

# PLAY UNDER REVIEW: HOW THE NLRB FAILED TO PROTECT SOME OF THE MOST VULNERABLE EMPLOYEES—COLLEGE ATHLETES

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## ABSTRACT\*\*

*While the scenery of Division I College Football has long reflected that of a professional business, its regulation has been stuck in an age of amateurism. The players may come and go through the years, but the exploitation remains the same. Unfortunately, the National Labor Relations Board missed its chance to make a lasting mark on this oppressive industry.*

*In 2014, members of the Northwestern University football team attempted to unionize under their private university. The Board, however, dismissed the claim by passing on jurisdiction. The folly of this decision was revealed through two of the Board's subsequent decisions. First, in *Trustees of Columbia*, the Board recognized graduate students as statutory employees under the National Labor Relations Act, establishing precedent that college students can be both students and employees. Next, in *Browning-Ferris Industries of**

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\* J.D. 2018, Michigan State University College of Law; B.S. 2015, Grand Valley State University. First and foremost, I would like to thank my parents, Bill and Lynn McInnis, for the support they have provided in my life academically, morally, and spiritually. I would also like to extend gratitude to Mary Bedikian, my expert reader, for her guidance throughout the writing process. Finally, thank you to the *Michigan State Law Review* members, past and present, who played any role in the publishing of this Comment.

\*\* This Comment was written in the interim between the National Labor Relations Board's decision to limit the joint-employment standard in *Hy-Brand Industries Contractors*, 365 N.L.R.B. No. 156 slip op. at 1 (Dec. 14, 2017), and its subsequent vacation of that decision on February 26, 2018. While that decision impacts this Comment's applicability, it also fortunately reopens the door to the original premise of this Comment: that Division I college football players are joint employees of their schools and the NCAA, respectively. This Comment further provides unique insight into how a restrictive joint-employment standard eliminates this argument. Finally, being that the NLRB has altered its approach to joint employment three times in the past two and a half years, this Comment remains relevant for future joint-employment jurisprudence.

California, Inc., *the Board made the joint-employment standard more inclusive. These decisions opened the door for a persuasive argument by Division I College Football players that they are employees under the NLRA, with the NCAA acting as a joint employer.*

*With the changing political climate, however, this potential argument has fallen to the wayside. The current Board has reverted back to a more restrictive standard of joint employment, and the changes will likely continue. In all, the Board missed its chance to protect some of the most vulnerable employees—college football players.*

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INTRODUCTION

On August 17, 2015, the National Labor Relations Board (NLRB or the Board) faced fourth and one on its opponent’s thirty-five yard line, and it decided to punt.<sup>1</sup> When considering a workplace landscape that has been characterized by some as a farce label of amateurism and analogized to slavery,<sup>2</sup> the Board decided in *Northwestern University* that asserting jurisdiction “would not serve to promote stability in labor relations”<sup>3</sup> among collegiate football athletes, the schools, and the National Collegiate Athletic Association (NCAA).<sup>4</sup> In puzzling fashion, the Board recognized that major college football does have extensive similarities to professional sports,<sup>5</sup> while at the same time granting the petitioning

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1. See Sheldon D. Pollack & Daniel V. Johns, *Northwestern Football Players Throw a “Hail Mary” but the National Labor Relations Board Punts: Struggling to Apply Federal Labor Law in the Academy*, 15 VA. SPORTS & ENT. L.J. 77, 109 (2015).

2. See, e.g., Richard T. Karcher, *Broadcast Rights, Unjust Enrichment, and the Student-Athlete*, 34 CARDOZO L. REV. 107, 111 (2012); César F. Rosado Marzán & Alex Tillet-Saks, *Work, Study, Organize!: Why the Northwestern University Football Players Are Employees Under the National Labor Relations Act*, 32 HOFSTRA LAB. & EMP. L.J. 301, 304 (2015); Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71, 157 (2006); Maria L. Ontiveros, *NCAA Athletes, Unpaid Interns and the S-Word: Exploring the Rhetorical Impact of the Language of Slavery*, 2015 MICH. ST. L. REV. 1657, 1666.

3. *Northwestern Univ.*, 362 N.L.R.B. No. 167, slip op. at 1 (Aug. 17, 2015).

4. See *id.* at 5. The Board acknowledged the extensive degree of control the NCAA has over member institutions, asserting that the “NCAA now exercises a substantial degree of control over the operations of individual member teams, including many of the terms and conditions under which the scholarship players (as well as walk-on players) practice and play the game.” *Id.*

5. See *id.* at 4-5 (identifying that “FBS football does resemble a professional sport in a number of relevant ways”).

workers<sup>6</sup> none of the benefits long possessed by professional athletes.<sup>7</sup> Therefore, without considering the inequities, the Board simply used its statutory authority to avoid deciding the case on its merits.<sup>8</sup>

Nevertheless, Board members appointed by President Obama<sup>9</sup> issued corresponding decisions and analyses<sup>10</sup> that hinted at a shifting perspective toward college football athletes, opening the path for a unique unionization attempt under the National Labor Relations Act (NLRA).<sup>11</sup> In *Trustees of Columbia*, the Board deemed student assistants at Columbia University to be statutory employees under § 2 of the NLRA.<sup>12</sup> Subsequently, in January 2017, the then-

6. It must be recognized that the Board never actually established the football players as contractual employees, but rather provided that even if they were, passing on jurisdiction was the correct approach. *See id.* at 1.

7. *See* Phil Thompson, *State of the Unions . . . in Professional Sports*, CHI. TRIB. (Jan. 19, 2015, 8:48 PM), <http://www.chicagotribune.com/sports/ct-spt-0120-state-of-the-unions-20150119-story.html> [<https://perma.cc/BY2G-SUJJ>].

8. *See Northwestern Univ.*, slip op. at 3 (declining to exercise jurisdiction).

9. *See Who We Are*, NLRB, <https://www.nlr.gov/who-we-are> [<https://perma.cc/YWY2-MA4S>] (last visited Mar. 5, 2018). There are five NLRB Board members, each of whom being appointed by the President and having a five-year term. *Id.* With one Board member's term expiring each year, the incumbent President has significant influence over the partisanship and perspective of the Board. *See Members of the NLRB Since 1935*, NLRB, <https://www.nlr.gov/who-we-are/board/members-nlr-1935> [<https://perma.cc/YCB8-E2QU>] (last visited Mar. 5, 2018) (detailing the shift of partisanship over the Board's lifespan). *See also* Daniel Wiessner, *AFL-CIO, Affiliates Set to Challenge Recent NLRB Rulings*, REUTERS (Dec. 27, 2017), <https://www.reuters.com/article/labor-aflcio/afl-cio-affiliates-set-to-challenge-recent-nlr-rulings-idUSL1N1OR0DD> [<https://perma.cc/X2Q3-TBY2>] (articulating the different manners in which the Trump administration's appointments to the NLRB have reversed the decisions of Barack Obama appointments to the NLRB).

10. *See* Trs. of Columbia Univ. in the City of N.Y., 364 N.L.R.B. No. 90, slip op. at 1-2 (Aug. 23, 2016); *see also* Memorandum GC 17-01 from Richard F. Griffin, Jr., General Counsel on the Statutory Rights of University Faculty and Students in the Unfair Labor Practice Context 1, 16 (Jan. 31, 2017) [hereinafter Internal Memorandum] (concluding “that scholarship football players in Division I FBS private sector colleges and universities are employees under the NLRA, with the rights and protections of that Act”). While this memorandum has since been withdrawn by the NLRB, its analysis is nevertheless persuasive and applicable.

11. *See* 29 U.S.C. § 152(3) (2016). *See also* Jay D. Lonick, Note, *Bargaining with the Real Boss: How the Joint-Employer Doctrine Can Expand Student-Athlete Unionization to the NCAA as an Employer*, 15 VA. SPORTS & ENT. L.J. 135, 137 (2015) (describing student-athletes' potential claim of joint employment against the NCAA under the NLRA).

12. *Trs. of Columbia Univ.*, slip op. at 1, 2 (defining student assistants as “students who perform services at a university in connection with their studies”). In

acting NLRB General Counsel issued an advisory opinion articulating that, in light of recent cases, Division I Football Subdivision (FBS) scholarship athletes of private universities are employees under the NLRA.<sup>13</sup>

The Board further provided, although inadvertently, a plausible response to its principal concern in *Northwestern University* that the NLRA does not apply to public entities, including public universities.<sup>14</sup> Because the NLRA does not apply to state universities, the Board would not have been able to exercise jurisdiction over college football players at 108 of the 125 FBS institutions,<sup>15</sup> thereby rendering the rationales of *Trustees of Columbia* and the former General Counsel moot.<sup>16</sup> However, four days after deciding *Northwestern University*, the Board expanded its joint-employment standard in *Browning Ferris Industries*.<sup>17</sup> This decision stimulated a

doing so, the Board overturned a foundation case in *Brown University*, 342 N.L.R.B. 483 (2004). *See id.* at 1.

13. *See* Internal Memorandum, *supra* note 10, at 16. While this opinion was seismic in persuasion, it lacked any binding effect on the Board and is subject to irrelevance because of the presidential change. *See* Lester Munson, *NLRB Rules Football Players at Private FBS Schools Are Employees*, ESPN (Feb. 3, 2017), [http://www.espn.com/espn/otl/story/\\_id/18612851/nlr-rules-football-players-private-fbs-schools-employees](http://www.espn.com/espn/otl/story/_id/18612851/nlr-rules-football-players-private-fbs-schools-employees) [<https://perma.cc/GGV4-NGN7>] (detailing how “[a] new general counsel, appointed by President Donald Trump [in November 2017], could rewrite and reverse this opinion”).

14. *See* *Northwestern Univ.*, 362 N.L.R.B. No. 167, slip op. at 1 (Aug. 17, 2015) (raising the possibility that even if another case arose regarding scholarship athletes, the Board might still pass on jurisdiction); Marc Edelman, *NLRB Decision to Unionize Columbia Student Workers May Help College Athletes’ Union Movement*, FORBES (Aug. 26, 2016, 2:52 PM), <https://www.forbes.com/sites/marcedelman/2016/08/26/nlr-b-decision-to-unionize-columbia-student-workers-may-help-college-athletes-union-movement/#623a12766962> [<https://perma.cc/JTJ3-5K5J>] (articulating that “the Columbia University decision does not help college athlete organizers directly with the issue about maintaining a ‘symbiotic relationship’ between rival football programs”).

15. *See* *Northwestern Univ.*, slip op. at 3 (stating that “the overwhelming majority of competitors are public colleges and universities over which the Board cannot assert jurisdiction”). Broadly, the FBS is where revenue-generating college football is played. *See* *Divisional Differences and the History of Multidivision Classification*, NCAA, <http://www.ncaa.org/about/who-we-are/membership/divisional-differences-and-history-multidivision-classification> [<https://perma.cc/48HV-AQYZ>] (last visited Mar. 5, 2018).

16. For rationale that is rendered moot, see *Trs. of Columbia Univ.*, slip op. at 5; Internal Memorandum, *supra* note 10, at 16-23 (describing how FBS football players conform to the statutory definition of employee).

17. *Browning-Ferris Indus. of Cal., Inc.*, 362 N.L.R.B. No. 186, slip op. at 2 (Aug. 27, 2015), *overruled by* *Hy-Brand Indus. Contractors, Ltd.*, 365 N.L.R.B. No.

persuasive argument that FBS college football players are employees under a joint-employment theory with the NCAA, a private entity,<sup>18</sup> acting as a joint employer, thereby remedying the jurisdictional concern.<sup>19</sup> However, the Obama-administration-appointed Board missed its chance to repair the inequities of college football, and a Board with a majority appointed by President Trump returned to a more restrictive joint-employment standard on December 14, 2017.<sup>20</sup>

This Comment will explain the argument that the Obama-administration Board overlooked: that the cumulative effect of a more inclusive standard for student unionization<sup>21</sup> and a less-restrictive joint-employment standard under *Browning-Ferris II*<sup>22</sup> eradicated any jurisdictional concerns and paved the way for the recognition of all scholarship FBS college football players as statutory employees under the NLRA.<sup>23</sup> While Northwestern players'

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156 slip op. at 1 (Dec. 14, 2017) [hereinafter *Browning-Ferris II*]. In *Browning-Ferris II*, the Board explained “two or more statutory employers are joint employers of the same statutory employees if they ‘share or codetermine those matters governing the essential terms and conditions of employment.’” *Id.* at 2 (quoting *NLRB. v. Browning-Ferris Indus. of Pa., Inc.*, 691 F.2d 1117, 1123 (3d Cir. 1982)).

18. See NCAA, 2016-17 NCAA DIVISION I MANUAL art. 1.1 (2016) [hereinafter NCAA DIVISION I MANUAL]; see also Rachel George, *Challenging the NCAA; No Longer Is Governing Body Invincible*, USA TODAY, Apr. 26, 2013, at 13C.

19. See Lonick, *supra* note 11, at 137. The Board even provided ammunition for this theory by citing the innate connection the NCAA holds with each member institution. See *Northwestern Univ.*, 362 N.L.R.B. No. 167, slip op. at 4 (stating “[t]here is [] a symbiotic relationship among the various teams, the conferences, and the NCAA”). It must be noted, however, that in a September 2016 Memorandum, the former General Counsel for the Board specifically responded to a joint-employer claim against the NCAA by recommending that it should be dismissed because it would not “effectuate the policies and purposes of the NLRA to issue [a] complaint” against the NCAA. Advice Memorandum from Barry J. Kearney, Assoc. Gen. Counsel, Div. of Advice, NLRB to Peter Sung Ohr, Reg’l Dir. Region 13, NLRB 1 n.1 (Sept. 22, 2016) [hereinafter *Northwestern Advice Memorandum*].

20. *Hy-Brand Indus. Contractors Ltd.*, slip op. at 2 (“[W]e overrule *Browning-Ferris* and return to the principles governing joint-employer status that existed prior to that decision.”).

21. See *Trs. of Columbia Univ. in the City of N.Y.*, 364 N.L.R.B. No. 90, slip op. at 5-7 (Aug. 23, 2016); Internal Memorandum, *supra* note 10, at 17 (referencing the recently adopted broad definition of statutory employee).

22. *Browning-Ferris II*, slip op. at 2.

23. See *infra* Part IV (explaining how a joint-employment claim could have remedied the Board’s original concern of exercising jurisdiction over a minority of FBS institutions).

efforts to unionize have been the subject of a few scholarly articles,<sup>24</sup> with one even addressing a joint-employment claim,<sup>25</sup> none of them dissected why the Board's decision to pass on jurisdiction in *Northwestern University* was contradicted by subsequent jurisprudence.<sup>26</sup> This Comment also possesses a unique revisionist perspective, assessing how the Obama-administration Board failed to rectify the inequality and exploitation of modern major college football.<sup>27</sup> For over a century, student-athletes have been confined to a rigid system of amateurism,<sup>28</sup> all while the NCAA has developed into the most profitable sports league at any level.<sup>29</sup> Now, they are stuck in a power structure that denies them a voice and does not account for their needs.<sup>30</sup>

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24. See, e.g., Mary Kate Bird, Comment, *Northwestern University: Opening the Door for Unionization in Collegiate Athletics*, 84 UMKC L. REV. 423, 423 (2015); Marzán & Tillet-Saks, *supra* note 2, at 301; Pollack & Johns, *supra* note 1, at 107; Audrey C. Sheetz, Note, *Student-Athletes vs. NCAA: Preserving Amateurism in College Sports Amidst the Fight for Player Compensation*, 81 BROOK. L. REV. 865, 887 (2016).

25. See Lonick, *supra* note 11, at 137. While Lonick's Note did address joint employment, it did so without analyzing the jurisdictional concerns of the Board and made no mention of analogous subsequent jurisprudence.

26. See *infra* Part IV.

27. See Joe Nocera & Ben Strauss, *Fate of the Union: How Northwestern Football Union Nearly Came to Be*, SPORTS ILLUSTRATED (Feb. 24, 2016), <http://www.si.com/college-football/2016/02/24/northwestern-union-case-book-indentured> [<https://perma.cc/N68D-2EP6>] (detailing how Kain Colter, quarterback of Northwestern's football team and the leading force for unionization, has described the NCAA as a "dictatorship" and "cartel"). By not taking swift action on a collective bargaining claim by college football athletes, the Obama administration Board left the door open for a subsequent Board to issue a case like *Hy-Brand Industry Contractors, Ltd.*, 365 N.L.R.B. No. 156, slip op. at 4 (Dec. 14, 2017), which effectively foreclosed any possible claim of joint employment by college football players. See *infra* Section IV.D.

28. See Brian L. Porto, *Neither Employees Nor Indentured Servants: A New Amateurism for a New Millennium in College Sports*, 26 MARQ. SPORTS L. REV. 301, 306 (2016) (describing the NCAA's official implementation of amateurism into its bylaws in 1916).

29. See Alex Moyer, Note, *Throwing Out the Playbook: Replacing the NCAA's Anticompetitive Amateurism Regime with the Olympic Model*, 83 GEO. WASH. L. REV. 761, 765 (2015) (stating that "[w]hile these student-athletes struggle financially, their work on and off the field helps generate more than \$12 billion in annual revenue, making college sports more profitable than any professional sports league").

30. See Nocera & Strauss, *supra* note 27 (reporting Northwestern quarterback Kain Colter's belief "that the power structure marginalized players and that he had deep concerns about issues such as long-term health care for college athletes").

Part I of this Comment evaluates the lives of college football players, the NCAA's role as overseer, and scholarly criticisms of the allegedly inequitable system.<sup>31</sup> Part II explains the Board's decisions in *Northwestern University* and *Trustees of Columbia*, its recent Internal Memorandum, and the Seventh Circuit's decision that student-athletes are not employees.<sup>32</sup> Part III explains the evolution of the joint-employment standard under the NLRA, including recent inconsistencies.<sup>33</sup> Finally, Part IV explains the solution the Obama administration missed, that FBS football players were statutory employees as a result of joint employment under the NCAA, and how this oversight ultimately left players stuck in a farce system of amateurism.<sup>34</sup>

#### I. THE LIFE OF AN AMATEUR: MODERN COLLEGE FOOTBALL AND NCAA CONTROL

As major college football has developed into a highly successful and popular enterprise,<sup>35</sup> several changes have taken place in the lives of the players,<sup>36</sup> the NCAA's degree of regulation,<sup>37</sup> and the overall outlook on the system.<sup>38</sup> Today, FBS football players live an onerous lifestyle, spending incredible amounts of time on both athletic and academic activities.<sup>39</sup> Many of the activities that fill this time are regulated by the NCAA, which attempts to maintain a uniform system of athletics that is distinct from professionalism through its emphasis on amateurism.<sup>40</sup> While this goal is considered admirable to some, it has not stopped scholars from criticizing the methodology of the system.<sup>41</sup>

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31. See *infra* Part I.

32. See *infra* Part II.

33. See *Browning-Ferris II*, 362 N.L.R.B. No. 186, slip op. at 12-14 (Aug. 27, 2015), *overruled by* *Hy-Brand Indus. Contractors, Ltd.*, 365 N.L.R.B. No. 156, slip op. at 1 (Dec. 14, 2017); see *infra* Section III.A.

34. See *infra* Part IV.

35. See *infra* Section I.B (detailing, in part, the high degree of financial success that the NCAA has obtained).

36. See *infra* Section I.A (describing the demanding lifestyle of college football players).

37. See *infra* Section I.B (explaining the supervisory role of the NCAA).

38. See *infra* Section I.C (outlining the scholarly review of the NCAA's system of amateurism).

39. See *infra* Section I.A.

40. See NCAA DIVISION I MANUAL, *supra* note 18, art. 1.3.1.

41. See *infra* Section I.C.

### A. A Day in the Life: Understanding the Demands of Modern FBS Football

While some view the lives of modern FBS football players as glamorous and covetous,<sup>42</sup> in truth they are incredibly hectic.<sup>43</sup> In addition to being full-time students,<sup>44</sup> players dedicate an incredible amount of time to football-related activities.<sup>45</sup> To start, during training camp, which lasts almost all of August, players dedicate at least fifty to sixty hours per week solely to football.<sup>46</sup> Once the season actually begins, and with it the academic school year, players can expect to spend roughly forty to fifty hours on football-related activities.<sup>47</sup> This will last the entire first semester, as games are generally played weekly from September through November, with successful teams playing into January.<sup>48</sup> Further, while the rest of the student body enjoys a holiday break, the football team uses this time to dedicate roughly fifty hours per week in preparation for an upcoming postseason game.<sup>49</sup>

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42. See, e.g., Jenna Johnson, *Freshman Football Players Balance Stresses of College Life*, WASH. POST (Dec. 25, 2013), [https://www.washingtonpost.com/local/education/freshman-football-players-balance-stresses-of-college-life/2013/12/25/ff5b446a-6673-11e3-a0b9-249bbb34602c\\_story.html](https://www.washingtonpost.com/local/education/freshman-football-players-balance-stresses-of-college-life/2013/12/25/ff5b446a-6673-11e3-a0b9-249bbb34602c_story.html) [<https://perma.cc/Y58N-CTPT>] (describing the fame college football players immediately earn); Sean Zak, *From Sunrise to Sunset: The Life of a Student-Athlete*, BADGER HERALD (Oct. 28, 2013), <https://badgerherald.com/sports/2013/10/28/sunrise-sunset-life-student-athlete/> [<https://perma.cc/3NSE-WECA>].

43. See *Northwestern Univ.*, 362 N.L.R.B. No. 167, slip op. at 11-15 (Aug. 17, 2015) (detailing the Northwestern football players' time commitment to the football program in great detail).

44. The NCAA requires players to be enrolled as full-time students. See NCAA DIVISION I MANUAL, *supra* note 18, at art. 14.2.

45. See *Northwestern Univ.*, slip op. at 2 (stating that “[s]cholarship players are required to devote substantial hours to football activities”); see also Scooby Axson, *UCLA QB Josh Rosen: Football and School “Don’t Go Together”*, SPORTS ILLUSTRATED (Aug. 8, 2017), <https://www.si.com/college-football/2017/08/08/josh-rosen-student-athlete-ncaa-comments> [<https://perma.cc/7MGH-T2EC>].

46. *Northwestern Univ.*, slip op. at 10.

47. See *id.*

48. See *id.* at 11.

49. *Id.* For example, the season after Northwestern players attempted to unionize, they played in the Outback Bowl on January 1, 2016. See Roger Mooney, *Mistake-Prone Northwestern ‘Not Good Enough to Win’ Against Tennessee*, CHI. TRIB. (Jan. 1, 2016), <http://www.chicagotribune.com/sports/college/ct-northwestern-tennessee-outback-bowl-spt-0102-20160101-story.html> [<https://perma.cc/BE6U-73CK>].

Even when the season ends, the frantic life of the modern FBS football player continues.<sup>50</sup> During the off-season, players can expect to spend fifteen to twenty hours per week on mandatory football activities,<sup>51</sup> which likely does not include the extensive time spent watching film.<sup>52</sup> Once spring finally blossoms, players devote roughly twenty to twenty-five hours per week to football activities in spring practice.<sup>53</sup> After a brief hiatus from football, lasting only a few weeks, the return of summer brings with it mandatory workouts, and the demanding cycle starts again.<sup>54</sup>

Therefore, in addition to sustaining a full-time academic schedule, FBS football players have the additional burden of dedicating as much time to football as one would to a full-time job.<sup>55</sup> Legal commentators and scholars of sports law Robert and Amy McCormick (the McCormicks) estimate that players dedicate an average of forty hours every week to football-related activities,<sup>56</sup> with an upward of eighty hours for weeks that culminate in away games.<sup>57</sup> This translates into players dedicating roughly 262 days per year to football.<sup>58</sup> When compared to the 250 days per year that the

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50. See *Northwestern Univ.*, slip op. at 14. One example is a week in February labeled “Winning Edge,” whereby “the football coaches separate the players into smaller groups and require them to compete with one another in various types of demanding competitions to test their levels of conditioning.” *Id.*

51. *Id.*

52. See, e.g., Zac Ellis, *Technology in College Football: The Evolution of Video and Film Study*, SPORTS ILLUSTRATED (June 23, 2015), <http://www.si.com/college-football/2015/06/24/college-football-technology-video-film-room> [<https://perma.cc/BA4V-M3SM>] (reporting that “many teams now expect [players] to sneak in extra film study during their free time”).

53. See *Northwestern Univ.*, slip op. at 14 (describing the period in which players engage in practice, film study, and physical conditioning, all of which “serves as an opportunity for the players to impress their coaches and move up on the depth charts in the various positions they are competing for”).

54. See *id.* at 15.

55. See McCormick & McCormick, *supra* note 2, at 99 n.127 (detailing that “between the workouts, practices, games and travel, being a big-time athlete amounts to a full-time job and more”) (quoting *60 Minutes: Here’s Ours?* (CBS television broadcast Jan. 6, 2002), transcript at 17).

56. *Id.*

57. *Id.* This, of course, is in addition to time spent in class, studying, and the mandatory ten hours per week of study hall that players must attend. *Id.* at 100.

58. *Id.* at 103.

average American works,<sup>59</sup> it becomes even more apparent how strenuous the life of a modern FBS football player is.<sup>60</sup>

While the NCAA characterizes football players as student-athletes,<sup>61</sup> the players' connection to the school and day-to-day lives reveal that their main focus is athletics.<sup>62</sup> To start, universities recruit football players for their athletic ability, with academic achievements being an adjacent necessity.<sup>63</sup> In fact, during the recruiting process, academic analysis of high school athletes only becomes relevant after the coaches determine whether the player could contribute to the football team.<sup>64</sup>

Once enrolled at the university, football continues to be paramount.<sup>65</sup> Due to their commitments to the football program, FBS football players can be denied the opportunity to take afternoon or morning classes, depending on the practice schedule.<sup>66</sup> The commitment to the football program may even dictate what academic programs they may pursue.<sup>67</sup> For example, Kain Colter, the quarterback for Northwestern who led the unionization charge, had to forego his pursuit of a pre-med degree due to class scheduling

59. *Id.* at 104.

60. *See* Johnson, *supra* note 42 (reporting that “top-flight athletes have added stresses, like allowing coaches to tightly schedule their lives, consuming thousands of calories, making it through practice, staying eligible, establishing a reputation on the team, coping with public criticism and being good enough to play—or to play eventually”).

61. *See* NCAA DIVISION I MANUAL, *supra* note 18, art. 2.2 (mandating “[i]ntercollegiate athletics programs shall be conducted in a manner designed to protect and enhance the physical and educational well-being of student-athletes”).

62. *See* McCormick & McCormick, *supra* note 2, at 78 (identifying the players as “employee-athletes” instead of student-athletes).

63. *See* Northwestern Univ., 362 N.L.R.B. No. 167, slip op. at 15 (Aug. 17, 2015) (declaring that “scholarship players are identified and recruited in the first instance because of their football prowess and not because of their academic achievement in high school”).

64. *See id.*

65. *See* Taylor Branch, *The Shame of College Sports*, ATLANTIC (Oct. 2011), <https://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/> [https://perma.cc/A6GQ-6TLE] (deconstructing the myth that there is a “precedence of scholarship over athletic endeavor”).

66. *See* McCormick & McCormick, *supra* note 2, at 99 n.127.

67. *See* Northwestern Univ., slip op. at 21 (stating how “it is clear that the players are controlled to such a degree that it does impact their academic pursuits to a certain extent”).

conflicts.<sup>68</sup> Finally, the emphasis on athletics is displayed by the fact that if a player quits the team, his scholarship is withdrawn.<sup>69</sup>

Regardless of this dedication, both the universities football players attend and the NCAA exercise unique control over the players—to the point where the control is unmatched anywhere else in academia or even in the general workplace.<sup>70</sup> In fact, major college football programs control the players' dietary habits;<sup>71</sup> study habits;<sup>72</sup> sleep patterns;<sup>73</sup> game day attire;<sup>74</sup> living accommodations;<sup>75</sup> car possession;<sup>76</sup> ability to leave campus;<sup>77</sup> alcohol consumption;<sup>78</sup> media communications;<sup>79</sup> and use of their names, reputation, and popularity.<sup>80</sup> The NLRB's former General Counsel highlighted many of these factors in his January 2017 Internal Memorandum.<sup>81</sup>

68. *See id.* at 16.

69. *See id.* at 21. For example, a player who is routinely tardy for practice “may be deemed to have voluntarily withdrawn from the team and will lose his scholarship.” *See id.*

70. *See* McCormick & McCormick, *supra* note 2, at 97. In their article, the McCormicks assert “[o]ur data suggest, and other sources confirm, that no other university employee is even remotely subject to the degree of control, day by day, hour by hour, minute by minute, as the employee-athlete.” *See id.* at 108. Further, they reason that “[t]he exercise of this degree of control over any other employee at the university would be unimaginable. Indeed, if any group of persons may be called ‘employees’ based upon the degree of control exercised by a university, it must be the employee-athletes enrolled there.” *See id.*

71. *See* Johnson, *supra* note 42 (detailing that nutritionists tell the players what to eat in order to reach an ideal playing weight).

72. *See* McCormick & McCormick, *supra* note 2, at 101 (declaring that universities “control [] the location, duration, and manner in which the employee-athletes carry out . . . academic commitments”).

73. *See* *Northwestern Univ.*, slip op. at 15 (describing the daily itinerary for players, in which they are expected to be in bed by 10:30 PM).

74. *See id.* at 21 (the game day itinerary explains the required dress attire for travel days).

75. *See id.* (players must disclose and gain approval from the coaching staff of where they are going to live).

76. *See id.* (explaining how players must “obtain permission from the coaches before they can . . . drive personal vehicles”).

77. *See id.* (permission is also required for traveling off campus).

78. *See id.*

79. *See* *Northwestern Advice Memorandum*, *supra* note 19, at 1. In this memorandum, the NLRB General Counsel's Office advised that such restrictions on social media habits and communications with the media were violative of the NLRA. *See id.*

80. *See* Porto, *supra* note 28, at 311 (describing the regulations prohibiting players from using their status for any sort of pay).

81. *See* *Internal Memorandum*, *supra* note 10, at 19. Particularly, the former General Counsel stated that “there is substantial evidence that colleges and

In exchange for relinquishing control over their daily lives, extensive time dedication, and physical compromise,<sup>82</sup> the players are granted a full scholarship to the university.<sup>83</sup> This scholarship covers the reasonable expenses associated with tuition, fees, room, board, and books.<sup>84</sup> Nevertheless, the actual costs associated with this full scholarship are much lower than the schools' purported value,<sup>85</sup> and players would earn more in a free market.<sup>86</sup> Further, while this compensation does provide an education, it has not prevented most college football players from living below the national poverty line.<sup>87</sup> Even in the midst of such conditions, players, unlike their academic peers, are denied the right to earn wages as employees or use their reputation for profit.<sup>88</sup> Largely, the NCAA is the official organization that imposes such rules, and many more, upon the players.<sup>89</sup>

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universities control the manner and means of scholarship football players' work on the field and numerous facets of the players' daily lives to ensure compliance with NCAA rules." *See id.* He also outlined the NCAA's extensive use of its control. *See id.*

82. *See* McCormick & McCormick, *supra* note 2, at 77 n.26. From 1931 to 2004, roughly 188 college football players died as the result of injuries from the sport. *Id.* This figure does not take into account issues associated with concussions down the road. *See, e.g.,* Ben Strauss, *Six Concussion Suits Are Filed Against Colleges and NCAA*, N.Y. TIMES (May 17, 2016), [http://www.nytimes.com/2016/05/18/sports/ncaafotball/six-head-injury-suits-filed-in-new-front-against-colleges-and-ncaa.html?\\_r=0](http://www.nytimes.com/2016/05/18/sports/ncaafotball/six-head-injury-suits-filed-in-new-front-against-colleges-and-ncaa.html?_r=0) [<https://perma.cc/75RP-BGQP>] (referencing both the physical and mental injuries that football causes).

83. *See Northwestern Univ.*, slip op. at 2. The Board found the scholarship at Northwestern to be worth \$61,000. *Id.*

84. *See id.*

85. *See, e.g.,* McCormick & McCormick, *supra* note 2, at 109 n.155; Ahmed E. Taha, *Are College Athletes Economically Exploited?*, 2 WAKE FOREST J.L. & POL'Y 69, 77 (2012) (recounting that "an athlete does not displace another student, so the cost to the college of the athletic scholarship is only the additional cost incurred in educating, housing, and feeding the athlete. Because the college has excess capacity, this cost is likely very low").

86. *See* Taha, *supra* note 85, at 71.

87. *See* McCormick & McCormick, *supra* note 2, at 79 n.30; Nocera & Strauss, *supra* note 27 (referencing a study that found "more than 80% of athletes playing football on 'full scholarship' lived below the poverty line" in 2012).

88. *See* Karcher, *supra* note 2, at 110 (detailing how student-athletes may not market their reputation as high-profile individuals for personal gain, cannot work for wages as employees, collectively bargain, or compete in a free market for increased payment).

89. *See Northwestern Univ.*, slip op. at 5 (stating that the NCAA has the authority to "set common rules and standards," "police and enforce the rules and regulations," and generally "exercises a substantial degree of control over the operations of individual member teams").

## B. The NCAA's Role as Supervisor

The NCAA, a non-profit organization, establishes the aforementioned rules with a self-declared purpose of upholding the integrity of intercollegiate athletics by emphasizing education and maintaining the demarcation from professional athletics.<sup>90</sup> In pursuit of this purpose, the NCAA has rigorously established the importance of the label “student–athlete,” which brands the individuals who perform in athletic events as students first.<sup>91</sup> The NCAA created the label of student–athlete in response to a collegiate football player being awarded worker’s compensation,<sup>92</sup> predicting the need to protect itself from an employment movement by athletes.<sup>93</sup> Six decades later, the NCAA is thriving with over 1,200 private and public schools, conferences, and affiliate organizations acting as members.<sup>94</sup>

Over this time, the NCAA has overseen the growth of college football into a multi-billion dollar industry and a very successful business model.<sup>95</sup> In fact, the top member institutions that support football programs are hugely profitable.<sup>96</sup> It has been estimated that

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90. See NCAA DIVISION I MANUAL, *supra* note 18, art. 1.3.1. More specifically, the NCAA holds that its purpose is to “maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports.” *Id.*

91. See McCormick & McCormick, *supra* note 2, at 74-75. The NCAA defines student–athlete as: “a student whose enrollment was solicited by a member of the athletics staff or other representative of athletics interests with a view toward the student’s ultimate participation in the intercollegiate athletics program.” NCAA DIVISION I MANUAL, *supra* note 18, art. 12.02.13.

92. See *Van Horn v. Indus. Accident Comm’n*, 219 Cal. App. 2d 457, 464 (1963) (holding the “record reveals that petitioners established a prima facie case for benefits upon the presentation of evidence showing the alleged contract of employment”).

93. McCormick & McCormick, *supra* note 2, at 86 (“The NCAA purposely created the term ‘student-athlete’ as propaganda.”).

94. *About Us: Membership*, NCAA, <http://www.ncaa.org/about/who-we-are/membership> [<https://perma.cc/U38Z-DG9Q>] (last visited Mar. 5, 2018).

95. See, e.g., Amy Christian McCormick & Robert A. McCormick, *The Emperor’s New Clothes: Lifting the NCAA’s Veil of Amateurism*, 45 SAN DIEGO L. REV. 495, 509-10 (2008) (detailing how “[t]he NCAA generates enormous revenue each year from college sports”).

96. See Alicia Jessop, *The Economics of College Football: A Look at the Top-25 Teams’ Revenues and Expenses*, FORBES (Aug. 31, 2013, 10:32 AM), <https://www.forbes.com/sites/aliciajessop/2013/08/31/the-economics-of-college-football-a-look-at-the-top-25-teams-revenues-and-expenses/#6bb125676476>

intercollegiate athletics is now a \$12 billion industry, which exceeds any professional sports league.<sup>97</sup> Further, the NCAA reported revenue of \$871.6 million in 2011–2012.<sup>98</sup> Specifically, television revenues are remarkable, as evidenced by the NCAA’s \$7.3 billion contract with ESPN for the broadcasting rights to the College Football Playoff.<sup>99</sup> The Big Ten Conference alone averages \$248.2 million annually in TV contracts,<sup>100</sup> with the other “Power Five” conferences<sup>101</sup> generating similar amounts.<sup>102</sup>

Further, NCAA member institutions have embraced the lucrative environment of college athletics.<sup>103</sup> For example, the Big Twelve Conference has stated that one of its annual goals is to “optimize revenue.”<sup>104</sup> Member institutions have further displayed remunerative interests through the salaries they pay to their head football coaches.<sup>105</sup> For example, in 2014, seventy-two head college football coaches made over \$1 million in salary, with nearly thirty earning over \$3 million, and the highest paid public employee is a college football coach.<sup>106</sup>

Even with the emergence of FBS football as a massive industry, the NCAA has been able to maintain systemic control while also delegating the day-to-day control of individual players to

[<https://perma.cc/F42P-EA7Z>]. For example, in the 2011–2012 season, long-established football programs reported the following profits: University of Texas (\$77,917,481); University of Michigan (\$61,568,910); University of Alabama (\$45,074,799); and University of Notre Dame (\$43,228,691). *Id.*

97. See Porto, *supra* note 28, at 308.

98. *Revenue*, NCAA, <http://www.ncaa.org/about/resources/finances/revenue> [<https://perma.cc/C8YK-9Y8X>] (last visited Mar. 5, 2018).

99. Porto, *supra* note 28, at 310.

100. *Id.*

101. Rounded out by the Atlantic Coast Conference; the Big 12 Conference; the Pac-12 Conference; and the Southeastern Conference.

102. Karcher, *supra* note 2, at 109 n.1 (reporting that “[t]he conferences have their own television contracts with the networks that, depending on the individual conference, distribute to each school in the conference on average anywhere from \$13 million to \$21 million annually”).

103. See Eric Snyder, *Amateurism and Intercollegiate Athletics*, HIGHEREDJOBS (Sept. 16, 2014), <https://www.higheredjobs.com/articles/articleDisplay.cfm?ID=560> [<https://perma.cc/KFP6-MK7D>].

104. See *id.*

105. See, e.g., Porto, *supra* note 28, at 311.

106. *Id.*; Steve Berkowitz, Christopher Schnaars & Sean Dougherty, *NCAA Salaries*, USA TODAY, <http://sports.usatoday.com/ncaa/salaries/> [<https://perma.cc/CEF5-ZJBH>] (last visited Mar. 5, 2018).

schools and conferences.<sup>107</sup> One example of this control is its establishment of limits on the compensation of student-athletes,<sup>108</sup> as well the terms and content of adjoining agreements.<sup>109</sup> The NCAA also requires that every student-athlete be enrolled as a full-time student at the member institution<sup>110</sup> and that they achieve a specified GPA to be eligible to play.<sup>111</sup> Specific to each sport, the NCAA dictates how much time member institutions can allot to practice and games.<sup>112</sup> Generally speaking, the NCAA sets the rules and standards that member institutions must follow to engage in competition.<sup>113</sup>

Further, the NCAA brazenly polices and punishes individuals and member institutions that violate its regulations.<sup>114</sup> For example, in 2016, the NCAA suspended fourteen players from the Charleston Southern University football team for purchasing extra items such as pencils, binders, and electronics with their allotted book money.<sup>115</sup> In 2010, it suspended star wide receiver AJ Green for four games for selling a game-worn jersey for \$1,000 to fund a spring break trip.<sup>116</sup> Such punishments for menial infractions are the product of a larger regulatory scheme of restriction by the NCAA that has been routinely criticized.<sup>117</sup>

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107. See NCAA DIVISION I MANUAL, *supra* note 18, art. 1.2(b) (stipulating that one of the NCAA's purposes is "[t]o uphold the principle of institutional control of, and responsibility for, all intercollegiate sports").

108. See *id.* art. 12.02.2 (defining the "actual and necessary expenses" for the athletes).

109. See *Northwestern Univ.*, 362 N.L.R.B. No. 167, slip op. at 2 (Aug. 17, 2015).

110. See NCAA DIVISION I MANUAL, *supra* note 18, art. 14.01.2.

111. See *id.* art. 14.4.3.3.

112. See, e.g., *id.* art. 17.10 (laying out the practice and games limitations for football).

113. *Northwestern Univ.*, slip op. at 4 ("[A]cademic institutions that sponsor intercollegiate athletics have banded together and formed the NCAA to, among other things, set common rules and standards governing their competitions, including those applicable to FBS football.").

114. See *id.* (asserting that "[t]he record demonstrates that the NCAA now exercises a substantial degree of control over the operations of individual member teams").

115. Ariya A. Massoudi & Perry Kostidakis, *BREAKING: Charleston Southern Players Suspended vs. FSU*, FSUNews (Sept. 9, 2016, 3:30 PM), <http://www.fsunews.com/story/sports/2016/09/08/breaking-30-charleston-southern-players-suspended/90107172/> [<https://perma.cc/C6VW-V3AC>].

116. See Porto, *supra* note 28, at 303.

117. See Christopher Davis, Jr. & Dylan O. Malagrino, *Hold Your Fire: The Injustice of NCAA Sanctions on Innocent Student Athletes*, 11 VA. SPORTS & ENT.

## C. Scholarly Criticism of the NCAA

The NCAA's questionable sanctioning,<sup>118</sup> high degree of control,<sup>119</sup> incredible revenue,<sup>120</sup> and restrictions on athlete compensation<sup>121</sup> have resulted in regular criticism of its organizational structure.<sup>122</sup> Particularly, the McCormicks have been outspoken critics of the NCAA, arguing that it operates an inequitable system.<sup>123</sup> They contend that the labels of student-athlete and amateur are myths, used only to continue the exploitation of athletes by not treating them as employees.<sup>124</sup> Specifically, they point to the fact that the universities, corporate sponsors, coaches, NCAA, and media all benefit from the toils of the players while the workers are denied the fruits of this enormous enterprise.<sup>125</sup> The McCormicks also claim that college football and basketball are decidedly not amateur, but inherently commercial, by pointing to three fields of law—labor, tax, and antitrust—that the NCAA has utilized to shield its status of amateurism.<sup>126</sup>

Professor Richard Karcher, alternatively, suggests that the television revenue the NCAA, conferences, and universities earn through college football and basketball players constitutes unjust enrichment.<sup>127</sup> Particularly, Karcher criticizes the fact that, much like professional sports leagues, the NCAA is reaping incredible financial benefits, while at the same time uniquely avoiding payment for

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L.J. 432, 439-40 (2012); Virginia A. Fitt, Note, *The NCAA's Lost Cause and the Legal Ease of Redefining Amateurism*, 59 DUKE L.J. 555, 569-70 (2009).

118. See Davis, Jr. & Malagrino, *supra* note 117, at 433-34.

119. See *Northwestern Univ.*, slip op. at 4.

120. See *supra* Section I.B.

121. See NCAA DIVISION I MANUAL, *supra* note 18, art. 16.01.1.

122. See Ontiveros, *supra* note 2, at 1665-66, 1668 (detailing many commentators' perspective of a slavery analysis that "focuses upon the lack of control that student-athletes have over their lives, as well as the money being made by universities off of the athletes' labor, none of which is given to the workers").

123. See McCormick & McCormick, *supra* note 95, at 496-98, 508 (describing the NCAA as a "tyranny").

124. McCormick & McCormick, *supra* note 2, at 73-74 ("The NCAA's purpose in this message [of academics first] is to shore up a crumbling façade, a myth in America, that these young athletes in NCAA-member sports programs are properly characterized only as 'student-athletes.'").

125. See *id.* at 75-76.

126. McCormick & McCormick, *supra* note 95, at 497 ("The idea that major college sports are amateur is demonstrably false, and that fallacy has improperly sheltered college sports from the application of a variety of laws.").

127. See Karcher, *supra* note 2, at 111.

labor.<sup>128</sup> When considering this discrepancy, Karcher questions the morality of the system,<sup>129</sup> alleging the NCAA engorges itself on the work of the athlete.<sup>130</sup>

Uniquely, Professor Brian Porto argues that while the NCAA's concept of amateurism is undeniably inequitable, the proper solution is modification, not destruction.<sup>131</sup> In doing so, however, Porto declares that the modern system of collegiate athletics is less about preserving tradition or protecting athletes and more about exploiting young athletes to avoid labor costs.<sup>132</sup> Like many others before him,<sup>133</sup> Porto highlights the fact that, even with the emergence of "unabashed commercialism"<sup>134</sup> in the NCAA, the rules of amateurism have largely stayed the same for roughly a century.<sup>135</sup>

In sum, the NCAA oversees a hugely popular and financially successful system<sup>136</sup> that is supported by the incredible work of its student-athletes.<sup>137</sup> However, the term student-athlete may be just a label, as football players invest incredible amounts of time and energy into their football programs each week.<sup>138</sup> Over the years, the hard work of the players has helped to build college football into a highly lucrative financial institution.<sup>139</sup> Through its supervisory role, the NCAA seeks to maintain a system of amateurism, dichotomous from professional sports.<sup>140</sup> As a result, scholars now routinely label

128. *See id.* at 171-72.

129. *Id.* at 110-11 ("[A]mateurism principles do not give the NCAA and its members a . . . right or justification to be enriched by the portion of the broadcast rights fees attributed to the players' expense and effort (beyond the value of the grant-in-aid) that would normally, equitably, and morally be paid to them.").

130. *See id.* at 146 (declaring that the fact that "the NCAA, conferences, and universities (and their personnel) continue to engorge at student-athletes' expense is increasingly becoming more unjust").

131. *See Porto, supra* note 28, at 304.

132. *See id.* at 311-12 (emphasizing that the current restrictions are "petty, nonsensical, and even likely to expose athletes to exploitation instead of protecting them from it").

133. *See id.* at 302-05.

134. *Id.* at 311.

135. *See id.* at 306-11.

136. *See supra* Section I.B (describing the vast financial success the NCAA has achieved).

137. *See supra* Section I.A (detailing football players' incredible dedication of time to football-related activities).

138. *See supra* Section I.A (identifying that football players receive their academic scholarships on the basis of athletic achievements).

139. *See supra* Section I.B.

140. *See McCormick & McCormick, supra* note 2, at 136-37.

the system as exploitive and inequitable.<sup>141</sup> It is this exploitive and inequitable system that acted as a guidepost for Northwestern football players in their attempt to collectively bargain.<sup>142</sup>

## II. THE BOARD'S APPROACH TO COLLEGIATE UNIONIZATION EFFORTS

While the Northwestern football players' unionization attempt was unprecedented in collegiate athletics, the Board has been confronted with unionization efforts connected to universities before.<sup>143</sup> However, due in part to the political fluctuation within the Board,<sup>144</sup> its response to such attempts has been inconsistent, and it has repeatedly switched tracks in its decisions over the past forty-five years.<sup>145</sup> Therefore, the Board's seemingly inconsistent decisions in *Northwestern University*<sup>146</sup> and *Trustees of Columbia*<sup>147</sup> conform to the Board's muddled history.<sup>148</sup>

### A. The Roles and Responsibilities of the Board

As an independent government agency, the Board makes labor decisions in pursuit of its purpose to enforce the National Labor Relations Act.<sup>149</sup> In enforcing the NLRA, the Board is called to protect the rights of powerless private employees by according them the right to utilize group negotiation to improve wages and working

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141. See *supra* Section I.C (identifying several different arguments from scholars as to why the current system of amateurism in the NCAA is inequitable, exploitive, or violative).

142. See *infra* Section II.C.

143. See *infra* Section II.B (describing the cases related to unionization efforts linked to universities).

144. See *Members of the NLRB*, *supra* note 9. For example, in *Brown University*, 342 N.L.R.B. 483, 493 (2004), three Republican Board members held that student assistants were not statutory employees, while two Democrat Board members dissented. In contrast, in *Trustees of Columbia in the City of New York*, 364 N.L.R.B. No. 90, slip op. at 1 (Aug. 23, 2016), a Democrat-majority Board overturned *Brown*, with the lone Republican dissenting.

145. See *infra* Sections II.B-D.

146. See *Northwestern Univ.*, 362 N.L.R.B. No. 167, slip op. at 1 (Aug. 17, 2015).

147. See *Trs. of Columbia Univ.*, slip op. at 2.

148. See *infra* Section II.B.

149. See *Introduction to the NLRB*, NLRB, <https://www.nlrb.gov/nlrb-introduction> [<https://perma.cc/832W-G2DL>] (last visited Mar. 5, 2018).

conditions.<sup>150</sup> Consequently, the Board's duty is to further the protection of workers' rights in the *private* sector.<sup>151</sup> In practice, however, effectuating this purpose in line with the complexities of the modern workforce is difficult, entitling the Board to judicial deference<sup>152</sup> and the ability to pass on exercising jurisdiction if it does not believe the policies of the NLRA would be furthered by a decision.<sup>153</sup>

## B. The Muddled History of Student Unionization Efforts

One particular modern labor complexity that the Board has addressed multiple times is unionization by college students.<sup>154</sup> In each case, the major issue was whether the particular individuals in focus were employees under the NLRA.<sup>155</sup> Largely, in determining this issue, the Board looked to one factor—the common-law definition of employee.<sup>156</sup> In turn, a common-law employee is one “who performs services for another under a contract of hire, subject to the other's control or right of control, and in return for payment.”<sup>157</sup>

Due to the NLRA's focus on private institutions,<sup>158</sup> past student unionization efforts have been connected to private, non-profit

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150. See Marc Edelman, *Upon Further Review: The NLRB Was Wrong to Deny Northwestern Football Players Union Status*, FORBES (Sept. 2, 2015, 4:02 PM) <http://www.forbes.com/sites/marcedelman/2015/09/02/upon-further-review-the-nlrw-was-wrong-to-deny-northwestern-football-players-union-status/#70f7ca52c941> [https://perma.cc/37AK-LMJ7].

151. See *National Labor Relations Act*, NLRB, <https://www.nlr.gov/resources/national-labor-relations-act> [https://perma.cc/EMF4-LSSP] (last visited Mar. 5, 2018).

152. See *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975).

153. See, e.g., *Northwestern Univ.*, 362 N.L.R.B. No. 167, slip op. at 3 (Aug. 17, 2015); *NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 684 (1951).

154. See *McCormick & McCormick*, *supra* note 2, at 93-96 (describing the Board's approach toward unionization efforts connected to universities and colleges).

155. See *id.* at 90.

156. See *id.* at 91 (stating “Congress . . . emphatically endorsed the common law right of control test as the proper measure of statutory coverage”).

157. *Brown Univ.*, 342 N.L.R.B. 483, 490 n.27 (2004), *overruled by* *Trs. of Columbia Univ. in the City of N.Y.*, 364 N.L.R.B. No. 90, slip op. at 1 (Aug. 23, 2016) (rejecting Brown's requirement of a primarily academic relationship, but still keeping the definition of common law employee).

158. See 29 U.S.C. § 152(2) (2016).

universities.<sup>159</sup> While the Board allows private university faculty members to collectively bargain,<sup>160</sup> it has been unpredictable with graduate students' rights to collectively bargain.<sup>161</sup> This inconsistency follows the Board's political composition, with Republican-majority Boards rejecting student assistants' attempts to unionize and Democrat-controlled Boards subsequently allowing such collective bargaining.<sup>162</sup>

Initially, a Republican-majority<sup>163</sup> Board rejected both graduate students'<sup>164</sup> and student clinicians'<sup>165</sup> attempts to collectively bargain in four cases in the 1970s, citing the claimants' status as "primarily students."<sup>166</sup> However, when controlled by President Clinton's Democrat appointees from 1999 and 2000,<sup>167</sup> the Board switched course in two cases, finding that clinicians and certain graduate students were employees under the common-law employee control test and therefore entitled to protection under the NLRA.<sup>168</sup> Nevertheless, a Republican board<sup>169</sup> retreated once again in *Brown*

159. See *Trs. of Columbia Univ.*, slip op. at 2 (declaring "[t]he Board has exercised jurisdiction over private, nonprofit universities for more than 45 years").

160. See *id.* (stating that "the Board has permitted collective bargaining by faculty members at private universities and has had frequent occasion to apply the Act in the university setting").

161. See *id.* at 2-5 (describing how its approach has varied over the past forty-five years). Collective bargaining is largely equivalent to unionization. See § 158(d).

162. See *Members of the NLRB Since 1935*, *supra* note 9. The party in control when each student assistant case was decided was, without failure, Republican in instances of denial of collective bargaining and Democrat where collective bargaining was approved. See *id.*

163. See *id.* (showing the Republican Party's majority status on the board).

164. See *Leland Stanford Junior Univ.*, 214 N.L.R.B. 621, 623 (1974); *Adelphi Univ.*, 195 N.L.R.B. 639, 640 (1972) (rejecting an attempt by graduate students to join faculty members in collectively bargaining).

165. See *St. Claire's Hosp. & Health Ctr.*, 229 N.L.R.B. 1000, 1004 (1977) (reaffirming "collective bargaining should not be applied to what is fundamentally an educational relationship"); *Cedars-Sinai Med. Ctr.*, 223 N.L.R.B. 251, 251 (1976) (holding "interns, residents, and clinical fellows . . . are not 'employees' within the meaning of . . . the Act").

166. *Leland Stanford Junior Univ.*, 214 N.L.R.B. at 623.

167. See *Members of the NLRB Since 1935*, *supra* note 9.

168. See *N.Y. Univ.*, 332 N.L.R.B. 1205, 1206 (2000) ("[G]raduate assistants are not within any category of workers that is excluded from the definition of 'employee' in Section 2(3)."); *Bos. Med. Ctr. Corp.*, 330 N.L.R.B. 152, 152 (1999) (deciding to overturn past fundamental cases and find "the interns, residents, and fellows employed by BMC, while they may be students learning their chosen medical craft, are also 'employees' within the meaning of Section 2(3) of the Act").

169. See *Members of the NLRB Since 1935*, *supra* note 9.

*University*<sup>170</sup> and created a new standard<sup>171</sup> that required the satisfaction of two components: (1) the common-law control test and (2) the relationship between the graduate students and the university be predominantly economic and not academic.<sup>172</sup> At the time the Board considered *Northwestern University*<sup>173</sup> and *Trustees of Columbia*,<sup>174</sup> this was the applicable standard.

### C. The Decision to Punt in *Northwestern University*

The Board made a straightforward decision in *Northwestern University*<sup>175</sup>—it simply decided not to decide.<sup>176</sup> This decision stemmed out of an attempt by Northwestern football players to unionize in January 2014, a decision that was inspired by their desire to utilize collective bargaining to combat the ostensible inequality of the NCAA’s amateurism system.<sup>177</sup> After all, these players devoted substantial amounts of time to football activities, were full-time students at a rigorous academic institution,<sup>178</sup> and were still forced to sign a release allowing Northwestern and the NCAA to use their name, likeness, and images for any reason.<sup>179</sup> Further, the team and its players were subject to the multitude of restrictions that the school, the Big Ten Conference, and the NCAA imposed.<sup>180</sup>

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170. See *Brown Univ.*, 342 N.L.R.B. 483, 483 (2004), *overruled by* *Trs. of Columbia Univ. in the City of N.Y.*, 364 N.L.R.B. No. 90, slip op. at 1 (Aug. 23, 2016)

171. See *id.* at 483, 491.

172. See *id.* at 488; see also *McCormick & McCormick*, *supra* note 2, at 92-96.

173. *Northwestern Univ.*, 362 N.L.R.B. No. 167, slip op. at 8 (Aug. 17, 2015).

174. *Trs. of Columbia Univ.*, slip op. at 1.

175. *Northwestern Univ.*, slip op. at 3.

176. See *id.* at 2 (holding that “asserting jurisdiction in this case would not serve to promote stability in labor relations”). The stability the Board mentioned was in reference to the member institutions, their conferences, and the NCAA. See *id.*

177. See *Nocera & Strauss*, *supra* note 27, at 2 (explaining the decision to file, quarterback Kain Colter asserted that the “current model resembles a dictatorship, where the NCAA places these rules and regulations on these students without their input or without their negotiation”) (internal quotation marks omitted).

178. See *Northwestern Univ.*, slip op. at 3; see also *supra* Section I.A.

179. See *Northwestern Univ.*, slip op. at 10.

180. See *id.* at 9-13. For example, the hearing officer reported that:

The players must also abide by a social media policy, which restricts what they can post on the internet, including Twitter, Facebook, and Instagram. In fact, the players are prohibited from denying a coach’s “friend” request and the former’s postings are monitored. The Employer prohibits players

The players filed the petition to unionize under Northwestern University, a private institution located in Evanston, Illinois.<sup>181</sup> At that time, the team was composed of roughly 112 players, with eighty-five of these athletes receiving scholarships worth about \$61,000 a year.<sup>182</sup> Northwestern is a member institution of the NCAA and is the only private institution in the Big Ten Conference.<sup>183</sup> Northwestern is also one of seventeen, out of 125, teams in the FBS that is a private college or university.<sup>184</sup> Ultimately, a hearing officer for the NLRB declared that the petitioning players from Northwestern were employees under § 2 of the NLRA on account of the exchange of scholarships for the athletes' academic exploits.<sup>185</sup>

On appeal, the Board did not consider whether the football players were statutory employees under § 2 of the NLRA.<sup>186</sup> Rather, it concluded that, even if the players were statutory employees, exercising jurisdiction would not effectuate the policies of the NLRA.<sup>187</sup> In support, the Board cited the structure of college football, pointing out that it could not exercise jurisdiction over the vast majority of member institutions, therefore making its potential decision a source of labor instability.<sup>188</sup> The Board further reasoned that there was no comparable precedent for the case, as scholarship players did not resemble graduate students or any other group of individuals that have been deemed to be statutory employees.<sup>189</sup> Particularly, the Board identified the fact that, unlike graduate

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from giving media interviews unless they are directed to participate in interviews that are arranged by the Athletic Department. Players are prohibited from swearing in public, and if a player "embarrasses" the team, he can be suspended for one game.

*Id.* at 9-10.

181. *See* Nocera & Strauss, *supra* note 27, at 8.

182. *Northwestern Univ.*, slip op. at 3.

183. *See id.*

184. *See id.*

185. *See id.* at 8.

186. *See id.* at 3 (determining that "even if the scholarship players were statutory employees (*which, again, is an issue we do not decide*), it would not effectuate the policies of the Act to assert jurisdiction") (emphasis added).

187. *See id.*

188. *See id.* (holding that "because of . . . the composition and structure of FBS football (in which the overwhelming majority of competitors are public colleges and universities over which the Board cannot assert jurisdiction), it would not promote stability in labor relations to assert jurisdiction in this case").

189. *Id.* at 3-4 ("[T]he scholarship players do not fit into any analytical framework that the Board has used in cases involving other types of students or athletes.").

students, the players were being compensated for an extracurricular activity.<sup>190</sup> Nevertheless, it also conceded the fact that it had exercised jurisdiction over collegiate athletic matters previously,<sup>191</sup> including those involving coaches,<sup>192</sup> employees who worked athletic events,<sup>193</sup> and referees.<sup>194</sup>

The Board further conceded that the FBS system does resemble professional sports to a degree.<sup>195</sup> However, it dismissed the importance of this concession by illuminating one key difference—the existence of a symbiotic relationship between the schools, their conferences, and the NCAA, meaning that a labor decision for one team impacts the entire structure.<sup>196</sup> Accordingly, the Board determined that exercising jurisdiction would disrupt labor relations systematically because there is no opportunity to unionize on a league-wide basis as there is in professional athletics.<sup>197</sup> Particularly, the Board emphasized that only seventeen private, out of 125 total, institutions fall under the scope of the NLRA, with Northwestern being the only private institution in the Big Ten Conference.<sup>198</sup>

Nevertheless, the Board did provide a ray of hope for future efforts to unionize.<sup>199</sup> Specifically, the Board mentioned that it may assume a different approach if all players, or at least all private institution players, attempted to unionize.<sup>200</sup> This optimism only increased as the Obama-administration-appointed Board issued case

190. *See id.*

191. *See id.* at 6.

192. *See* Univ. of Bridgeport, 229 N.L.R.B. 1074, 1075 (1977) (focusing on a larger bargaining unit that included coaches); Manhattan Coll., 195 N.L.R.B. 65, 66 (1972) (determining that athletic coaches that were not academic teachers should be included in a bargaining unit).

193. *See* Providence Coll., 340 N.L.R.B. 966, 971-72 (2003).

194. *See* Big E. Conference, 282 N.L.R.B. 335, 340-42 (1986) (holding that basketball referees were directly employed by the conference).

195. *See Northwestern Univ.*, slip op. at 4. For example, both systems generate substantial revenue, and both depend upon direct interaction between member teams. *See id.*

196. *See id.* at 4-5 (deeming the FBS to be a “markedly different type of enterprise”).

197. *See id.* at 5.

198. *Id.* With most teams coming from state institutions, any effort to unionize and collectively bargain would require state permission, which has been uniformly denied. *See id.*

199. *See id.* at 6.

200. *See id.* (proclaiming “[w]e note that our decision to decline jurisdiction in this case is based on the facts in the record before us, and that subsequent changes in the treatment of scholarship players could outweigh the considerations that motivate our decision today”).

law and internal analyses that provided transformative pieces of persuasion for future unionization efforts.<sup>201</sup> However, much of this hope for collective bargaining has now been quashed by a recent Board decision.<sup>202</sup>

#### D. The Board's Decision in *Trustees of Columbia*

One ray of hope for collective bargaining in college football emerged in August 2016, when a Democrat-majority Board<sup>203</sup> reconsidered the issue of whether graduate students who perform services for universities are employees under § 2 of the NLRA.<sup>204</sup> Ultimately, the Board reversed field again, as it overturned *Brown University* and reverted back to the common-law employment test for determining whether students can be employees under the NLRA.<sup>205</sup> In its decision, the Board highlighted the NLRA's purpose of encouraging collective bargaining and protecting workers' rights to organize, associate, and choose representation.<sup>206</sup> The Board further remarked on the NLRA's broad definition of employee, which solidified its finding that where students are compensated for the work they perform for a university, statutory employment may be found.<sup>207</sup>

In deciphering its past interpretations of the NLRA, the Board openly criticized its earlier holding that student assistants could not also be statutory employees.<sup>208</sup> Consequently, the Board returned to its original standard that a common-law employment relationship necessarily creates a sufficient basis for a finding of statutory employment.<sup>209</sup> In support, the Board pointed to the Supreme Court's

201. See *Trs. of Columbia Univ. in the City of N.Y.*, 364 N.L.R.B. No. 90, slip op. at 1 (Aug. 23, 2016); Internal Memorandum, *supra* note 10, at 16-23.

202. See *Hy-Brand Indus. Contractors, Ltd.*, 365 N.L.R.B. No. 156, slip op. at 2 (Dec. 14, 2017).

203. See *Members of the NLRB*, *supra* note 9.

204. See *Trs. of Columbia*, slip op. at 1.

205. See *id.* at 2 (holding that "given [the policy of the act], coupled with the very broad statutory definitions of both 'employee' and 'employer,' it is appropriate to extend statutory coverage to students working for universities covered by the Act").

206. See *id.* (referencing the purpose established by 29 U.S.C. § 151 (2016)).

207. See *id.* at 2.

208. See *id.* at 5. The Board specifically criticized its own decision from *Brown University*, 342 N.L.R.B. 483 (2004). See *id.*

209. See *id.* at 5. The Board did not, however, state that where a common-law employment relationship exists the employee *must* be accorded collective bargaining rights under the NLRA. See *id.*

approval of a broad definition of employee utilized by the Board in the past.<sup>210</sup> It also emphasized the expansive scope of the NLRA,<sup>211</sup> indicating that the Act covers all those who work for a private entity with the expectation of tangible compensation.<sup>212</sup> It further acknowledged its past failure of not focusing on economic components of relationships.<sup>213</sup>

Even with its refurbished legal interpretation, the Board had to establish why asserting jurisdiction over graduate assistants was necessary.<sup>214</sup> The Board first rationalized its decision to exercise jurisdiction by criticizing the logic in *Brown University* that collective bargaining could not peacefully exist in an academic environment, noting that there was zero empirical evidence supporting that finding.<sup>215</sup> The Board then emphasized that student assistants can be both students and workers at the same time, with the NLRA governing their employment functions.<sup>216</sup> Further, the Board justified its decision by acknowledging that while the recognition of graduate assistants as employees could be considered novel, collective bargaining is historically flexible and adaptable.<sup>217</sup> Finally, the Board criticized *Brown University* for not considering the potential benefits of graduate assistants' unionization,<sup>218</sup> as well

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210. See *id.* at 5 (citing the Supreme Court's endorsement of the Board's concept that the existence of a common law agency relationship in a labor context indicates statutory employment in *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 94 (1995)).

211. See 29 U.S.C. § 152(3) (2012).

212. See *Trs. of Columbia*, slip op. at 4 (referencing the Supreme Court's imperative that the Act provides "a definition that 'includes any person who works for another in return for financial or other compensation'" (emphasis added) (quoting *Town & Country Elec.*, 516 U.S. at 90).

213. See *id.* at 6 (instructing that "the payment of compensation, in conjunction with the employer's control, suffices to establish an employment relationship for purposes of the Act").

214. See *id.*

215. See *id.* at 7 (criticizing *Brown University*, 342 N.L.R.B. 483 (2004), because its rationale was "almost entirely theoretical," and citing labor law scholars' disagreement with *Brown* due to its total lack of empirical support).

216. See *id.* at 7 (noting that "a graduate student may be both a student and an employee; a university may be both the student's educator and employer").

217. See *id.* at 9 (justifying its skepticism by signaling collective bargaining's historical flexibility and the utilization of collective bargaining by faculty in the academic setting for decades prior).

218. See *id.* at 11-12 (referencing *Columbia* "neglect[ing] to weigh the possibility of any benefits that flow from collective bargaining, such as those envisioned by Congress when it adopted the Act").

as for its failure to recognize the present system's unresponsiveness to students' needs that created labor unrest.<sup>219</sup>

The Board's acknowledgement of jurisdiction and reestablishment of the common-law definition of employment required them to apply the common-law employment test, which "generally requires that the employer have the right to control the employee's work, and that the work be performed in exchange for compensation."<sup>220</sup> The Board first established the existence of control exercised by Columbia over the graduate students through several indicative facts: demands that certain graduate assistants teach,<sup>221</sup> controls on how research was conducted,<sup>222</sup> and the University controlled the work product<sup>223</sup> for roughly twenty hours per week.<sup>224</sup> Further, the Board dismissed Columbia's arguments that the control was temporary and contingent on acceptance into the University on the basis of academics, asserting that these factors are not mutually exclusive of an economic relationship.<sup>225</sup> Next, the Board had little issue concluding that tangible compensation was present, pointing to the tuition and stipend earned by the graduate assistants.<sup>226</sup> In doing so, the Board began to change the narrative with regard to student unionization, which gave hope of future recognition of athletes as statutory employees.<sup>227</sup>

#### E. The Former General Counsel's Internal Memorandum

The next inspiring analyses came in January 2017, when the Board's (now former) Democrat General Counsel opined in an Internal Memorandum to NLRB regional directors that football players of FBS private universities are statutory employees under the

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219. *See id.* at 12 (finding the old system to be "insufficiently responsive to student assistants' needs").

220. *Id.* at 15.

221. *See id.*

222. *See id.* at 14.

223. *See id.* at 19.

224. *See id.* at 14.

225. *Id.* at 20 ("[T]he Board has made clear that finite tenure alone cannot be a basis on which to deny bargaining rights.").

226. *See id.* at 7 (holding that "the extent of any required 'economic' dimension to an employment relationship is the payment of tangible compensation"); *see id.* at 17 (referencing that the stipends were contingent on the teaching assistantships).

227. *See infra* Part IV.

NLRA.<sup>228</sup> The General Counsel pointed to the facts of *Northwestern University*, the degree of control the NCAA possesses over the players' activities,<sup>229</sup> and the Board's decision in *Trustees of Columbia* as foundational pieces of evidence for his conclusion.<sup>230</sup> Particularly, he reasoned that there was nothing within *Northwestern University* that foreclosed a future finding of statutory employment under the NLRA for private university FBS football players.<sup>231</sup>

Further, in the Internal Memorandum, the former General Counsel detailed exactly why football players are employees under the NLRA.<sup>232</sup> To begin, he provided the definition of employee under § 2 of the NLRA,<sup>233</sup> noting that student-athletes are not among the Act's enumerated exceptions to coverage.<sup>234</sup> His next step was establishing that the athletes in *Northwestern University* did perform a service for the University.<sup>235</sup> Further, he identified that the

228. See Internal Memorandum, *supra* note 10, at 16.

229. See *id.* at 19. The Memorandum stated:

The NCAA has the right to control and actually controls the competition among football players and many of their terms and conditions of employment, including the maximum number of practice and competition hours, scholarship eligibility, limitations on compensation, minimum grade point average and other conditions for potential loss of scholarships, restrictions on gifts and benefits players may accept, restrictions on the number of scholarship players, and mandatory drug testing. The NCAA also maintains a "Compliance Assistance Program" to ensure that colleges and student-athletes are in compliance with NCAA rules, including those that regulate terms and conditions of employment, and colleges employ staff whose sole function is to ensure compliance with those rules.

*Id.*

230. See *id.* at 16.

231. See *id.* at 17.

232. See *id.* at 18 (asserting that "[t]he conclusion that Division I FBS scholarship football players in private colleges and universities are employees under the NLRA is supported by the statutory language and policies of the NLRA").

233. See *id.* (providing the common-law definition that "an employee includes any person 'who perform[s] services for another and [is] subject to the other's control or right of control. Consideration, i.e., payment, is strongly indicative of employee status'" (quoting *Bos. Med. Ctr. Corp.*, 330 N.L.R.B. 152, 160 (1999))).

234. See *id.* (referencing that "Section 2(3) contains only a few enumerated exceptions, and university employees, football players, and students are not among them").

235. See *id.* at 19 (pronouncing that the football program "undoubtedly boosted student applications and alumni financial donations"). Particularly, the General Counsel referenced the fact that the football program brought in \$76 million in net profit over a ten-year period and further brought positive attention to the University. *Id.*

scholarships the athletes received for their services constituted significant compensation.<sup>236</sup> He also intricately explained how Northwestern controlled the players' athletic contributions and daily lives.<sup>237</sup> Finally, after recognizing the existence of an employment relationship,<sup>238</sup> he subtly questioned the continued use of amateurism in light of the substantial financial value of modern FBS football programs.<sup>239</sup>

While undeniably significant, this acknowledgement of football players as employees was limited for a number of reasons.<sup>240</sup> First, the memorandum did not bind the Board to recognizing players as statutory employees in the future.<sup>241</sup> Second, given that a Republican majority now controls the Board and Republican boards have repeatedly denied graduate students the opportunity to collectively bargain, history suggests the current board will not follow this opinion.<sup>242</sup> Finally, the position held by the former General Counsel was expressly limited to those players enrolled in private colleges and universities, once again reflecting the important dichotomy

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236. *See id.* In fact, he did not even deliberate over the issue, conclusively asserting that “[t]he players’ compensation is clearly tied to their status and performance as football players, since they risk the loss of their scholarships if they quit the team or are removed because they violate their school’s or the NCAA’s rules.” *Id.*

237. *See id.* at 19-20 (commenting on the daily itineraries the players must follow, the minimum GPA requirement, the restrictions on gifts, and the random drug tests, among other things).

238. *See id.* at 20 (concluding “FBS scholarship football players clearly satisfy the broad Section 2(3) definition of employee and the common-law test”).

239. *See id.* at 22 (contrasting the tradition of amateurism with “the enormous revenue generated by FBS football programs and the substantial salaries paid to university administrators, coaches, and conference officials involved in the sport”).

240. *See* Munson, *supra* note 13.

241. *See id.* (stating the Internal Memorandum “is nothing more than the opinion of the current general counsel of the NLRB”). In fact, after the memorandum was released, the NCAA’s chief legal officer emphasized this fact, announcing that “we have stated before and he was obligated to acknowledge, the Board previously decided that it would not exercise jurisdiction regarding the employment context of student-athletes and their schools. The general counsel’s memo does not change that decision and does not allow student-athletes to unionize.” Jon Solomon, *NLRB Counsel: Football Players at Private FBS Schools Are Employees*, CBS SPORTS (Feb. 2, 2017), <http://www.cbssports.com/college-football/news/nlr-counsel-football-players-at-private-fbs-schools-are-employees/> [<https://perma.cc/H66Q-U6JA>].

242. *See* Munson, *supra* note 13 (“[N]ew general counsel, appointed by President Donald Trump, could rewrite and reverse this opinion.”); *Members of the NLRB*, *supra* note 9; *supra* Section II.B.

between private and public employees.<sup>243</sup> Nevertheless, the former General Counsel's conscientious decision to cement such an acknowledgement in writing, at the time, provided probative hope for future unionization efforts.<sup>244</sup>

#### F. The Seventh Circuit's Answer to the Question of Student–Athletes as Employees

Student–athletes were confronted with an obstacle in their pursuit of employment recognition in January 2017.<sup>245</sup> The Seventh Circuit dealt this blow by denying claims of Fair Labor Standards Act (FLSA) violations posed by members of the University of Pennsylvania Women's Track and Field Team against the NCAA and 120 member institutions.<sup>246</sup> In making this decision, the court declined to find standing against the NCAA, reasoning that the relationship between the NCAA and the student–athletes was too far attenuated.<sup>247</sup> Particularly, the court stated that the athletes could not allege an injury that was connected to the NCAA either in traceability or redressability.<sup>248</sup>

The Seventh Circuit further denied the claim against the University of Pennsylvania, definitively holding that student–athletes are not employees under the FLSA.<sup>249</sup> In its reasoning, the court pointed to the longstanding relationship of amateurism between universities and their athletes,<sup>250</sup> the lack of historical expectations of compensation,<sup>251</sup> and an interpretive guide from the Department of Labor that advised that extracurricular activities, such as athletics, do

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243. See Internal Memorandum, *supra* note 10, at 20 (recognizing “the composition of Division I FBS football, in which the majority of the teams are public universities not subject to the Board’s jurisdiction”).

244. See Munson, *supra* note 13 (describing how this may open the door for athletes to receive a share in the profits).

245. See *Berger v. NCAA*, 843 F.3d 285, 288 (7th Cir. 2016).

246. See *id.*

247. See *id.* at 289 (stating that the athletes’ “connection to the other schools and the NCAA is far too tenuous to be considered an employment relationship”).

248. See *id.*

249. See *id.* at 293 (asserting “we do not believe that the Department of Labor intended the FLSA to apply to student athletes”).

250. See *id.* at 291 (referencing a “tradition of amateurism”).

251. See *id.* at 293 (concluding that “[a]lthough we do not doubt that student athletes spend a tremendous amount of time playing for their respective schools, they do so—and have done so for over a hundred years under the NCAA—without any real expectation of earning an income”).

not constitute work.<sup>252</sup> Together, these factors inspired the court to reason that the student–athletes are not employees under the FLSA.<sup>253</sup>

However, in his concurrence, Judge Hamilton recognized the differences between the claims asserted in the case before the court and potential future claims by student–athletes.<sup>254</sup> First, he highlighted the fact that, in accordance with Ivy League standards, the filing athletes received no scholarship or compensation.<sup>255</sup> Further, he noted that the filing athletes were not participants of revenue sports such as FBS football or men’s basketball.<sup>256</sup> Particularly, he emphasized the billions of dollars in revenue that member institutions generate, which reveals a unique economic reality of the sports.<sup>257</sup> Therefore, Judge Hamilton carefully separated himself out of fear for the majority’s cut and dry rule that student–athletes are not statutory employees.<sup>258</sup>

In whole, student unionization efforts are characterized by routine modification, revision, and total alteration.<sup>259</sup> For the time being, however, the current standard of employment under the NLRA revolves around a common-law definition of employment and the existence of control by the alleged employer.<sup>260</sup> With this refurbished approach, the Board identified in *Trustees of Columbia* that graduate students who are under the control of a private university and are compensated by the university are statutory

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252. See *id.* at 292-93 (citing that “[t]he Department of Labor, through its Field Operations Handbook (‘FOH’), has also indicated that student athletes are not employees under the FLSA”).

253. See *id.* at 293 (holding “as a matter of law, that student athletes are not employees and are not entitled to a minimum wage under the FLSA”).

254. See *id.* at 294 (Hamilton, J., concurring) (“I am less confident, however, that our reasoning should extend to students who receive athletic scholarships to participate in so-called revenue sports like Division I men’s basketball and FBS football.”).

255. See *id.*

256. See *id.*

257. See *id.* (emphasizing that football and men’s basketball “involve billions of dollars of revenue for colleges and universities”).

258. See *id.*

259. See McCormick & McCormick, *supra* note 2, at 92-95; see also *supra* Section II.B.

260. See *Trs. of Columbia Univ. in the City of N.Y.*, 364 N.L.R.B. No. 90, slip op. at 5 (Aug. 23, 2016) (stating that “[w]here student assistants have an employment relationship with their university under the common law test . . . this relationship is sufficient to establish that the student assistant is a Section 2(3) employee for all statutory purposes”).

employees under the NLRA.<sup>261</sup> However, given the recent political alterations and the Republican Party's historical view of graduate student unionization, this approach is in significant danger.<sup>262</sup> Further, even with the current liberalized standard of student unionization, the fact that most alleged employers of FBS football players are public institutions would thwart any unionization attempts.<sup>263</sup> Therefore, if FBS football players want to unionize, they would have to do so under a private entity such as the NCAA.<sup>264</sup>

### III. A BRIEF INSIGHT INTO JOINT EMPLOYMENT UNDER THE NLRA

In specified instances, an employee can allege that an entity is a joint employer under the NLRA.<sup>265</sup> Joint employment acknowledges that more than one business entity can be an employer of a single employee.<sup>266</sup> Such a relationship exists where two business entities, although separate in nature, cooperate together in the governance of the essential terms and conditions of employment.<sup>267</sup> Similar to the Board's indecisive approach toward graduate assistants,<sup>268</sup> its approach to joint employment under the NLRA is muddled and characterized by inconsistencies,<sup>269</sup> following the political trajectory of the Board.<sup>270</sup>

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261. See *id.* at 7.

262. See Alana Semuels, *Will Grad Students Lose the Right to Unionize Under Trump?*, ATLANTIC (June 28, 2017), <https://www.theatlantic.com/business/archive/2017/06/graduate-students-unions/531975/> [<https://perma.cc/ECC7-3CWE>] (predicting “[a] reversal may be coming”).

263. See Northwestern Univ., 362 N.L.R.B. No. 167, slip op. at 3 (Aug. 17, 2015).

264. See *infra* Part IV (describing a joint-employment attempt against the NCAA under *Browning-Ferris II*).

265. See, e.g., *NLRB v. Browning-Ferris Indus. of Pa., Inc.*, 691 F.2d 1117, 1124 (3d Cir. 1982).

266. See Rueben A. Garcia, Note, *Modern Accountability for a Modern Workplace: Reevaluating the National Labor Relations Board's Joint Employer Standard*, 84 GEO. WASH. L. REV. 741, 750 (2016) (detailing that employment exists where an entity possesses control, or potential for control, of significant terms of employment).

267. See Craig Becker, *Labor Law Outside the Employment Relation*, 74 TEX. L. REV. 1527, 1540 (1996).

268. See *supra* Section II.B (describing the Board's inconsistencies in deciding graduate student unionization efforts).

269. See Garcia, *supra* note 266, at 750.

270. See Wiessner, *supra* note 9; *Members of the NLRB*, *supra* note 9.

## A. A History of Inconsistency

Although joint employment is well engrained in the history of the NLRA,<sup>271</sup> one particular inconsistency that has plagued the Board is the requisite degree of control that each entity must hold to be considered a joint employer.<sup>272</sup> Initially, the Board construed the doctrine broadly, recognizing both direct and indirect control as sufficient for a finding of joint employment.<sup>273</sup> This approach lasted into the 1980s, as the Board and courts continued to accept the existence of joint employment where two business entities shared decision-making powers regarding the essential terms and conditions of labor.<sup>274</sup>

However, the state of the doctrine was scrambled in 1984, when the Board strayed from its past precedent through two decisions that declared joint employment did not apply where supervision was insignificant and routine.<sup>275</sup> Instead, the Board would require that an entity's control be exercised in a direct and

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271. See *Bethlehem-Fairfield Shipyard, Inc.*, 53 N.L.R.B. 1428, 1431 (1943) (stating “[w]e find that Bethlehem is *also* the employer within Section 2(2) of the Act of the employees involved herein”) (emphasis added). Therefore, even as early as 1943, the Board recognized the concept that there could be multiple employers of a single group of employees. See *id.* The doctrine was further solidified within Supreme Court jurisprudence in 1964 in *Boire v. Greyhound Corp.*, 376 U.S. 473, 481 (1964), which was remanded for further factual consideration to determine whether Greyhound possessed the requisite degree of control over an independent contractor to be considered a joint employer.

272. See *Browning-Ferris II*, 362 N.L.R.B. No. 186, slip op. at 1 (Aug. 27, 2015), *overruled by* *Hy-Brand Indus. Contractors, Ltd.*, 365 N.L.R.B. No. 156, slip op. at 1 (Dec. 14, 2017) (explaining how recent case law related to joint employment was “inconsistent with prior caselaw that has not been expressly overruled”).

273. See, e.g., *Becker*, *supra* note 267, at 1541; *Garcia*, *supra* note 266, at 750.

274. See *NLRB v. Browning-Ferris Indus. of Pa., Inc.*, 691 F.2d 1117, 1124 (3d Cir. 1982). There, the Third Circuit clearly iterated the approach in considering joint employment up until that time: “[W]here two or more employers exert significant control over the same employees—where from the evidence it can be shown that they share or co-determine those matters governing essential terms and conditions of employment—they constitute joint employers within the meaning of the NLRA.” *Id.*

275. See *Laerco Transp. & Warehouse*, 269 N.L.R.B. 324, 326 (1984) (denying joint employment based on “the minimal and routine nature of Laerco supervision”); *TLI, Inc.*, 271 N.L.R.B. 798, 799 (1984) (finding that “[a]lthough Crown may have exercised *some* control over the drivers, Crown did not affect the terms and conditions of employment to such a degree that it may be deemed a joint employer”) (emphasis added).

immediate manner.<sup>276</sup> By the time of *Browning-Ferris II*, the Democrat-majority Board believed that the standard had become too narrow, no longer effectuated the policies of the NLRA, and that a change should be considered.<sup>277</sup>

### B. *Browning Ferris II*: Reviving Indirect Control

After it recognized the severely narrowed state of the joint-employment doctrine, a Democrat-controlled Board concluded that the limitations had gone too far, impermissibly undermining the NLRA's intended protections.<sup>278</sup> In turn, the Board decided to revert back to what it deemed to be the original standard of joint employment,<sup>279</sup> which the Third Circuit enunciated in the initial *Browning-Ferris*.<sup>280</sup> This meant that joint employment would arise in instances where two or more business entities share decision-making powers in the governance of the essential terms and conditions of employment.<sup>281</sup>

The Board deconstructed the revived joint-employment doctrine into a two-step process.<sup>282</sup> First, it articulated that the initial inquiry is whether both entities possess a common-law employment

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276. See *Airborne Freight Co.*, 338 N.L.R.B. 597, 597 n.1 (2002) (stating that “approximately 20 years ago, the Board, with court approval, abandoned its previous test in this area, which had focused on a putative joint employer’s *indirect* control over matters relating to the employment relationship”); see also *Browning-Ferris II*, slip op. at 10 (describing how the Board “imposed additional requirements that effectively narrowed the joint-employer standard”); Garcia, *supra* note 266, at 750.

277. See *Browning-Ferris II*, slip op. at 2 (explaining its disapproval of the additional requirements it had imposed since 1984, “which serve to significantly and unjustifiably narrow the circumstances where a joint-employment relationship can be found” and “potentially undermine[] the core protections of the Act”); Garcia, *supra* note 266, at 751 (reporting that the Board invited parties to file briefs on the issue).

278. See *Browning-Ferris II*, slip op. at 1 (identifying that “the Board, without explanation, has since imposed additional requirements for finding joint-employer status, which have no clear basis in . . . the text or policies of the Act”).

279. See *id.* at 2 (holding that “we restate the Board’s joint-employer standard to reaffirm the standard articulated by the Third Circuit in [the first] *Browning-Ferris* decision”).

280. See *NLRB v. Browning-Ferris Indus. of Pa., Inc.*, 691 F.2d 1117, 1124 (3d Cir. 1982); *supra* note 274 (describing the joint-employment standard adopted by the Third Circuit in that case).

281. See *Browning-Ferris II*, slip op. at 2.

282. See *id.*

relationship with the specified employees.<sup>283</sup> According to the Board, an individual is deemed to be a common-law employee when he or she performs services for another, is compensated for those services, and is under the control of the other.<sup>284</sup> When considering an employment relationship, the Board provided that it would consider the existence, extent, and objective of control over an employee's work.<sup>285</sup> Thus, the Board declared that mere service by the employee is not sufficient for a finding of control.<sup>286</sup> Most importantly, it abolished the requirement that such control be direct and immediate.<sup>287</sup> Instead, a putative employer's control could once again be *indirect*, thereby making the determinative factor whether the employer possesses, not exercises, the right to control.<sup>288</sup>

The Board then stated that if a common-law employment relationship exists, the next question is "whether the putative joint employer possesses *sufficient* control over employees' essential terms and conditions of employment to permit meaningful collective bargaining."<sup>289</sup> Here too, consideration into the existence, extent, and object of control possessed by the proposed joint employer is required.<sup>290</sup> The Board further identified several different influential matters to the essential terms and conditions of employment,<sup>291</sup> including hiring and firing, discipline and supervision, wages, hours, number of workers, scheduling control, and the manner and method of work performance.<sup>292</sup> Finally, the Board clarified that even where sufficient control is established, the finding of joint employment

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283. See *id.* (stating that "the initial inquiry is whether there is a common-law employment relationship with the employees in question").

284. See *Brown Univ.*, 342 N.L.R.B. 483, 483 n.3 (2004).

285. See *Browning-Ferris II*, slip op. at 12 (stating that "the Board properly considers the existence, extent, and object of the putative joint employer's control").

286. See *id.* (labeling mere service as "not evidence of an employment, or joint-employment, relationship").

287. See *id.* at 14 (proclaiming that "[j]ust as the common law does not require that control must be exercised in order to establish an employment relationship, neither does it require that control . . . must be exercised directly and immediately").

288. See *id.* at 2 (holding that "control exercised indirectly—such as through an intermediary—may establish joint-employer status").

289. *Id.* (emphasis added).

290. See *id.* (describing those factors as "central" to the inquiry).

291. See *id.* at 29 (clarifying that, while these matters were suggestive, the list was "nonexhaustive").

292. See *id.* at 15 (noting that the Board was subscribing to the approach followed by the federal courts of appeals).

must further the NLRA's purpose<sup>293</sup> of promoting peaceful resolution of labor-related disputes through collective bargaining.<sup>294</sup>

In justifying its decision to revert back to the original joint-employment standard, the Board cited changing complexities within the modern labor force as a determinative factor.<sup>295</sup> The Board recognized that its duty is to apply the intricacies of the NLRA to modern industrial life,<sup>296</sup> and it asserted that the joint-employment standard in use was failing to achieve this purpose.<sup>297</sup> This failure, the Board declared, resulted in the deprivation of employees' statutory right to collectively bargain with their employers over the essential terms and conditions of their employment.<sup>298</sup> Therefore, the joint-employment standard ran contrary to the mandates of the NLRA and required reformation.<sup>299</sup>

However, the Board's decision was not free from criticism, particularly from its own dissent.<sup>300</sup> The dissent pointed to five major problems with the Board's overhaul of the joint-employment standard.<sup>301</sup> First, it labeled the standard as implausibly broad, not only subjecting an incredible number of business entities to joint-

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293. See *id.* at 12 (accepting its responsibility to "tak[e] into account the Act's paramount policy to 'encourage[] the practice and procedure of collective bargaining'" (quoting 29 U.S.C. § 151 (2012))).

294. See *id.* at 12-13; see also *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 211 (1964) (holding that "[o]ne of the primary purposes of the Act is to promote the peaceful settlement of industrial disputes by subjecting labor-management controversies to the mediatory influence of negotiation").

295. See *Browning-Ferris II*, slip op. at 11 (finding that "the diversity of workplace arrangements in today's economy has significantly expanded," and that "[t]his development is reason enough to revisit the Board's current joint-employer standard").

296. See, e.g., *Ford Motor Co. v. NLRB*, 441 U.S. 488, 496 (1979) (labeling the primary responsibility of the Board to be "that of 'applying the general provisions of the Act to the complexities of industrial life'" (quoting *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963))).

297. See *Browning-Ferris II*, slip op. at 11. The Board asserted that the modern workforce is distinct from the workforce under which the Board decided in *TLI, Inc.*, 271 N.L.R.B. 798 (1984). See *id.* at 11. The Board further pointed to the fact that 4.1% of all employees today are "contingent workers." *Id.*

298. See *id.* at 15 (reasoning that a narrowed joint-employment standard increases the risk that the Board is failing to pursue the Supreme Court's mandate to adopt the NLRA to modern industrial complexities).

299. See *id.* at 11 (concluding "we are persuaded that the current joint-employer standard is not mandated by the Act and that it does not best serve the Act's policies.").

300. See *id.* at 25 (Member Miscimarra, dissenting).

301. See *id.* at 21.

employment liability, but also having the effect of exceeding its own statutory authority.<sup>302</sup> Second, the dissent criticized the majority's citation of labor force changes as simply incorrect, arguing the current workforce resembles the workforce that has been in place for the past 200 years.<sup>303</sup> Third, the dissent asserted that an alteration of the standard must come from Congress and not the Board.<sup>304</sup> Fourth, it claimed the majority's adopted standard is littered with ambiguities, such that it provides little to no guidance to those entities that it will certainly affect.<sup>305</sup> Finally, the dissent criticized the use of collective bargaining to remedy the current inequality of bargaining power, reasoning that it will only promote labor disruptions and not remedy them.<sup>306</sup>

Further, interest groups, including the United States Chamber of Commerce, have also argued<sup>307</sup> that the Board's decision ignores precedent and bypasses congressional intent.<sup>308</sup> Worries have also been expressed about the implications of the new standard on the franchisor–franchisee relationship, a foundational piece of the United States economy.<sup>309</sup> Even so, the Equal Opportunity Employment Commission (EEOC) has claimed to use an almost identical joint-

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302. See *id.* (stating that “no bargaining table is big enough to seat all of the entities that will be potential joint employers under the majority’s new standards”).

303. See *id.* at 22 (arguing that the economy pictured by the majority “has not existed in this country for more than 200 years”).

304. *Id.* (“This type of change is clearly within the province of Congress, not the Board.”).

305. *Id.* (“[T]he majority abandons a longstanding test that provided certainty and predictability, and replaces it with an ambiguous standard.”).

306. *Id.* at 23 (“[T]he ‘inequality’ addressed by the majority is the wrong target, and collective bargaining is the wrong remedy.”).

307. See Robert Iafolla & Daniel Wiessner, *Browning-Ferris Fights U.S. Ruling on ‘Joint-Employment’ in Court*, REUTERS (June 7, 2016, 6:22 PM), <http://www.reuters.com/article/us-browningferris-nlrp-idUSKCN0YT2PQ> [<https://perma.cc/PQ3P-MMDR>] (reporting the director of labor policy at the Chamber of Commerce’s warning that the decision will eliminate jobs).

308. See *id.* (arguing “[s]ome [business] groups have warned that it could upend the franchise model”).

309. See, e.g., Robert C. Brady et al., *Can a Franchisor Be Deemed the Employer of a Franchisee’s Employee?: The Unsettled Landscape of Joint Employer Status*, 298 N.J. LAW. 57, 59 (2016) (asserting that the decision has placed franchisors “in an untenable situation: Implement controls to protect its mark and be potentially subject to joint-employer status or fail to maintain sufficient controls to protect against joint employer status and risk abandonment of the [trade]mark”).

employment standard, and courts have routinely upheld the EEOC's standard.<sup>310</sup>

The Democrat-based Board's decision in *Browning-Ferris II*<sup>311</sup> emphasized the importance of employees' right to collectively bargain.<sup>312</sup> By expanding the definition of joint employment, the Board attempted to establish a standard that would have a lasting impact in American industry.<sup>313</sup> However, this reemphasis on a more expansive state of collective bargaining was short lived, as a Republican-appointed-majority Board immediately reverted back to the old standard of requiring direct control.<sup>314</sup>

### C. Political Cycle: Immediate Reversal in *Hy-Brand Industries*

After regaining control of the Board after the election of President Trump, one of the Republican Board's principal goals was to overturn the joint-employment standard adopted in *Browning-Ferris II*.<sup>315</sup> The Board seized the opportunity to do so in December 2017, overturning *Browning-Ferris II* because it was a "distortion of common law" and "ill-advised as a matter of policy."<sup>316</sup> In doing so, the Board limited the scope of joint employment by requiring putative employers to actually exercise direct and immediate control.<sup>317</sup>

The Board started its opinion by echoing the five concerns raised by the dissent in *Browning-Ferris II*.<sup>318</sup> However, its principal

310. See Matthew Bultman, *EEOC Backs NLRB's Joint-Employer Rule at D.C. Circ.*, LAW360 (Sept. 14, 2016, 9:09 PM), <https://www.law360.com/articles/840135/eec-backs-nlr-s-joint-employer-rule-at-dc-circ> [<https://perma.cc/PSR4-V23S>] (detailing the EEOC's support for the standard because it is workable and flexible).

311. See *Browning-Ferris II*, slip op. at 1.

312. See *id.* at 2 (previewing its decision by emphasizing its goal of establishing a standard that can encourage collective bargaining).

313. See Brady, *supra* note 309, at 58; Garcia, *supra* note 266, at 753.

314. See *Hy-Brand Indus. Contractors, Ltd.*, 365 N.L.R.B. No. 156, slip op. at 1 (Dec. 14, 2017).

315. See Sean Higgins, *Senate OKs Trump Pick for NLRB*, WASH. EXAMINER (Sept. 25, 2017, 6:16 PM), <http://www.washingtonexaminer.com/senate-oks-trump-pick-for-nlr/article/2635556> [<https://perma.cc/JFJ5-K5GD>] (labeling changing the joint-employment standard as a "top priority").

316. *Hy-Brand Indus. Contractors Ltd.*, slip op. at 2.

317. See *id.* at 34 (requiring control that has a "direct and immediate" impact on employment terms").

318. See *id.* at 1-2; *Browning-Ferris II*, 362 N.L.R.B. No. 186, slip op. at 21 (Aug. 27, 2015), *overruled by Hy-Brand Indus. Contractors, Ltd.*, slip op. at 1

concern was the drastic implications an expansive joint-employment doctrine can have on the labor force and economy as a whole.<sup>319</sup> Specifically, the Board expressed concerns over the fact that employers across the nation could be subjected to joint-employment liability without ever knowing they had a responsibility to respect the collective bargaining rights of purported and distant employees.<sup>320</sup> For example, the Board argued that, under the *Browning-Ferris II* standard, a homeowner who hired a contractor for renovations and set limitations on the working hours and number of employees could be considered a joint employer.<sup>321</sup> This, the Board declared, exemplified the impermissible vagueness of the *Browning-Ferris II* standard that resulted in massive legal uncertainty across the labor industry.<sup>322</sup>

Thus, the Board not only found that the *Browning-Ferris II* standard was an inappropriate breakaway from precedent, but was also overbroad and unfit for real-world collective bargaining.<sup>323</sup> In turn, the Board once again required that the relevant considerations for joint-employment claims be whether control was actually exercised, directly and immediately shaped employment terms, and was not limited.<sup>324</sup> Even with this heightened standard, the Board found that joint employment did exist in the circumstances before it.<sup>325</sup>

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(Member Miscimarra, dissenting); *supra* Section III.B (detailing the dissent's five major problems with the *Browning-Ferris II* decision).

319. *See Browning-Ferris II*, slip op. at 21 (“Changing the test for identifying the ‘employer,’ therefore, has dramatic implications for labor relations policy and its effect on the economy.”).

320. *Id.* (“This change will subject countless entities to unprecedented new joint-bargaining obligations that most do not even know they have, to potential joint liability for unfair labor practices and breaches of collective-bargaining agreements, and to economic protest activity, including what have heretofore been unlawful secondary strikes, boycotts, and picketing.”).

321. *See id.* at 36.

322. *See id.* at 23. The Board emphasized the uncertainty and impact in the franchising industry, which makes up 3.4% of the nation's GDP. *Id.* at 45. The Board argued, “The majority does not mention, much less discuss, the potential impact of its new standard on franchising relations, but it will almost certainly be momentous and hugely disruptive.” *Id.*

323. *Id.* at 37 (“Our colleagues greatly expand the joint-employer test without grappling with its practical implications for real-world collective-bargaining relationships.”).

324. *See id.* at 7-8.

325. *See id.* at 18. The Board highlighted the fact that there was an officer “who served as the Corporate Secretary for both companies, was directly involved in the decisions at both companies to discharge all seven of the discriminatees.” *See*

The dissent, comprised of two Democrats, criticized the decision on multiple fronts, both procedural and substantive.<sup>326</sup> Procedurally, the dissent criticized the majority for adopting a new standard in a case where there was clearly joint employment, no party requested reconsideration of the *Browning-Ferris II* standard, and there was no opportunity given to interested persons of the public to comment on the issue, contrary to the requirements of the Administrative Procedure Act.<sup>327</sup> Substantively, the dissent labeled the decision as directly contrary to the NLRA's policy of encouraging collective bargaining and common law, opining the majority assured "employers that, by retaining a nominal distance from the supervision of workers, they can exert control and still avoid statutory bargaining obligations."<sup>328</sup> The concern of the dissent, and major labor organizations, was that workers' rights to collectively bargain would be significantly diminished under the majority's standard.<sup>329</sup>

Given the historical inconsistencies and each political party's respective position toward joint employment, the decision in *Hy-Brand Industries* was not surprising.<sup>330</sup> Nevertheless, its impact is vast, as the narrowed standard affects countless numbers of employers and employees.<sup>331</sup> Unfortunately, one such set of employees who may be affected by the decision is FBS football players, who likely can no longer argue that the NCAA is a joint employer.<sup>332</sup>

#### IV. WHAT COULD HAVE BEEN: THE ARGUMENT THAT COULD HAVE REMEDIED THE INEQUALITY

For years, the NCAA has labeled football players as student-athletes<sup>333</sup> even while, objectively, their status resembles that of

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also *Hy-Brand Indus. Contractors, Ltd.*, 365 N.L.R.B. No. 156, slip op. at 31 (Dec. 14, 2017).

326. See *Hy-Brand Indus. Contractors, Ltd.*, slip op. at 35 (Members Pearce and McFerran, dissenting).

327. See *id.* at 38.

328. See *id.* at 47.

329. See *id.* at 36; see also Wiessner, *supra* note 9.

330. See Higgins, *supra* note 315; *supra* Section III.A.

331. See *Hy-Brand Indus. Contractors, Ltd.*, slip op. at 2 (criticizing the *Browning-Ferris II* standard for "subject[ing] countless entities to unprecedented new joint bargaining obligations that most may not even know they have").

332. See *infra* Part IV.

333. See McCormick & McCormick, *supra* note 2, at 83.

employees.<sup>334</sup> As employees, the players should be entitled to collectively bargain,<sup>335</sup> a right they have been wrongfully denied up until this point.<sup>336</sup> While the Obama-administration Board provided several suggestive analyses that could have opened the door for an official recognition of FBS football players as statutory employees,<sup>337</sup> its reluctance to exercise jurisdiction in *Northwestern University* was tremendously detrimental.<sup>338</sup> Recent Board jurisprudence<sup>339</sup> has effectively eliminated a persuasive argument the Obama administration overlooked: that the NCAA acts as a joint employer over FBS scholarship football athletes.<sup>340</sup>

### A. Establishing Jurisdiction

Before the athletes could have asserted the NCAA was a joint employer under the *Browning-Ferris II* standard, they would have had to convince the Board that exercising jurisdiction over the players would effectuate the policies of the NLRA.<sup>341</sup> The necessity of this discussion obviously stems from the Board's decision to deny jurisdiction in *Northwestern University*.<sup>342</sup> The Board's rationales were exposed as profoundly questionable through its exercise of jurisdiction, even in the face of similar arguments, in *Trustees of Columbia*.<sup>343</sup>

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334. See *id.* at 75 (arguing that “major college sports have not been truly amateur for many years, if ever”).

335. See 29 U.S.C. § 151 (2012) (prohibiting certain employers from denying employees the right to organize and collectively bargain).

336. See *Northwestern Univ.*, 362 N.L.R.B. No. 167, slip op. at 1 (Aug. 17, 2015).

337. See *Trs. of Columbia Univ. in the City of N.Y.*, 364 N.L.R.B. No. 90, slip op. at 5 (Aug. 23, 2016); Internal Memorandum, *supra* note 10, at 1.

338. See Munson, *supra* note 13 (describing the impact of the political change on college athletes).

339. See *Hy-Brand Indus. Contractors, Ltd.*, 365 N.L.R.B. No. 156, slip op. at 1 (Dec. 14, 2017).

340. See *infra* Section IV.C.

341. See *Northwestern Univ.*, slip op. at 3 (recognizing that “even if the scholarship players were statutory employees . . . it would not effectuate the policies of the Act to assert jurisdiction”).

342. See *id.* at 1.

343. See *Trs. of Columbia Univ. in the City of N.Y.*, 364 N.L.R.B. No. 90, slip op. at 5 (Aug. 23, 2016) (acknowledging the arguments raised by Columbia, but ultimately “find[ing] that they do not outweigh the considerations that favor extending statutory coverage to student assistants”).

The Board's earlier rationalization that exercising jurisdiction would not effectuate the policies of the NLRA and would only inspire instability<sup>344</sup> was flawed for a number of reasons.<sup>345</sup> First, the Board's contention of potential instability was supported by a dearth of evidence and rationale.<sup>346</sup> Unsurprisingly, the Board condemned such hypothetical and unsubstantiated decisions in *Trustees of Columbia*.<sup>347</sup> Similar to the claims criticized in *Trustees of Columbia*, the rationale advanced by the Board in *Northwestern University* was entirely theoretical, providing no empirical or evidentiary support for the contention that instability would develop.<sup>348</sup> Instead, the Board repeated that college football's structure is unique due to its makeup of mostly public institutions that the Board could not exercise jurisdiction over.<sup>349</sup> Undeniably, college football is distinguishable from other established labor forces, particularly those in professional athletics.<sup>350</sup> However, the Board rejected the same argument of uniqueness of the academic environment in *Trustees of Columbia*.<sup>351</sup>

Second, the Board's professed systematic instability was flawed because it inexplicably ignored the ostensible instability that already exists.<sup>352</sup> The current structure of college football is one of exploitation, covered up by a farce label of amateurism.<sup>353</sup> While the

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344. See *Northwestern Univ.*, slip op. at 5 (reasoning that "labor issues directly involving only an individual team and its players would also affect the NCAA, the Big Ten, and the other member institutions").

345. See Edelman, *supra* note 150 (arguing the decision ignores the NLRA's goal of "empower[ing] non-managerial employees").

346. See *Northwestern Univ.*, slip op. at 5-6. The Board failed to explain how or why instability would ensue, instead choosing to continually reiterate that the structure of college football would not promote stability. See *id.*

347. *Trs. of Columbia Univ.*, slip op. at 8 (stating "[w]e disagree . . . with the conclusion reached by the *Brown University* Board, including its view that 'empirical evidence' is irrelevant to the inquiry") (quoting *Brown Univ.*, 342 N.L.R.B. 483, 492-93 (2004)).

348. See *id.* at 5-6 (discussing its decision to pass on jurisdiction, but providing no empirical support).

349. See *id.* at 5.

350. See *id.* (describing the FBS as a "markedly different type of enterprise").

351. *Id.* at 10-13 (countering the Board's past reasoning that collective bargaining was inappropriate in academics).

352. See *supra* Section I.C (outlining the scholarly criticism of the NCAA's system of amateurism on the basis that it harms the players). One obvious representation is the income gap between the coaches and the poverty-stricken players. See Nocera & Strauss, *supra* note 27; *NCAA Salaries*, *supra* note 106.

353. See Marzan & Tillet-Saks, *supra* note 2, at 303; McCormick & McCormick, *supra* note 2, at 156-57.

players sacrifice their bodies<sup>354</sup> for compensation that places 80% of them below the poverty line,<sup>355</sup> the NCAA,<sup>356</sup> member institutions,<sup>357</sup> television networks,<sup>358</sup> and coaches<sup>359</sup> are all tremendously and unjustly enriched.<sup>360</sup> Instead of considering this evidence that exposes the system as inequitable and unstable,<sup>361</sup> the Board pointed to theoretical instability as a reason to avoid deciding.<sup>362</sup> Under the principles established in *Trustees of Columbia*, where the Board criticized willful blindness of the current state of affairs and exercised jurisdiction to remedy a system that was unresponsive to graduate students' needs, its earlier ignorance of the undeniable inequality in college athletics is appallingly inappropriate.<sup>363</sup>

Further, the Board failed to consider the potential benefits that would arise out of allowing FBS football players to collectively bargain.<sup>364</sup> In tune with the Board's other purported rationales in *Northwestern University*, the Board criticized this train of thought in

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354. See McCormick & McCormick, *supra* note 2, at 77; Strauss, *supra* note 82 (detailing a lawsuit in which college football players allege the concussions sustained as players have led to “a variety of health problems, including mood swings, depression and sleeplessness”).

355. See Nocera & Strauss, *supra* note 27.

356. See *NCAA Revenue*, *supra* note 98 (providing the annual income of the NCAA).

357. See, e.g., Jessop, *supra* note 96 (identifying the millions of dollars that marquee programs earn annually).

358. See Porto, *supra* note 28, at 311 (stating “[n]obody benefits more from the college sports juggernaut, though, than the television networks”).

359. See, e.g., *NCAA Salaries*, *supra* note 106.

360. See, e.g., Karcher, *supra* note 2, at 110-11 (arguing “amateurism principles do not give the NCAA and its members a corresponding right or justification to be enriched by the portion of the broadcast rights fees attributed to the players’ expense and effort . . . that would normally, equitably, and morally be paid to them”).

361. See *supra* Section I.C (providing the scholarly criticisms of the system’s inequalities).

362. See *Northwestern Univ.*, 362 N.L.R.B. No. 167, slip op. at 5-6 (Aug. 17, 2015).

363. See *Trs. of Columbia Univ. in the City of N.Y.*, 364 N.L.R.B. No. 90, slip op. at 11 (Aug. 23, 2016) (criticizing arguments that “focus[] on a few discrete problems that may arise in bargaining—without considering the likelihood that they would both actually occur and not be amenable to resolution by bargaining partners acting in good faith”).

364. See generally *Northwestern Univ.*, slip op. at 1-7 (never considering the benefits of collective bargaining).

*Trustees of Columbia*.<sup>365</sup> As such, the Board's incorrect disregard of both the inequitable state of college football and the potential benefits of collective bargaining<sup>366</sup> exposes its decision to pass on jurisdiction as entirely unconvincing.<sup>367</sup>

Third, the potential instability cited by the Board could have been remedied by a finding of joint employment for FBS football players under the NCAA.<sup>368</sup> Only days after denying jurisdiction, the Board significantly expanded its joint-employment standard in *Browning-Ferris II*, meaning the alteration was already well within Board members' thoughts.<sup>369</sup> Thus, at the time the Board decided to pass on jurisdiction, there was a persuasive argument right in front of it that the NCAA was a putative joint employer.<sup>370</sup> This, in turn, would have provided a league-wide unionization base comparable to that of all professional sports leagues, thereby negating any attempt by the Board to distinguish the two.<sup>371</sup> While this argument has now been undercut by *Hy-Brand Industries*, the flaw in the Obama-administration Board's opinion is nevertheless readily apparent and was foreseeable at that time.<sup>372</sup>

Further, in defense of its denial of jurisdiction, the Board cited that it had never exercised jurisdiction over student-athletes before and that such athletes are distinct from cases of graduate students.<sup>373</sup>

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365. *Trs. of Columbia Univ.*, slip op. at 11-12 (stating "Columbia and amici neglect to weigh the possibility of any *benefits* that flow from collective bargaining, such as those envisioned by Congress when it adopted the Act").

366. *See* McCormick & McCormick, *supra* note 2, at 80-81 (citing benefits that would result from a recognition of statutory employment under the NLRA, such as the right to wages, negotiation, collectively bargain, and striking).

367. *See Trs. of Columbia Univ.*, slip op. at 13 (condemning analyses that are empirically unsupported and neglectful of potential benefits).

368. *See infra* Section IV.C (describing the application of the *Browning-Ferris II* joint-employment standard to the NCAA).

369. *Browning-Ferris II*, 362 N.L.R.B. No. 186, slip op. at 2 (Aug. 27, 2015), *overruled by* *Hy-Brand Indus. Contractors, Ltd.*, 365 N.L.R.B. No. 156, slip op. at 1 (Dec. 14, 2017).

370. *See infra* Section IV.C (describing how the NCAA could have been a putative employer under the former joint-employment standard due to the degree of control it possesses over the athletes' work habits and daily lives).

371. *See* *Northwestern Univ.*, 362 N.L.R.B. No. 167, slip op. at 5 (Aug. 17, 2015) (labeling the NCAA's system of amateurism as "unprecedented," and separating it on the count that "all previous Board cases concerning professional sports involve leaguwide bargaining units").

372. *See Hy-Brand Indus. Contractors, Ltd.*, slip op. at 1 (Dec. 14, 2017).

373. *See Northwestern Univ.*, slip op. at 4 (opining that "scholarship players do not fit into any analytical framework that the Board has used in cases involving other types of students or athletes").

Once again, this reasoning is unpersuasive, particularly in light of its decision to exercise jurisdiction in *Trustees of Columbia*.<sup>374</sup> First, distinguishing the employment status of football players and graduate students on the basis of different levels of studies and work product makes little sense.<sup>375</sup> After all, both groups are students enrolled at the university who are compensated for the work they provide to the university.<sup>376</sup> Pointing to minute discrepancies between the two further ignores the fact that the NLRA is intentionally broad so as to encourage collective bargaining throughout all commercial activity.<sup>377</sup>

Next, even conceding the fact that jurisdiction has not been exercised over such individuals in the past, jurisdiction is still appropriate due to the nature of collective bargaining.<sup>378</sup> It is utterly foolish to justify denying jurisdiction on the basis that it has not been exercised before, considering the fact that the issue had never been raised prior.<sup>379</sup> Further, collective bargaining, as identified by *Trustees of Columbia*, has been a historically flexible system that can adapt to a variety of structures.<sup>380</sup> For example, the Board acknowledged that “collective bargaining by student assistants at private universities is historically uncommon,”<sup>381</sup> yet still exercised jurisdiction and recognized these individuals as statutory employees.<sup>382</sup>

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374. See *Trs. of Columbia Univ.*, 364 N.L.R.B. No. 90, slip op. at 1 (Aug. 23, 2016).

375. See *Northwestern Univ.*, slip op. at 4 n.10.

376. See *id.* at 2-3 (recognizing that the players receive a scholarship worth \$61,000 for their substantial devotion to the football program); *Trs. of Columbia*, 364 N.L.R.B. No. 90, slip op. at 15.

377. See *Trs. of Columbia Univ.*, slip op. at 2 (declaring that “coupled with the very broad statutory definitions of both ‘employee’ and ‘employer,’ it is appropriate to extend statutory coverage to students working for universities covered by the Act unless there are strong reasons *not* to do so”).

378. See *id.* at 8 (stating “[t]he National Labor Relations Act, as we have repeatedly emphasized, governs only the employee-employer relationship”).

379. See *Northwestern Univ.*, slip op. at 4 (acknowledging “[t]he Board has never before been asked to assert jurisdiction in a case involving college football players”).

380. See *Trs. of Columbia Univ.*, slip op. at 10 (recognizing “the historic flexibility of collective bargaining as a practice and its viability at public universities where graduate student assistants are represented by labor unions and among faculty members at private universities”).

381. *Id.*

382. See *id.* at 7 (deciding “the Act’s text supports the conclusion that student assistants who are common-law employees are covered by the Act”).

Opponents of college football unionization would certainly point to Board's entitlement of judicial deference, claiming the decision should be respected.<sup>383</sup> However, judicial review of a Board decision was not the appropriate remedy to the current state of inequality.<sup>384</sup> Rather, the Board should have accounted for its expanding coverage in analogous cases and utilized a transformative approach to the unionization issue.<sup>385</sup>

In short, the Board's denial of jurisdiction in *Northwestern University*<sup>386</sup> was inappropriate and inequitable, particularly in light of the rationales asserted in *Trustees of Columbia*.<sup>387</sup> Looking even beyond the flawed rationales identified above, the Board failed to carry out its call of applying the NLRA to modern labor complexities in order to protect powerless workers.<sup>388</sup> Ultimately, in light of the recent political shifting, this failure is even more egregious, as players are now left without a legitimate claim of joint employment due to the narrowed state of the standard.<sup>389</sup> The Obama-administration Board should have utilized its rationales from *Trustees of Columbia*<sup>390</sup> and exercised jurisdiction over oppressed individuals.<sup>391</sup>

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383. See *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975).

384. See *supra* Introduction (describing the focus of this Comment as the Board's decisions, not judicial review).

385. See *infra* Section IV.C. The former General Counsel of the NLRB recognized this when he issued the internal memorandum to the Board's regional directors. See Internal Memorandum, *supra* note 10, at 1 (explaining that the "Report is intended as a guide for employers, labor unions, and employees that summarizes Board law regarding NLRA employee status in the university setting").

386. See *Northwestern Univ.*, 362 N.L.R.B. No. 167, slip op. at 1 (Aug. 17, 2015).

387. See *Trs. of Columbia Univ.*, slip op. at 8-14.

388. See *Ford Motor Co. v. NLRB*, 441 U.S. 488, 496 (1979); *NLRB v. Ins. Agents' Int'l Union*, 361 U.S. 477, 499 (1960); *NLRB v. United Steelworkers*, 357 U.S. 357, 362-63 (1958) (calling upon the Board to apply the provisions and effectuate the policies of the NLRA to the complexities of the modern workforce).

389. See *Hy-Brand Indus. Contractors, Ltd.*, 365 N.L.R.B. No. 156, slip op. at 1 (Dec. 14, 2017).

390. See *Trs. of Columbia Univ.*, slip op. at 7.

391. See *Edelman*, *supra* note 150 (stating the decision to pass on jurisdiction "was not only fundamentally flawed, but also facilitates the continued exploitation of college athletes around the country").

## B. Establishing Players as Common-Law Employees of Member Institutions

Should the Board have exercised jurisdiction under the principles of *Trustees of Columbia*,<sup>392</sup> the next step would have been to identify FBS football players as common-law employees.<sup>393</sup> While the former General Counsel did argue that private university FBS football players are statutory employees, given the modern political climate, this opinion is moot.<sup>394</sup> A common-law employment relationship exists where the employer controls the employees' work and there is an exchange of services for compensation.<sup>395</sup> Under this definition, the Obama-administration Board should have recognized FBS football players are statutory employees based upon the work they perform,<sup>396</sup> the degree of control imposed upon them,<sup>397</sup> and the compensation they receive.<sup>398</sup>

To begin, there is little doubt that FBS football players perform a service for their university by engaging in practices and games.<sup>399</sup> Through these efforts, the Northwestern football players generated a \$76 million profit during a decade-long period culminating in 2013.<sup>400</sup> This figure does not even incorporate the extra attention and financial donations the University received on account of the players' services.<sup>401</sup> In light of such facts, it can hardly be disputed

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392. See *Trs. of Columbia Univ.*, slip op. at 8-14.

393. See *id.* at 6 (describing the common-law definition of employee).

394. See Solomon, *supra* note 241 (describing the memorandum's limitations, as "President Donald Trump will eventually appoint the majority of the [B]oard" who does not have to, and likely would not, follow this opinion in a future case).

395. See Internal Memorandum, *supra* note 10, at 12.

396. See *supra* Section I.A (describing the work life of a college football player).

397. See *supra* Section I.B (detailing how the NCAA and universities control every aspect of players' lives).

398. See Northwestern Univ., 362 N.L.R.B. No. 167, slip op. at 19 (Aug. 17, 2015) (stating that the hearing officer found that players "receive a substantial economic benefit for playing football").

399. See *Northwestern Univ.*, slip op. at 11-15 (describing the players' efforts for the program throughout the year); Internal Memorandum, *supra* note 10, at 19; McCormick & McCormick, *supra* note 2, at 100 (describing the players' time commitment to their team and the mission of winning football games).

400. Internal Memorandum, *supra* note 10, at 19.

401. See *id.* (finding the players "provided an immeasurable positive impact to Northwestern's reputation").

players contribute a valuable service to their universities through football.<sup>402</sup>

Establishing a university's control of a FBS football player is also relatively straightforward.<sup>403</sup> As detailed prior, universities exercise an incredible degree of control over their scholarship football players,<sup>404</sup> such that it is unmatched anywhere else in academia.<sup>405</sup> To start, football-related activities consume 262 days of the year for the players,<sup>406</sup> and the players spend forty to sixty hours a week on football during the season.<sup>407</sup> Beyond time, the universities control players' dietary,<sup>408</sup> study,<sup>409</sup> and sleep<sup>410</sup> habits; what the players will wear to the games;<sup>411</sup> where they live;<sup>412</sup> what car they drive;<sup>413</sup> when they can leave campus;<sup>414</sup> what they post on social media;<sup>415</sup> their use of alcohol;<sup>416</sup> and if they can talk to the media.<sup>417</sup> The rampant, deep, and incredible degree of control that universities

402. See *id.* (declaring "scholarship football players at Northwestern and other Division I FBS private colleges and universities . . . perform services for their colleges").

403. See McCormick & McCormick, *supra* note 2, at 97 (definitively stating that "[e]mployee-athletes are subject to an extraordinary degree of control by their universities").

404. See *supra* Section I.A.

405. See McCormick & McCormick, *supra* note 2, at 97 (arguing that, unlike other employees, the athletes "are subject virtually every day of the year to pervasive control by the athletic department and coaches").

406. *Id.* at 103.

407. See Northwestern Univ., 362 N.L.R.B. No. 167, slip op. at 12-14 (Aug. 17, 2015). Players spend considerable amounts of time on football related activities during the offseason as well. See McCormick & McCormick, *supra* note 2, at 99 n.127 (stating that "the daily experience of football players during the season mirrors published accounts of off-season life").

408. See Johnson, *supra* note 42.

409. See McCormick & McCormick, *supra* note 2, at 101.

410. See Northwestern Univ., slip op. at 20.

411. See *id.* at 21.

412. See *id.*

413. See *id.*

414. See *id.*

415. See *id.* This was deemed to be violative of the NLRA by the NLRB's former General Counsel in the Northwestern Advice Memorandum, *supra* note 19, at 1.

416. See Northwestern Univ., slip op. at 21.

417. See *id.* Northwestern's policies on media communications were also deemed violative of the NLRA in the Northwestern Advice Memorandum. See Northwestern Advice Memorandum, *supra* note 19, at 1.

exercise over the players' daily life undermines any misconception that players are not employees under the NLRA.<sup>418</sup>

Finally, in return for the work they contribute to their respective universities, the players are compensated with a scholarship,<sup>419</sup> which is conditioned on their conformance to the rules of each member institution and the NCAA.<sup>420</sup> Therefore, just as in *Trustees of Columbia*, where graduate student workers were compensated through scholarships and recognized as statutory employees,<sup>421</sup> the players' receipt of a scholarship acts as a form of compensation that is contingent on the services they perform.<sup>422</sup> It could be argued that players do not receive a traditional form of compensation, as a scholarship is inherently distinct from wages, salary, or even a stipend.<sup>423</sup> However, the common-law employment test only requires tangible compensation, and it is hard to imagine how an education, books, food, and shelter would not conform to a definition of "tangible."<sup>424</sup> This conclusion is supported by the former General Counsel's opinion that there is no doubt that such scholarships are compensation.<sup>425</sup>

Opponents of an employment relationship would certainly point to the rationales raised by the Seventh Circuit in its decision to

418. See, e.g., McCormick & McCormick, *supra* note 2, at 97 ("[E]mployee-athletes are subject to more control by their universities than is any other employee or group of employees at their institutions."); Internal Memorandum, *supra* note 10, at 19 (expressly stating that schools "control . . . numerous facets of the players' daily lives").

419. See *Northwestern Univ.*, slip op. at 2 (valuing the scholarship at over \$61,000).

420. See McCormick & McCormick, *supra* note 2, at 109 (contending that "athletic scholarships function as contracts of employment, setting forth the obligations of employee-athletes and defining the resulting economic compensation to be provided," which are shaped by the rules of the NCAA).

421. See *Trs. of Columbia Univ.*, 364 N.L.R.B. No. 90, slip op. at 21 (Aug. 23, 2016) (detailing that the scholarships provided to the graduate assistants were attached to specific expectations and therefore constituted compensation).

422. *Northwestern Univ.*, slip op. at 2 ("[T]he scholarship award is subject to the player's compliance with the school's policies and NCAA's and Big Ten's regulations.").

423. *Id.* at 2 ("[N]one of the money is directly disbursed to the players.").

424. *Trs. of Columbia*, slip op. at 7 ("The Board and the courts have repeatedly made clear that the extent of any required 'economic' dimension to an employment relationship is the payment of tangible compensation.").

425. Internal Memorandum, *supra* note 10, at 19 ("It is also clear that college scholarship football players receive significant compensation in exchange for [a] service.").

deny student-athletes employee status.<sup>426</sup> Particularly, critics can claim there is a long-standing tradition of amateurism that has defined the alleged economic relationship between student-athletes, member institutions, and the NCAA.<sup>427</sup> This tradition, in turn, has created serious reliance interests by universities and the NCAA, ultimately resulting in a complicated system of rules.<sup>428</sup> Further, the Department of Labor's characterization of athletics solely as an extracurricular activity is an authoritative position on the issue.<sup>429</sup>

What these arguments neglect, however, is the remarkable expansion of modern college football into a multi-billion dollar industry and the obvious distinctions from the facts presented in *Berger v. National Collegiate Athletic Ass'n*.<sup>430</sup> Principally, the athletes in *Berger* received no compensation for their athletic efforts in accordance with Ivy League standards.<sup>431</sup> Thus, the athletes in consideration were truly students first, with athletics acting as an extracurricular activity.<sup>432</sup> Alternatively, FBS football players are compensated and receive such payment uniquely on account of their athletic, not academic, achievements.<sup>433</sup> Further, the athletes in *Berger*, while admirable in their efforts, were not at the core of a revenue-generating sport that constitutes a multi-billion dollar industry like football players are.<sup>434</sup>

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426. See *Berger v. NCAA*, 843 F.3d 285, 291-93 (7th Cir. 2016) (holding “as a matter of law, that student athletes are not employees”).

427. See *id.* at 291 (arguing that there is a “long-standing tradition [that] defines the economic reality of the relationship between student athletes and their schools”).

428. See *id.* (“[T]o maintain this tradition of amateurism, the NCAA and its member universities and colleges have created an elaborate system of eligibility rules.”).

429. See *id.* at 292 (reasoning that the Department of Labor’s opinions outlined in its Field Operations Handbook “certainly are persuasive. In fact, we have cited this handbook as persuasive authority several times”).

430. See *id.* at 294 (Hamilton, J., concurring) (generally referencing the key economic differences).

431. See *id.* (acknowledging, unlike the majority, that “the plaintiffs in this case did not receive athletic scholarships”).

432. See *id.* (analogizing the athletes’ performance in the case to those associated with “college musicians, actors, journalists, and debaters”).

433. See *Northwestern Univ.*, 362 N.L.R.B. No. 167, slip op. at 15 (Aug. 17, 2015) (detailing that the players are recruited and compensated principally for their athletic ability).

434. See *Berger*, 843 F.3d at 294 (Hamilton, J., concurring) (distinguishing men’s basketball and football on account that those “sports involve billions of dollars of revenue for colleges and universities”).

Next, the tradition of amateurism is wholly unpersuasive in light of the fact that college football is now a revenue sport in which there is an inherent economic reality.<sup>435</sup> The distinguished tradition of amateurism, while once admirable, is now incompatible with the incredible revenues generated by FBS programs and the salaries of coaches, administrators, and commissioners in modern college football.<sup>436</sup> Therefore, any purported reliance interests that seek to uphold this tradition only further the currently inequitable system.<sup>437</sup> Finally, the Department of Labor's characterization of athletics as an extracurricular activity is patently wrong in the context of FBS football, as it is academics, not athletics, which is the adjacent endeavor for the players.<sup>438</sup> In fact, the NLRA explicitly provides specified individuals who are exempt from coverage under the Act, and college athletes are not among these specified individuals, undercutting any theory that their efforts are solely an extracurricular activity and cannot constitute a work product.<sup>439</sup>

Ultimately, the relationship between scholarship FBS football players and their respective universities reflects that of a common-law employment relationship,<sup>440</sup> thereby qualifying the players to be statutory employees under the NLRA.<sup>441</sup> Given this fact, the Board should have originally granted jurisdiction to rectify the inequitable

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435. See *id.* at 294 (questioning whether the court's "reasoning should extend to students who receive athletic scholarships to participate in so-called revenue sports like Division I men's basketball and FBS football").

436. See Internal Memorandum, *supra* note 10, at 22 (acknowledging that "[t]he 'revered tradition of amateurism in college sports' and the substantial value of a university scholarship are set against the enormous revenue generated by Division I FBS football programs and the substantial salaries paid to university administrators, coaches, and conference officials involved in the sport") (quoting *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 120 (1984)).

437. See McCormick & McCormick, *supra* note 2, at 157 (asserting "NCAA rules, promulgated by the university-employers themselves, bar these athletes from earning compensation representing their true worth").

438. See *Northwestern Univ.*, slip op. at 15 (describing how players are recruited principally for their athletic achievements); McCormick & McCormick, *supra* note 2, at 99-101 (describing players' time commitments to football, which are substantially greater than time spent on academics).

439. See Internal Memorandum, *supra* note 10, at 18.

440. See *id.* at 16 (concluding "scholarship football players in Division I FBS private sector colleges and universities are employees under the NLRA").

441. See *Trs. of Columbia Univ.*, 364 N.L.R.B. No. 90, slip op. at 5 (Aug. 23, 2016); Internal Memorandum, *supra* note 10, at 16 (identifying that because the athletes are employees, they are accorded "the rights and protections of [the NLRA]").

system in place.<sup>442</sup> Its failure to do so was contradicted by its own subsequent analyses,<sup>443</sup> which, together with a joint-employment claim, provided hope that has now been eliminated by recent Board decision making.

### C. The NCAA as a Joint Employer Under *Browning-Ferris II*

Through its 2015 *Browning-Ferris II* decision, the Obama-administration Board expanded the joint-employment standard by holding that where two entities both hold a common-law employment relationship *and* possess sufficient control over the essential terms and conditions of employment, a joint-employment relationship exists.<sup>444</sup> This liberalized standard opened up the argument that the NCAA is a putative employer of FBS college football players based on the extensive degree of control it exercises over the athletes.<sup>445</sup> This claim would have provided a private nexus under which FBS football players could unionize and eliminated past jurisdictional concerns.<sup>446</sup> However, a Republican-majority Board recently eradicated this claim by narrowing the joint-employment standard.<sup>447</sup> Nevertheless, there is an important argument that the Obama-administration Board missed: that the NCAA is a joint employer under *Browning-Ferris II*'s inclusive standard.<sup>448</sup>

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442. See Edelman, *supra* note 150 (arguing the Board's decision was incorrect as a result of the contrast between the incredible affluence that exists at the administrative level of college athletics with the fact that 85% of scholarship athletes live below the poverty line).

443. See *Trs. of Columbia*, slip op. at 1; Internal Memorandum, *supra* note 10, at 16.

444. See *Browning-Ferris II*, 362 N.L.R.B. No. 186, slip op. at 2 (Aug. 27, 2015), *overruled by* *Hy-Brand Indus. Contractors, Ltd.*, 365 N.L.R.B. No. 156, slip op. at 1 (Dec. 14, 2017) (deciding "to revisit and to revise the Board's joint-employer standard" in a manner that broadens it and better conforms to the federal policy of encouraging collective bargaining).

445. See *supra* Section I.B (describing the NCAA as the supervisor of FBS football).

446. See *Northwestern Univ.*, 362 N.L.R.B. No. 167, slip op. at 6 (Aug. 17, 2015). This, in turn, would eliminate the inherent problem that many athletes, as employees for public universities, are subject to state laws that prohibit collective bargaining. See *id.*

447. See *Hy-Brand Indus. Contractors, Ltd.*, slip op. at 1 (overturning the Board's more inclusive standard from *Browning-Ferris II* and returning to a requirement of the exercise of direct control).

448. See Lonick, *supra* note 11, at 137.

### 1. *The NCAA as a Common-Law Employer*

The first step in establishing joint employment under *Browning-Ferris II* would have been to find a common-law employment relationship between the players and the NCAA.<sup>449</sup> This would have required showing that the players perform a service for the NCAA, are compensated for those services, and are under the control of the NCAA.<sup>450</sup> Careful consideration of the NCAA's symbiotic role with participating members in the multi-billion dollar industry of college football confirms the existence of all three elements of common-law employment.<sup>451</sup>

The Board previously confirmed, albeit inadvertently, both service by the players and the NCAA's requisite control when it asserted "the NCAA now exercises a substantial degree of control over the operations of individual member teams, including many of the terms and conditions under which the scholarship players . . . practice and play the game."<sup>452</sup> Certainly some, including the Seventh Circuit, would deny actual control by the NCAA.<sup>453</sup> However, one need only look to the annual NCAA Division I Manual to understand how pervasive the NCAA's control is.<sup>454</sup> Indeed, even the NCAA acknowledges in its 414-page manual that its principal purpose is to maintain institutional control of intercollegiate athletics.<sup>455</sup>

In response, critics would have reiterated that this control is on an institutional level and that the actual relationship between the NCAA and the players is "tenuous" at best.<sup>456</sup> This analysis, however, is simply unsupported by the evidence.<sup>457</sup> In truth, the NCAA's control over the daily lives of the players is extensive, and

449. See *Browning-Ferris II*, slip op. at 2 (prescribing that "the initial inquiry is whether there is a common-law employment relationship with the employees in question").

450. See *Brown Univ.*, 342 N.L.R.B. 483, 494 (2004).

451. See *Northwestern Univ.*, slip op. at 4; *Trs. of Columbia Univ.*, 364 N.L.R.B. No. 90, slip op. at 6 (Aug. 23, 2016). As a point of reminder, the three elements are services performed by the employee, compensation, and control by the employer. *Trs. of Columbia Univ.*, slip op. at 17.

452. *Northwestern Univ.*, slip op. at 4.

453. See *Berger v. NCAA*, 843 F.3d 285, 289 (7th Cir. 2016) (describing the relationship between athletes and the NCAA as "tenuous").

454. See generally NCAA DIVISION I MANUAL, *supra* note 18, art. 1.2.

455. See *id.* art. 1.2(b).

456. See *Berger*, 843 F.3d at 289.

457. See *Northwestern Univ.*, slip op. at 4.

it includes limits on compensation,<sup>458</sup> a requirement of full time enrollment,<sup>459</sup> a requisite GPA for eligibility,<sup>460</sup> a cap on the amount of time that can be spent on football-related activities,<sup>461</sup> and an ability to police individuals for minor violations.<sup>462</sup> The former General Counsel confirmed the pervasive nature of the NCAA's control on the individual players when he asserted, "NCAA rules [] significantly control the activities of . . . FBS scholarship football players."<sup>463</sup>

Next, FBS football players are compensated via the scholarships they receive.<sup>464</sup> One can argue that because the scholarships do not come from the NCAA, there is no compensation so as to render the NCAA an employer.<sup>465</sup> Rather, the funding for the scholarships comes from the member institutions themselves.<sup>466</sup>

However, this argument is problematic in two ways. First, it would effectively destroy every joint-employment claim produced because if direct compensation were provided, then the joint-employment doctrine would not be needed.<sup>467</sup> Second, it neglects the symbiotic relationship that the Board already recognized in *Northwestern University*.<sup>468</sup> It would have been overtly contradictory

458. See NCAA DIVISION I MANUAL, *supra* note 18, art. 12.02.2 (limiting expenses to a few specified categories, such as meals, lodging, and coaching instructions).

459. See *id.* art. 14.01.2 (requiring that "a student-athlete shall be enrolled in at least a minimum full-time program of studies, be in good academic standing and maintain progress toward a baccalaureate or equivalent degree").

460. See *id.* art. 14.4.3.3 (requiring a "Fulfillment of Minimum Grade-Point Average Requirements").

461. See *id.* art. 17.1 ("General Playing-Season Regulations.").

462. See *supra* Section I.B (detailing specific instances where individual players were suspended for menial activities like accepting money for a game worn jersey and spending their allotted book money on the wrong items in the bookstore).

463. Internal Memorandum, *supra* note 10, at 16.

464. See *Northwestern Univ.*, 362 N.L.R.B. No. 167, slip op. at 2 (Aug. 17, 2015).

465. See NCAA DIVISION I MANUAL, *supra* note 18, art. 15.01.3 (mandating that "[a]ny student who receives financial aid other than that administered by the student-athlete's institution shall not be eligible for intercollegiate athletics competition").

466. See *Northwestern Univ.*, slip op. at 2.

467. See *Browning-Ferris II*, 362 N.L.R.B. No. 186, slip op. at 5 (Aug. 27, 2015), *overruled by* *Hy-Brand Indus. Contractors, Ltd.*, 365 N.L.R.B. No. 156, at 1 (Dec. 14, 2017). For example, it was the general contracting agency, not the putative employer, in *Browning-Ferris II* that provided the direct compensation to the employees. See *id.* at 4.

468. *Northwestern Univ.*, slip op. at 5.

for the Board to, on the one hand, accept an argument that the NCAA is distanced in an economic context but at the same time concede that the NCAA, conferences, and member institutions are effectively inseparable.<sup>469</sup> Thus, while attenuated, the compensation is directly related to both the NCAA and member institutions' collection of massive revenues.<sup>470</sup> Therefore, FBS football players are compensated for the services they perform and are subsequently under the control of the NCAA,<sup>471</sup> thereby creating a common-law employment relationship.<sup>472</sup>

## 2. *The NCAA Controls Essential Terms and Conditions of Employment*

Further, the NCAA fit the definition of a joint employer under the *Browning-Ferris II* standard because of its shared control over the essential terms and conditions of the players' employment.<sup>473</sup> In *Browning-Ferris II*, the Board required that the putative employer possess a sufficient degree of control over the essential terms and conditions of employment.<sup>474</sup> Thus, a putative employer could have been deemed a joint employer if it shaped decisions related to hiring and firing, discipline and supervision, wages, hours, number of workers, scheduling control, and the manner and method of work performance.<sup>475</sup>

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469. See *id.* (holding that a decision against an institution directly affects the entire NCAA).

470. See Karcher, *supra* note 2, at 109 n.1. Basically, if a member institution is not a part of the NCAA, it necessarily cannot receive financing from the television deals made by conferences and the NCAA. See *id.*

471. See *Northwestern Univ.*, slip op. at 2.

472. See McCormick & McCormick, *supra* note 2, at 156-57.

473. See *supra* Section I.B (describing the NCAA's supervisory role over the entire system of amateurism, which includes both establishing rules and enforcing them); see also Internal Memorandum, *supra* note 10, at 16 (referencing "NCAA rules that significantly control the activities of Division I FBS scholarship football players").

474. See *Browning-Ferris II*, 362 N.L.R.B. No. 186, slip op. at 2 (Aug. 27, 2015), *overruled by* Hy-Brand Indus. Contractors, Ltd., 365 N.L.R.B. No. 156, slip op. at 1 (Dec. 14, 2017) (stating that if a "common-law employment relationship exists, the inquiry then turns to whether the putative joint employer possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining").

475. See *id.* at 19. Other issues identified by the Board as matters that are essential to the terms and conditions of employment were seniority and overtime. See *id.*

The NCAA meets this standard.<sup>476</sup> To begin, the NCAA shapes hiring decisions by dictating the minimum academic standards that high school athletes must achieve in order to be “hired” by a college football program.<sup>477</sup> It also shapes decisions related to discipline and control by establishing that athletes will be determined ineligible for a multitude of activities, including contact with agents, engaging in promotional activities, and accepting outside compensation.<sup>478</sup> Additionally, it controls wages by limiting athlete compensation,<sup>479</sup> dictating the time athletes can spend practicing,<sup>480</sup> and capping the number of workers for each institution to eighty-five players.<sup>481</sup> Further, it regulates the athletes’ work performance by dictating the length of the season, when post-season workouts may occur, whether players may participate in camps or clinics,<sup>482</sup> and how many coaches each institution may have.<sup>483</sup>

The NCAA exercises its police powers to punish individuals and institutions that violate the aforementioned bylaws as well.<sup>484</sup> In fact, the NCAA Division I Manual intricately describes the NCAA’s “infractions program” over the course of twenty-seven pages, flaunting its ability impose penalties and sanctions against violating

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476. *See id.* at 2 (detailing that it “will no longer require that a joint employer not only *possess* the authority to control employees’ terms and conditions of employment, but also *exercise* that authority”).

477. *See* NCAA DIVISION I MANUAL, *supra* note 18, art. 14.3. The NCAA requires not only that high school athletes take specified classes, but also that they achieve minimum standards of grade point average and standardized test scores. *See id.*

478. *See id.* art. 12.1 (stating “[a]n individual must comply with the following [rules] to retain amateur status”).

479. *See id.* art. 15.02.02 (limiting compensation to the “cost of attendance,” which only takes into account tuition, room, board, books, transportation, and “other expenses related to attendance”).

480. *See id.* art. 17.10.2. For example, the NCAA limits mandatory off-season conditioning to eight hours per week. *Id.* art. 17.10.6.1.1(e).

481. *See id.* art. 15.5.6.1 (mandating that “[t]here shall be . . . an annual limit of 85 on the total number of counters (including initial counters) in football at each institution”).

482. *See id.* art. 17.10.

483. *See id.* art. 11.7.4 (limiting the number of coaches to one head coach, nine assistant coaches, and four graduate assistant coaches).

484. *See* Davis & Malagrino, *supra* note 117, at 440-43 (detailing, as examples, sanctions brought by the NCAA against the University of Southern California, the University of Michigan, and Southern Methodist University); *see also supra* Section I.B (explaining sanctions by the NCAA against specified individuals).

parties.<sup>485</sup> Via its routine issuance of sanctions, the NCAA meets the standard established in *Browning-Ferris II*<sup>486</sup> by possessing and exercising control through its authoritative position.<sup>487</sup>

Ultimately, the relationship between FBS football players, the NCAA, and member institutions reflected a joint-employment relationship under the inclusive *Browning-Ferris II* standard.<sup>488</sup> Such a finding of joint employment would have created a medium for all FBS players, not just those attending private institutions, to unionize, thus eliminating a major policy concern cited by *Northwestern University*.<sup>489</sup> Accordingly, this would have given exploited individuals a voice in a system that has deprived them of sharing in the fruits of their labor for far too long.<sup>490</sup> However, by passing on jurisdiction in *Northwestern University*,<sup>491</sup> the Obama-administration Board failed to take action against a system of gross exploitation.<sup>492</sup> Instead, the argument that could have been used to combat the farce system of amateurism has come and gone, with the Board's new, more restrictive standard effectively eliminating any legitimate claim of joint employment.<sup>493</sup>

#### D. *Hy-Brand Industries* and Its Effect on Future Unionization Efforts

The recent shift in the political makeup of the Board likely solidified the continuation of exploitation in the NCAA by

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485. See NCAA DIVISION I MANUAL, *supra* note 18, art. 19.01.2 (explaining that the “infractions program shall hold institutions, coaches, administrators and student-athletes who violate the NCAA constitution and bylaws accountable for their conduct, both at the individual and institutional levels”).

486. See *Browning-Ferris II*, 362 N.L.R.B. No. 186, slip op. at 2 (Aug. 27, 2015), *overruled by* *Hy-Brand Indus. Contractors, Ltd.*, 365 N.L.R.B. No. 156, slip op. at 1 (Dec. 14, 2017) (declaring “[r]eserved authority to control terms and conditions of employment, even if not exercised, is clearly relevant to the joint-employment inquiry”).

487. See NCAA DIVISION I MANUAL, *supra* note 18, art. 19.01.1 (describing how its infractions program will exercise its authority and “prescribe appropriate and fair penalties if violations occur”).

488. See *Browning-Ferris II*, slip op. at 2; Lonick, *supra* note 11, at 137.

489. See *Northwestern Univ.*, 362 N.L.R.B. No. 167, slip op. at 3 (Aug. 17, 2015) (discussing jurisdictional limits of the NLRB).

490. See *McCormick & McCormick*, *supra* note 2, at 89, 156-57 (explaining the deprivation of student-athletes).

491. See *Northwestern Univ.*, slip op. at 3 (passing on jurisdiction).

492. See *Edelman*, *supra* note 150 (explaining the exploitation of college athletes).

493. See *Hy-Brand Indus. Contractors, Ltd.*, 365 N.L.R.B. No. 156, slip op. at 1-2 (Dec. 14, 2017) (holding that the employers were joint employers).

foreclosing any potential claim of joint employment by the athletes.<sup>494</sup> The Board's recent decision in *Hy-Brand Industries*<sup>495</sup> and historical approach toward student unionization suggests that any future attempt of unionization by college football players would not be looked upon favorably.<sup>496</sup> Ultimately, the decision making by both political parties is subject to criticism and once again leaves players voiceless.

Broadly speaking, the Board would dismiss the claim of joint employment against the NCAA, arguing it is contrary to the congressional intent of the NLRA and would not promote peaceful resolution of labor disputes as required by the Act.<sup>497</sup> In fact, the claim would be a model example of the dissent's arguments in *Browning-Ferris II*<sup>498</sup> and the Board's recent decision in *Hy-Brand Industries*, where conservative Board members vehemently argued against such an extension of joint employment.<sup>499</sup> To the current Board, a recognition of joint employment for college football players would be yet another attempt to pull an entity into a labor dispute that it is not directly connected to.<sup>500</sup>

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494. See *Members of the NLRB*, *supra* note 9 (providing links to each division of the NLRB and its members).

495. See *Hy-Brand Indus. Contractors, Ltd.*, at 6 (describing the Board's decision).

496. See *supra* Section II.B (detailing Republican Boards' approach toward student unionization); *Northwestern Univ.*, slip op. at 1 (passing on jurisdiction).

497. See *Hy-Brand Indus. Contractors, Ltd.*, slip op. at 8, 11, 29, 44 (describing how *Browning-Ferris II* was against congressional intent); *Browning-Ferris II*, 362 N.L.R.B. No. 186, slip op. at 16 (Aug. 27, 2015) *overruled by Hy-Brand Indus. Contractors, Ltd.*, slip op. at 13, 16 (stating that all joint-employment claims must promote peaceful resolution of labor disputes via collective bargaining).

498. See *Browning-Ferris II*, slip op. at 21 (Members Miscimarra and Johnson, dissenting) (reasoning the *Browning-Ferris II* standard "will subject countless entities to unprecedented new joint-bargaining obligations that most do not even know they have").

499. See *Hy-Brand Indus. Contractors, Ltd.*, slip op. at 9 ("Nor is there any discernible limit on the *Browning-Ferris* majority's open-ended, multifactor standard, which is an analytical grab bag from which any scrap of evidence . . . could suffice to prove that multiple entities collectively comprise a joint employer, whether they numbered two or two dozen.").

500. See *id.* at 30 ("*Browning-Ferris*' expansion of the joint-employer doctrine swept many more entities into primary-employer status as to labor disputes that are not directly their own. As a result, unions were enabled to picket or apply other coercive pressure to either or both of the joint employers as they chose."); *Browning-Ferris II*, slip op. at 25 (Members Miscimarra and Johnson, dissenting) (arguing that the *Browning-Ferris II* standard would create "confusion and disarray[, which] threaten[] to cause substantial instability in bargaining relationships").

FBS football players could argue that, due to the incredible amount of control the NCAA possesses, the NCAA even falls under the more restrictive standard from *Hy-Brand Industries*.<sup>501</sup> In fact, the players may hold a persuasive argument that the NCAA's control is "direct and immediate."<sup>502</sup> After all, the NCAA seemingly exercises direct control by using its authority to punish individual players and set conditions on all players' eligibility requirements.<sup>503</sup>

However, the Board would have two responses to this claim. First, it would not be surprising for the current Republican Board to retreat from *Trustees of Columbia*,<sup>504</sup> as Republican Boards have historically found that students cannot be employees, and this Board has already shown a willingness to disagree with the Obama-administration Board's decisions.<sup>505</sup> Second, even if football players were considered employees, the Board could point to its discussion of franchises and general contractors in *Hy-brand Industries*.<sup>506</sup> While the NCAA does hold a certain degree of control, analogous to that of the franchisor or a homeowner who sets conditions on an independent contractor's employees, the Board would reiterate, "Congress did not intend that every entity with some degree of economic relationship with the employer-disputant be thrown into its labor dispute."<sup>507</sup> In other words, the Board would reason the control

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501. See *Hy-Brand Indus.*, slip op. at 1 (promulgating a more restrictive standard); *supra* Section I.B (describing the NCAA's control).

502. *Hy-Brand Indus. Contractors, Ltd.*, slip op. at 1.

503. See NCAA DIVISION I MANUAL, *supra* note 18, art. 19.01.2 (explaining that the "infractions program shall hold institutions, coaches, administrators and student-athletes who violate the NCAA constitution and bylaws accountable for their conduct, both at the individual and institutional levels").

504. See *generally* Trs. of Columbia Univ. in the City of N.Y., 364 N.L.R.B. No. 90, slip op. at 1 (Aug. 23, 2016).

505. See Semuels, *supra* note 262 (explaining the varying political views on student collective bargaining rights); *supra* Section II.B (describing the historical political disagreement over student unionization). See *generally Hy-Brand Indus.*, slip op. (overturning an Obama-administration Board's decision after two years).

506. *Hy-Brand Indus. Contractors, Ltd.*, slip op. at 30 ("[A]ssuming that a franchisor exerts similar indirect control over each franchisee, a union could picket the franchisor and all franchisees even though its dispute only involves the employees of one franchisee.").

507. *Id.* The Board specifically criticized the applicability of a broad standard on the construction industry, saying that "a general contractor in the construction industry is not an 'employer' of subcontractor employees, even though general contractors obviously have 'reserved' control over most if not all work performed by subcontractor employees on construction projects." See *id.*

is too attenuated and not under the scope of the Act as congressionally intended.<sup>508</sup>

However, the problem with the Republican Board's narrow view of the NLRA is that it does contravene the core purpose of the Act: the resolution of labor disputes via peaceful settlements in order to protect vulnerable workforces.<sup>509</sup> The Supreme Court has specified that the Board possesses congressionally delegated authority to adapt the provisions of the NLRA to the fluctuating nature of modern workforces.<sup>510</sup> Therefore, it is the Board's sole responsibility to implement the provisions of the Act in order to protect employees who are subject to a system that has been labeled as a dictatorship<sup>511</sup> and a farce.<sup>512</sup> In fact, to allow the continuance of an exploitive system of amateurism in the face of the obvious emergence of a multi-billion dollar industry<sup>513</sup> would be directly contrary to the purposes of the NLRA expressed by the Act<sup>514</sup> and the Supreme Court.<sup>515</sup> If the true goal of the NLRA is resolution of labor disputes

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508. *Id.* (“[T]he uncertainty created by *Browning-Ferris*’ vague standard created an unreasonable risk that . . . other parties would discover that they unlawfully injected themselves into collective bargaining involving another employer and its union(s), based on a relationship that turned out to be insufficient to result in joint-employer status.”).

509. *Browning-Ferris II*, 362 N.L.R.B. No. 186, slip op. at 16 (Aug. 27, 2015), *overruled by Hy-Brand Indus. Contractors, Ltd.*, slip op. at 1; Edelman, *supra* note 150 (stating “Congress passed the [NLRA] in 1935 to ensure that otherwise powerless employees would enjoy better terms and conditions than if each employee were to bargain independently”).

510. *See Browning-Ferris II*, slip op. at 15 (detailing Supreme Court jurisprudence that established the Board’s job is to apply the Act to fluid and complex industrial structures).

511. *See Nocera & Strauss*, *supra* note 27 (referencing Kain Colter’s proclamation the NCAA’s structure “resembles a dictatorship, where the NCAA places their rules and regulations on these students without their input or without their negotiation”).

512. *See McCormick & McCormick*, *supra* note 2, at 157 (describing the label of student–athlete as “farcical”).

513. *See id.* at 76, 157.

514. *See* 29 U.S.C. § 151 (2012) (providing that the NLRA was intended to “encourage[e] the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection”).

515. *See, e.g., Ford Motor Co. v. NLRB*, 441 U.S. 488, 496 (1979) (labeling the primary responsibility of the Board to be “that of ‘applying the general provisions of the Act to the complexities of industrial life’”) (quoting *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963)); *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 211 (1964).

via peaceful settlements,<sup>516</sup> it is inexcusable for the Board to permit the NCAA and member institutions to continue to impose their requirements without the slightest input from the laborers.<sup>517</sup> Unfortunately, the Board missed its chance to right the wrongs inherent in college football, and now the exploitation will endure for the foreseeable future.<sup>518</sup>

## CONCLUSION

The motivation behind the Northwestern football players' attempt to unionize in 2014 was not rooted in greed or a desire for attention; rather, the players desired to gain a voice in a system they considered to be a dictatorship.<sup>519</sup> However, the Board denied such an opportunity for the players by choosing to pass on exercising jurisdiction, rationalizing that it did not want to create labor unrest.<sup>520</sup> What the Board utterly failed to consider, however, is that there is already labor unrest of the highest severity—exploitation.<sup>521</sup> Toward the end of Barack Obama's presidential term, his appointed Board members took action that suggested a change in college athletics might be forthcoming.<sup>522</sup> Unfortunately, the Obama-administration Board was not swift enough, ultimately giving way to political modifications that led to the foreclosure of a persuasive argument that the NCAA is a joint employer under the NLRA.<sup>523</sup> Looking

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516. See *Browning-Ferris II*, 362 N.L.R.B. No. 186, slip op. at 16 (Aug. 27, 2015), *overruled by Hy-Brand Indus. Contractors, Ltd.*, 365 N.L.R.B. No. 156 (Dec. 14, 2017).

517. See *McCormick & McCormick*, *supra* note 2, at 79 (contending “the relationship between scholarship athletes and their colleges and universities can no longer be fairly characterized as anything other than an employment relationship in which the athletes serve as employees and the institutions for which they labor as their employers”).

518. See *Edelman*, *supra* note 150.

519. See *Nocera & Strauss*, *supra* note 27 (noting the players' belief that the current system has marginalized them).

520. See *Northwestern Univ.*, 362 N.L.R.B. No. 167, slip op. at 1 (Aug. 17, 2015).

521. See *McCormick & McCormick*, *supra* note 2, at 157 (arguing the label of student-athlete “obscure[es] the reality of [the players'] exploitation”); *supra* Section I.B (describing the NCAA's astonishing financial state).

522. See *e.g.*, *Browning-Ferris II*, 362 N.L.R.B. No. 186, slip op. at 1 (Aug. 27, 2015), *overruled by Hy-Brand Indus. Contractors, Ltd.*, 365 N.L.R.B. No. 156 (Dec. 14, 2017); *Trs. of Columbia*, 364 N.L.R.B. No. 90, slip op. at 10 (Aug. 23, 2016); Internal Memorandum, *supra* note 10, at 22.

523. See *Hy-Brand Indus. Contractors, Ltd.*, slip op. at 1; *supra* Section IV.D.

back, it is safe to say this oversight may have cost college football players their escape from exploitation and that the Board has failed to protect some of the nation's most vulnerable employees.<sup>524</sup>

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524. See Edelman, *supra* note 150.