid by students through federal loans, virtually every private and public university is bound by Title IX.[281] Moreover, the "educational program or activity" protected by Title IX explicitly includes intercollegiate athletics.[282] Thus, if Northwestern University football players are able to collectively bargain for particular benefits that women's athletic teams are not afforded, a university will run the risk of violating Title IX if the benefits are only extended to men's athletic teams.[283]

The problem with addressing Title IX considerations in the context of one specific sport, such as football, is that merely permitting student athletes to unionize does not itself constitute a *de facto* violation of Title IX.[284] In order to determine whether Title IX would be implicated by unionization, it is first necessary to know the benefits that Northwestern University football players would be able to collectively bargain for. While it is entirely speculative to assess what conditions universities would be willing to concede to through collective bargaining, the National Collegiate Players Association ("NCPA"), a nonprofit advocacy group supporting the collective rights of collegiate athletes,[285] has identified eleven goals it hopes to achieve through unionization.[286] Considering that the NCPA helped Northwestern University quarterback Kain Colter establish the College Athletes Players Association ("CAPA"), which is a party in the *Northwestern* case,[287] the two associations have similar goals in supporting unionization.[288] As such, the NCPA's goals are a good start-

279. 20 U.S.C. § 1681 (2012).

280. *Id.* § 1681(a).

281. *Behind the Blue Disk: Examining Title IX*, NCAA.ORG, http://www.ncaa.org/sites/default/files/NCAA+Title+IX.pdf (last visited May 18, 2016).

282. Title IX of the Education Amendments of 1972: A Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,414 (Dec. 11, 1979) [hereinafter "Title IX Policy Interpretation"].

283. *See id.* at 71,415.

284. *See* Kevin Trahan, *Clarity Sought as Northwestern Football's Labor Effort Evolves*, USATODAY (Mar. 31, 2014, 2:43 AM), http://www.usatoday.com/story/sports/ncaaf/2014/03/31/college-football-ncpa-capa-nlrb-chicago-northwestern-labor-union/7077455/ (noting that whether Title IX would be invoked by any collective bargaining would depend on the nature of what is being bargained for).

285. *About NCPA*, NAT'L COLL. PLAYERS ASS'N, http://www.ncpanow.org/about (last visited May 18, 2016).

286. *Mission & Goals*, *supra* note 13.

287. Northwestern Univ. & Coll. Athletes Players Ass'n, No. 13-RC-121359, 2014 WL 1246914, at *21 (N.L.R.B., Region 13, Mar. 26, 2014).

288. *Mission & Goals*, *supra* note 13; *Why We're Doing It*, COLL. ATHLETES PLAYERS ASS'N, http://www.collegeathletespa.org/why (last visited May 18, 2016).

ing point. Each of the NCPA's goals will be discussed with the purpose of ascertaining whether the specific goals would conflict with Title IX.

1. The National College Players Association's Eleven Goals Behind Unionizing and the Title IX Repercussions

a. "Minimize College Athletes' Brain Trauma Risks"

The NCPA's first stated goal is to "[m]inimize college athletes' brain trauma risks."[289] The NCPA aims to achieve this by implementing a "Concussion Awareness and Reduction Emergency" ("CARE") plan.[290] The CARE plan would require universities and training staff to take additional precautions when an athlete is suspected to have suffered from a concussion, such as reduced contact during practices and independent concussion experts to evaluate symptoms.[291] In addition, the CARE plan seeks to use a portion of athletic revenues to research and support current and former players who are suffering from brain trauma.[292]

One of Title IX's requirements is that male and female athletes receive equivalent medical services.[293] Although brain trauma stemming from concussions occurs at a much higher rate in football than any other major sport, concussions are a reality of every sport—regardless of gender.[294] Since the proposed measures of the NCPA's CARE plan would constitute a form of medical treatment, Title IX would undoubtedly be implicated.[295] As such, any university willing to cede to the NCPA's demands for a revised brain trauma program would be required to implement an equal program for all women's sports.[296]

b. "Raise the scholarship amount"

The NCPA's second stated goal is to "[r]aise the scholarship amount."[297] With "full scholarships" not actually covering the entire cost of attendance, student-athletes are often left several thousand dollars short of what it costs to attend a university.[298] To address this disparity,

289. *Mission & Goals*, *supra* note 13.
290. *Id.*
291. *Id.*
292. *Id.*
293. 34 C.F.R. § 106.41(c)(8) (2016).
294. *See* Lindsey Barton Straus, *Concussions in High School Sports Rising at 15% Annual Rate, Study Finds*, MOMS TEAM (Aug. 22, 2011) http://www.momsteam.com/softball/concussion-in-high-school-sports-rising-fifteen-percent-new-study-finds (analyzing an eleven-year study on the prevalence of concussions in high school sports). *See also* Ken Belson, *Universities Lag in Concussion Management, Study Says* (N.Y. TIMES), Oct. 22, 2014, http://www.nytimes.com/2014/10/23/sports/ncaafootball/study-finds-many-athletes-are-still-taught-little-about-concussions.html (noting the need for revised concussion policies in collegiate athletics).
295. *See* Title IX Policy Interpretation, *supra* note 282.
296. *Id.*
297. *Mission & Goals*, *supra* note 13.
298. *See* Ramogi Huma & Ellen J. Staurowsky, *Scholarship Shortfall Study Methodology: An Examination of the Financial Shortfall for Athletes on Full Scholarship at NCAA Division I Institutions*, NAT'L COLL. PLAYERS ASS'N, http://www.ncpanow.org/research/scholarship-shortfall-study-method

the NCPA seeks to have universities provide additional scholarships to reflect the actual cost of attendance.[299]

If the Northwestern University football players are able to collectively bargain for increased scholarships to cover the full cost of attendance, Title IX would compel the university to provide equal scholarships for female athletes as well.[300] Title IX requires that "[financial] assistance should be available on a substantially proportional basis to the number of male and female participants in the institution's athletic program."[301] With the average "shortfall" between the actual cost of attendance and a full scholarship being $2,763 per-athlete per-year,[302] a university awarding 200 "full scholarships" would be forced to devote an additional $552,600 annually to athletic scholarships in order to meet the actual cost of attendance.

Given the high price tag that would be associated with extending scholarships to cover the cost of attendance for both men's and women's athletics, it is not surprising that universities have begun making lesser concessions. For instance, some universities are now offering full four-year scholarships.[303] Until recently, all scholarships were only one year long and were required to be renewed every year—although there is no guarantee that they will be.[304] By guaranteeing scholarships, universities are able to concede something to the athletes without truly losing anything. Allowing a student to attend a university tuition-free does not *actually* cost the university anything.[305] In contrast, forcing universities to pay for the shortfall between a full-scholarship and the cost of attendance would *actually* cost a university money because they would have to provide student-athletes with hefty stipends.[306] As such, it is difficult to

ology (last visited May 18, 2016) (finding an average shortfall between a full scholarship and the actual cost of attendance of $2,763 per-year).

299. *Mission & Goals*, *supra* note 13. It is important to note that it is currently against NCAA bylaws for member universities to provide additional scholarship funds in excess of a "full scholarship." As such, the NCPA seeking to eliminate the scholarship "shortcoming" is more of a strife with the NCAA than it is with each member university because the universities are bound by the NCAA bylaws.

300. *See, e.g.*, William B. Gould IV et al., *Full Court Press:* Northwestern University*, a New Challenge to the NCAA*, 35 LOY. L.A. ENT. L. REV. 1, 50–53 (2014) (arguing that Title IX would require universities to provide additional scholarships to female athletes if a university were to increase the scholarships of male athletes to cover the actual of attendance).

301. Title IX Policy Interpretation, *supra* note 282.

302. Huma & Staurowsky, *supra* note 298.

303. Jon Solomon, *Schools Can Give Out 4-Year Athletic Scholarships, but Many Don't*, CBS SPORTS (Sept. 16, 2014, 10:15 AM), http://www.cbssports.com/collegefootball/writer/jon-solomon/24711067/schools-can-give-out-4-year-scholarships-to-athletes-but-many-dont.

304. *Id.*

305. It can be argued that by a student-athlete taking away a limited spot at a university from someone who would otherwise be paying to attend is an opportunity cost that has an economical value. However, universities calculate their attendance capacities irrespective of athletes because sports teams have roughly the same number of players from year to year. Thus, it is not as if an athlete choosing to attend a university is taking away a seat from a student that would be in the general student body and paying standard tuition.

306. *See* John Infante, *A Simple Solution to the Cost of Attendance Debate*, ATHNET (May 7, 2014, 7:00 PM), http://www.athleticscholarships.net/2014/05/07/a-simple-solution-to-the-cost-of-attendance-

imagine universities being willing to cover the scholarship and cost of attendance gap, given the Title IX implications.

c. "Prevent Players from Being Stuck Paying Sports-Related Medical Expenses"

In the same vein as the NCPA's first goal, the Association's third goal is to "[p]revent players from being stuck paying sports-related medical expenses."[307] Since this goal also implicates equivalent medical treatment, it too would fall within the purview of Title IX, and universities would be required to pay for all sports-related medical treatments for men and women alike.[308]

d. "Increase Graduation Rates"

The NCPA's fourth goal is to "[i]ncrease graduation rates."[309] While this may not seem to involve anything within the scope of Title IX, it would depend on what actions a particular university takes in order to improve graduation rates. If a university were to, as the NCPA suggests,[310] significantly reduce the number of weekday games, it would violate Title IX if female athletic teams did not also get a reduced number of weekday games.[311] Title IX requires equality in "games and practice times; travel and per diem."[312] However, if a university were to implement other measures, like strictly enforcing class and study hall attendance in order to increase graduations rates, these measures would not need to be applied equally to female athletic teams because they do not involve some tangible benefit or opportunity.[313]

e. "Protect Educational Opportunities for Student-Athletes in Good Standing"

In its fifth goal, the NCPA seeks to "[p]rotect educational opportunities for student-athletes in good standing."[314] Namely, the NCPA would like universities to guarantee student-athlete scholarships by requiring a university to extend non-athletic scholarships to student-athletes that have their athletic scholarship retracted.[315] This goal is aimed at giving

debate.htm (arguing that "Pell Grants" should be used to cover the gap between full scholarships and the cost of attendance).

307. *Mission & Goals*, *supra* note 13.

308. *See* Title IX Policy Interpretation, *supra* note 282.

309. *Mission & Goals*, *supra* note 13.

310. *See id.* ("[T]he NCAA should work to reduce games that take place during the week. Although weekday games are in the interest of the TV networks, they hurt college athletes academically.").

311. *See* Title IX Policy Interpretation, *supra* note 282.

312. *Id.*

313. *Id.* (stating, "the governing principle [of Title IX] is that male and female athletes should receive equivalent treatment, benefits, and opportunities.").

314. *Mission & Goals*, *supra* note 13.

315. *Id.*

student-athletes the ability to complete their degrees, even if the student is no longer participating in the sport they originally attended the university to compete.[316]

Replacing an athletic scholarship with a non-athletic scholarship would invoke Title IX because this would constitute an "award of financial assistance" and, therefore, universities must provide equivalent awards in proportion to the number of students of each sex participating in intercollegiate athletics.[317] Unlike an athletic scholarship, if universities were required to provide non-athletic scholarships to former athletes this would cost universities money.[318] Once student-athletes are no longer competing in collegiate athletics, they enter the general student body. With the majority of a general student body paying at least some tuition,[319] a former athlete taking the seat of non-athlete would cause universities to forego tuition they would otherwise be collecting.[320] As such, universities are likely to resist providing former athletes with guaranteed non-athletic scholarships since this would cost universities money.

f. "Prohibit Universities from Using a Permanent Injury Suffered During Athletics as a Reason to Reduce/Eliminate a Scholarship"

Related to its third goal,[321] the NCPA's sixth goal aims to "[p]rohibit universities from using a permanent injury suffered during athletics as a reason to reduce/eliminate a scholarship."[322] The NCPA's justification for this desired prohibition rests upon a moral ground, namely, that it is "immoral to allow a university to reduce or refuse to renew a college athlete's scholarship after sustaining an injury while playing for the university."[323] Although the morality of reducing a student athlete's scholarship when the athlete is no longer able to perform the function for which the scholarship was awarded is a discussion for a different venue, making a scholarship irrevocable due to injury does not necessarily fall within the scope of Title IX.[324]

Bargaining to make scholarships irrevocable due to injury would not necessarily invoke Title IX so long as the number of scholarships

316. *Id.*

317. Title IX Policy Interpretation, *supra* note 282.

318. *Id.*

319. *See* Tyler Kingkade, *Most College Students Work Part-Time Jobs, But Few Pay Their Way Through School: Poll*, HUFFINGTON POST (Aug. 7, 2013, 3:35 PM), http://www.huffingtonpost.com/2013/08/07/college-students-jobs_n_3720688.html (noting that of the students polled, only sixteen percent of students reported scholarships covering their cost of tuition).

320. *Id.*

321. *See Mission & Goals*, *supra* note 13 (stating the NCPA's third goal as, "[p]revent[ing] players from being stuck paying sports-related medical expenses.").

322. *Id.*

323. *Id.*

324. *See* Title IX Policy Interpretation, *supra* note 282.

available for men's and women's athletics remains proportionate.[325] Under the current structure, however, it is unlikely that universities would agree to such a stipulation given the finite amount of scholarships that each school is permitted to award per-sport.[326] Unless injured athletes were considered exempt from the per-sport scholarship cap, it is difficult to imagine universities agreeing to give fully guaranteed scholarships to athletes when there is no promise that the athlete will ever be on the field. If injured student-athletes are guaranteed scholarships but are considered exempt from the scholarship cap, allowing men's athletic programs to then offer additional scholarships to reach the cap would inherently conflict with Title IX.[327] To do so would increase the total number of athletic scholarships available to male athletes, causing the proportion of male athletes receiving scholarships to be greater than the proportion of women athletes receiving scholarships—a direct violation of Title IX.[328] Given the finite number of scholarships that universities are permitted to award per-sport and the Title IX implications for exempting injured athletes, the NCPA's sixth goal of prohibiting universities from revoking scholarships due to injuries is unlikely to be successful.

g. "Establish and Enforce Uniform Safety Guidelines in All Sports to Help Prevent Serious Injuries and Avoidable Deaths"

Although it is not entirely clear what the NCPA is seeking to change with its seventh stated goal, "[e]stablish[ing] and enforc[ing] uniform safety guidelines in all sports to help prevent serious injuries and avoidable deaths,"[329] insofar as achieving this goal would require substantive changes to the medical services currently being offered, this objective would conflict with Title IX.[330] Based on the description of the NCPA's aim, however, it seems as though the player's association is concerned with the off-campus safety of athletes.[331] If this is the true interpretation of the seventh objective, then it does not appear that imple-

325. *See* 34 C.F.R. § 106.37(c)(1) (2015) ("To the extent that a recipient awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics.").

326. *See* David Frank, *College Football Scholarships By the Numbers*, ATHLETIC SCHOLARSHIPS (Nov. 8, 2011, 9:00 AM), http://www.athleticscholarships.net/2011/11/08/college-football-scholarships.htm (stating the limit on Division I Football scholarships as being 85 scholarships per football program).

327. *See* 34 C.F.R. § 106.37(c)(1) (2015) ("To the extent that a recipient awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics.").

328. *See id.*

329. *Mission & Goals*, *supra* note 13.

330. 34 C.F.R. § 106.41(c)(8) (2015).

331. *See Mission & Goals*, *supra* note 13 ("Several deaths in the college football off-season have highlighted the need for year round safety requirements that provide an adequate level of protections for college athletes from all sports. College athletes and athletic staff should be given the means to anonymously report breaches in such safety requirements.").

menting and enforcing safety guidelines would fall within the scope of Title IX.

Moreover, if the safety guidelines would be applicable to women's athletics, as the language, "college athletes from all sports" seems to imply, then there would be no issue with respect to Title IX whatsoever.[332] Of all the goals that the NCPA is attempting to achieve through unionization, this is perhaps the goal most likely to succeed. From the perspective of a university, implementing safety guidelines would not only be relatively inexpensive but, assuming the effectiveness of such a system, would also help insulate universities from the negative press typically associated with off-campus safety problems. Accordingly, it is very likely that universities would be willing to implement off-campus safety guidelines in which student-athletes are required to adhere.

h. "Eliminate Restrictions on Legitimate Employment and Players' Ability to Directly Benefit from Commercial Opportunities"

Although this goal would likely cause issues with other NCAA rules,[333] it is not entirely clear whether allowing student-athletes to profit off commercial opportunities would fall within the purview of Title IX. The only plausible way in which this goal could conflict with Title IX is if seizing individual commercial opportunities were deemed "publicity." One of the specific considerations to evaluating whether a university has provided equal athletic opportunities under Title IX is "publicity."[334] Given the context of Title IX, however, it is unlikely that *individual* student-athletes profiting off commercial opportunities would be deemed "publicity." Since Title IX is a statute that is solely enforceable against universities,[335] an individual student-athlete publicizing himself through his own efforts would not be prohibited.[336] More than likely, in 1972, when Title IX was enacted,[337] the notion of having players profit off their position as a student-athlete was too farfetched to have even been contemplated.[338]

If outside the reach of Title IX, it is difficult to speculate whether universities would agree to let student-athletes profit off their time as a

332. *Id.*

333. Namely, Bylaw 12.1.2.1.1, which prohibits "[a]ny direct or indirect salary, gratuity, or comparable compensation." *See* 2015–16 NCAA DIVISION I MANUAL, 62 (Aug. 2015), *available at* http://www.ncaapublications.com/p-4427-2015-2016-ncaa-division-i-manual-january-version.aspx.

334. 34 C.F.R § 106.41(c)(10) (2015).

335. *See Title IX and Sex Discrimination*, U.S. DEP'T OF EDUC., (Apr. 29, 2015) http://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html ("Title IX applies to institutions that receive federal financial assistance from ED, including state and local educational agencies. These agencies include approximately 16,500 local school districts, 7,000 postsecondary institutions, as well as charter schools, for-profit schools, libraries, and museums.")

336. *Id.*

337. *History of Title IX*, TITLE IX, http://www.titleix.info/History/History-Overview.aspx (last visited May 18, 2016).

338. *Id.*

collegiate athlete. Upon first consideration, it would seem likely that schools would oppose this, since student-athletes would be taking some of the profits that a university would otherwise receive.[339] This, however, is not taking into account the fact that students may be more inclined to stay in college for their entire four years of eligibility if given the opportunity to reap some of the fruits of their college success.

It is entirely plausible that universities could insert clauses in scholarships that would permit the student-athlete to profit off his person, but would stipulate that the student must attend the university for a certain number of years. This would be mutually advantageous for student-athletes and universities. Those student-athletes who are talented enough to earn a substantial amount of money off of commercial opportunities may be more inclined to stay in college, since they would be earning money while enjoying the college experience. Likewise, it is beneficial to the university, because when a talented athlete is committed to attending the university for a certain number of years, the small amount of profits that the school would be losing to the student-athlete would pale in comparison to the profits the university will gain by having the student-athlete around for an additional number of years.[340] Due to this mutual benefit, it is somewhat plausible that the NCPA's eighth goal could be achieved through unionization without offending Title IX.

i. "Prohibit the Punishment of College Athletes That Have Not Committed a Violation"

Stated more accurately, the NCPA's ninth goal seeks to prevent the NCAA from imposing sanctions upon universities for violations of NCAA bylaws that adversely affect collegiate athletes.[341] In recent years, the NCAA has levied sanctions against several universities for violating NCAA bylaws, including violations for improper recruiting,[342] illegal booster payments,[343] grade inflation schemes,[344] permitting players to re-

339. *Id.*

340. *Id.*

341. *See Mission & Goals*, *supra* note 13 ("It is an injustice to punish college athletes for actions that they did not commit i.e. suspending a team's post-season eligibility for the inappropriate actions of boosters. Such punishments have significant negative impacts on the short college experience of many college athletes.").

342. *See Top 10 Infamous NCAA Sanctions: The Death Penalty*, REAL CLEAR SPORTS (May 17, 2013), http://www.realclearsports.com/lists/infamous_ncaa_sanctions/smu_football.html?state=stop (describing the recruiting violations that led to Southern Methodist University Men's Football team being put on probation for eleven years).

343. *See Top 10 Infamous NCAA Sanctions: Not So 'Fab Five'*, REAL CLEAR SPORTS (May 17, 2013), http://www.realclearsports.com/lists/infamous_ncaa_sanctions/michigan_fab_five.html?state=stop (discussing the more than $600,000 that four University of Michigan Men's Basketball players accepted from a booster).

344. *See, e.g.*, *UNC Report: Sham Classes Pushed*, ESPN (Oct. 23, 2014), http://espn.go.com/college-sports/story/_/id/11745036/north-carolina-investigation-says-advisers-pushed-sham-classes (discussing a decade-long scheme in which University of North Carolina athletes were enrolled in fake classes that never met and only required one paper that would almost always receive an "A" or "B," regardless of the quality).

ceive gifts,[345] and covering up violations.[346] In such instances, the NCAA has implemented a range of punishments including fines against the university,[347] forcing a university to forfeit all revenue gained during the time period of the violation,[348] banning an athletic program from participating in the playoffs,[349] retroactively nullifying all wins an athletic program earned while the violations were occurring,[350] and banning an athletic program from appearing on television.[351]

The NCPA argues that by sanctioning universities for NCAA violations through methods such as limiting scholarships, banning playoff participation, and nullifying wins, the NCAA is not actually sanctioning a university, but, rather, the student-athletes—most of whom have nothing to do with the violation.[352] While the NCPA raises a valid point, this goal could not be achieved without violating Title IX. If, for instance, the NCPA were successful in bargaining to prohibit sanctions in the form of lost scholarships, by only prohibiting scholarship sanctions in men's athletic programs, the NCAA would be "limit[ing] eligibility" and "apply[ing] different criteria" for the receipt of scholarships—in direct violation of provisions defining Title IX.[353] Moreover, since the entire aim of Title IX is to prevent discrimination against individuals based on sex,[354] limiting the severity of sanctions permissibly imposed on men's athletic programs, while allowing more severe sanctions to be instituted against women's athletic programs, would be inherently discriminatory.[355]

345. *See* Mark Yost, *Schools for Scandals*, WALL ST. J. (Sept. 14, 2010, 12:01 AM), http://www.wsj.com/articles/SB10001424052748703453804575479663933878090 (chronicling the sanctions against the University of Southern California stemming from former running back Reggie Bush receiving hundreds of thousands of dollars worth of "gifts" from sports agents).

346. *See, e.g.*, Mike Herndon, *NCAA Report: Missouri Coach Frank Haith Tried to Cover Up Violations at Miami*, AL.COM (Oct. 22, 2013, 12:21 PM), http://www.al.com/sports/index.ssf/2013/10/ncaa_report_missouri_coach_fra.html (reporting on Missouri Men's Basketball head coach, Frank Haith, making a $10,000 payment to a booster, Nevin Shapiro, to prevent him from exposing improper benefits that Haith had accepted while coaching at the University of Miami).

347. *E.g.*, *The NCAA Hits Georgia Tech with Four Years of Probation and Are Stripped of 2009 ACC Title*, BUS. INSIDER (July 15, 2011, 1:03 PM), http://www.businessinsider.com.au/the-ncaa-hits-georgia-tech-with-four-years-of-probation-and-are-stripped-of-2009-acc-title-2011-7.

348. Erik Brady et al., *Schools Seek Protection if Coach Breaks NCAA Rules*, USA TODAY (Nov. 20, 2012, 2:59 AM), http://www.usatoday.com/story/sports/ncaaf/2012/11/19/football-coaches-contracts-repayment-bonuses/1711909/.

349. *See Top 10 Infamous NCAA Sanctions: The Fall of Troy*, REAL CLEAR SPORTS (May 17, 2013), http://www.realclearsports.com/lists/infamous_ncaa_sanctions/reggie_bush_usc.html?state=stop (stating that the University of Southern California received a two-year postseason ban due to the university's violations when Reggie Bush attended the university).

350. *See Not So 'Fab Five'*, *supra* note 343 (noting that as a penalty for improper booster benefits, the University of Michigan was forced to vacate retroactively five seasons of victories).

351. *Top 10 Infamous NCAA Sanctions: Chomped 107 Times*, REAL CLEAR SPORTS (May 17, 2013), http://www.realclearsports.com/lists/infamous_ncaa_sanctions/charley_pell_florida.html?state=stop.

352. *Mission & Goals*, *supra* note 13.

353. 34 C.F.R. § 106.37(a)(1) (2015).

354. *See* 20 U.S.C. § 1681(a) (2012) (stating that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .").

355. *Id.*

Additionally, this goal would be inconsistent with this Note's recommendation *infra* Part IV,[356] as achieving this goal would require student-athletes to directly bargain with the NCAA, as opposed to bargaining with the leadership from each member university within an athletic conference.[357] Irrespective of this Note's recommendation, the NCAA would never bargain over its authority to sanction universities. As described *supra* Part II.B, when the NCAA lacked the authority to enforce its bylaws, universities took advantage.[358]

Although limiting scholarships, vacating wins, and banning future teams from playoff contention seems as though it is punishing the student-athletes, these sanctions are calculated to hit universities where it hurts most—their pocketbooks. These sanctions make it more difficult for universities to compete at a high level, thereby reducing a university's profits derived from athletics.[359] Given that money is what drives collegiate athletic programs,[360] and universities as a whole,[361] such sanctions are impactful in deterring future violations,[362] even if such sanctions are also detrimental to student-athletes.[363] Thus, for reasons associated with Title IX and other fringe considerations, the NCPA is unlikely to be successful in wresting away any of the NCAA's broad authority to impose sanctions on universities for violations of NCAA bylaws.

j. "Guarantee that College Athletes Are Granted an Athletic Release from Their University if They Wish to Transfer Schools"

As it currently stands, when a Division I collegiate athlete seeks to transfer universities for the purpose of athletic participation, the student must formally request permission to leave their current university.[364] A student-athlete's current school must then agree to allow the student to contact other schools.[365] If the university denies the student-athlete's request for transfer, the student is still able to transfer, but is ineligible to

356. *See Infra* Part IV.

357. This is because the NCAA wields the authority to impose sanctions on universities, not conferences. Leadership from the universities within each conference would have no problem agreeing to such a demand because it would also be benefitting the university.

358. *See supra* Part II.B.

359. *See* Jason Figueiredo, *Cause & Effect: Possible Ripples from NCAA Sanctions on USC*, BLEACHER REP. (Feb. 15, 2010), http://bleacherreport.com/articles/345997-cause-effect-possible-ripples-from-ncaas-sanctions-on-usc (noting that sanctions on the University of Southern California could have a substantial impact on not only the university's football program but the local economy as well).

360. *Id.*

361. *Id.*

362. *But see,* Mark Yost, *supra* note 345 (questioning the effectiveness of the NCAA imposing sanctions through the limitation of scholarships given the overwhelming financial incentives associated with a highly competitive athletic programs).

363. *Id.*

364. *See NCAA Four-Year Transfer Rules*, ATHNET, http://www.athleticscholarships.net/college-transfer-4-4.htm (last visited May 18, 2016) (noting that, per NCAA rules, "a student-athlete must request permission to contact other schools about a transfer.").

365. *Id.*

receive a scholarship for the first year at their new university and, except in rare circumstances, the student-athlete is unable to participate in the sport the first year at the new university as well.[366] While there are exceptions allowing for first year athletic participation upon a student-athlete's forcible transfer, these exceptions are not available to athletes participating in football, men's and women's basketball, baseball, and men's ice hockey—the most competitive collegiate sports.[367]

Given the highly competitive nature of collegiate athletic recruiting, universities standing to lose a talented player often arbitrarily refuse the student-athlete's request for transfer.[368] In fact, some universities have even blacklisted entire athletic conferences by refusing to allow student-athletes to transfer to any school within a given conference.[369] Assuming that the student-athlete is ineligible for an exception, in denying the request the university is forcing the student-athlete to transfer and forfeit a year of collegiate athletic participation or remain at their current university where the student is unhappy for one reason or another.[370] Thus, by prohibiting universities from denying requests to transfer by student-athletes, the NCPA hopes to eliminate the mandatory year of ineligibility in athletic participation and receipt of financial aid.[371]

As in its ninth stated goal, the NCPA's tenth goal would be inconsistent with this Note's recommendation *infra* Part IV, as the NCAA implements the guidelines for transferring.[372] Since this Note proposes collective bargaining at the athletic conference level, as opposed to with the NCAA directly, the individual athletic conferences would not have the authority to alter the current transfer guidelines.[373] It bears noting, however, that some individual conferences have implemented their own transfer limitations, which impose even stricter limitations on student-athletes transferring to universities within the same athletic conference.[374]

366. *Id.*

367. *Id.*

368. *See* Greg Bishop, *Want to Play at a Different College? O.K., but Not There or There*, N.Y. TIMES (June 7, 2013), http://www.nytimes.com/2013/06/08/sports/ncaafootball/college-coaches-use-transfer-rules-to-limit-athletes-options.html?_r=0 (describing a situation at Oklahoma State University where the school refused to allow a malcontent backup quarterback to transfer to over forty schools, including two entire athletic conferences).

369. *Id.* Interestingly, this was not discussed in the Board's *Northwestern* decision as a basis exemplifying the amount of control universities exert over student-athletes when analyzing the employer/employee-like relationship. *See* Nw. Univ. & Coll. Athletes Players Ass'n, 2014–15, N.L.R.B. Dec. (West) ¶ 15781 (Mar. 26, 2014) (discussing the amount of control that universities exert over student-athletes as a basis for finding that an employer/employee relationship existed).

370. *See* Bishop, *supra* note 368 (describing a situation at Oklahoma State University where the school refused to allow a malcontent backup quarterback to transfer to over forty schools, including two entire athletic conferences).

371. *See Mission & Goals*, *supra* note 13 (arguing that a university's ability to deny a student-athlete's request to transfer "contradicts the educational mission and principle of sportsmanship that the NCAA is supposed to uphold").

372. *See infra* Part IV.

373. *Id.*

374. *See NCAA Four-Year Transfer Rules*, *supra* note 364 (noting that "[m]any conferences have additional rules beyond the NCAA's releases and residency requirements if you transfer from one conference school to another").

Thus, the heightened limitations on transferring intra-conference would be something that the NCPA could negotiate under this Note's recommendation, since these additional limitations are imposed by individual athletic conferences and not by the NCAA.[375]

With respect to Title IX, if the NCPA were to effectively renegotiate the conditions by which student-athletes are able to transfer, these more relaxed restrictions would have to be applied uniformly between men's and women's athletic teams.[376] Since an unfettered ability to transfer without a year of athletic ineligibility would necessarily constitute a "benefit," and since withholding such a benefit would be treating men and women "differently," Title IX would be invoked.[377] Given that there is only one women's sport currently prohibited from exercising the "one-time transfer exception,"[378] if the NCPA were able to negotiate a decrease in transfer restrictions, it is unlikely that the NCAA or individual conferences would oppose applying these new restrictions to women's athletics as well as men's athletics.

Whether the NCAA or individual conferences would be willing to agree to alter transfer requirements, however, is a different story. The NCAA justifies its limitations on transfers by stating that it is "safeguard[ing] the process and help[ing] student-athletes make rational decisions about the best place to earn an education and compete in their sport."[379] The NCAA also points to lower graduation rates among student-athletes who choose to transfer.[380] Perhaps a less ambiguous explanation is that the NCAA does not want student-athletes to use the threat of transfer as means of extorting universities. As such, any agreement to remove transfer restrictions would also likely have to include a provision prohibiting student-athletes from using threats of transfer as a means of acquiring some additional benefit. Although it seems unlikely that the NCAA would be willing to agree to remove all transfer restrictions, collective bargaining may lead to some middle ground where transfer restrictions are less prohibitive than they are under the current NCAA bylaws. As discussed above, however, Title IX would dictate that any such agreement would need to be extended to men's and women's athletic programs alike.[381]

375. *See infra* Part IV.

376. *See* Title IX Policy Interpretation, *supra* note 282.

377. *See* 34 C.F.R. § 106.41(a) (2014) ("No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club . . . .").

378. *NCAA Four-Year Transfer Rules*, *supra* note 364.

379. *Frequently Asked Questions about the NCAA*, NCAA (2012), http://www.ncaa.org/about/frequently-asked-questions-about-ncaa (last visited May 18, 2016).

380. *Id.*

381. *See* Title IX Policy Interpretation, *supra* note 282.

k. "Allow College Athletes of All Sports the Ability to Transfer Schools One-Time Without Punishment"

As discussed in the NCPA's tenth goal, the NCAA requires students participating in football, men's and women's basketball, baseball, and men's ice hockey to obtain university approval prior to transferring, otherwise they will be forced to sit out an academic-year at the student-athlete's new university.[382] Accordingly, the NCPA aims to allow student-athletes to transfer once without having to obtain university approval or having to face sitting out an entire season.[383] For the reasons outlined in the discussion of the NCPA's tenth goal, if the NCPA were able to bargain with athletic conferences or the NCAA to alter the transfer guidelines, Title IX would require these benefits to be extended to women's athletics as well.[384]

2. What Unionization Will Mean for Title IX

Undeniably, it is quite difficult to predict what demands the NCAA and individual conferences would be willing to cede through collective bargaining given these institutions' resolve in refusing to entertain the notion of unionization. Since the ability to collectively bargain in and of itself would not invoke Title IX, the relevant inquiry for the purposes of Title IX must focus on what benefits student-athletes are seeking to obtain. Although this is an exercise in speculation, the NCPA's mission and goals outlined in Part III.A.1 are a good starting point for understanding the points of contention between student-athletes and their terms of athletic participation.[385]

Having exhausted the Title IX implications that would flow from the NCPA achieving its pronounced goals in obtaining the right to collectively bargain, it becomes evident that nearly any benefit that student-athletes reap through collective bargaining would necessarily invoke Title IX. Given the fundamental aim of Title IX being equality among sexes in opportunities and the benefits stemming therefrom,[386] it is not surprising that providing one gender with more expansive benefits than the other violates these notions of equality.[387] Since universities would be legally compelled to provide nearly all of the bargained-for benefits to women's athletic teams,[388] universities are likely to place strong emphasis on the cost of providing these benefits to hundreds of additional student-athletes. Therefore, to best assess the willingness of the NCAA to bar-

382. *See supra* Part III.A.1.j.
383. *Mission & Goals*, *supra* note 13.
384. *See supra* Part III.A.1.j.
385. *See supra* Part III.A.1.
386. *See* 34 C.F.R. § 106.41(a) (2014) ("No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club . . . .").
387. *See* Title IX Policy Interpretation, *supra* note 282.
388. *Id.*

gain over a particular benefit, one must look no further than the total cost of providing the benefit.

Although analyzing the potential effects of unionization requires a great deal of speculation, one thing is certain—if student-athletes are recognized as employees and permitted to unionize, the impact would not be confined to men's athletic programs.[389] While Title IX would dictate that most benefits achieved through unionization are allocated evenly between men's and women's athletic teams, the effects stemming from unionization reverberate much further than that. As it currently stands under the *Northwestern* decision, only student-athletes at private universities are recognized as employees under the NLRA.[390] Given that the vast majority of Division I student-athletes attend public universities,[391] only providing those student-athletes attending private universities with the ability to unionization has the potential to alter the entire landscape of collegiate athletics.

B. The Disparate Impact of Unionization on Public and Private Universities

Currently, there are seventeen private universities and an additional one hundred and three public universities in the Division I Football Bowl Subdivision ("FBS").[392] As many have noted,[393] only student-athletes attending private universities are recognized as employees under the NLRA.[394] The reason for this is that the NLRB only decides employment disputes arising under Federal law.[395] Since public universities are by their very nature state institutions, employment disputes arising at public universities must be decided based on the laws of the state in which the public university is located.[396] Similarly, the right to unionize would also be controlled by the laws of a given state governing public employees' right to organize.[397] Consequently, the majority of collegiate athletes will

389. *Id.*

390. *See Employee Rights*, NAT'L LAB. REL. BOARD, https://www.nlrb.gov/rights-we-protect/employee-rights (last visited May 18, 2016) (stating that the NLRB only protects private employees and not state employees).

391. *See* Nw. Univ. & Coll. Athletes Players Ass'n, 2014–15 N.L.R.B. Dec. (West) ¶ 15781 n.2 (Mar. 26, 2014) (noting that there are over 100 public universities in the FBS and only seventeen private universities).

392. S.M. Oliva, *College Football Unionization Decision Opens a Can of Worms*, REASON.COM (Mar. 30, 2014), http://reason.com/archives/2014/03/30/college-football-unionization-decision-o.

393. *See, e.g.*, Steven L. Willborn, *College Athletes As Employees: An Overflowing Quiver*, 69 U. MIAMI L. REV. 65, 78 (2014) (noting that the Board's decision in the *Northwestern* case is limited to the specific circumstances before the Board—including Northwestern University being a private school).

394. *See Employee Rights*, *supra* note 390 (stating that the NLRB only protects private employees and not state employees).

395. *See Jurisdictional Standards*, NAT'L LAB. REL. BOARD, https://www.nlrb.gov/rights-we-protect/jurisdictional-standards (last visited May 18, 2016).

396. *See, e.g.*, Fram & Frampton, *supra* note 16, at 1038–39 (recognizing that whether public universities would be likely to unionize depends on the state laws governing the state in which the university is located).

397. *Id.* at 1040.

be entirely unaffected by any unionization effort stemming from a NLRB decision.

If collegiate athletes at private universities were recognized as employees and permitted to collectively bargain with their universities, the disparity between public and private universities could lead to several different outcomes. First, assuming public universities do not embrace recognizing student-athletes as employees,[398] potential recruits may begin flocking to private universities where they are entitled to greater benefits stemming from collective bargaining. This would undoubtedly cause a dramatic ripple through the world of collegiate athletics, as an astonishing number of top-recruits currently opt to attend public universities.[399]

If top-recruits were, in fact, to begin showing a preference for private universities, this would likely to be the quickest way to get public schools to begin recognizing student-athletes as employees. Talented recruits typically correlate with the athletic success of a given university.[400] Since successful teams are televised more, invited to play in Bowl games, and, of course, sell more tickets—leading to greater revenues for a university[401]—losing recruits would force public universities to alter how they characterize their relationship with their athletes or risk losing the money that these universities hold so dearly.

A second potential consequence stemming from the disparity between public and private universities is some public universities may begin voluntarily recognizing student-athletes as employees. Although this may seem counterintuitive given the revenue universities stand to lose by providing greater benefits to student-athletes,[402] some universities may view this as an opportunity to gain a recruiting advantage over other public schools that refuse to recognize student-athletes as employees. Perpetually successful athletic programs at public universities are unlikely to act proactively, however, since these universities already have an inherent recruiting advantage over middling athletic programs.[403]

398. This is very unlikely to happen given the substantial amount of revenue that universities would have to give up in order to accommodate the student-athlete's collective bargaining demands. Even if a public university were aware that unionization is inevitable, by fighting student-athletes in the judicial system, universities would continue collecting revenue while the litigation is pending—thereby disincentivizing the voluntary recognition of student-athletes as employees.

399. *See 2015 Football Top Recruits*, 247 SPORTS, http://247sports.com/Season/2015-Football/CompositeRecruitRankings?InstitutionGroup=HighSchool (last updated Dec. 12, 2016) (listing only three of the top-thirty recruits as having committed to attending a private university—all three committing to the University of Southern California).

400. *See* Craig Bennett, *Top 10 Best College Football Recruiting Classes of 2015*, HEAVY (Feb. 4, 2015, 6:25 PM), http://heavy.com/sports/2015/02/top-10-best-college-football-recruiting-classes-2015-commitments-signing-day-high-school-players-list-national-letters-of-intent/ (listing Alabama as the top-recruiting school for the second consecutive year).

401. *See* Scott Morgan, *How Much Money Do College Sports Generate?*, ZACKS, http://finance.zacks.com/much-money-college-sports-generate-10346.html (last visited May 18, 2016).

402. *See generally* Gould IV et. al., *supra* note 300, at 48 (discussing the financial implications of recognizing student-athletes as employees).

403. Public universities with consistently successful athletic programs are effective in recruiting top-high school athletes for a variety of reasons including: more revenue to spend on recruiting staff and recruiting efforts, the lure of playing for a championship-caliber team, greater prospects of a student-athletes being drafted by a professional team, and the like.

Yet, for those universities that do not have "top-tier" athletic programs, voluntarily recognizing student-athletes as employees may provide an opportunity to recruit student-athletes that might not otherwise even consider attending a particular university. If, over time, the athletic programs at these universities gain prominence in collegiate athletics due to their improved quality of recruits, other universities would have no choice but to follow suit if they wish to remain competitive. It is important to note, however, that any university preemptively recognizing student-athletes as employees would still be compelled to adhere to the labor laws of its respective state. Given that some states' labor laws are more favorable to organized labor than others are,[404] permitting student-athletes to unionize may not even be a legally viable option for some public universities.[405]

A final, and perhaps the most likely, outcome stemming from the inapplicability of the *Northwestern* decision to public universities is that nothing at all will change. Regardless of the prohibition against it, top-student-athletes at public universities often receive improper benefits in some form or another.[406] Knowing this, top recruits are unlikely to be swayed heavily by a university's willingness to provide greater non-monetary benefits than other universities.[407]

Furthermore, from the perspective of the university, there are very few incentives in allowing student-athletes to unionize. Unionization would necessarily mean that universities would have less power to control daily activities of athletes.[408] Universities greatly value their ability to compel student-athlete participation in various activities.[409] Accordingly, universities are unlikely to forfeit this power without being mandated to do so.

Moreover, accommodating student-athlete collective bargaining demands would be exceedingly expensive.[410] In order to meet these demands, universities would be forced to either raise additional revenue or redistribute its current revenue.[411] Given that neither of these options is particularly attractive from the standpoint of a university, a more likely

404. *See* Fram & Frampton, *supra* note 16, at 1041–54 (analyzing four states' labor laws to determine whether it would be possible for student-athletes at public universities to unionize).

405. *Id.*

406. *See supra* Part III.A.1.i. (noting the various NCAA bylaw violations stemming from student-athletes receiving improper benefits and booster payments).

407. *Id.*

408. *See* 29 U.S.C. § 152(5) (2012) (defining labor organization as "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.").

409. *See* Samuel Thorp, *Should College Athletes Be Recognized as "Employees" Within the Meaning of the National Labor Relations Act (NLRA)?*, CAMPBELL L. OBSERVER (May 14, 2014), http://campbelllawobserver.com/2014/05/should-college-athletes-be-recognized-as-employees-within-the-meaning-of-the-national-labor-relations-act-nlra/ (noting the various activities that student-athletes are compelled to attend throughout the year).

410. *See* Gould IV et. al., *supra* note 300, at 48 (showing the financial implications of recognizing student-athletes as employees).

411. *Id.*

result is that universities will simply wait until they are judicially compelled to recognize student-athletes as employees under their state's labor laws.

While the precise effects stemming from disparate recognition of student-athletes as employees between private and public universities is largely unknown, one thing is evident. If student-athletes at private universities are able to collectively bargain for greater benefits than those offered by public universities, this disparity would exert pressure on public universities to match these benefits. Be it internal pressure from student-athletes or external pressure from the media, public universities would have to justify their decision to withhold such benefits.

C. Exclusion of Walk-On Athletes

In the original *Northwestern* decision, the Regional Board made it abundantly clear that walk-on student-athletes are not employees under the NLRA and therefore not permitted to unionize.[412] Its basis for so holding was that walk-ons do not receive compensation for their athletic performance, and therefore do not meet the common law criteria of an employee.[413] Additionally, the Board noted, "[u]nlike the scholarship players, the walk-ons do not . . . enter into any type of employment contract" and are permitted greater flexibility with respect to missing practice for class conflicts.[414] Despite the Board's characterization of walk-ons only participating for "the love of the game,"[415] the fact remains that these student-athletes invest just as much, if not more, time into the sport as their teammates on scholarship.[416] Yet, walk-ons would not be entitled to any benefits that "grant in"[417] student-athletes collectively bargain for.[418]

Assuming the framework under which the Regional Board was operating when coming to these conclusions does not change substantially before the next group of student-athletes challenge the relationship between themselves and their universities, it is likely that walk-on student athletes will still be precluded from enjoying any benefits of collective bargaining. While such a notion might be legally sound, it seems inher-

412. *See* Nw. Univ. & Coll. Athletes Players Ass'n, 2014–15 N.L.R.B. Dec. (West) ¶ 15781 (Mar. 26, 2014).

413. *Id.*

414. *Id.*

415. *Id.*

416. *See* David Piper, *Pay to Play: The Life of the College Football Walk-On*, SB NATION (Jul. 26, 2013, 9:00 AM), http://www.addictedtoquack.com/2013/7/26/4557792/oregon-ducks-football-walkon-ryan-depalo-andiel-brown-nick-federico (documenting the path of two walk-on football players at the University of Oregon and how they had to go above and beyond what it required of their scholarship-receiving teammates).

417. The phrase the Board uses when addressing student-athletes who receive scholarships. *See* Nw. Univ. & Coll. Athletes Players Ass'n, 2014–15 N.L.R.B. Dec. (West) ¶ 15781 (Mar. 26, 2014).

418. *See What the Northwestern Decision Means*, DOWN THE TUNNEL (Mar. 28, 2014), http://downthetunnel.com/2014/03/28/what-the-northwestern-decision-means/comment-page-1/ (noting that, under the *Northwestern* decision, walk-on student-athletes would not be entitled to any benefits that grant-in student athletes reap from collective bargaining).

ently unjust to treat those who are already receiving greater benefits more favorably than those receiving less when the latter are working equally as hard as the former. To better illustrate this shortcoming, one need only consider the NCPA's eleven goals discussed in Part III.A.1. If the grant-in student-athletes were to secure greater benefits with respect to medical care and treatment, the walk-ons would not be entitled to the same level of medical care and treatment as their teammates competing on the very same field. Not only is such a result incomprehensible, it seems impractical in application. The same can be said for many of the NCPA's eleven goals if grant-it student-athletes are able to collectively bargain for these benefits while walk-ons are excluded.

Few debate the importance of walk-ons to the overall success of an athletic program. As one collegiate coach noted, walk-on student-athletes "are essential to any program" and without them, the team would lack depth and would not be able accomplish what needs to be done in practice—thereby limiting a team's potential.[419] Additionally, walk-ons are used to help boost a team's Average Graduation Rate, which must be maintained above a certain percentage in order for the team to remain eligible for the playoffs.[420] Since walk-on student-athletes constitute roughly twenty percent of collegiate athletic teams, a fairly substantial number of student-athletes would be precluded from enjoying any benefits resulting from collective bargaining.[421]

Although this Note has primarily discussed the impact of unionization on Division I collegiate athletics, it bears noting that the *Northwestern* decision would also have a distinct effect on Division III athletic teams. Like walk-on student-athletes, Division III student-athletes are not eligible for athletic scholarships.[422] Accordingly, under the Regional Board's *Northwestern* framework, Division III student-athletes would not be considered employees under the NLRA since they are not compensated for their athletic participation.[423] This is particularly concerning given that the NLRB would otherwise have jurisdiction to make labor decisions with respect to the 358 private universities that participate at the Division III level [424]

419. Kristie Serrano & Melanie Power, *You Work. You Train. But You Don't Get a Scholarship*, BAYLOR LARIAT (Apr. 26, 2013), http://baylorlariat.com/2013/04/26/you-work-you-train-but-you-dont-get-a-scholarship/.

420. *Id.*; Bryan Toporek, *NCAA Raises Minimum GPA for Incoming Student-Athletes*, EDUC. WK. (Oct. 27, 2011, 3:25 PM), http://blogs.edweek.org/edweek/schooled_in_sports/2011/10/ncaa_raises_minimum_gpa_for_incoming_student-athletes.html.

421. *What the Northwestern Decision Means*, *supra* note 418.

422. *See Recruiting in Division III and the NAIA*, NCSA ATHLETIC RECRUITING (Feb. 21, 2012), http://ncsasports.org/blog/2012/02/21/recruiting-in-division-iii-and-the-naia/ ("While technically speaking Division III schools cannot offer 'athletic scholarships,' they can and do help their athletes fund their education with need-based, academic, and third party scholarships.").

423. *See* Nw. Univ. & Coll. Athletes Players Ass'n, 2014–15 N.L.R.B. Dec. (West) ¶ 15781 (Mar. 26, 2014) (deeming that walk-on student-athletes were not employees under the NLRA because they were not compensated).

424. *See Division III Colleges*, COLL. SPORTS SCHOLARSHIPS, http://www.collegesportsscholarships.com/division-3-colleges-schools.htm (last visited May 18, 2016).

D. What Unionization Would Mean for the Current Structure of the NCAA

While it may take some time for other groups of student-athletes to challenge labor relation with their respective universities, the impact of the Northwestern University football player's unionization efforts have already sparked internal change within the NCAA. In August 2014, less than five months after the NLRB released its *Northwestern* decision, the NCAA Division I Board of Directors voted to amend its governance structure.[425] The new structure allows the Power-5 conferences more autonomy in handling specific student-athlete issues.[426] Not through happenstance, many of the CAPA and NCPA's goals correlated with areas of increased autonomy for conferences, such as health and wellness, meals and nutrition, financial aid, expenses and benefits, insurance and career transition, time demands, and academic support.[427]

Certainly, this increased autonomy for the Power-5 conferences seems like a positive step toward accommodating student-athlete's concerns about health and the cost of attendance. As some have recognized, however, these changes likely stem from the pressures facing the NCAA, including litigation.[428] In fact, in its July 2014 proposal for a new governance structure, the NCAA admitted that the lawsuits and outside pressure played a role in its decision to provide more autonomy for the Power-5 conferences stating, "[t]hese institutions are further challenged in addressing these needs by an increasingly litigious environment and confused public sentiment."[429] Is the public sentiment really misplaced though? As the adage goes, "numbers never lie." The fact of the matter is that student-athletes and the public are no longer buying into the NCAA's rhetoric about collegiate athletes being students first and athletes second when the NCAA is operating a billion-dollar business.[430]

Although the August 2014 amendments to the structure of NCAA Division I athletics provide an opportunity for the concerns of student-athletes to be addressed, in reality, these amendments are unlikely to

425. *Division I Governance*, NCAA http://www.ncaa.org/governance?division=d1 (last visited May 18, 2016).

426. *2014 NCAA Amendments*, *supra* note 212.

427. *See Mission & Goals*, *supra* note 13; *Why We're Doing It*, *supra* note 288. *See also 2014 NCAA Amendments*, *supra* note 212.

428. *See* Kevin Trahan, *Will the NCAA's 'Big 5' Reform Be Enough to Save Amateurism?*, SB NATION (Apr. 24, 2014, 9:00 AM), http://www.sbnation.com/college-football/2014/4/24/5594090/ncaa-changes-power-conferences-unions-lawsuits (noting that the amendments to the structure of the NCAA were likely spurred by the numerous lawsuits pending against the NCAA and individual conferences).

429. *2014 NCAA Amendments*, *supra* note 212, at 28.

430. *See, e.g.*, Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71, 83 (2006) (noting that the NCAA created the term "student-athlete" to avoid having to recognize collegiate athletes as employees). *See also NCAA College Athletics Statistics*, STATISTIC BRAIN (Apr. 26, 2014), http://www.statisticbrain.com/ncaa-college-athletics-statistics/ (reporting annual NCAA revenue in excess of $10.6 billion).

elicit substantial change.[431] By allowing universities in the Power-5 conferences more autonomy over the specific areas that student-athletes have identified as the greatest areas of concern, the NCAA has merely created a system in which it can place the blame on individual universities when no meaningful change comes from this new structure of governance. For instance, when student-athletes complain about not being able to afford the true cost of attendance despite being on a full-scholarship, the NCAA can now respond by saying such shortcomings are attributable to the individual universities since the NCAA has given schools the "autonomy" to provide additional funds to student-athletes. Moreover, this new structure does not provide the universities within the Power-5 conferences any additional funds from the NCAA to implement any changes.[432] Therefore, even if a university would like to provide greater benefits for student-athletes, the university would have to redistribute its current allocation of funds in order to accommodate these demands.[433]

The fact remains, these new governance amendments do nothing to change the NCAA rules allowing for the exploitation of student-athletes. In its proposal for the new governance structure, the NCAA repeatedly emphasizes that "these modifications can be made without violating basic principles of amateurism and the collegiate model."[434] This model does nothing to address the fundamental flaws of the NCAA system—namely, that student-athletes lack any meaningful ability to negotiate the terms of their athletic participation.[435] Furthermore, nothing in this new structure changes underlying issue that universities and the NCAA are aiming to maximize their profits, and anything that detracts from this aim is likely to be opposed.[436]

While the new model of NCAA Division I governance is a nice gesture toward compromise, at the end of the day that is all it is, a gesture. This is unlikely to quell student-athletes' desire to unionize, and if student-athletes are successful in doing so, the structure of the NCAA would likely be compromised in the process.[437] Unchanged, the NCAA bylaws are purposefully restrictive to any form of benefit outside of those necessary for the mere subsistence of student-athletes.[438] If student-

431. *See* Trahan, *supra* note 428 (arguing that the NCAA governance amendments will have little change to the current structure of Division I athletics in practical application).

432. *Id.*

433. *See 2014 NCAA Amendments*, *supra* note 212 at 29 (failing to mention how universities would fund any changes to student-athlete benefits).

434. *Id.* at 31.

435. While the new structure of governance does slightly increase the number of student representatives within the various governing the bodies of the NCAA, the increase is nominal at best. *See id.* at 6 (describing the new voting structure in which student-athletes are given merely fifteen of a total eighty votes within the autonomous sub-Council). Accordingly, the university representatives could still veto any proposed amendment supported by all fifteen student-athlete representatives and pass any amendment opposed by all student-athlete representatives.

436. *Id.*

437. *Id.*

438. *See* DIVISION I MANUAL, *supra* note 333 at 211–310.

athletes are to have any legitimate say in the terms of their athletic participation under the rigidity of the current structure, unionization is almost compelled.[439]

Yet, for reasons outlined within this Part of the Note, unionization has considerable drawbacks for the majority of student-athletes.[440] Unionization would require equal provisions between men's and women's athletic teams, it would not be an option for student-athletes at private universities, and walk-on athletes would be excluded from reaping any benefits of a successful collective bargaining agreement between universities and grant-in student-athletes.[441] Furthermore, any effort to unionize would require a complete overhaul of the current structure of the NCAA.[442] Given the numerous disadvantages that would accompany successful unionization for student-athletes, universities, and the NCAA alike, these entities should be aiming for a model that is mutually advantageous for all involved. Ideally this would be a model in which all student-athletes, including women and walk-ons, would be able to dictate their terms of athletic participation and one where the NCAA remains in its role as the ultimate overseer of collegiate athletics. Is such a model possible?

IV. RECOMMENDATION

"All things are subject to interpretation whichever interpretation prevails at a given time is a function of power and not truth."[443] Since the NCAA's implementation of the "student-athlete" model in the early 1960s,[444] the power of interpreting what the relationship between athletes and their respective universities is has rested with the NCAA.[445] As the NCAA has become increasingly commercialized, individuals have begun questioning the "truth" of the student-athlete model.[446] While it is tempting to advocate for athletes having the unfettered ability to bargain for their rights, using unionization to achieve this has various drawbacks, as described in Part III of this Note.[447] Although unionization is an imperfect method of addressing the concerns of student-athletes, the threat of collectively bargaining through unions can play an imperative role in dissipating the unequal distribution of power that currently exists in collegiate athletics.

439. *See* Trahan, *supra* note 428 (noting that the new structure does little to upset the status quo and power that the NCAA and its member universities exert over student-athletes).

440. *See supra* Part III.A.–D.

441. *See supra* Part III.A.–D.

442. *See supra* Part III.A.–D.

443. *Friedrich Nietzsche Quote*, IZ QUOTES, http://izquotes.com/quote/135719 (last visited May 18, 2016).

444. *See* Fram & Frampton, *supra* note 16, at 1014–1015 (noting that the NCAA created the "student-athlete" due to concern that students might be recognized as employees).

445. *Id.*

446. *See, e.g.*, McCormick & McCormick, *supra* note 430, at 83 (noting that the NCAA created the term "student-athlete" to avoid having to recognize collegiate athletes as employees).

447. *See supra* Part III.A.–D.

Unions exist to advance employee rights.[448] As the Regional Board originally found in its *Northwestern* decision, collegiate athletes certainly appear to be employees under the NLRA.[449] Yet, unionizing should not be student-athletes' primary method of organizing when attempting to advance their concerns. Rather, unionizing should be a fallback option—available if universities are unresponsive in addressing the problems facing student-athletes. The threat of collegiate athletes unionizing and collectively bargaining with universities should be sufficient to compel meaningful conversations between administrators and student-athletes. The threat alone has already caused the NCAA to restructure, at least facially, its internal governance.[450]

To ensure that student-athletes have a voice with respect to their terms of athletic participation, this Note suggests that universities create student-athlete advisory committees. Student-athletes from each sport would be given a seat at the table, and would be able to shed light on the issues they are facing. Likewise, administrators would be able to voice their concerns in accommodating the requests by student-athletes. In theory, the student-athlete advisory committee would promote a dialogue akin to what would be heard in a non-binding arbitration hearing.[451] Both sides would make their position known to the other and would come to a compromise that is advantageous for both groups.

To guarantee the best bargaining rights of the individual student-athletes, a university would form a student-advisory committee with representatives from each men and women's athletic team. The advisory committees from each school within an athletic conference[452] would then come together to meet with the administrators in charge of the athletic conference. Since universities compete against schools within their athletic conference, implementing student-advisory committees at the athletic conference level will ensure that each university's direct competition is competing under the same conditions. If each university were to bargain individually with its student-athletes, schools within the same conference would lack cohesion with respect to the benefits that students are afforded.[453] With each university vying to attract the most talented athletic recruits, schools will compete with one another to offer recruits the most benefits—giving schools with the means to offer perks a decisive

448. *See supra* Part II.

449. *See* Nw. Univ. & Coll. Athletes Players Ass'n, 2014–15, N.L.R.B. Dec. (West) ¶ 15781 (Mar. 26, 2014).

450. *See 2014 NCAA Amendments*, *supra* note 212 at 5.

451. In non-binding arbitration hearings, all parties present their position in a dispute and an unbiased neutral arbitrator seeks to find a middle ground between the parties and then suggests an outcome for resolving the dispute. The arbitrator's suggested outcome is not binding on the parties, but if all parties agree to the arbitrator's suggested resolution, then the resolution becomes binding.

452. In stating "athletic conferences," I am referencing the major athletic conferences that are made up of a coalition of schools—typically from a similar geographic area. These schools then play against one another multiple times per-year in each sport. For a list of the major football conferences, see *College Football Conferences*, ESPN, http://espn.go.com/college-football/conferences (last visited May 18, 2016).

453. *See supra* Part III.

recruiting advantage over other schools. By ensuring that the universities within a particular conference collectively bargain together, no one school within a conference will have a recruiting advantage over another school. Additionally, bargaining at the athletic conference level could potentially allow smaller conferences to more effectively compete for talented recruits by allowing smaller conferences to offer more expansive benefits than the larger conferences.[454]

Moreover, collective bargaining at the conference level would give student-athletes more bargaining power, as a whole, than bargaining with individual universities. As discussed in Part II, collective bargaining is most effective when those advocating for greater benefits have a stronghold on the labor force within a given industry. Where it would be easy for a single university to remain steadfast in refusing to cede to the requests of its student-athletes during bargaining negotiations, when student-athletes from an entire athletic conference have the ability to strike or unionize, universities are likely to be more willing to listen to the concerns of its student-athletes.

Although it should not be the primary goal of the student-advisory committees, should negotiations fail to produce significant change, retaining the ability to unionize would give student-athletes a meaningful alternative to collective bargaining. As chronicled in Part III, several adverse consequences would stem from student-athletes unionizing.[455] These consequences would not only harm the NCAA and individual universities, but potentially the student-athletes as well. Knowing that if negotiations were to fall through that student-athletes could unionize and strike—thereby threatening the stream of revenue that universities have long enjoyed—at the very least, schools would be compelled to entertain the concerns of student-athletes. Likewise, this would provide administrators with a venue to voice their concerns with the student-athlete's requests. In doing so, student-athletes and administrators would be more likely to reach mutually beneficial outcomes.

Including members of each athletic team on the advisory committees will not only ensure that each student-athlete's interests are represented, but also alleviate many of the adverse consequences that would flow naturally from unionization. Requiring representation from each sport will advance the rights of student-athletes—as a whole—which *should* be the ultimate goal in student-athletes bargaining for greater benefits. Under the student-athlete advisory committee model, benefits that the committees bargain for would extend to all private and public universities, women's athletic teams, and walk-on athletes as well. Unlike

454. I understand that this is theoretically possible, but, in practical application, unlikely to occur given the fact that large conferences generate more revenue than small conferences. Since the financial consequences will be a conference's primary concern with affording greater benefits to student-athletes, the conferences with more money will likely be more willing to attract talented-recruits by granting greater student-athlete benefits.

455. *See supra* Part III.

the new model of governance that the NCAA passed in August 2014,[456] under the student-athlete advisory committee model universities would be allowed more autonomy in addressing the concerns of student-athletes, and this would not be limited only to the Power-5 athletic conferences.

Furthermore, unionization would likely benefit only those athletes participating in men's football and basketball within the major revenue-generating conferences. Since universities are primarily concerned with the profits earned from athletic programs, schools would be more inclined to cater to the demands of those participating in revenue-generating sports. As the sole "revenue-generating" sports, student-athletes participating in men's football and basketball would be in an advantageous position to collectively bargain for benefits that advance only their own interests. Having representatives on the student-athlete advisory committee from the non-revenue-generating athletic programs would help alleviate these potential issues.

Additionally, as noted in Part III, the ability to unionize is only available to student-athletes at private universities.[457] If unionization were the default option when disputes arose between student-athletes and a university's administration, only those student-athletes attending private schools would have recourse by unionizing, at least under the *Northwestern* decision. Conversely, if the student-advisory committee structure were adopted at the conference level, student-athletes at both private and public universities would be able to advance the interests of all collegiate athletes within a conference without private universities having an advantageous bargaining position.

Similarly, the interests of walk-on student-athletes would be best served by creating student-advisory committees at the conference level. Considering that walk-on athletes are not recognized as employees under the NLRA, since they do not receive any monetary benefit for their athletic participation,[458] collectively bargaining to attain rights for all student-athletes would reflect the reality that non-scholarship athletes put in at least as much time and energy as their teammates on scholarship.

While it is conceded that implementing student-athlete advisory committees may be difficult at first, change is necessary. It can also be argued that the student-advisory committees would do nothing to maintain the current structure of the NCAA if student-athletes make demands that would violate the NCAA bylaws. Although a valid concern, athletic conference leadership would be able to convey their concerns regarding violating the NCAA structure during negotiations, and the parties could reach mutually beneficial outcomes respecting the concerns of the student-athletes and the structure of the NCAA.

456. *See 2014 NCAA Amendments*, *supra* note 212.
457. *See supra* Part III.
458. *What the Northwestern Decision Means*, *supra* note 418.

V. CONCLUSION

Complex problems often require innovative solutions. The fact of the matter is that American society is much different now than it was when the NCAA was established at the turn of the twentieth century. The popularity of collegiate athletics could never have been foreseen by the drafters of the first NCAA bylaws.[459] With this popularity has come an increase in the competition among universities for top athletic talent. Today, getting student-athletes to commit to a university requires much more than an athletic scholarship. The current structure of the NCAA and its unwavering prohibition on compensating student-athletes in any manner, however, does not reflect the fact that the NCAA has itself become a revenue generating entity. No longer are student-athletes blindly enduring the exploitative practices of the NCAA without a fight.

In 2014, with tensions between the NCAA and student-athletes escalating, the football players at Northwestern University decided to be proactive in their pursuit of more expansive benefits for student-athletes. To do so, the Northwestern University football players petitioned to the NLRB in an attempt to be recognized as employees and, thereby, able to collectively bargain for the terms of their athletic participation. Although the Regional Board's decision was nullified on appeal when the Review Board decided to decline jurisdiction, the attempt at unionizing will likely go down in history as a monumental step towards more expansive rights for collegiate athletes.

While retaining the ability to unionize undoubtedly would be a key victory for student-athletes, there are inherent consequences associated with full-blown unionization of collegiate athletics. By being able to collectively bargain with the universities and the NCAA at large, student-athletes would be able to obtain greater benefits. These benefits, however, would come at a cost. If the Regional Board's framework in its original *Northwestern* decision were to be applied going forward, only student-athletes at private universities could benefit from collective bargaining negotiations. Additionally, walk-on athletes, who comprise a substantial number of student-athletes, would be precluded from enjoying the fruits of any bargaining agreements. Moreover, only providing benefits to revenue-generating men's athletic teams would conflict with Title IX, which requires universities to provide substantially equal athletic opportunities for men's and women's athletic teams.

To achieve the best outcome for student-athletes and the NCAA, unionization should be avoided if possible. Adopting a middle ground, whereby student-athletes from each university within an athletic conference would come together to collectively bargain with administrators would not only ensure that the interests of *all* student-athletes are being advanced, but also, would allow the NCAA to keep its current structure without having to substantially alter the traditional relationship between

459. *See*, 1906 NCAA Bylaws, *supra* note 178.

student-athletes and the NCAA. The ability to unionize, however, should not be foreclosed to student-athletes, as the ability to unionize needs to be a legitimate threat in order for collective bargaining to be effective.

The NCAA would be well served by heeding some advice from the iconic American musician, songwriter, and philosopher, Bob Dylan.

> "Come gather 'round people wherever you roam
> Admit that the waters around you have grown
> And accept it that soon you'll be drenched to the bone
> If your time to you is worth savin'
> Then you better start swimmin' or you'll sink like a stone
> For the times they are a-changin'"[460]

The NCAA has a choice. It can sit by idly as the relationship between student-athletes and universities shift to reflect the true commercial nature of collegiate athletics, *or* the NCAA can act proactively in implementing student advisory committees—thereby ensuring that collective bargaining is mutually advantageous to all involved. If history were to be our guide, the NCAA would be wise to do the latter.

460. Bob Dylan, *Times They Are a Changing*, METROLYRICS, http://www.metrolyrics.com/times-they-are-a-changing-lyrics-bob-dylan.html (last visited May 18, 2016).