

AN INVISIBLE UNION FOR AN INVISIBLE LABOR MARKET: COLLEGE FOOTBALL AND THE UNION SUBSTITUTION EFFECT

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Should college football players have collective bargaining rights? The National Collegiate Athletic Association's (NCAA) contractual relationship with student-athletes provides scholarships while limiting the athletes' earnings. This model is premised on the belief that players are amateurs. But this view is contradicted by the heavy commercialization of NCAA football. Meanwhile, football players do not receive enough aid to pay their full cost of attending school. This Article theorizes that college football players participate in an invisible labor market, where the NCAA is a monopsony purchaser of their labor and strictly allocates these market inputs to regulate competitive balance between schools. I propose a unique and limited form of collective bargaining for college football that is consistent with the NCAA's amateur athlete model. This proposal does not involve wage negotiations or strikes, but allows players to bargain over scholarship shortfalls, extended or improved educational benefits, complete medical and hospital insurance for football-related injuries, long-term disability insurance for injuries such as brain trauma, transfer and eligibility rights not inconsistent with NCAA rules, and a grievance process to challenge abusive treatment by coaches and administrators. This proposal also draws from industrial relations research on the "union substitution" effect, which shows that when employers face a credible threat of unionization they provide more voice and benefits to employees. If state or federal lawmakers proposed this type of representation for college football players, this would be enough to stimulate a robust union substitution effect—that is, the NCAA would likely be pressured to provide players a voice in their own affairs and be more responsive to their own concerns.

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INTRODUCTION

All of these things . . . are “terms of employment” that currently sweeten the pot for athletes choosing among college football programs. They provide, apart from tuition, room and board, the means by which colleges, as purchasers of labor, attract and compensate their players, the suppliers of labor. That the medium of exchange is non-monetary does not alter the fact that these benefits constitute the “price” of labor in the college football market, or that the categorical elimination of one of those benefits harms competition in that market.

—Banks v. NCAA¹

No knowledgeable observer could earnestly assert that big-time college football programs competing for highly sought-after high school football players do not anticipate economic gain from a successful recruiting program. . . . [T]he transactions those schools make with premier athletes—full scholarships in exchange for athletic services—

1. 977 F.2d 1081, 1096 (7th Cir. 1992).

are not noncommercial, since schools can make millions of dollars as a result of these transactions.

—Agnew v. NCAA²

Clearly, the collegiate model is dead.

—John Marinatto, former Big East Commissioner³

A. Context for the Amateur-Professional Distinction

At first glance, the National Collegiate Athletic Association's (NCAA) regulation of college athletics is far removed from collective bargaining. The mission of the NCAA is to promote academic achievement in the context of athletic competition.⁴ The NCAA Manual restricts compensation and employment for student-athletes.⁵ The association requires that athletes maintain their amateur status.⁶ Teams must demonstrate academic progress of their athletes or face serious sanctions.⁷ So, why should collective bargaining—a process that is

2. 683 F.3d 328, 340 (7th Cir. 2012).

3. Pete Thamel, *Commissioner Steps Down amid Big East's Instability*, N.Y. TIMES, May 8, 2012, at B12.

4. *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 88–89 (1984) (explaining that since 1905 the NCAA has enforced standards for academic eligibility while regulating athletic competition for member schools); *see also* Rodney K. Smith, *A Brief History of the National Collegiate Athletic Association's Role in Regulating Intercollegiate Athletics*, 11 MARQ. SPORTS L. REV. 9, 12 (2000) (reporting that the death of eighteen college football players prompted President Theodore Roosevelt to pressure colleges into forming their own regulatory organization). Sixty-two schools formed the Intercollegiate Athletic Association, which was renamed the National Collegiate Athletic Association in 1910. *Id.*

5. *See* 2011-12 NCAA DIVISION I MANUAL art. 15.1 (2012) [hereinafter DIVISION I MANUAL], *available at* <http://www.ncaapublications.com/p-4224-2011-2012-ncaa-division-i-manual.aspx>; *see also Afif v. Loyola Marymount Univ.*, No. B169946, 2004 WL 2596002, at *7 n.11 (Cal. Ct. App. Nov. 16, 2004). “A student-athlete shall not be eligible to participate in intercollegiate athletics if he or she receives financial aid that exceeds the value of a full grant-in-aid” *Id.* (quoting 2009-10 NCAA DIVISION I MANUAL art. 15.1 (2011)). At that time, the NCAA set an earnings limit that included income from “[e]mployment during semester or term time . . . except for the legitimate on- or off-campus employment of Division I student-athletes who may receive earnings per 15.2.6.1 up to the value of a full grant-in-aid plus \$2,000.” *Id.*

6. DIVISION I MANUAL, *supra* note 5, art. 12.01.2; *see also Oliver v. NCAA*, 920 N.E.2d 203, 209 (Ohio Misc. 2d 2009) (reporting that the NCAA adopts the amateur model of collegiate athletics and delineates collegiate and professional sports).

7. *See UConn Loses Appeal*, PITTSBURGH POST-GAZETTE, Apr. 6, 2012, at C8. The NCAA disqualified the University of Connecticut men's basketball team in post-season tournaments due to failure to achieve minimum Academic Progress Rate scores. *Id.*

predicated on an employment relationship—be considered for NCAA student-athletes?

More Equitable Distribution of Wealth: Division I college football generates enormous wealth for schools, conferences, and the NCAA.⁸ These athletic competitions also enrich communities that host contests.⁹ So much money is at stake in televised football games that universities took their revenue dispute with the NCAA to the Supreme Court and won the right to make their own TV deals.¹⁰ The players who provide this highly marketable product were ignored in this epic litigation. Today, some universities defect from one conference to join another. They are motivated by finances, not academics.¹¹ Donors shower universities with millions of dollars to finance lavish sports arenas.¹² Coaches cash in on their players' success with multi-million dollar employment contracts.¹³ The on-field success of college players translates into commercial licensing agreements that benefit schools—

8. See *Agnew v. NCAA*, 683 F.3d 328, 340 (7th Cir. 2012) (“Successful college football programs often lead to large profits, and to acquire those profits, schools must pay in-kind benefits, namely, grant-in-aid, access to training facilities, and instruction from premier coaching.”); see also *infra* charts 1–3 for revenues for football programs.

9. See *The Bowl Championship Series: Money and Other Issues of Fairness for Publicly Financed Universities: Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection of the H. Comm. on Energy and Commerce*, 111th Cong. 48–49 (2009) (statement of Derrick Fox, Former Chairman, Football Bowl Ass’n) (in 2009 these games created “more than \$1 billion in annual combined economic impact to the host cities, donate[d] one-quarter of a billion dollars annually to higher education, and [gave] millions to charitable endeavors in their own communities”).

10. *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 136 (1984).

11. See, e.g., *Univ. of Conn. v. Atlantic Coast Conference*, No. X07CV030082695S, 2004 WL 424219, at *4 (Conn. Super. Ct. 2004) (the University of Connecticut and other conference schools sued Boston College, also a conference affiliate, for jumping to the Atlantic Coast Conference); Peter Kreher, *Antitrust Theory, College Sports, and Interleague Rulemaking: A New Critique of the NCAA’s Amateurism Rules*, 6 VA. SPORTS & ENT. L.J. 51, 71–74 (2006).

12. See Ann Zimmerman & Leslie Scism, *Boone Calls the Plays as Largess Complicates Life at Alma Mater*, WALL ST. J., July 7, 2012, at A1 (T. Boone Pickens donated \$165 million to Oklahoma State University, Ralph Engelstad donated \$100 million to the University of North Dakota, Phil Knight donated \$100 million to the University of Oregon, and John Hammons donated \$32.5 million to Missouri State University for sports programs).

13. See *O’Brien v. Ohio State Univ.*, No. 06AP-946, 2007 WL 2729077, at *1, *23 (Ohio Ct. App. Sept. 20, 2007) (affirming \$2.49 million judgment for basketball coach whose employment contract was breached by university).

but not star athletes.¹⁴ While many others prosper from college sports, the NCAA strictly caps the financial gains of players.¹⁵

The Grant-in-Aid Contract Reflects Unequal Bargaining Power. Student-athletes sign a form contract that binds them to NCAA rules. Athletes have no bargaining power over these take-it-or-leave-it offers.¹⁶ In addition, the contract is drafted by a monopsony organization,¹⁷ with the result that standardized scholarship contracts eliminate competition in terms and conditions between schools. While players receive oral promises of four-year scholarships from coaches, their contracts limit aid to annual renewals, subject to limitations.¹⁸ The agreements also fail to cover the full cost of their education.¹⁹

14. See, e.g., *O'Bannon v. NCAA*, No. C 09 3329 CW, 2009 WL 4899217 (N.D. Cal. Dec. 11, 2009) (denying the NCAA's motion to transfer venue). A UCLA basketball player alleged that the association violated the Sherman Antitrust Act by preventing him and other players from licensing their images, while exploiting his likeness in a commercial video game. *Id.* at *1. In 2011, a ruling reinstated EA Sports as a defendant for conspiring with the NCAA to withhold royalties and fees from athletes after their playing days ended. PBS, *The NCAA Lawsuit*, FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/money-and-march-madness/ncaa-lawsuit/> (last visited Oct. 12, 2012). The case has now been consolidated. See *In re NCAA Student Athlete Name and Likeness Licensing Litig. for N. Dist. of Cal.*, No. 1:11MC63, 2012 WL 2281253 (M.D.N.C. June 18, 2012).

15. See Chad W. Pekron, *The Professional Student Athlete: Undermining Amateuism as an Antitrust Defense in NCAA Compensation Challenges*, 24 *HAMLIN L. REV.* 24, 30 (2000).

16. See Debra D. Burke & Angela J. Grube, *The NCAA Letter of Intent: A Voidable Agreement for Minors?*, 81 *MISS. L.J.* 265, 297 (2011) (the NCAA misleads recruits into believing they are bound once they sign intent agreements).

17. See Daniel E. Lazaroff, *The NCAA in Its Second Century: Defender of Amateuism or Antitrust Recidivist*, 86 *OR. L. REV.* 329, 351 n.115 (2007) ("It would be more accurate to view the NCAA as a collusive monopsonist.").

18. E.g., 2007–2008 SOUTHEASTERN CONFERENCE FINANCIAL AID AGREEMENT, available at http://www.lsusports.net/src/data/lsu/assets/docs/ad/policymanual/pdf/appd502D3.pdf?DB_OEM_ID=5200 (last visited Oct. 12, 2012). However, the NCAA announced in 2012 a change in this policy. See *Agnew v. NCAA*, 683 F.3d 328, 332 n.1 (7th Cir. 2012) (NCAA repealed its prohibition on multiyear scholarships). This repeal does not necessarily mean that schools will offer and honor four-year scholarship agreements—only that a multiyear grant is not disallowed.

19. See Christian Dennie, *White Out Full Grant-in-Aid: An Antitrust Action the NCAA Cannot Afford to Lose*, 7 *VA. SPORTS & ENT. L.J.* 97, 103 (2007) (citing *White v. NCAA*, No. CV-06-0999 RGK (C.D. Cal. filed Sept. 8, 2006)) (former NCAA athletes, including a football player, sued to remove the cap on financial aid for athletes and allow them to receive aid up to the cost of attendance); Romogi Huma & Ellen J. Staurowsky, *Scholarship Shortfall Study Methodology: An Examination of the Financial Shortfall for Athletes on Full Scholarship at NCAA Division I Institutions*, NAT'L C. PLAYERS ASS'N, <http://www.ncpanow.org/research?id=0022> (discussing the National College Players Association's (NCPA) calculation of scholarship shortfall) (last visited Oct. 12, 2012).

De Facto Employment. Student-athletes engage in activities that are comparable to employment. They participate in a labor market that treats their athletic competition as an implicit apprenticeship.²⁰ Unlike other students, they are under constant direction and control by their coaches, not only during practice but in the scheduling of classes and the rest of their daily routines.²¹ During the off-season, they are expected to participate in “voluntary” workouts²²—a practice that compares to requiring employees to continue to work while they are off the clock. By comparison, certain unpaid internships for college students violate the Fair Labor Standards Act (FLSA) because students perform services that are indistinguishable from employment.²³

The Industrial Relations Comparison. Industrial-period workers were forced to sign contracts that prohibited them from joining a union.²⁴ These “yellow dog” contracts prevented them from joining a union by threatening termination and, therefore, exploited their inferior bargaining power.²⁵ Similarly, the NCAA restricts athletes from being represented by agents.²⁶ Like the yellow dog contract, this rule inhibits negotiation for pay.²⁷

While NCAA athletes enjoy vastly superior conditions and opportunities compared to turn-of-the-century industrial workers,²⁸ the pedestal on which they are placed is, “upon closer inspection, . . . revealed as a cage.”²⁹ This is because so many college players leave school with no degree³⁰—a betrayal of the NCAA’s goal of using

20. *E.g.*, *Clarett v. NFL*, 369 F.3d 124, 130 (2d Cir. 2004).

21. *E.g.*, *Aff v. Loyola Marymount Univ.*, No. B169946, 2004 WL 2596002, at *7 n.11 (Cal. Ct. App. Nov. 16, 2004).

22. *See generally Will v. Northwestern Univ.*, 881 N.E.2d 481 (Ill. App. Ct. 2007) (discussing the death of a college football player following a preseason conditioning drill during football practice).

23. *See generally infra* notes 56–64 and accompanying text.

24. Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017, 1037 n.146 (1996).

25. *Id.*

26. DIVISION I MANUAL, *supra* note 5, art. 12.3.1.

27. *See Lazaroff, supra* note 17, at 334–36.

28. *Dothard v. Rawlinson*, 433 U.S. 321, 346 (1977) (paternalistic treatment of women in the workplace is insidious employment discrimination).

29. *Sail’er Inn, Inc. v. Kirby*, 485 P.2d 529, 541 (Cal. 1971).

30. *See* Jordan Grimm, A Study of the Effect of Collegiate Football Success on Student-Athlete Graduation Rates (Dec. 3, 2004) (unpublished University of Central Florida student coursework), *available at* <http://www.bus.ucf.edu/faculty/rhofler/file.axd?file=2011%2F2%2FGrimm-Football+Graduation+Rates.pdf> (graduation rate for Division I football teams was 51.1%); Patrick James Rishe, *A Reexamination of How Athletic Success Impacts Graduation Rates*, 62 AM. J. ECON. & SOC. 407, 415 tbl.2 (2003) (football graduation rate at Division I schools was 52.46%).

competitive athletics as a vehicle for promoting academic achievement. Only a few earn a living as professional athletes.³¹ Furthering the industrial relations analogy, NCAA athletes lack due process and other fairness protections.³² Also, some athletes want a voice in the rules, regulations, and culture that pervade their lives.³³

This Article does not suggest that the same collective bargaining regime for National Football League (NFL) players should apply to college football players. Nor does it suggest that players be paid a salary or wages,³⁴ entitled to negotiate a personal service contract, or allowed to strike. This Article proposes that college football players have a right to collective bargaining because they function like employees; generate great wealth but share in little of it; are subject to a non-negotiable, one-sided agreement imposed by a monopsony; receive less than four-year scholarships; pay out of pocket or borrow money for scholarship shortfalls; and are penalized for transferring to other schools. They play in a violent sport that causes serious injury and, on rare occasions, death, but are usually disqualified for worker's compensation. They are also uninsured for long-term medical disabilities. Players are idealized as student-athletes but many exhaust their eligibility without earning a degree. These "Saturday heroes" are solely dependent on a monopsony to enact regulations for their welfare. While the NCAA recently adopted a reform that addressed some of the problems identified in this Article, its board of trustees aborted this effort to implement change.³⁵ Players have no voice in their welfare.

31. Only 1.3% of NCAA men's basketball players, 0.9% of women's basketball players, 1.6% of football players, and 9.7% of baseball players become pro athletes. *Probability of Competing in Athletics beyond High School*, NCAA, <http://www.ncaa.org/wps/wcm/connect/public/Test/Issues/Recruiting/Probability+of+Going+Pro> (last updated Sept. 17, 2012).

32. Richard G. Johnson, *Submarining Due Process: How the NCAA Uses Its Restitution Rule to Deprive College Athletes of Their Right of Access to the Courts . . . Until Oliver v. NCAA*, 11 FLA. COASTAL L. REV. 459, 487 (2010).

33. See Dana O'Neil, *Student-Athletes Ask: Will NCAA Listen?*, ESPN (Oct. 25, 2011), http://espn.go.com/college-sports/story/_/id/7148175/ncaa-student-athletes-ask-cut-television-revenue-cover-school-costs. Three hundred football and men's basketball players signed a petition seeking a greater share of the wealth in their sports. *Id.* Keeping with the NCAA amateur model, the petition proposes that revenues be set aside in a "lock box" for players who complete their eligibility. *Id.*

34. *But see* Brian G. Carlson, *Pay-for-Play to Face Debate*, LINCOLN J. STAR, Mar. 4, 2003, at A1 (discussing a Nebraska bill that revives 1988 legislation, vetoed by the governor, that would pay a stipend to University of Nebraska football players).

35. Rachel George, *Momentum Gathers for SEC to Start TV Network*, ORLANDO SENTINEL, June 1, 2012, at B1 (the NCAA approved legislation in October 2011 to allow schools to pay athletes a \$2000 stipend, but the Division I board of directors suspended the rule in January 2012).

These are the reasons for proposing collective bargaining for college football players.

B. Overview and Organization of this Article

I theorize that college football players participate in an invisible labor market, where the NCAA is a monopsony purchaser and strictly allocates their labor to ensure competitive balance between schools. This theory is supported by examining the U.S. Tax Code, the Fair Labor Standards Act, the employment-at-will doctrine, and worker's compensation laws. Specific provisions suggest that NCAA football programs are employers because they control so much of a player's nonacademic activities and derive a direct financial benefit from this labor.³⁶

This Article proposes a unique and limited form of collective bargaining for Division I football. This conception accounts for the fact that NCAA football differs from the NFL model because college players are full-time students who must adhere to a code of amateurism. Thus, the proposed model of collective bargaining does not involve wage negotiations or strikes. My analysis shows, however, that players have interests apart from wages. These include scholarship shortfalls (the difference between their grant-in-aid and true cost for attending college), extended or improved educational benefits, complete medical and hospital insurance for football-related injuries, long-term disability insurance for injuries such as brain trauma, transfer and eligibility rights not inconsistent with NCAA rules, and a grievance process to challenge abusive treatment by coaches and administrators. For negotiations between players and schools that deadlock on these subjects, the proposal draws from public sector labor laws that bar strikes but allow arbitration. This proposal would not alter the NCAA's amateur character.

The main thesis is that a plausible threat to unionize college football players will produce a "union substitution" effect—the NCAA will be induced to provide players a voice in their affairs and to be more responsive to their concerns. That process cannot begin unless there is a credible proposal to legislate collective bargaining for college football. To support this idea, this Article draws from industrial relations research on the "union substitution" effect, which shows that employers often provide more voice and benefits to employees when there is a possibility of unionization. This Article develops a small-scale but plausible method to unionize college football players. Even if the

36. See *infra* charts 1–3.

concept is only proposed as state or federal legislation, the proposal alone would pressure the NCAA to provide players a voice in their affairs and to be more responsive to their concerns.

In sum, without a credible threat of unionization, the NCAA has no reason to confront the fact that it has professionalized college football. College football exploits an invisible labor market, but traditional collective bargaining is not feasible for players. However, an invisible union, derived from the union substitution effect, is a plausible way to address their interests.

I. WHY COLLECTIVE BARGAINING? THEORETICAL ELEMENTS

NCAA Division I football is so similar to the NFL that the comparison invites consideration of collective bargaining for these college athletes. When NFL players entered into their first collective bargaining agreement, they sought relief from severe labor market restrictions, such as the draft and reserve clause.³⁷ The NCAA imposes similar restrictions on Division I football players.³⁸

There is nothing new about comparing NCAA athletes to professional athletes. A few courts have ruled or suggested that NCAA athletes are similar to employees.³⁹ This idea has also enjoyed support

37. See *Mackey v. Nat'l Football League*, 543 F.2d 606, 610–11 & n.6 (8th Cir. 1976); see also Robert A. McCormick & Matthew C. McKinnon, *Professional Football's Draft Eligibility Rule: The Labor Exemption and the Antitrust Laws*, 33 EMORY L.J. 375, 439 (1984) (NFL draft eligibility rules are an unreasonable restraint of trade).

38. Each school's limit on scholarships is similar to the numerical limit on draft picks in the NFL. DIVISION I MANUAL, *supra* note 5, art. 15.5.6.1 (limiting each school's football team to eighty-five "counters"). The reserve system in the NFL, which prohibited players from moving to another team, *Mackey*, 543 F.2d at 610–11 & n.6, compares to the NCAA's restrictions on transfers, see DIVISION I MANUAL, *supra* note 5, art. 14.5.1.

39. See, e.g., *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1064 (9th Cir. 2001) ("[R]estrictions on student-athlete transfers could be loosely analogized to the National Football League free agency restrictions."); *Univ. of Denver v. Nemeth*, 257 P.2d 423, 426 (Colo. 1953) (a player had a university contract for a job as long as he was on the football team); *Van Horn v. Indus. Accident Comm'n*, 33 Cal. Rptr. 169, 170–74 (Ct. App. 1963) (widow and minor children of a college football team member, who was killed in a plane crash while returning from a game, were entitled to death benefits under the California Workmen's Compensation Act because athletic scholarship was "consideration . . . paid for services"); cf. *Rensing v. Ind. State Univ. Bd. of Trs.*, 444 N.E.2d 1170, 1174–75 (Ind. 1983); *State Comp. Ins. Fund v. Indus. Comm.*, 314 P.2d 288 (Colo. 1957) (a college student who had received an athletic scholarship for his tuition plus a part-time job, and who was fatally injured while playing in a college football game, was not entitled to a beneficiary death benefit under the Colorado Workmen's Compensation Act).

in published studies.⁴⁰ Scholarly research has also suggested that NCAA athletes should have collective bargaining rights.⁴¹

In developing a theory of collective bargaining for college football players, I take a new approach by conceptualizing that Division I football is a labor market; labor market competition among schools should be stimulated and encouraged in order to improve benefits for players; the NCAA should be pressured to provide players a uniquely limited form of representation and bargaining; and this form of collective bargaining should be specifically scaled for student-athletes and designed to avoid conflicts with NCAA rules and regulations. I now explain and justify these theoretical elements.

A. Recognize that Division I Football Is a Labor Market for Players

To begin, I focus on the only college sport that serves as an unambiguous labor market to a professional sport. College football is a minor league labor market that is the sole pipeline for the NFL. The league hires, with rare exceptions,⁴² only players who have competed in

40. See, e.g., Lee Goldman, *Sports and Antitrust: Should College Students Be Paid to Play?*, 65 NOTRE DAME L. REV. 206, 234 (1990) (“[I]t is disingenuous for the NCAA to rely on the Olympic ideal to justify restrictions on payments to athletes.”); Sharon Elizabeth Rush, *Touchdowns, Toddlers, and Taboos: On Paying College Athletes and Surrogate Contract Mothers*, 31 ARIZ. L. REV. 549, 587 (1989) (“[I]t would be naive to suppose that simply the *pretense* of maintaining the amateur ideal is essential to continuing the current system.”) (emphasis in original); Sarah M. Kinsky, Comment, *An Antitrust Challenge to the NCAA Transfer Rules*, 70 U. CHI. L. REV. 1581, 1602 (2003) (comparing NCAA transfer rules which deter the free movement of student-athletes among schools to restrictions on employees who could be competitive threat if left unrestricted); Note, *Sherman Act Invalidation of the NCAA Amateurism Rules*, 105 HARV. L. REV. 1299, 1313 (1992) (the limited compensation rule is contradicted by the fact that thirty out of thirty-three national championship basketball teams from 1952–85 violated the no-pay rule); Note, *Tackling Intercollegiate Athletics: An Antitrust Analysis*, 87 YALE L.J. 655, 659 n.22 (1978) (financial aid is a quid pro quo for a student’s exchange of athletic skills for a package of goods and services).

41. E.g., Melvin L. Braziel, Jr., *United We Stand: Organizing Student Athletes for Educational Reform*, 4 SPORTS LAW. J. 81, 111–12 (1997) (proposing a modified player association model that would bargain over terms and conditions of aid with NCAA members); Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71, 72–82 (2006); Rohith A. Parasuraman, Note, *Unionizing NCAA Division I Athletics: A Viable Solution*, 57 DUKE L.J. 727, 753 (2007).

42. Ben LeDoux, *5 NFL Players That Did Not Go to College*, MADEMAN, <http://www.mademan.com/mm/5-nfl-players-did-not-go-college.html> (last visited Sept. 30, 2012) (Antonio Gates played basketball for four years; Eric Swann was ruled academically ineligible, leading to a pre-NFL career in a semi-pro league; Vince Papale was a track star in college, and played for a semi-pro team; Ray Seals never attended college; and Darren Bennett was born in Australia and played Australian-rules football for 12 years).

NCAA football games. Moreover, because the NFL will not draft a player until three years have passed from the time his high school class graduated,⁴³ this lengthy eligibility bar turns college football into a multiyear apprenticeship.

In contrast, NCAA basketball, the other big college revenue sport, is not a sole supplier to the National Basketball Association's (NBA) labor market. The league drafts international players, and also allows teams to sign players who have played only one year in college.⁴⁴ Consequently, the apprentice analogy is weaker for college basketball. As I demonstrate later in my analysis, this distinction matters because it is not enough to suggest that all or many college athletes share in the revenue that their athletic programs generate. Before collective bargaining rights can be granted, there must be an employment relationship—and no such relationship can exist without an actual labor market.

*B. Increase Competition among Schools to Improve Benefits for
Players*

While a monopoly controls pricing by limiting competition to sell a product or service, a monopsony controls pricing by limiting purchasing competition.⁴⁵ As the primary outlet for professional football, the NFL is a monopsony purchaser for the labor of pro football players. The league enhances this power by greatly restricting competition among teams. This is accomplished by requiring all players to sign a uniform player contract, the terms of which limit their freedom in the labor market.⁴⁶

43. See *Clarett v. NFL*, 369 F.3d 124 (2d Cir. 2004). Since 1990, the NFL has disallowed a player to enter the draft until three full seasons after his high school class graduated. *Id.* at 126. The court compared this rule to hiring hall arrangements for certain unions. *Id.* at 140–41.

44. Warren K. Zola, *Transitioning to the NBA: Advocating on Behalf of Student-Athletes for NBA & NCAA Rule Changes*, 3 HARV. J. SPORTS & ENT. L. 159, 163 (2012) (from 2006–11, only thirty-seven seniors were drafted in the first round out of 180 picks, leaving the remaining draft selections to underclassmen and international players).

45. See generally *Permian Basin Area Rate Cases*, 390 U.S. 747, 794 n.64 (1968) (“Monopsony is the term used to describe a situation in which the relevant market for a factor of production is dominated by a single purchaser.”). As the term applies to a sports labor market, see Comment, *Monopsony in Manpower: Organized Baseball Meets the Antitrust Laws*, 62 YALE L.J. 576, 592 (1953) (“[O]rganized baseball’s agreements establishing a player monopsony are manifested in both the uniform player’s contract and the trade regulations.”).

46. See *Brady v. NFL*, 644 F.3d 661, 663–67 (8th Cir. 2011).

Similarly, NCAA football players must sign a grant-in-aid agreement.⁴⁷ Its terms and conditions strictly limit player mobility⁴⁸ and freedom to earn income.⁴⁹ I will show later in my analysis, the NCAA maintains its grip on the market for Division I football players by imposing “input limits” for players.⁵⁰ These include roster limits,⁵¹ transfer restrictions,⁵² and ineligibility rules for players who engage an agent or enter the pro draft prematurely.⁵³

My reasoning draws on court opinions that view collective bargaining in professional sports as an appropriate counterbalance to league-imposed labor market restrictions on players in the NFL,⁵⁴ the NBA,⁵⁵ the National Hockey League (NHL),⁵⁶ and Major League

47. *E.g.*, *In re NCAA I-A Walk-On Football Players Litig.*, 398 F. Supp. 2d 1144, 1146–47 (W.D. Wash. 2005); *Rensing v. Ind. State Univ. Bd. of Trs.*, 444 N.E.2d 1170, 1173 n.1. (Ind. 1983).

48. *See* DIVISION I MANUAL, *supra* note 5, art. 13.1.1.3 (prohibiting a school from contacting a student at another school or encouraging an athlete to transfer); *id.*, art. 14.5.1 (requiring a transfer student to complete one full year in residence at a new school before he or she is eligible to participate in athletic competition).

49. *See Sherman Act Invalidation*, *supra* note 40, at 1313 (citing noncompensation rule in 1990–91 NCAA DIVISION I MANUAL art. 12.1.4 (1990)).

50. *See Walk-On Football Players*, 398 F. Supp. 2d at 1151. For a deeper discussion of input restrictions in the context of NCAA, see *Law v. NCAA*, 134 F.3d 1010, 1023 (10th Cir. 1998) (explaining that courts tend to accept anti-competitive practices if they increase output, enhance efficiencies, introduce a new product, improve product or service quality, or improve consumer choice). But courts frown on profitability or cost savings as antitrust defenses. *Id.*

51. *See* DIVISION I MANUAL, *supra* note 5, art. 15.5.6.1 (limiting football team to eighty-five “counters”).

52. *Id.*, art. 14.5.1.

53. *See id.*, art. 12.2.4.2.3 (permitting a football player to declare for the NFL draft only once); *see also infra* notes 186–204 and accompanying text. The NCAA also forbids a player from retaining an agent. DIVISION I MANUAL, *supra* note 5, art. 12.3.1.

54. *Clarett v. NFL*, 369 F.3d 124, 140 (2d Cir. 2004) (“[T]he complex scheme by which individual salaries in the NFL are set, which involves, *inter alia*, the NFL draft, league-wide salary pools for rookies, team salary caps, and free agency, was built around the longstanding restraint on the market for entering players imposed by the eligibility rules . . .”).

55. Judge Ralph Winter had two prominent occasions to explain how collective bargaining appropriately applies to the NBA’s anti-competitive labor market restrictions. As a federal appeals judge who authored the opinion in *Wood v. NBA*, he reasoned:

Although the combination of the college draft and salary cap may seem unique in collective bargaining . . . the uniqueness is strictly a matter of appearance. The nature of professional sports as a business and professional sports teams as employers calls for contractual arrangements suited to that unusual commercial context. However, these arrangements result from the same federally mandated processes as do collective agreements in the more

Baseball (MLB).⁵⁷ Motivated to spread talent evenly across all their teams, professional leagues act as labor market monopsonies.⁵⁸ These antitrust cases involving professional athletes are similar to antitrust lawsuits involving player challenges to NCAA restrictions.⁵⁹ This comparison supports my suggestion to increase competition among schools so that players enjoy more benefits from their apprentice-like activities.

C. Spur the NCAA to Provide Players a Limited Form of Representation and Bargaining

My theory recognizes that a comprehensive collective bargaining system, patterned after the one that exists for the NFL and its players' association, is unrealistic. I hypothesize, however, that if a single Division I football team voted for a collective bargaining representative, and furthermore, was legally entitled to bargain over limited terms and conditions of their participation, the threat of wider player unionization would stimulate the NCAA to make more

familiar industrial context. Moreover, examination of the particular arrangements arrived at by the NBA and NBPA discloses that they have functionally identical, and identically anticompetitive, counterparts that are routinely included in industrial collective agreements.

809 F.2d 954, 959 (2d Cir. 1987). This view reflected his published research. See Michael S. Jacobs & Ralph K. Winter, Jr., *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 YALE L.J. 1, 11 (1971) ("The reserve or option clause is at the heart of the collective bargaining relationship and an issue which must be resolved if bargaining is to mature.").

56. See *McCourt v. Cal. Sports, Inc.*, 600 F.2d 1193, 1199 (6th Cir. 1979) ("We emphasize today . . . that the subject of player movement restrictions is a proper one for resolution in the collective bargaining context. When so resolved, as it appears to have been in the current collective bargaining agreement, the labor exemption to antitrust attack applies, and the merits of the bargaining agreement are not an issue for court determination.").

57. *Silverman v. MLB Player Relations Comm., Inc.*, 67 F.3d 1054, 1060 (2d Cir. 1995) ("Free agency and the ban on collusion are one part of a complex method—agreed upon in collective bargaining—by which each major league player's salary is determined under the Basic Agreement. They are analogous to the use of seniority, hours of work, merit increases, or piece work to determine salaries in an industrial context.").

58. Gabriel Feldman, *Brady v. NFL and Anthony v. NBA: The Shifting Dynamics in Labor-Management Relations in Professional Sports*, 86 TUL. L. REV. 831, 847 (2012) (the NFL and the NBA have a monopsony in the labor market for players); Joanna Shepherd Bailey & George B. Shepherd, *Baseball's Accidental Racism: The Draft, African-American Players, and the Law*, 44 CONN. L. REV. 197, 212 (2011) ("As MLB intended, the draft, by giving a team a monopsony in pay negotiations with its draftees, immediately reduced salaries for U.S. players.").

59. See *infra* Part II.C.

meaningful reforms that allow players to move more freely in their labor market, and to gain more financial benefits while in college (for example, full reimbursement for their actual cost of attending school).

My theory is based on an extensive research of literature in industrial relations, showing that one method that employers use to avoid unionization is to substitute their own form of employee representation to address the concerns of individual workers.⁶⁰ I suggest that the NCAA would respond to the possible advent of collective bargaining by providing football players a substitute form of representation. I also suggest that collective bargaining for even a handful of football players, if legislated at the federal or state level, would stimulate a broad union substitution effect. This is because football programs with a limited form of collective bargaining could offer attractive inducements to new recruits (for example, disability insurance for the long-term effects of brain trauma), and, consequently, upset the NCAA's carefully conceived balance of competition among member schools.

60. See Bruce E. Kaufman, *Does the NLRA Constrain Employee Involvement and Participation Programs in Nonunion Companies?: A Reassessment*, 17 YALE L. & POL'Y REV. 729, 780 (1999) ("In a union substitution strategy, the employer establishes human resource policies and practices—such as above-market wages, job security, a formal dispute-resolution process, and a culture of respect and fair dealing—intended not only to eliminate most of the sources of discontent that motivate employees to seek union representation but also to give employees more than they could hope to gain through collective bargaining."); see also ROBERT J. FLANAGAN, LABOR RELATIONS AND THE LITIGATION EXPLOSION 67–71, 85–94 (1987); THOMAS A. KOCHAN, COLLECTIVE BARGAINING AND INDUSTRIAL RELATIONS 183 (1st ed. 1980); THOMAS A. KOCHAN & HARRY C. KATZ, COLLECTIVE BARGAINING AND INDUSTRIAL RELATIONS, 190–94 (2d ed. 1988); THOMAS A. KOCHAN ET AL., THE TRANSFORMATION OF AMERICAN INDUSTRIAL RELATIONS 93–108 (1986); JOHN J. LAWLER, UNIONIZATION AND DEUNIONIZATION 72–75, 102–08 (1990) (employers impose personnel practices to frustrate unionization); PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 110 (1990); Alexander J.S. Colvin, *Institutional Pressures, Human Resource Strategies, and the Rise of Nonunion Dispute Resolution Procedures*, 56 INDUS. & LAB. REL. REV. 375, 375 (2003); Jack Fiorito, *Human Resource Management Practices and Worker Desires for Union Representation*, 22 J. LAB. RES. 335, 335 (2001); William C. Green, *Negotiating the Future: The NLRA Paradigm and the Prospects for Labor Law Reform*, 21 OHIO N.U. L. REV. 417, 418 (1994); Nancy R. Hauserman & Cheryl L. Maranto, *The Union Substitution Hypothesis Revisited: Do Judicially Created Exceptions to the Termination-at-Will Doctrine Hurt Unions?*, 72 MARQ. L. REV. 317, 321 (1989); Stephen Machin & Stephen Wood, *Human Resource Management as a Substitute for Trade Unions in British Workplaces*, 58 INDUS. & LAB. REL. REV. 201, 201 (2005); Daphne Gottlieb Taras, *Evolution of Nonunion Employee Representation in Canada*, 20 J. LAB. RES. 31, 45 (1999).

D. Create a Scalable Form of Representation for College Football Players

I theorize a form of collective bargaining that uniquely suits college football. My conception stems from the fact that NCAA football significantly differs from the NFL model because college football players are bona fide student-athletes who must adhere to a regime of amateurism.⁶¹ Thus, the model I propose does not involve wage negotiations. But players have interests in a variety of nonwage matters that affect them—for example, scholarship shortfall,⁶² disability insurance,⁶³ interschool transfer rights,⁶⁴ and a grievance system that protects them from abusive coaching behaviors.⁶⁵

61. See *infra* notes 186–204 and accompanying text.

62. The National College Players Association (NCPA) has identified scholarship shortfall as a problem for many NCAA athletes. See Huma & Staurowsky, *supra* note 19, at 1. The term refers to the difference between what a grant-in-aid pays and total expenses for attending school. *Id.* The NCPA commissioned a study based on data from the U.S. Department of Education, which measured the total cost of attending a university or college (i.e., tuition, fees, and estimated student expenses). *Id.* at 2. The NCPA's study of 336 NCAA schools for the 2009–10 academic year found an average shortfall of \$2951 per year. *Id.* at 3. This implies that students on a full and recurring scholarship would pay \$11,804 over four years. *Id.*

63. This Article proposes a long-term disability plan for football-related head injuries. NFL players have a broad disability plan, but recovery for head trauma is problematic. See Alan Schwarz, *Duerson's Case Highlights the Limits of the N.F.L.'s Disability Plan*, N.Y. TIMES, May 5, 2011, at B15. The NFL-NFLPA Collective Bargaining Agreement has a disability insurance plan in Article 61. See NFL-NFLPA, COLLECTIVE BARGAINING AGREEMENT art. 61 (2011), available at http://images.nflplayers.com/mediaResources/files/PDFs/General/2011_Final_CBA.pdf.

64. I do not offer a specific proposal, but call attention to the problem of over-restricting athletes from transferring. See illustration *infra* note 160 (where the University of Wisconsin's men's basketball coach restricted the transfer of Jarrod Uthoff beyond conference rules); see also *Afif v. Loyola Marymount Univ.*, No. B169946, 2004 WL 2596002, at *4–5 (Cal. Ct. App. Nov. 16, 2004) (new coach refused to renew a player's grant-in-aid because he wanted to start over with his own players).

65. This Article does not propose a definition of coaching abuse, leaving that for bargaining between players and schools. See, e.g., *Adam James 'Closet' Video: Alleged Mike Leach Punishment Footage Surfaces*, HUFFINGTON POST (Mar. 18, 2010, 6:12 AM), http://www.huffingtonpost.com/2009/12/31/adam-james-closet-video-m_n_407983.html (last updated May 25, 2011) (discussing the alleged mistreatment of a player by Texas Tech head football coach Mike Leach, accused of forcing the player to spend time in a dark closet after disclosing he had a concussion); Dugan Arnett, *Ex-player Accuses Mangino of Mistreatment*, LJWORLD.COM (Dec. 2, 2009, 5:47 PM), <http://www2.ljworld.com/news/2009/dec/02/ex-player-accuses-mangino-mistreatment/> (reporting player allegations against head football coach Mark Mangino, accusing him of ordering extreme and injurious physical punishments); Austin Knoblauch, *South Florida's Jim Leavitt Fired for Allegedly Mistreating Player*, L.A.

My theory is also unique for sports because it precludes the use of economic weapons—that is, it forbids strikes and lockouts. Given the short duration of college playing careers⁶⁶ and the necessity for players to continue their education while they are players, a strike/lockout model is unrealistic. Strike weapons are also inappropriate because the potential bargaining structure for all NCAA Division I schools would span private and public sectors. No single labor law covers both domains.⁶⁷ It is implausible, therefore, to invent a labor law for college athletics that would transcend this fractured approach to labor policy.

To understand this point, consider a strike at a private football program subject to the National Labor Relations Act—for example, Stanford. This would have a direct spillover effect for public school football programs who play against Stanford—for example, UCLA and Washington. These institutions are under the jurisdiction of state collective bargaining laws, not the National Labor Relations Act (NLRA).⁶⁸ Thus, a player strike at Stanford would potentially ruin the season for public schools that are covered by state labor laws. My approach avoids this chaos—it provides for continuity of games while allowing represented players recourse to a third-party neutral for resolving a dispute with a school.

II. PUBLIC POLICY PREDICATES FOR COLLECTIVE BARGAINING IN DIVISION I FOOTBALL

Collective bargaining is not possible unless certain legal and public policy preconditions exist. First, there must be an employment

TIMES (Jan. 8, 2010, 10:39 AM), http://latimesblogs.latimes.com/sports_blog/2010/01/jim-leavitt-south-florida-fired-mistreating-player.html (discussing a coach's firing after he allegedly grabbing a player by the throat and slapped him, causing cuts on the player's face); John Taylor, *Texas Tech Hires Trainer Accused of, Sued for Mistreating Player*, NBC SPORTS (July 8, 2010, 5:01 PM), <http://collegefootballdiscuss.com/2010/07/08/texas-tech-hires-trainer-accused-of-sued-for-mistreating-player/> (discussing an offensive lineman for Auburn who accused the strength coach of aggressively accelerating his weight lifting program after back surgery and giving orders that directly conflicted with the treatment program prescribed by the surgeon—allegedly, this led to a more serious second injury)). For more examples, see Ray Yasser & Clay Fees, *Attacking the NCAA's Anti-Transfer Rules as Covenants Not to Compete*, 15 SETON HALL J. SPORTS & ENT. L. 221, 251 n.188 (2005).

66. See DIVISION I MANUAL, *supra* note 5, art. 14.2.1. Unlike NFL players, who have no cap on the years they are eligible to compete, the NCAA limits player eligibility to five years. *Id.*

67. See *infra* notes 221–23 and accompanying text.

68. See *infra* note 243 and accompanying text (discussing the NLRA's exclusion of states and political subdivisions). These schools are in states that provide public sector bargaining rights. See *infra* note 237.

relationship. The fact that the NCAA defines the athletic experience of football players as amateur competition is a major impediment to collective bargaining. In the following analysis, I demonstrate that Division I football players are de facto employees. They should qualify for treatment as employees under a variety of federal and state law criteria that define an employment relationship: the U.S. Tax Code, the Fair Labor Standards Act, the common law doctrine known as employment-at-will, and state worker's compensation laws.

Beyond this legal precondition, the NLRA favors collective bargaining as a method to address inequality of bargaining power between employers and employees. Division I football generates far more revenue than costs.⁶⁹ Currently, players have no power to negotiate the terms and conditions of their participation, not even on subjects that have no connection to income—for example, the right to transfer to another school without restriction.

Antitrust law is another public policy that addresses the unique circumstances of Division I football players. Their economic conditions are strictly regulated by the NCAA. The NCAA is a monopsony that stifles competition for the valuable services of these players by imposing scholarship limits. The NCAA augments this anti-competitive practice by strictly limiting conditions for players to transfer to other schools. This has pro-competitive effects for football programs by spreading, and preserving in place, the supply of talented players and making games more interesting. But these beneficial effects come at the expense of players, who are unable to challenge or negotiate these labor market restrictions.

*A. Employment Statutes, Regulations, and Common Law Doctrines:
Players Are De Facto Employees*

This Section explains and justifies the legal arguments for treating Division I football players as employees and not merely student-athletes. This analysis begins in Subsection 1 with the U.S. Tax Code and provisions that define an employment relationship. During and outside competitive seasons, coaches exercise the degree of behavioral control over players that is common to the employment relationship. Next, in Subsection 2, the definition of employment and employee under the Fair Labor Standards Act is explored. The Department of Labor's regulation of unpaid internships—a somewhat common situation today that has drawn scrutiny from the federal agency—is applied to the direction and control of football players

69. See *infra* charts 1–3.

outside the classroom. The analysis, in Subsection 3, also includes the common law doctrine of employment-at-will and shows that NCAA athletes are treated more like employees than students in matters involving team discipline. They can be summarily dismissed from teams—like employees can be fired from their jobs—not only for violating rules, but for sub-par performance. Subsection 4 examines several attempts on behalf of seriously or fatally injured football players to recover compensation. While the majority trend rejects these attempts to equate college football competition to employment, a few have found an employment relationship. Overall, the analysis in this Section shows that when common law doctrines, employment statutes, and administrative regulations are applied to the economic realities of college football, the activities of a player tend to indicate an employment relationship.

1. U.S. TAX CODE

The U.S. Tax Code excludes scholarships as income, but college students must report room and board as taxable income.⁷⁰ In another tax provision, the Internal Revenue Service (IRS) uses a multi-factor test to determine if an employment relationship exists.⁷¹ When the factors are applied to the experiences of football players, they tend to support finding an employment relationship.⁷²

The first factor, behavioral control, is the right to direct how a person performs specific tasks for which he is engaged.⁷³ NCAA coaching staffs control more than just a player's regular season activities—for example, they control off-season conditioning drills. In

70. INTERNAL REVENUE SERV., DEP'T OF TREASURY, TAX BENEFITS FOR EDUCATION: FOR USE IN PREPARING 2011 RETURNS 40 (2012), *available at* <http://www.irs.gov/pub/irs-pdf/p970.pdf>.

71. *See* WILLIAM HAYS WEISSMAN, SECTION 530: ITS HISTORY AND APPLICATION IN LIGHT OF THE FEDERAL DEFINITION OF THE EMPLOYER-EMPLOYEE RELATIONSHIP FOR FEDERAL TAX PURPOSES 5, *available at* http://www.irs.gov/pub/irs-utl/irpac-br_530_relief_-_appendix_natrm_paper_09032009.pdf.

72. Only the third element, relationship of the parties, *see id.*, favors the schools. This is because schools emphasize amateur competition and the player's pursuit of a degree. *See* DIVISION I MANUAL, *supra* note 5, art. 12.1.2.1.

73. *See* WEISSMAN, *supra* note 71, at 5. This applies to college football players, whose game, practice, and individual training activities are controlled for more than forty hours per week during the season. *See* NCAA, EXAMINING THE STUDENT-ATHLETE EXPERIENCE THROUGH THE NCAA GOALS AND SCORE STUDIES 17-18, *available at* http://www.ncaa.org/wps/wcm/connect/5fb7ac004567f21ead40bfc8c7999200/Goals10_score96_final_convention2011_public_version_01_13_11.pdf?MOD=AJPERES&CACHEID=5fb7ac004567f21ead40bfc8c7999200.

Will v. Northwestern University,⁷⁴ a court approved a \$16 million settlement arising from a wrongful death claim after a college football player died during an organized summer workout.⁷⁵ Other NCAA football players have also died in off-season workouts.⁷⁶

These cases do not prove the existence of an employment relationship, but they provide evidence in support of the behavioral control test. The off-season conditioning drills that led to these players' deaths were structured more like jobs than avocations. During the school year, coaches also exert control beyond practices and games. While the dispute in *Afif v. Loyola Marymount University*⁷⁷ occurred in the context of college basketball, it involved a player-control phenomenon that could also occur in football: a coach's control of a player's class schedule.⁷⁸

The second IRS factor, financial control,⁷⁹ also applies to college football players. Schools strictly control the financial activities of players.⁸⁰ *In re NCAA I-A Walk-On Football Players Litigation*⁸¹ noted that "[t]he law is clear that athletes may not be 'paid to play.'"⁸² The NCAA articles that protect amateurism in college athletics are simply another way of saying that universities and colleges exert extreme financial control over football players.⁸³

74. 881 N.E.2d 481 (Ill. App. Ct. 2007).

75. *Id.* at 487–88.

76. Tim Griffin, *Coaches Plan to Prevent Workout Deaths; Ongoing Program Would Be Watched*, SAN ANTONIO EXPRESS-NEWS (Jan. 10, 2002), at 1C (reporting that the deaths of three college players renewed discussion of how college football teams conduct voluntary workouts).

77. No. B169946, 2004 WL 2596002, at *1 (Cal. Ct. App. Nov. 16, 2004).

78. *Id.* at *2 (coaching staff handled all course enrollments and drops for players).

79. See WEISSMAN, *supra* note 71, at 5. This factor applies to college football players insofar as schools have a strictly defined right to control the business activities of players. See DIVISION I MANUAL, *supra* note 5, art. 12.1.2.1. Only the third factor, relationship of the parties, see WEISSMAN, *supra* note 71, at 5, favors the schools. This is because schools emphasize amateur competition and the player's pursuit of a degree. See DIVISION I MANUAL, *supra* note 5, art. 2.9.

80. See DIVISION I MANUAL, *supra* note 5, art. 12.1.2.1.

81. *In re NCAA I-A Walk-On Football Players Litig.*, 398 F. Supp. 2d 1144 (W.D. Wash. 2005).

82. See *id.* at 1148 (citation omitted).

83. See *McCormack v. NCAA*, 845 F.2d 1338, 1344–45 (5th Cir. 1988) (upholding rules that restricted compensation for football players to scholarships with limited financial benefits); *Gaines v. NCAA*, 746 F. Supp. 738 (M.D. Tenn. 1990) (holding that the NCAA is entitled to revoke an athlete's eligibility when the individual enters a draft or signs with an agent); *Justice v. NCAA*, 577 F. Supp. 356, 383 (D. Ariz. 1983) (enforcing a rule denying an athlete's eligibility for accepting payment to play in the sport). *But see Oliver v. NCAA*, 920 N.E.2d 203 (Ohio Misc. 2d 2009) (the

2. THE FAIR LABOR STANDARDS ACT

There is no apparent case where a Division I football player sued a school under the Fair Labor Standards Act (FLSA) in an effort to claim minimum wage or overtime pay. However, this does not mean that the FLSA could not be applied to find that college football players are employees. College football is structured along the lines of an NFL apprenticeship. Because the NFL has no minor league system, NCAA football provides the equivalent of an unpaid internship.

The FLSA is potentially relevant because the Wage and Hour Division of the Department of Labor (DoL) has determined that some unpaid internships violate the law's requirement of minimum compensation. This regulation has been prompted by a growing number of college students who struggle to secure employment and engage in unpaid internships. The DoL regulates unpaid internships for the services that college students render to "for-profit" employers.⁸⁴ On its face, this regulation is inapplicable to Division I football players because member schools are not chartered as profit-seeking institutions. However, as I show elsewhere in this analysis,⁸⁵ football programs have much greater revenues than costs. The surplus is simply not labeled as a profit.

The point is that this FLSA regulation has not been applied to the economic realities of college football. A case can be made for finding that this activity is an uncompensated internship. Already, the broad coverage of the FLSA extends to all universities and colleges, whether private or public.⁸⁶ Moreover, the FLSA's internship regulation does not apply to educational internships because these are defined by their

NCAA tried unsuccessfully to enforce its player eligibility rules when a pitcher was represented by an attorney during an offer from the Minnesota Twins).

84. U.S. DEP'T OF LABOR, WAGE AND HOUR DIVISION, FACT SHEET #71: INTERNSHIP PROGRAMS UNDER THE FAIR LABOR STANDARDS ACT (Apr. 2010) [hereinafter FACT SHEET #71], <http://www.dol.gov/whd/regs/compliance/whdfs71.htm> ("The Fair Labor Standards Act (FLSA) defines the term 'employ' very broadly as including to 'suffer or permit to work.'"). Individuals who work must be compensated for services they perform. *Id.* Internships with "for-profit" entities are viewed as employment, unless the test for a trainee is met. *Id.* Interns who qualify as employees rather than trainees must be paid at least the minimum wage and overtime for more than forty hours in a workweek. *Id.*

85. See *infra* charts 1-3.

86. Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-19 (2006). Employer is defined comprehensively as "any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency. . . ." § 203(d). A "person" is defined as "an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons." § 203(a).

grant of academic credit.⁸⁷ But participation in college football does not generate academic credit for players. This essential fact strengthens the case for characterizing college football as an unpaid internship.

If the DoL's restrictions for establishing an unpaid internship were applied to college football, the NCAA would encounter challenges in satisfying this six-factor test.⁸⁸ The six factors are:

1. The internship . . . is similar to training which would be given in an educational environment;
2. The internship experience is for the benefit of the intern;
3. The intern does not displace regular employees, but works under close supervision of existing staff;
4. The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded;
5. The intern is not necessarily entitled to a job at the conclusion of the internship; and
6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.⁸⁹

The fourth factor—the putative employer derives no immediate advantage from the activities of the intern⁹⁰—is the most problematic element for Division I football schools because of the revenue and reputational benefits that inure to them.⁹¹ The first factor—the internship is similar to training which would be given in an educational environment⁹²—is challenging for exempting players as unpaid interns because Division I stadiums and football training facilities are not built or used for academic instruction.⁹³ And the second factor—the internship experience is for the benefit of the intern⁹⁴—is true for players, but must be weighed against the large and positive spillover

87. FACT SHEET #71, *supra* note 84.

88. *Id.*

89. *Id.*

90. *Id.*

91. For research that relates to the fourth factor as an element for finding an employment relationship because schools derive academic benefits from football and basketball success, see Devin G. Pope & Jaren C. Pope, *The Impact of College Sports Success on the Quantity and Quality of Student Applications*, 75 S. ECON. J. 750 (2009).

92. FACT SHEET #71, *supra* note 84.

93. See generally Zimmerman & Scism, *supra* note 12 (describing construction of a lavish football stadium at Oklahoma State University).

94. FACT SHEET #71, *supra* note 84.

business impact that successful college football has for the core academic enterprise of universities.⁹⁵

The DoL elaborates on the internship exemption in a way that implies that football players are employees. The regulation begins with the idea that the scope of an unpaid internship “is necessarily quite narrow because the FLSA’s definition of ‘employ’ is very broad.”⁹⁶ It then has language to suggest that football should be treated as an exempt activity: “[i]n general, the more an internship program is structured around a classroom or academic experience as opposed to the employer’s actual operations, the more likely the internship will be viewed as an extension of the individual’s educational experience.”⁹⁷ Significantly, the DoL asks whether an “internship program . . . provides educational credit.”⁹⁸ The fact that football does not count toward academic credit makes the activity more like employment.⁹⁹

Apart from the internship regulation, the DoL also regulates employment for all types of students, a broad group that includes college students, for employers seeking certification under its “Full-Time Student Program.”¹⁰⁰ The rules apply to colleges seeking certification who hire full-time students.¹⁰¹ Coincidentally, full-time student status is a requirement for a Division I football player.¹⁰² The Full-Time Student Program permits the university, as an employer, to hire a student under a DoL certificate that allows the employer to pay eighty-five percent of the minimum wage.¹⁰³ The certificate also limits the hours that the student may work to eight hours in a day and no

95. Pope & Pope, *supra* note 91, at 752 (“Our results suggest that sports success can affect the number of incoming applications and, through a school’s selectivity, the quality of the incoming class.”).

96. FACT SHEET #71, *supra* note 84.

97. *Id.*

98. *Id.*

99. The advice continues: “The more the internship provides the individual with skills that can be used in multiple employment settings, as opposed to skills particular to one employer’s operation, the more likely the intern would be viewed as receiving training.” *Id.* Certainly, college football instills physical and mental discipline, as well as teamwork and leadership. But the DoL regulation does not easily permit vague experiential effects to negate an inference of compensable work, noting that just because a college student “may be receiving some benefits in the form of a new skill or improved work habits will not exclude them from the FLSA’s minimum wage and overtime requirements because the employer benefits from the interns’ work.” *Id.*

100. See *Full-Time Student Program*, U.S. DEP’T LAB., <http://www.dol.gov/elaws/esa/flsa/docs/ftsplink.asp> (last visited Oct. 8, 2012).

101. See *id.*

102. DIVISION I MANUAL, *supra* note 5, art. 12.1.1.1.3.

103. *Full-Time Student Program*, *supra* note 100.

more than twenty hours a week when school is in session and forty hours when school is out.¹⁰⁴

No school is known to apply this regulation to football players. The point, however, is to compare this twenty-hour work limit for full-time students employed by their schools with the number of hours that Division I football players spend on athletics. In a self-study performed by the NCAA in 2011, Division I football players spent an average of 43.3 hours on their sport every week during the season.¹⁰⁵ This compared to spending thirty-eight hours per week on academic activities.¹⁰⁶ The fact that football activities require so many hours per week is more evidence that these players function like employees.

In summary, the main reason that college football players are not legally regarded as employees is because they sign a grant-in-aid contract that perpetuates a legal fiction of their amateur status. But schools profit from players' football activities. They closely regiment their activities during the season and off-season. The fact that players are not employees is not because schools want players to practice less and play fewer games so that players can take more classes or challenge themselves in harder classes. This Section shows that when common law doctrines, employment statutes, and administrative regulations are applied to the economic realities of college football, the activities of a player tend to indicate an employment relationship.

3. EMPLOYMENT-AT-WILL

The doctrine of employment-at-will allows either the employer or individual to terminate the work relationship at any time, for any reason. The practical significance of employment-at-will is an employer's freedom to discipline an employee, either by suspension or

104. *Id.*

105. *See* EXAMINING THE STUDENT ATHLETE EXPERIENCE, *supra* note 73, at 17-18.

106. *Id.* at 18.

termination.¹⁰⁷ This common law doctrine remains a bedrock principle of the American employment relationship.¹⁰⁸

NCAA athletes are treated more like employees than students in matters involving team discipline. Similar to fired employees, they can be summarily dismissed from teams, not only for violating rules, but for sub-par performance as well.¹⁰⁹ Just as discharged employees lose their benefits, players can lose their scholarships.¹¹⁰ In contrast, when an ordinary student faces disciplinary sanctions from a school, she has a right to challenge the adverse action.¹¹¹ A university's sanction may be subject to an internal, independent review by faculty and administrators.¹¹²

107. See Jack Stieber & Michael Murray, *Protection against Unjust Discharge: The Need for a Federal Statute*, 16 U. MICH. J.L. REF. 319, 324 (1983) (estimating that employers unjustly dismiss 140,000 employees each year). For a justification of employment-at-will, see *Payne v. W. & Atl. R.R. Co.*, 13 Tenn. 507, 518 (1884) (“May I not dismiss my domestic servant for dealing, or even visiting, where I forbid? And if my domestic, why not my farm-hand, or my mechanic, or teamster? And, if one of them, then why not all four? And, if all four, why not a hundred or a thousand of them? The principle is not changed or affected by the number.”).

108. See FRANK ELKOURI & EDNA ASPER ELKOURI, *HOW ARBITRATION WORKS* 650–51 (4th ed. 1985) (“In the absence of a collective bargaining agreement arbitrators have recognized the legal principle that the only restriction on management’s right to discharge and discipline employees not hired for a definite term is that contained in federal and state labor relations acts or other laws dealing with discrimination.”).

109. Kate Hairopoulos, *SMU’s Brown Trims 4 Players from Roster*, DALL. MORNING NEWS, Apr. 28, 2012, at C11 (a new head men’s basketball coach terminated four players’ basketball scholarships to make way for better players, prompting the athletic director to admit: “[t]here was honest, straight-forward discussion about the future of the program.”).

110. See *LoPiccolo v. Am. Univ.*, 840 F. Supp. 2d 71, 73–74 (D.D.C. 2012). An NCAA wrestler’s alleged that his coach promised a full athletic scholarship to fund four years of college, but the coach reneged after the wrestler refused to compete due to illness. *Id.* at 73. Like an employer asserting the employment-at-will doctrine, the school said the grant-in-aid was not automatically renewable. *Id.*

111. See *Papish v. Bd. of Curators of Univ. of Mo.*, 410 U.S. 667, 668–69 (1973). A graduate student in journalism was expelled for distributing a student newspaper that depicted policemen raping the Statue of Liberty. *Id.* at 667. She was provided a hearing to challenge her expulsion and was permitted an appeal to the Chancellor. *Id.* at 668.

112. See, e.g., *Ward v. Members of Bd. of Control of E. Mich. Univ.*, 700 F. Supp. 2d 803, 808–09 (E.D. Mich. 2010). A state university removed a graduate student from a counseling position because she imposed her personal views on a client who sought counseling for a same-sex relationship. *Id.* The graduate student was provided formal hearings procedures to challenge the charge that she violated a code of ethics. *Id.*

But an NCAA athlete has no right to appeal a coach's decision to cut him or her from a team.¹¹³ Courts have concluded that "even contractual athletic scholarships do not ensure a student's right to play a sport but only constitute a promise by the university to provide the student with financial assistance in exchange for the student's maintenance of athletic eligibility."¹¹⁴ An incoming coach may cut multiple members from the team on grounds that they cannot play to a higher level of competition and replace them with better prospects. This behavior is indistinguishable from termination under employment-at-will.¹¹⁵ But when players seek to transfer to another school, a practice among some nonscholarship athletes, some coaches deny or limit this possibility.¹¹⁶ This behavior has no academic justification. It is simply a selfish practice that denies rivals access to a player who is not good enough to start on one team, but who is promising enough to develop into a competitive threat at another school. In the case of regular undergraduate students, universities never block or limit a transfer.

113. *E.g.*, *Jennings v. Univ. of N.C.*, 482 F.3d 686 (4th Cir. 2007) (involving a female soccer player who was summarily cut from the team during final exams). Her Title IX lawsuit alleged pervasive sexual harassment during her time on the team, but did not challenge the fact that she was cut from the team. *Id.* Prior to her departure, she complained to a high-level university official that her coach talked persistently about the players' sex lives. *Id.* at 693-94. The coach justified his removal of Jennings on grounds that she was not fit. *Id.* at 694. The player was unable to challenge her dismissal, but the university conducted a harassment probe which led to a letter of reprimand. *Id.* After UNC told the player that it could not guarantee her safety on campus, she spent her senior year at another campus. *Id.* In sum, the case shows that while a student-athlete may have a collateral method for appealing a coach's decision to cut him or her from a team, there is no direct appeal of the student's removal from the team.

114. *Guiliani v. Duke Univ.*, No. 1:08CV502, 2010 WL 1292321 (M.D.N.C. Mar. 30, 2010), at *6. An athlete was persuaded to commit to Duke based on the coach's verbal assurance of "educational services, lodging, and a right of access to the Athletic Department's Varsity program and facilities," but after the coach died, the new coach told the team he was terminating the athlete's eligibility. *Id.* The new coach said that the athlete's scholarship could be restored if all twelve of his teammates wrote a letter supporting his reinstatement. *Id.* The athlete tried to invoke an internal hearing but was only afforded a student's usual grievance procedure. *Id.* at *7.

115. *See* Hairopoulos, *supra* note 109.

116. *See* Kevin Scarbinsky, *Players Deserve Transfer Freedom*, BIRMINGHAM NEWS, Feb. 24, 2012, at 2 (St. Joseph's men's basketball coach Phil Martelli blocked transfer of Todd O'Brien to University of Alabama at Birmingham, where he could have preserved a fifth year of eligibility by enrolling in a graduate degree program not available at St. Joseph's); Eric Prisbell, *O'Brien Leaves U-Md. Program*, WASH. POST, Feb. 14, 2012, at D1 (noting that football coach Randy Edsall refused to allow a quarterback to transfer to Vanderbilt and sixteen other schools).

4. WORKER'S COMPENSATION

College football players have filed worker's compensation and disability insurance claims against universities in which they have contended that they are employees. Worker's compensation has been the primary focus of these disputes.¹¹⁷ This state insurance system provides employees who are injured in the course of employment with benefits such as medical care, rehabilitative services and equipment, payment for lost capacity, and income replacement. Most courts have denied coverage to injured NCAA athletes, reasoning that these players are student-athletes rather than employees. *Rensing v. Indiana State University Board of Trustees*¹¹⁸ is a tragic illustration.¹¹⁹ Fred Rensing, a football player at Indiana State University, suffered an injury during spring football practice that rendered him a quadriplegic.¹²⁰ The Indiana Supreme Court ruled that he was not eligible for worker's compensation to cover the costs of his catastrophic injury.¹²¹ This was because he signed an agreement to abide by the NCAA's rules, which treated him as a student-athlete.¹²² The court also rejected Rensing's argument that he was more like an employee than a student at the time of his injury.¹²³

117. The experience of California is informative. In *Van Horn v. Indus. Accident Comm'n*, 33 Cal. Rptr. 169 (Ct. App. 1963), a student-athlete who received financial assistance from California Polytechnic State University died in an airplane crash while returning from a game. *Id.* at 170. The Court of Appeals held that the student had an employment contract with the college and his heirs were entitled to worker's compensation benefits. *Id.* at 172-75. Van Horn's agreement to play football was a contract to render services within the meaning of worker's compensation law. *Id.* at

172-74. The legislature amended the law in response to *Van Horn*. See CAL. LAB. CODE § 3352(k) (excluding athletic participants as employees). More recently, see *Graczyk v. Workers' Comp. Appeals Bd.*, 229 Cal. Rptr. 494 (Ct. App. 1986) (reporting legislative amendments).

118. 444 N.E.2d 1170 (Ind. 1983).

119. *Id.* at 1171-72.

120. *Id.*

121. *Id.* at 1175.

122. *Id.* at 1173.

123. The court concluded that,

Rensing was not working at a regular job for the University. The scholarship benefits he received were not given him in lieu of pay for remuneration for his services in playing football any more than academic scholarship benefits were given to other students for their high scores on tests or class assignments.

Id. at 1174.

However, a student-athlete was awarded a worker's compensation benefit in *University of Denver v. Nemeth*¹²⁴ after he hurt his back during the team's football practice.¹²⁵ The school also paid him to work on the campus tennis court.¹²⁶ The Colorado Supreme Court concluded that the claimant's injury arose in the course of employment,¹²⁷ reasoning that the better players "engage in football games under penalty of losing the job and meals," and therefore "playing football was an incident of his employment by the University, well-known to it and a requirement which it imposed on claimant."¹²⁸ The school's provision of athletic equipment and a field, plus medical care for injured athletes, brought the player's injury within the scope of employment.¹²⁹

The insurance industry, with apparent approval by the NCAA, pays football players for the lost opportunity to compete in the NFL. However, coverage does not include medical or hospitalization. In *Fireman's Fund Insurance Co. v. University of Georgia Athletic Association*,¹³⁰ the University of Georgia Athletic Association administered a disability insurance program for football players who showed clear promise of playing at the professional level.¹³¹ The "Exceptional Student-Athlete Disability Insurance Program" was offered to Decory Bryant, a junior. On a Tuesday before a regular season game, Bryant told the school's administrator that he wanted to be covered by the disability policy.¹³² Two days later, an insurance agent solicited quotes for the coverage, and received a bid to cover Bryant for a disability policy that would pay \$500,000 if the player was permanently disabled from playing football.¹³³ When the University of Georgia administrator sent the paperwork to bind coverage that Friday, he forgot to attach Bryant's signed form.¹³⁴ The next day, Bryant

124. 257 P.2d 423 (Colo. 1953).

125. *Id.* at 424.

126. *Id.* As part of his football aid, he lived in campus housing and received free rent for maintaining the property. *Id.*

127. *Id.* at 430.

128. *Id.* at 428.

129. Compare *id.* at 428-29, with *Fishman v. Lafayette Radio Corp.*, 89 N.Y.S.2d 563 (App. Div. 1949) (awarding employee-player for hand injury because employer sponsored baseball team and allowed employees to quit work early to play), and *Wilson v. Gen. Motors Corp.*, 70 N.Y.S.2d 109 (App. Div. 1947) (awarding benefit to employee who was injured while playing in a softball game because the employer supported the team by furnishing equipment and nursing care for injuries).

130. 654 S.E.2d 207 (Ga. Ct. App. 2007).

131. *Id.* at 210.

132. *Id.*

133. *Id.*

134. *Id.*

suffered a career-ending spinal injury.¹³⁵ The school's failure to complete his policy application resulted in his noncoverage, a mistake that the university refused to rectify voluntarily.¹³⁶

B. The National Labor Relations Act: Players Have No Bargaining Power

The theoretical underpinnings of the NLRA are also relevant to college football. By way of background, Congress realized that employers usurped the voice of employees by requiring these individuals to agree not to join a union.¹³⁷ In 1932, lawmakers declared that these “yellow dog” contracts were no longer enforceable.¹³⁸ Grant-in-aid agreements are similar to yellow dog contracts.¹³⁹ Both contracts terminate an individual who engages an agent to represent his financial interests.¹⁴⁰ Both agreements are also nonnegotiable.¹⁴¹

135. *Id.*

136. See Glenn M. Wong & Chris Deubert, *The Legal & Business Aspects of Career-Ending Disability Insurance Policies in Professional and College Sports*, 17 VILL. SPORTS & ENT. L.J. 473, 510 n.216 (2010) (reporting that a court dismissed the action in 2009 based on sovereign immunity). In 2010, Georgia and Bryant settled their dispute for \$400,000. *Id.* (citation omitted).

137. See Van Wezel Stone, *supra* note 24, at 1037 n.146 (referencing the Norris-LaGuardia Act, ch. 90, 47 Stat. 70 (1932) (codified as amended at 29 U.S.C. §§ 101–15 (2006))).

138. The Norris-LaGuardia Act made these contracts unenforceable in Section 3. See Norris-LaGuardia Act, ch. 90, sec. 3, 47 Stat. 70 (1932) (codified as amended at 29 U.S.C. §§ 101–15 (2006)) (making “yellow dog” contracts unenforceable as a matter of public policy). Earlier, the Supreme Court ruled that these agreements were lawful in *Coppage v. Kansas*, 236 U.S. 1, 19–21 (1915), and *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229, 251 (1917).

139. See Lazaroff, *supra* note 17, at 335–36 (players are restricted by grant-in-aid contracts from being represented by agents who would negotiate compensation for their services).

140. See, e.g., *State v. Coppage*, 125 P. 8, 8 (Kan. 1912) (quoting the “yellow dog” contract presented by the St. Louis & San Francisco Railway Company, mandating that its employees withdraw from the Switchman’s Union or face automatic termination). An employee was fired after his superintendent tendered the contract and the worker refused to sign it. Compare *id.* (recounting the termination of an employee who refused to sign a contract mandating he withdraw from his union), with *Oliver v. NCAA*, 920 N.E.2d 203, 206–07 (2009) (illustrating the penalization of a collegiate pitcher who signed a letter of intent to play with Oklahoma State University, after an attorney/agent was present when the Minnesota Twins presented their \$390,000 post-draft offer). Although the attorney/agent never spoke and the father advised his son to reject the offer, the NCAA declared that the player was ineligible to compete in college because of this meeting with an agent. *Id.* The court said:

The status of the no-agent rule . . . is a prohibition against agents, not lawyers. Therein lies the problem. It is impossible to allow student-athletes to hire lawyers and attempt to control what that lawyer does for his client

By 1935, Senator Robert Wagner believed that economic power was too concentrated in the hands of employers.¹⁴² His view emphasized economic justice and morality.¹⁴³ The NLRA reflected his belief that collective bargaining would lead to more stable employment relationships.¹⁴⁴ How well this law applies to college football is a matter of debate.¹⁴⁵ The NCAA treats college football as an amateur sport played by student-athletes.¹⁴⁶ This premise negates consideration of collective bargaining for college football because the NLRA and parallel state labor laws require an employment relationship.¹⁴⁷ Increasingly, however, the business side of college football undermines the premise of amateurism. Recently, the Big East Commissioner

by Bylaws 12.3.2 or 12.3.2.1. These rules attempt to say to the student-athlete that he or she can consult with an attorney but that the attorney cannot negotiate a contract with a professional sport team. This surely does not retain a clear line of demarcation between amateurism and professionalism.

Id. at 214.

141. *See, e.g., Oliver*, 920 N.E.2d at 213; *Coppage*, 125 P. at 8.

142. 78 CONG. REC. 3678 (1934), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 18–19 (1985).

143. *Id.* at 20 (“The law has long refused to recognize contracts secured through physical compulsion or duress. The actualities of present-day life impel us to recognize economic duress as well. We are forced to recognize the futility of pretending that there is equality of freedom when a single workman, with only his job between his family and ruin, sits down to draw a contract of employment with a representative of a tremendous organization having thousands of workers at its call.”).

144. S. 1958, 74th Cong. 1373, 1419 (1935), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 137 (1985) (statement of Sen. Robert Wagner) (“While the bill explicitly states the right of employees to organize, their unification will prove of little value if it is to be used solely for Saturday night dances and Sunday afternoon picnics.”).

145. *E.g., RAMOGI HUMA & ELLEN J. STAUROWSKY, NAT’L COLLEGE PLAYERS ASS’N, THE PRICE OF POVERTY IN BIG TIME COLLEGE SPORT 15–16, available at* <http://assets.usw.org/ncpa/The-Price-of-Poverty-in-Big-Time-College-Sport.pdf> (last visited Sept. 30, 2012); *see e.g., Kristi Dosh, Collective Bargaining, Lockouts and Strikes: The Unintended Consequences of Paying College Athletes*, BUS. C. SPORTS (July 26, 2011), <http://businessofcollegesports.com/2011/07/26/collective-bargaining-lockouts-and-strikes-the-unintended-consequences-of-paying-college-athletes/>.

146. The purpose of the NCAA is in Rule 1.3.1 of the Manual. DIVISION I MANUAL, *supra* note 5, art. 1.3.1 (“The competitive athletics programs of member institutions are designed to be a vital part of the educational system. A basic purpose of this Association 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.”).

147. *E.g.,* 29 U.S.C. §§ 151–52 (2006); CONN. GEN. STAT. ANN. § 31-104 (West 2011).

bluntly conceded: “[c]learly, the collegiate model is dead.”¹⁴⁸ Apart from the billions of dollars tied up in media contracts with the NCAA,¹⁴⁹ college conferences negotiate their own lucrative TV deals.¹⁵⁰

To demonstrate that college football is highly profitable,¹⁵¹ Charts 1-3 provide financial snapshots for three major conferences.¹⁵² The charts show revenues and costs in the 2010-11 football season for the Southeastern Conference (SEC), Big Ten, and Pacific-12 (PAC-12) conferences. Every school generated surplus revenue, often more than \$10 million.

148. Thamel, *supra* note 3.

149. See NAT’L COLLEGIATE ATHLETIC ASS’N & SUBSIDIARIES, CONSOLIDATED FINANCIAL STATEMENTS AS OF AND FOR THE YEARS ENDED AUGUST 31, 2011 AND 2010, SUPPLEMENTARY INFORMATION AS OF AND FOR THE YEAR ENDED AUGUST 31, 2011, AND INDEPENDENT AUDITORS’ REPORT 16 (2011), available at <http://www.ncaa.org/wps/wcm/connect/public/ncaa/finances/ncaa+consolidated+financial+statements> (reporting results from Deloitte & Touche LLP’s 2011 independent auditor’s report).

150. See *ACC Expansion Should Pay Off*, GREENSBORO NEWS & RECORD, Feb. 9, 2012, at B3. By recently expanding from twelve to fourteen teams, the Atlantic Coast Conference (ACC) will be able to reopen its twelve-year, \$1.86 billion media rights deal with ESPN. *Id.* Under the 2010 contract, each school was entitled to receive about \$13 million per year. *Id.* That payout would likely increase to \$14 million per year per school with the addition of new members. *Id.*; see also Michael Smith & John Ourand, *Big 12, ESPN Expected to Sign an Extension through '25 Worth \$1.3B*, SPORTS BUS. DAILY (Mar. 14, 2012), <http://www.sportsbusinessdaily.com/Daily/Issues/2012/03/14/Media/Big-12-ESPN.aspx?hl=acc%20tv%20deal&sc=0> (reporting that the Big 12 would likely earn \$2.5 billion over the next thirteen years in TV deals with Fox and ESPN). The PAC-12, also partnered with Fox and ESPN, is expected to generate \$3 billion over the next twelve years. *Id.*

151. See generally *Top 50 Most Profitable FBS Football and Men’s Basketball Programs*, BUS. C. SPORTS (Dec. 28, 2011, 11:43 AM), <http://businessofcollegesports.com/2011/12/28/top-50-most-profitable-fbs-football-and-mens-basketball-programs/> (listing the expenses and profits of the fifty most profitable men’s football and basketball programs).

152. SEC data in Chart 1 is from *SEC Financials '10-'11*, BUS. C. SPORTS (Dec. 24, 2011), <http://businessofcollegesports.com/2011/12/24/sec-financials-10-11/>. Big Ten data in Chart 2 is from *Big Ten Financials '10-'11*, BUS. C. SPORTS (Dec. 21, 2011), <http://businessofcollegesports.com/2011/12/21/big-ten-financials-10-11/>. PAC-12 data in Chart 3 is from *PAC-12 Financials*, BUS. C. SPORTS (Dec. 23, 2011), <http://businessofcollegesports.com/2011/12/23/pac-12-financials-10-11/pac-12-10-11/>.

CHART 1
 SEC FOOTBALL REVENUE & EXPENSES
 BY SCHOOL (2010-11 SEASON IN DOLLARS)
 ■ 2010-11 Revenue ■ 2010-11 Expenses

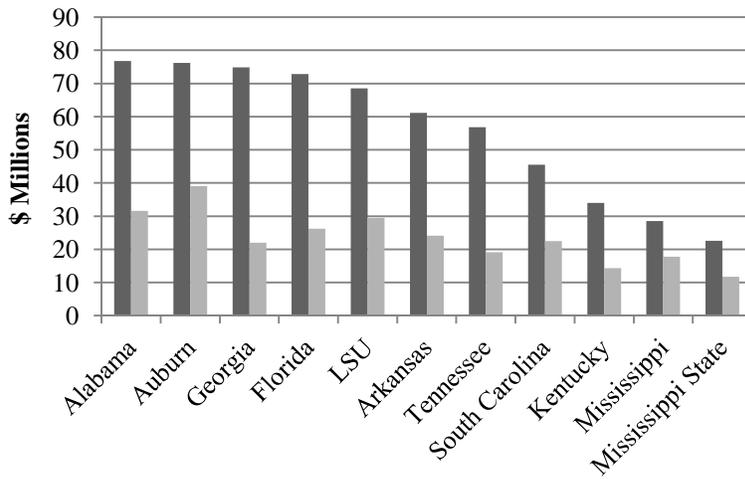


CHART 2
 BIG TEN FOOTBALL REVENUE & EXPENSES
 BY SCHOOL (2010-11 SEASON IN DOLLARS)
 ■ 2010-11 Revenue ■ 2010-11 Expenses

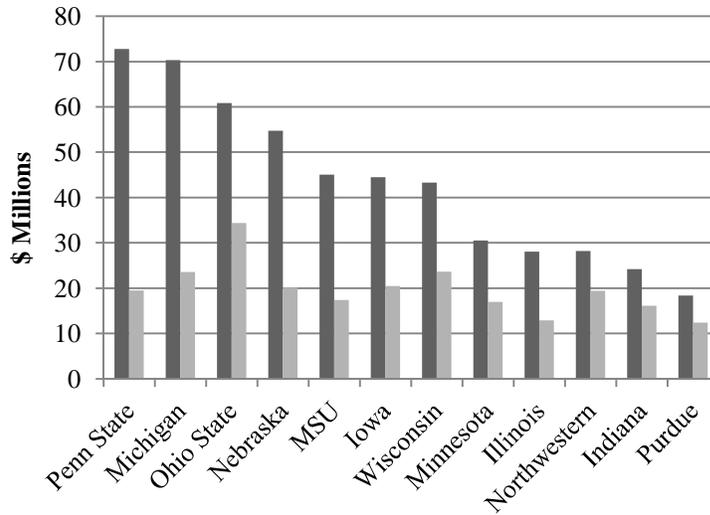
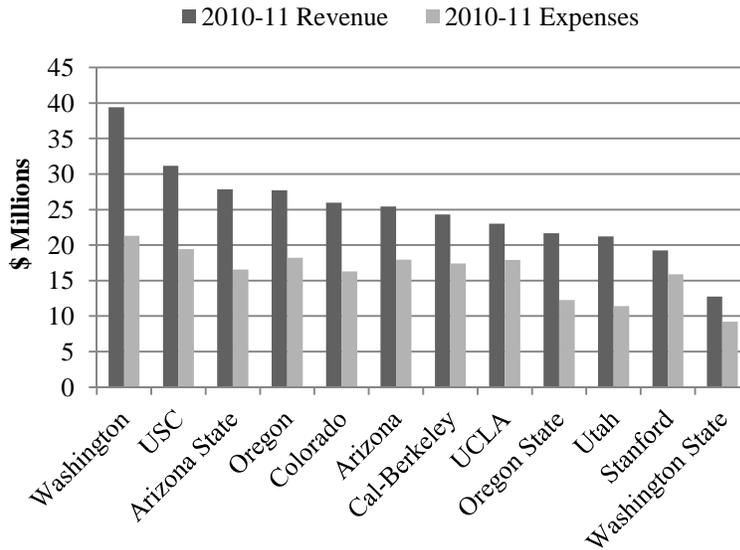


CHART 3
 PAC-12 FOOTBALL REVENUE & EXPENSES
 BY SCHOOL (2010-11 SEASON IN DOLLARS)



NCAA athletes enjoy a privileged lifestyle that turn-of-the century industrial workers could not imagine. Nonetheless, the business side of collegiate football pervades their academic culture.¹⁵³ Still, only a few players will earn an NFL paycheck.¹⁵⁴ This strengthens the argument that football players are exploited by schools, even if these “Saturday heroes” are revered during their college careers. The industrial worker analogy is further advanced by the fact that college players often lack due process and other fairness protections.¹⁵⁵ Like workers of a bygone era, they are eager to have a voice in the rules and regulations that dominate their lives.¹⁵⁶

153. Academic fraud adds to the NCAA’s problem of reconciling lofty ideals and incentives to cheat. *E.g.*, Aaron Beard, *Discovery of Suspect Classes at UNC Extends Lingering Aftermath of NCAA Football Probe*, CANADIAN PRESS., June 14, 2012. UNC found fraud and poor oversight in fifty-four classes in a single department. *Id.* Problems included unauthorized grade changes and forged faculty signatures for grades. *Id.* One class was populated entirely with football players. *Id.*

154. *See Probability of Competing in Athletics*, *supra* note 31 (1.6% of NCAA football players become pro athletes).

155. *See Johnson*, *supra* note 32, at 483–87.

156. *See O’Neil*, *supra* note 33 (reporting that 300 football and basketball players signed a petition for a share of the revenue they help to generate). The petition

C. The Sherman Antitrust Act: Players Suffer Mobility and Earnings Restrictions from Monopsony Restraints

The grant-in-aid agreement comprehensively governs athletic and academic participation by college football players. This contractual regime resembles the uniform player contract that has been the cornerstone of professional sports. Beginning in the 1880s, baseball leagues required players to sign form contracts that specified terms and conditions of employment.¹⁵⁷ So, too, the grant-in-aid agreement regulates a player's relationship to his team by incorporating a variety of NCAA rules.¹⁵⁸ Baseball leagues imposed the uniform player contract to prevent one team from gaining a competitive advantage over a rival team by offering a player better terms.¹⁵⁹ Similarly, athletic conferences that operate under NCAA rules restrict competition by league members for a player's athletic services in their agreements with players.¹⁶⁰ The NCAA also deters players from transferring by imposing a one-year period of ineligibility upon transfer.¹⁶¹

While important, these similarities pale in comparison to the importance of centerpiece restraints in baseball and NCAA regulations, respectively, the reserve clause, and the one-year financial commitment rule in NCAA player agreements. In baseball, a player could be terminated with a ten-day notice from his team,¹⁶² but his team could bind him from year to year by invoking an option, called the reserve

asks for part of the TV revenue to be set aside in an educational lockbox. *Id.* This money would be available only to players who exhaust their eligibility. *Id.*

157. *Metro. Exhibition Co. v. Ward*, 24 Abb. N. Cas. 393, 395 n.1 (N.Y. Sup. Ct. 1890) (providing a detailed reproduction of the standard contract).

158. *See, e.g.*, SOUTHEASTERN CONFERENCE FINANCIAL AID AGREEMENT, *supra* note 18.

159. *See* ROGER I. ABRAMS, LEGAL BASES: BASEBALL AND THE LAW 15–16 (1998) (explaining that the National League (NL) instituted the reserve clause in 1879 to control rising player salaries). Initially, NL teams agreed that each team could reserve five players, thereby restricting any other team from negotiating with a designated player. *Id.* at 15. In 1883, the NL and its rival, the American League, authorized teams to reserve eleven out of fourteen players on their squads. *Id.*

160. The SEC form contract states: “[a]ll Southeastern Conference institutions shall cease recruiting activities intended to result in this student’s enrollment at another SEC institution.” SOUTHEASTERN CONFERENCE FINANCIAL AID AGREEMENT, *supra* note 18. For a compelling example of how coaches leverage this type of transfer restriction, see *Ex-Badger Chooses Hawkeyes*, DES MOINES REG., June 7, 2012, at C3 (reporting that a Wisconsin basketball player, Jarrod Uthoff, was told that he could not obtain the school’s release if he transferred to any of twenty schools). To abate this controversy, Wisconsin lifted its restrictions that went beyond those imposed by the Big Ten. *Id.*

161. *See* DIVISION I MANUAL, *supra* note 5, art. 14.5.1.

162. *Phila. Ball Club, Ltd. v. Hallman*, 8 Pa. C. 57, 62–63 (C.P. Phila. 1890).

clause.¹⁶³ This meant a player could not play for another team in the league, unless he was traded or his contract was not renewed. Nor could he bargain for better terms by seeking offers from competing teams.¹⁶⁴ Similarly, grants-in-aid limit a school's financial commitment to one year.¹⁶⁵ These contracts also provide grounds for terminating a school's obligation to a player by requiring individuals to adhere to eligibility rules.¹⁶⁶ Thus, just as the reserve clause perpetually bound a player who would otherwise have marketed his services to other teams, the

grant-in-aid exerts this type of global restraint on a player's mobility.

The reserve clause in baseball eventually was modified after players voted to form a union¹⁶⁷ and challenged the restriction in arbitration.¹⁶⁸ Football was not significantly different. In time, the NFL

163. An excellent explanation of the reserve clause appears in Comment, *Organized Baseball and the Law*, 46 YALE L.J. 1386, 1386–87 (1937) (“Since the contract entered into in each succeeding season will have a similar provision, the player is really signing for the duration of his baseball life.”); e.g., *Metro. Exhibition Co. v. Ewing*, 42 F. 198, 200 (C.C.S.D.N.Y. 1890).

164. Courts were not usually inclined to enforce the reserve clause against players who sought to jump their contracts, but some did. See *Monopsony in Manpower*, *supra* note 45, at 590 n.74. For courts that refused to enforce the reserve clause, see *Weeghman v. Killifer*, 215 F. 289, 291–92 (6th Cir. 1914), *aff’d* 215 F. 168 (C.C.W.D. Mich. 1914); *Brooklyn Baseball Club v. McGuire*, 116 F. 782, 783 (C.C.E.D. Pa. 1902); *Metro. Exhibition*, 42 F. at 200; *Allegheny Base-Ball Club v. Bennett*, 14 F. 257, 258–60 (C.C.W.D. Pa. 1882); *Cincinnati Exhibition Co. v. Johnson*, 190 Ill. App. 630, 631–32 (Ill. App. Ct. 1914); *Columbus Base Ball Club v. Reiley*, 11 Ohio Dec. Reprint 272, 272–73 (Hamilton C.P. 1891).

165. See SOUTHEASTERN CONFERENCE FINANCIAL AID AGREEMENT, *supra* note 18. The form contract states in bold text: “[i]n accordance with NCAA regulations, an athletics grant-in-aid may not be awarded or promised for a period longer than one academic year.” *Id.* The contract accentuates a school's leverage over players by stipulating: “[a]n institution will notify a student by no later than July 1, 2008 regarding the renewal of this grant-in-aid for an additional year.” *Id.* This late date impedes earlier transfers that would advantage a player.

166. *Id.* The SEC agreement also states in bold print:

The student agrees to be bound by and to abide by determinations and by the requirements, rules, and procedures (now in force and as amended from time to time) of this institution, the Southeastern Conference, and the NCAA concerning his or her eligibility. The student further . . . agrees . . . that student must be deemed eligible by [the institution, the SEC, and the NCAA] to compete in intercollegiate athletics.

Id.

167. The Major League Baseball Players Association became a labor union in 1966. *MLBPA INFO: Frequently Asked Questions*, MLBPLAYERS.COM, <http://mlb.mlb.com/pa/info/faq.jsp#created> (last visited Oct. 12, 2012).

168. *Kansas City Royals Baseball Corp. v. MLB Players Ass'n*, 532 F.2d 615, 617–19 (8th Cir. 1976). After Andy Messersmith, a star pitcher, played out his option year, he thought he was free to sign with another team. *Id.* at 618. Arbitrator Peter

adopted its own version of the reserve clause¹⁶⁹ and a blacklisting rule for players who jumped to a rival league.¹⁷⁰

Whether the sport was baseball,¹⁷¹ football,¹⁷² basketball,¹⁷³ or hockey,¹⁷⁴ professional players sued in antitrust to challenge these restraints. Courts understood that these restraints had an anti-competitive effect. The question was whether these restraints were permitted because antitrust law usually exempts labor agreements, even those with anti-competitive restrictions.¹⁷⁵ Some courts ruled that league restraints violated antitrust law even though the restrictions were collectively bargained.¹⁷⁶ Others decided that the restrictions were permissible because they were a product of collective bargaining.¹⁷⁷

Seitz agreed with him, and the Eighth Circuit Court of Appeals found no reason to vacate this award. *Id.* at 619 n.3, 631–32. These events curtailed the reserve system but did not eliminate it.

169. *Mackey v. NFL*, 407 F. Supp. 1000 (D. Minn. 1975), was an early antitrust challenge of the NFL's version of the reserve clause, *id.* at 1002. The rule required a team that signed a free agent to provide fair and equitable compensation to the player's previous team. *Id.* at 1004. Judge Larson agreed with the players, holding that the Rozelle Rule was an antitrust violation, because the rule deterred free agent signings. *Id.* at 1007–08. Applying the rule of reason test, the Eighth Circuit affirmed. *Id.*

170. *Radovich v. NFL*, 352 U.S. 445, 449 (1957). For a further discussion of *Radovich*, see *infra* notes 181–185 and accompanying text.

171. See *Toolson v. N.Y. Yankees, Inc.*, 346 U.S. 356, 356–57 (1953).

172. *Radovich*, 352 U.S. at 446–47.

173. *Robertson v. NBA*, 389 F. Supp. 867, 872–73 (S.D.N.Y. 1975).

174. *McCourt v. Cal. Sports, Inc.*, 460 F. Supp. 904, 905–06 (E.D. Mich. 1978).

175. A concise explanation of the antitrust labor exemption appears in *Clarett v. NFL*, 369 F.3d 124 (2d Cir. 2004) (citing *Brown v. Pro Football, Inc.*, 518 U.S. 231, 236 (1996)).

The non-statutory exemption has been inferred from federal labor statutes, which set forth a national labor policy favoring free and private collective bargaining; which require good-faith bargaining over wages, hours, and working conditions; and which delegate related rulemaking and interpretive authority to the National Labor Relations Board. The exemption exists not only to prevent the courts from usurping the NLRB's function of determining, in the area of industrial conflict, what is or is not a reasonable practice, but also to allow meaningful collective bargaining to take place by protecting some restraints on competition imposed through the bargaining process from antitrust scrutiny.

Id. at 130–31.

175. *Id.* at 130.

176. See generally *Brown v. Pro Football, Inc.*, 50 F.3d 1041, 1058 (D.C. Cir. 1995); *Brady v. NFL*, 779 F. Supp. 2d 992, 1038–41 (D. Minn. 2011); *Clarett v. NFL*, 306 F. Supp. 2d 411, 412–14 (S.D.N.Y. 2004); *Brown v. Pro Football, Inc.*, No. 90-1071, 1992 WL 88039 (D.D.C. Mar. 10, 1992); *Jackson v. NFL*, 802 F. Supp. 226, 228–30 (D. Minn. 1992); *McCourt*, 460 F. Supp. at 906, 909–12; *Robertson v.*

This background is relevant to Division I football. Like the NFL or other professional sports leagues, the NCAA promulgates rules to enhance parity. The limit on eighty-five scholarships per school is a prime illustration because it prevents elite football schools from stockpiling talent.¹⁷⁸ The following analysis demonstrates how the NCAA uses restrictions to exert its monopsony power to the detriment of players. As further background to this analysis, it is important to note that most courts have repeatedly upheld NCAA rules that preserve amateur competition.¹⁷⁹ Nonetheless, some courts have ruled that NCAA activities violate antitrust law.¹⁸⁰ I now examine three types of NCAA rules that restrict the labor market for college football players.

Blacklisting Players: The NFL and NCAA strictly penalize players who defect to another league. To demonstrate this comparison, two important decisions are considered. In *Radovich v. NFL*,¹⁸¹ a player for

NBA, No. 70 Civ. 1526, 1976 WL 1220 (S.D.N.Y. Mar. 3, 1976); *Bowman v. NFL*, 402 F. Supp. 754, 755–56 (D. Minn. 1975); *Robertson*, 389 F. Supp. at 895–96; *Phila. World Hockey Club, Inc. v. Phila. Hockey Club, Inc.*, 351 F. Supp. 462, 496–500, 518 (E.D. Pa. 1972); *Denver Rockets v. All-Pro Mgmt., Inc.*, 325 F. Supp. 1049, 1059, 1066–67 (C.D. Cal. 1971).

177. See generally *Brady*, 638 F.3d 1004, 1005 (8th Cir. 2011); *Denver Rockets v. All-Pro Management, Inc.*, No. 71-1089, 1971 WL 3015 (9th Cir. Feb. 16, 1971); *Brown*, 50 F.3d at 1058; *Clarett*, 306 F. Supp. 2d at 412–14; *McCourt*, 460 F. Supp. at 906–12.

178. See DIVISION I MANUAL, *supra* note 5, art. 15.5.6 (limiting each school’s football team to eighty-five “counters”).

179. See *Smith v. NCAA*, 139 F.3d 180, 182, 185–87 (3d Cir. 1998) (upholding rule that barred participation by graduate student who had been an undergraduate at a different school); *Banks v. NCAA*, 977 F.2d 1081, 1083–84, 1094 (7th Cir. 1992) (upholding rules that revoked a football player’s eligibility to participate in the sport after he signed with an agent and participated in the NFL draft); *McCormack v. NCAA*, 845 F.2d 1338, 1340, 1343–45 (5th Cir. 1988) (upholding rules that limited compensation for football players to scholarships with limited financial benefits); *Hennessey v. NCAA*, 564 F.2d 1136, 1151–54 (5th Cir. 1977) (upholding a rule limiting the number of assistant football and basketball coaches Division I schools could employ); *Bowers v. NCAA*, 9 F. Supp. 2d 460, 465, 497 (D.N.J. 1998) (upholding a rule that set minimum academic standards for participation); *Gaines v. NCAA*, 746 F. Supp. 738, 740–41 (M.D. Tenn. 1990) (upholding rules that revoked an athlete’s eligibility to participate in an intercollegiate sport after the athlete entered the draft and engaged an agent); *Justice v. NCAA*, 577 F. Supp. 356, 360, 375, 383–84 (D. Ariz. 1983) (upholding a rule that denied an athlete’s eligibility to participate in a sport after the athlete accepted pay for participation in the sport).

180. *Metro. Intercollegiate Basketball Ass’n v. NCAA*, 339 F. Supp. 2d 545, 550–52 (S.D.N.Y. 2004) (the NCAA rules affected Division I men’s college basketball post-season tournaments); *Law v. NCAA*, 902 F. Supp. 1394, 1410 (D. Kan. 1995) (the NCAA rule limited the maximum compensation Division I members paid to a category of basketball coaches).

181. 352 U.S. 445 (1957).

the Detroit Lions asked the NFL to allow him to transfer to the league's Los Angeles team to be near his ailing father.¹⁸² When the NFL refused, he signed with a rival league's team in California.¹⁸³ Later, when Radovich sought reemployment in the NFL, he was blacklisted by a rule that banned play in a rival league.¹⁸⁴ In a ruling for Radovich, the Supreme Court allowed him to proceed with an antitrust challenge to the blacklisting rule.¹⁸⁵

A Notre Dame football player filed a comparable lawsuit against the NCAA in *Banks v. NCAA*.¹⁸⁶ After Braxton Banks was injured in his sophomore and junior seasons while playing football for Notre Dame, he sat out his senior year to ensure a complete recovery and enhance his chances to play pro football.¹⁸⁷ During that season, he signed with an agent and participated in the NFL's pre-draft evaluations.¹⁸⁸ When no team drafted or signed him as a free agent, he sought to return to Notre Dame, believing that he had a final year of unused eligibility remaining.¹⁸⁹ Notre Dame denied his return to the team and renewal of his scholarship because Banks' efforts to enter the NFL violated two NCAA rules.¹⁹⁰

Banks sued the NCAA, alleging that the rules violated the Sherman Antitrust Act by restricting opportunities in the labor market for college football players.¹⁹¹ He contended that the NCAA rules unlawfully restricted him by giving him only one chance to compete for a job in the NFL.¹⁹² A federal appeals court affirmed the dismissal of his antitrust lawsuit.¹⁹³

The appellate decision reveals why an NFL player was permitted in *Radovich* to challenge the NFL's blacklisting rule under antitrust

182. *Id.* at 448.

183. *Id.*

184. *Id.*

185. *Id.* at 453–54. The court explained:

If this ruling is unrealistic, inconsistent, or illogical, it is sufficient to answer, aside from the distinctions between the businesses, that were we considering the question of baseball for the first time upon a clean slate we would have no doubts. . . . No other business claiming the coverage of those cases has such an adjudication.

Id.

186. 977 F.2d 1081 (7th Cir. 1992).

187. *Id.* at 1083.

188. *Id.* at 1083–84.

189. *Id.* at 1083.

190. *Id.* at 1083–84 (referencing NCAA Article 12.2.4.2 and Article 12.3.1).

191. *Id.* at 1084.

192. *Id.* at 1088.

193. *Id.* at 1094.

law, while an NCAA player could not do the same. Banks argued that the NCAA rules restricted the labor market in which he competed.¹⁹⁴ He defined the collegiate labor market as football players who enter the draft and employ an agent.¹⁹⁵ But the majority opinion refused to characterize the NCAA's two rules in dispute as labor market restraints.¹⁹⁶ Instead, the court treated the rules as a "desirable and legitimate attempt to keep university athletics from becoming professionalized to the extent that profit making objectives would overshadow educational objectives."¹⁹⁷ In other words, "the no-draft rule and other like NCAA regulations preserve[d] the bright line of demarcation between college and 'play for pay' football."¹⁹⁸

In a separate opinion, Judge Joel Flaum concluded that the NCAA's restriction on entering the draft adversely affected players as labor market participants.¹⁹⁹ He believed that "the market at issue here is the college football *labor* market, and the NCAA member colleges are consumers in that market."²⁰⁰ If the NCAA had no draft restriction, players would benefit from more competition between schools who, in varying degrees, would allow them to test the waters for a pro career without impairing their return to the team.²⁰¹ Judge Flaum theorized that "the no-draft rule operates to the detriment of the players, and that colleges benefit from the fact that their athletes feel tied to the institution for four years."²⁰² This is because some talented players, described by the judge as "bubble" players,²⁰³ are good enough to be considered by the NFL but are not certain to be hired. The no-draft rule resolves this uncertainty in a way that harms players and benefits schools.²⁰⁴

194. *Id.* at 1084.

195. *Id.* at 1088.

196. *Id.* at 1089–90.

197. *Id.* at 1090 (internal quotation marks omitted). The court added: "This conclusion is buttressed by the fact that a very small number of college athletes go on to participate in professional athletics. Of the over 12,000 Division 1-A college football players, less than 300 go on to the NFL each year." *Id.* at 1090 n.12.

198. *Id.* at 1090.

199. *Id.* at 1095–97 (Flaum, J., concurring in part and dissenting in part).

200. *Id.* at 1098 (Flaum, J., concurring in part and dissenting in part).

201. *Id.* at 1095 (Flaum, J., concurring in part and dissenting in part).

202. *Id.* (Flaum, J., concurring in part and dissenting in part).

203. *Id.* (Flaum, J., concurring in part and dissenting in part).

204. *Id.* at 1095–96 (Flaum, J., concurring in part and dissenting in part) ("The rule permits colleges to squeeze out of their players one or two more years of service, years the colleges might have lost had the ability to enter the draft without consequence to eligibility been the subject of bargaining between athletes and colleges. The rule thereby distorts the 'price' of labor in the college football labor market to the detriment of players.") (citation omitted). Judge Flaum elaborated on his labor market analysis,

Roster Limits and Parity. In *In re NCAA I-A Walk-On Football Players Litigation*,²⁰⁵ a group of nonscholarship players claimed, in their antitrust lawsuit, that they would have received grants-in-aid if the NCAA did not limit each school to eighty-five football scholarships.²⁰⁶ The players alleged that the scholarship limit was an artificial restraint to limit costs among horizontal competitors.²⁰⁷ The district court denied the NCAA's motion for judgment on the pleadings.²⁰⁸ The plaintiffs were entitled to go forward with proof that the NCAA operated as an unlawful monopsony by controlling the market for players.²⁰⁹ The court also ruled that the players had demonstrated possible injury by pleading that the NCAA rule left them with enormous student loans, while sparing schools hundreds of millions of dollars in scholarships.²¹⁰ While the players prevailed in this phase of the lawsuit, their litigation bogged down after several futile attempts to persuade the court to certify their class.²¹¹

The NFL, in *Brown v. Pro Football, Inc.*,²¹² provides a comparison to *NCAA I-A Walk-On Football Players* in league-imposed input limits on team rosters. In 1989, the NFL unilaterally created a developmental squad program—in effect, an enlargement of team rosters.²¹³ This rule not only regulated the supply of labor, but

explaining that athletes do not weigh the value of tuition, which often varies between schools, especially public and private institutions. *Id.* at 1096 (Flaum, J., concurring in part and dissenting in part). He observed that “[s]ome athletes look primarily to the reputation of a particular program or coach as a ‘feeder’ into the NFL.” *Id.* (Flaum, J., concurring in part and dissenting in part). He added that some “look to whether a college will offer them a cushy, high-paying job during the summer or school year; others might be attracted by state-of-the-art training facilities.” *Id.* (Flaum, J., concurring in part and dissenting in part). Returning to his point that the NCAA's restrictions on entering the draft are a labor market restraint, he concluded: “And some athletes, if given the chance, would look to whether a college would allow them to enter the NFL draft and return if they did not join a professional team.” *Id.* (Flaum, J., concurring in part and dissenting in part).

205. 398 F. Supp. 2d 1144 (W.D. Wash. 2005) (challenging NCAA Article 15.5.5 as an artificial restraint on the number of scholarships for football teams).

206. *Id.* at 1146–47.

207. *Id.* at 1147. The players alleged that the NCAA operated as a classic cartel because it was “a combination of producers of a product joined together to control its production, sale, and price.” *Id.* at 1051.

208. *Id.* at 1152.

209. *Id.* at 1151–52.

210. *Id.* at 1151.

211. Opposition to Plaintiffs' Motion to Amend Complaint at 1, *In re NCAA I-A Walk-On Football Players Litig.*, 398 F. Supp. 2d 1144 (W.D. Wash. 2005) (No. C-04-01254-C), 2007 WL 759903.

212. 518 U.S. 231 (1996).

213. *Id.* at 234.

demonstrated the NFL's monopsony power—the NFL required each team, under threat of sanctions, to pay every player exactly \$1000 per week for salary.²¹⁴ A class of 235 developmental squad players sued the NFL under the Sherman Act, claiming that the roster limit and pay plan were restraints in trade.²¹⁵ A federal jury awarded damages of more than \$30 million to the players, but the D.C. Court of Appeals reversed, holding that the NFL was immune from antitrust liability because these restraints on competition were imposed through the collective bargaining process.²¹⁶ The Supreme Court affirmed, reasoning that antitrust courts should not referee labor disputes.²¹⁷

The NFL's Reserve Clause and NCAA Transfer Restrictions: Professional leagues, including the NFL, utilize some form of the reserve clause in the uniform player contracts that athletes must sign. The reserve clause is akin to an option, and allows a team to renew a player's contract automatically and indefinitely.²¹⁸ The four major league sports continue to impose some form of the reserve clause to promote competition among teams.²¹⁹

Similarly, the NCAA prohibits a student who transfers from one school to another from participating in its athletic competitions for one

214. *Id.* at 235.

215. *Id.*

216. *Id.*

217. *Id.* at 235, 242 (“We recognize . . . that, in principle, antitrust courts might themselves try to evaluate particular kinds of employer understandings, finding them ‘reasonable’ (hence lawful) where justified by collective-bargaining necessity. But any such evaluation means a web of detailed rules spun by many different nonexpert antitrust judges and juries, not a set of labor rules enforced by a single expert administrative body, namely the [National Labor Relations] Board. The labor laws give the Board, not antitrust courts, primary responsibility for policing the collective-bargaining process. And one of their objectives was to take from antitrust courts the authority to determine, through application of the antitrust laws, what is socially or economically desirable collective-bargaining policy.”).

218. The reserve clause originated in baseball in 1879, when teams barred valuable players from ending their contractual relationship to sign with another team. *See* ABRAMS, *supra* note 159, at 15; *Organized Baseball and the Law*, *supra* note 163, at 1386–87. In the modern era of professional sports, every league uses some form of the reserve clause to promote parity and wide interest in the sport. *See, e.g., Robertson v. NBA*, 389 F. Supp. 867, 874 (S.D.N.Y. 1975).

219. The reserve clause continues in baseball, though it has been relaxed to permit free agency to players with six or more years of major league service. *See* Paul D. Staudohar, *Have We Seen the Last of Baseball's Labor Wars?*, 61 LAB. LAW J. 192, 193 (2010) (explaining limited free agency for baseball players). For a comprehensive history of the NFL's restrictions on free agency, see *Brady v. NFL*, 644 F.3d 661, 664–68 (8th Cir. 2011). For background on the NHL's restrictions on free agency, see *McCourt v. Cal. Sports, Inc.*, 600 F.2d 1193, 1194–95 (6th Cir. 1979).

full academic year.²²⁰ This amounts to a transfer penalty and has been compared to the reserve clause in professional sports.²²¹ Other cases do not make this comparison but uphold NCAA transfer restrictions with the same deference as courts that leave the reserve clause undisturbed in professional sports.²²²

Consider the reasoning in *Williams v. Hamilton*.²²³ Upholding the NCAA's restrictions on transfers by student-athletes, the court thought the rule was intended

to avoid movement of 'tramp athletes' interested in one sport from school to school in the fond hope that such athlete might be able to participate in post-season national championship competition or in the hope that he might be able to assist the team of the school to which he transfers to enter such competition.²²⁴

*Weiss v. Eastern College Athletic Conference*²²⁵ denied a player's motion to enjoin a transfer restriction, reasoning that the tennis player could not demonstrate a personal or public injury resulting from the rule.²²⁶ In *Tanaka v. University of Southern California*,²²⁷ a soccer player sued in antitrust when her school prohibited her transfer to UCLA, a PAC-10 school.²²⁸ She alleged that USC singled her out for reprisal because she claimed that USC arranged for athletes to receive fraudulent academic credit through sham classes.²²⁹ But the Ninth Circuit Court of Appeals denied her motion to enjoin the transfer restriction, explaining that Tanaka alleged a personal injury but no harm to a market.²³⁰

220. *NCAA v. Yeo*, 171 S.W.3d 863, 866 nn.5-6 (Tex. 2005) (citing 2001-02 NCAA DIVISION I MANUAL, art. 14.5.5.1); DIVISION I MANUAL, *supra* note 5, art. 14.5.1.

221. *Konsky*, *supra* note 40, at 1585-86, 1593-94; *see also Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1064 (9th Cir. 2001).

222. *See, e.g., Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1065 (9th Cir. 2001) (holding that the transfer rule did not have significant anti-competitive effects within a relevant market for purposes of the Sherman Act).

223. 497 F. Supp. 641 (D.C.N.H. 1980).

224. *Id.* at 646.

225. 563 F. Supp. 192 (E.D. Pa. 1983).

226. *Id.* at 194.

227. 252 F.3d 1059.

228. *Id.* at 1061.

229. *Id.*

230. *Id.* at 1064. The court reasoned that "antitrust laws were enacted for the protection of competition, not competitors." *Id.* (internal quotation marks omitted).

III. A UNIQUE APPROACH TO COLLECTIVE BARGAINING FOR COLLEGE FOOTBALL

This Part explains and justifies my argument for legislating limited and unique collective bargaining rights for Division I football players. The first Section begins by documenting strong parallels between the National Football League and Division I football. These enterprises garner billions of dollars each season, arrange competitions in the fall and early winter, and generate large revenues for related industries. No other college sport—not even men’s basketball—has this economic scale and impact. Because all NFL teams are privately owned, they are employers under one labor law that pertains to the private sector. This law, the National Labor Relations Act (NLRA), also applies to private universities and colleges, such as Stanford and Northwestern. But many Division I schools have public charters, and therefore are excluded as employers under the NLRA. The second Section provides extensive detail about states that provide collective bargaining rights and others that have no collective bargaining for any public employees. The complex coverage of labor laws vis-à-vis public and private sector football programs supports my argument, in Part IV, that college football can avoid damaging conflicts when these legal regimes apply to their industry by providing a voluntary “union substitute” for players. The third Section delineates how private sector labor laws might apply to Division I football. By way of illustration, the NLRA and the Railway Labor Act (RLRA) have specific industry rules for hospitals and critical transportation systems. The public interest in uninterrupted services is so pronounced that these rules place limits on the general right of an employee to strike. These industry-specific laws are potentially useful for conceiving a collective bargaining law for college football.

A. Why Is a Unique Approach Appropriate?

College football does more than provide leisure for players and fans. It is a big and growing business for schools, conferences, and media outlets. Its recent controversy over selecting a national champion²³¹ shows why a unique approach is necessary if collective bargaining is to be considered for college football. The new tournament format is itself unique, involving only four teams. The concept is a compromise between advocates of an eight- or sixteen-team tournament

231. See, e.g., Ralph D. Russo, *College Closes in on a Playoff—Finally*, SFGATE, <http://www.sfgate.com/news/article/College-football-closes-in-on-a-playoff-3651088.php> (last updated June 21, 2012).

and supporters of the status quo ante arrangement of choosing a champion in a national poll. PAC-12 Commissioner Larry Scott justified the compromise approach, noting that it takes into account the academic calendar that is common to NCAA schools.²³²

When the NCAA adopted a playoff in 2012 to determine a football champion, the National College Players Association (NCPA), an organization that speaks for players,²³³ was shut out of the planning process that allocated the new \$5 billion in revenue.²³⁴ While NCPA had no say in this policy change, it may have influenced the NCAA proposal to allow schools to award an additional \$2000 in annual stipends to scholarship athletes.²³⁵ In 2009, the NCPA publicized scholarship shortfalls at 336 NCAA schools.²³⁶ The group estimates that grants-in-aid fail to pay an average of \$2951 each year for a player's cost of attending school.²³⁷ Given the fact that there is little transparency to the NCAA's recent policy proposal for awarding stipends, it is impossible to estimate the effect, if any, of NCPA's publication of these data. But it is plausible to infer that the NCAA's stipend proposal is early evidence of a union substitution effect.

In short, college football has grown to resemble the NFL, but the NCAA cannot adopt the NFL's lengthy playoff system because of its educational mission. Therefore, I propose a unique hybrid form of collective bargaining that draws from elements in the NLRA and state collective bargaining laws. But my proposal has unusual limits that preserve the amateur character of NCAA athletic competition. For example, the subjects of bargaining are much more limited than in traditional labor laws. Notably, wages are not proposed as a subject of

232. *Id.* ("I'm sure it won't satisfy everyone," PAC-12 Commissioner Larry Scott said. . . . But we're trying to balance other important parties, like the value of the regular season, the bowls, the academic calendar.").

233. *NCPA Mission: To Provide the Means for College Athletes to Voice Their Concerns and Change NCAA Rules*, NAT'L C. PLAYERS ASS'N, <http://www.ncpanow.org/more?id=0004> (last visited Oct. 13, 2012).

234. David Steele, *College Football Playoff: NCPA Wants Players at Negotiating Table*, SPORTINGNEWS (June 26, 2012, 4:30 PM), <http://aol.sportingnews.com/ncaa-football/story/2012-06-26/college-football-playoff-ncpa-wants-plays-at-negotiating-table>. Ramogi Huma, president of the National College Players Association, urged the Bowl Championship Series (BCS) and NCAA to give the players a voice at the table. *Id.* Huma, a former UCLA player, observed that no players or athlete representatives were part of the discussion to adopt the playoff system. *Id.*

235. *NCPA Seeks More Aid for Athletes*, NCAA, <http://www.ncaa.com/news/ncaa/article/2012-01-09/ncpa-seeks-more-aid-athletes> (last updated Jan. 9, 2012).

236. Huma & Staurowsky, *supra* note 19.

237. *Id.* The median is the value for Rank 168 (Gonzaga University). *See id.*

bargaining.²³⁸ Strikes and lockouts are not permitted, either.²³⁹ Instead, this proposal draws from labor laws that substitute arbitration for the use of economic weapons.²⁴⁰

Table 1 summarizes the Illinois Public Labor Relations Act (IPLRA)²⁴¹ and the Illinois Educational Labor Relations Act (IELRA).²⁴² Table 1 highlights elements from these laws that are potentially useful for my proposal. A more detailed discussion below explains these proposals. I also explain why my proposal distinguishes between private and public schools.²⁴³

238. Compare *Local 24, Int'l Bhd. of Teamsters, Chauffeurs, Warehouse-Men and Helpers of Am. v. Oliver*, 358 U.S. 283, 295 (1959) (implying a duty under the NLRA to bargain in good faith over wages, hours, and working conditions), with 29 U.S.C. §§ 158(a)(5), 158(d) (2006).

239. Compare *Nat'l Labor Relations Bd. v. Erie Resistor Corp.*, 373 U.S. 221, 234 (1963) (“[T]he right to strike is predicated upon the conclusion that a strike when legitimately employed is an economic weapon which in great measure implements and supports the principles of the collective bargaining system.”), with *Nat'l Labor Relations Bd. v. Brown*, 380 U.S. 278, 283 (1965) (taking a similar view of an employer’s main weapon: a lockout employer “may in various circumstances use the lockout as a legitimate economic weapon”).

240. See *infra* note 239 and accompanying text.

241. 5 ILL. COMP. STAT. ANN. 315/1–315/27 (West 2005 & West Supp. 2012).

242. 115 ILL. COMP. STAT. ANN. 5/1–5/21 (West 2006).

243. See *infra* Part IV, Argument One.

B. State Law Approach

TABLE 1
STATE LAW APPROACH

Illinois Public Labor Relations Act (Public Safety Employees)	Illinois Public Educational Labor Relations Act	Model Collective Bargaining Statute for NCAA Division 1 Football
<ul style="list-style-type: none"> • Private sector • Industry specific laws for hospitals • Bargaining subjects: wages, hours, terms & conditions of employment • Strike is lawful • Lockout is lawful • Mediation is allowed • Interest arbitration is allowed but rarely used 	<ul style="list-style-type: none"> • Private sector • Industry specific laws for railroads and airlines • Mediation required before strike/lockout • Strike/lockout lawful after mediation exhausted • Congress has authority to legislate resolution to dispute 	<ul style="list-style-type: none"> • Private sector • Industry specific laws for Division I college football • Bargaining subjects: scholarship shortfall, medical disability, stipend, transfer policy, grievance system • Strike is illegal • Lockout is illegal • Mediation is allowed • Congress has authority to legislate resolution to dispute

Illinois has two laws that provide collective bargaining rights to public employees: The Illinois Public Labor Relations Act,²⁴⁴ and the Illinois Educational Labor Relations Act.²⁴⁵ Both statutes extend collective bargaining rights to state and local employees,²⁴⁶ and thereby

244. 5 ILL. COMP. STAT. ANN. 315/1–315/27.

245. 115 ILL. COMP. STAT. ANN. 5/1–5/21.

246. 5 ILL. COMP. STAT. ANN. 315/6(a); 115 ILL. COMP. STAT. ANN. 5/3(a). The IELRA defines an “employee” broadly to include “any individual, excluding supervisors, managerial, confidential, short term employees, student, and part-time academic employees of community colleges employed full or part time by an educational employer.” 115 ILL. COMP. STAT. ANN. 5/2(b) (including exceptions for managerial and confidential employees). The IPLRA defines an employee as “any individual employed by a public employer, including (i) interns and residents at public

legislate for an excluded group under the NLRA.²⁴⁷ The IELRA is specifically intended for educational employers and employees.²⁴⁸ This law extends to university students whose duties are more like employment (e.g., a teaching assistantship) than academic activities that count toward a degree (e.g., course-related research activities).²⁴⁹

While the IPLRA has broad coverage for public employees,²⁵⁰ it has specific rules for public safety officers that are appropriate for football players.²⁵¹ Foremost, the law prohibits strikes and lockouts for safety officers because of the public interest in maintaining uninterrupted services.²⁵² When a public safety employer and labor organization cannot agree to a contract, the law provides for mediation.²⁵³ It also allows the parties to utilize fact-finding.²⁵⁴ The last step in resolving a contract dispute is final offer interest arbitration.²⁵⁵ The third-party neutral must select one party's final offer.²⁵⁶ Also, the law dictates factors for the arbitrator to consider.²⁵⁷

hospitals," with exceptions for certain categories of managerial employees. 5 ILL. COMP. STAT. ANN. 315/3(n).

247. National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-69 (2006)) (section 152(3) defines employee as "any employee, . . . unless this subchapter explicitly states otherwise"). The same section then excludes "any individual employed by . . . any other person who is not an employer as herein defined." § 152(3). An employer excludes "any State or political subdivision thereof. . . ." § 152(2).

248. 115 ILL. COMP. STAT. ANN. 5/1 ("It is the public policy of this State and the purpose of this Act to promote orderly and constructive relationships between all educational employees and their employers.").

249. *Graduate Emps. Org. v. Ill. Educ. Labor Relations Bd.*, 733 N.E.2d 759, 765 (Ill. App. Ct. 2000).

[R]esearch assistants usually perform work related to their dissertations or theses. However, graduate students who receive a stipend to answer phones are indistinguishable from other office workers. Therefore, we hold that the IELRB's conclusion that the receipt of financial aid is the determinative indicia of a significant connection between assistants' employment and their role as students is clearly erroneous.

Id.

250. 5 ILL. COMP. STAT. ANN. 315/1-315/27.

251. *See id.* 315/14 (applying to security employees, peace officers, and fire fighters).

252. *Id.* 315/17(a) (granting employees other than security employees, peace officers, fire fighters, and paramedics the right to strike).

253. *See id.* 315/7, 315/14(a).

254. *Id.* 315/13.

255. *Id.* 315/14(g) (referring to the arbitrator's power to choose one party's last offer of settlement.).

256. *Id.* (directing the arbitration panel to adopt a last offer of settlement "[a]s to each economic issue").

257. *Id.* 315/14(h) (detailing objective criteria for the arbitrator's decision).

Both laws have appropriate elements for a model statute for college football. In the Big Ten, PAC-12, and SEC, fifteen schools are in states that have some form of public sector collective bargaining.²⁵⁸ Although Wisconsin and Ohio recently repealed their public sector collective bargaining laws,²⁵⁹ many states are not part of this recent trend.²⁶⁰ Ohio voters reversed this legislation and restored public sector collective bargaining.²⁶¹ Putting aside schools in these three conferences, many states have some form of collective bargaining for public employees.²⁶² A smaller but still substantial group of states have interest arbitration for public employees.²⁶³

258. See *infra* tbl.1.3, derived from *infra* note 262 and accompanying text.

259. The Wisconsin law repealing collective bargaining for virtually all public sector employees was upheld in *State ex rel. Ozanne v. Fitzgerald*, 2011 WI 43, ¶ 15, 334 Wis. 2d 70, 79, 798 N.W.2d 436, 441. A detailed history of an Ohio bill that repealed collective bargaining for public employees appears in Martin H. Malin, *The Legislative Upheaval in Public-Sector Labor Law: A Search for Common Elements*, 27 A.B.A. J. LAB. & EMP. L. 149, 150, 160 (2012).

260. See *infra* tbl.1.3 (middle column).

261. Malin, *supra* note 259, at 150; see also Sabrina Tavernise, *Ohio Turns Back a Law Limiting Unions' Rights*, N.Y. TIMES, Nov. 8, 2011, <http://www.nytimes.com/2011/11/09/us/politics/ohio-turns-back-a-law-limiting-unions-rights.html>.

262. See Alaska: Public Employment Relations Act, ALASKA STAT. §§ 23.40.070–.260 (2010 & Supp. 2011); California: Meyers-Milias-Brown Act, CAL. GOV'T CODE §§ 3500–11 (West 2010 & Supp. 2012); §§ 3512, 3560; Connecticut: Municipal Employee Relations Act, CONN. GEN. STAT. ANN. §§ 7-467 to -477 (West 2007 & Supp. 2012); State Employee Collective Bargaining Act §§ 5-270 to -280; Teacher Negotiation Act §§ 10-153a to -153o; Delaware: Public School Employment Relations Act, DEL. CODE ANN. tit. 14, §§ 4001–18 (Michie 2007 & Supp. 2012); Public Employment Relations Act, DEL. CODE ANN. tit. 19, §§ 1301–19 (Michie 2005 & Supp. 2010); Police Officers' and Firefighters' Employment Relations Act §§ 1601–23; Florida: Public Employees Labor Relations Act, FLA. STAT. ANN. §§ 447.201–.309 (West 2002 & Supp. 2012); Hawaii: HAW. REV. STAT. ANN. §§ 89-12(c) to -23 (LexisNexis 2012); Idaho: IDAHO CODE ANN. §§ 33-1271 to -1276 (2008 & Supp. 2012), *amended by* 2011 Idaho Sess. Laws, ch. 96, § 17, 208; 2011 Idaho Sess. Laws, ch. 295, § 5, 821, 2012 Idaho Sess. Laws, ch. 265, § 5, 740; Illinois: Illinois Public Labor Relations Act, 5 ILL. COMP. STAT. ANN. 315/1 to /27 (West 2005 & Supp. 2012); 115 ILL. COMP. STAT. ANN. 5/1 to /21 (West 2005 & Supp. 2012); Iowa: Public Employment Relations Act, IOWA CODE ANN. §§ 20.1–.30 (West 2010 & Supp. 2012); Kansas: Public Employer-Employee Relations Act, KAN. STAT. ANN. §§ 75-4321 to -4337 (1997 & Supp. 2011); §§ 72-5410 to -5437; Kentucky: KY. REV. STAT. ANN. §§ 78.470, 345.010–.130 (LexisNexis 2009 & Supp. 2011); Maine: Municipal Public Employees Labor Relations Law, ME. REV. STAT. ANN. tit. 26, §§ 961–74 (2007 & Supp. 2011); State Employees Labor Relations Act §§ 979-A to -S; University of Maine System Labor Relations Act §§ 1021–36; Maryland: MD. CODE ANN., Education §§ 6-408 to -411 (LexisNexis 2008 & Supp. 2011); Massachusetts: MASS. GEN. LAWS ch. 150E, §§ 1–15 (LexisNexis 2012 & Supp. 2012); Michigan: Public Employment Relations Act, MICH. COMP. LAWS ANN. §§ 423.201–.512 (West 2001 & Supp. 2012); Minnesota: 1984 Public Employment

Labor Relations Recodification Act, MINN. STAT. ANN. §§ 179A.01–.40 (West 2006 & Supp. 2012); Missouri: MO. REV. STAT. §§ 105.500–.530 (West 2012 & Supp. 2012); Nebraska: Industrial Relations Act, NEB. REV. STAT. §§ 48-801 to -818.02 (LexisNexis 2012); Nevada: Local Government Employee-Management Relations Act, NEV. REV. STAT. ANN. §§ 288.010–.280 (LexisNexis 2008 & Supp. 2011); New Hampshire: Public Employee Labor Relations, N.H. REV. STAT. ANN. §§ 273-A.1 to -A.17 (2008 & Supp. 2011); New Jersey: New Jersey Employer-Employee Relations Act, N.J. STAT. ANN. §§ 34:13A-1 to -43 (West 2011 & Supp. 2012); New York: Taylor Act, N.Y. CIV. SERV. LAW §§ 200–14 (McKinney 2011 & Supp. 2012); Ohio: OHIO REV. CODE ANN. §§ 4117.01–.24 (LexisNexis 2007 & Supp. 2012); Oregon: Public Employee Collective Bargaining Act, OR. REV. STAT. §§ 243.650–.782 (2011 & Supp. 2012); Pennsylvania: Public Employee Relations Act, PA. STAT. ANN. §§ 1101.101–.902 (West 2009 & Supp. 2012); Policemen and Firemen Collective Bargaining Act §§ 217.1–.10; Rhode Island: Rhode Island State Labor Relations Act, R.I. GEN. LAWS §§ 28-7-1 to -27 (2003 & Supp. 2011); South Dakota: S.D. CODIFIED LAWS §§ 3-18-1 to -18 (2004 & Supp. 2012); Texas: Fire and Police Employee Relations Act, TEX. LOC. GOV'T CODE ANN. §§ 174.101–.253 (West 2008 & Supp. 2012); Vermont: State Employees Labor Relations Act, VT. STAT. ANN. tit. 3, §§ 941–1007 (2010 & Supp. 2011); Vermont Municipal Employee Relations Act, VT. STAT. ANN. tit. 21, §§ 1721–35 (2009 & Supp. 2011); Labor Relations for Teachers Act, VT. STAT. ANN. tit. 16, §§ 1981–2027 (2004 & Supp. 2011); Washington: WASH. REV. CODE ANN. §§ 41.56.010–.950 (West 2012); Educational Employment Relations Act §§ 41.59.0001–.950; WASH. REV. CODE ANN. §§ 47.64.005–.910 (West 2001 & Supp. 2012). Colorado has an executive order authorizing partnership agreements with employees. See OFFICE OF THE GOVERNOR, STATE OF COLO., EXEC. ORDER NO. D 028 07: AUTHORIZING PARTNERSHIP AGREEMENTS WITH STATE EMPLOYEES (Nov. 2, 2007), available at <http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheader=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere1251616366875&ssbinary=true>. This was not counted in table 3's category of states with collective bargaining laws because the bargaining process differed from the aforementioned statutes. Also, Arizona is a state with schools in table 3. The state has no collective bargaining law, but Phoenix has an ordinance for local collective bargaining. Accordingly, Arizona State and University of Arizona are grouped among states without collective bargaining. However, the local approach to public-sector collective bargaining is referenced in *City of Phx. v. Phx. Emp't Relations Bd.*, 86 P.3d 917, 921 (Ariz. Ct. App. 2004) (discussing Phoenix ordinance that created an agency to adjudicate unfair labor practice charges).

263. Alaska: ALASKA STAT. § 23.40.200(b) (2010 & Supp. 2011); Connecticut: Municipal Employee Relations Act, CONN. GEN. STAT. ANN. §§ 7-473c, 7-475 (West 2008 & Supp. 2012); State Employee Collective Bargaining Act, CONN. GEN. STAT. ANN. § 5-279 (West 2007 & Supp. 2012); Hawaii: HAW. REV. STAT. ANN. § 89-11 (LexisNexis 2012); Illinois: 5 ILL. COMP. STAT. ANN. 315/14 (West 2005 & Supp. 2012); Iowa: Public Employment Relations Act, IOWA CODE ANN. §20.22 (West 2010 & Supp. 2012); Maine: Judicial Employees Labor Relations Act, ME. REV. STAT. ANN. tit. 26, § 1285(4)(B) (2007 & Supp. 2011); Michigan: MICH. COMP. LAWS ANN. § 423.238 (West 2001 & Supp. 2012); Minnesota: 1984 Public Employment Labor Relations Recodification Act, MINN. STAT. ANN. § 179A.16 (West 2006 & Supp. 2012); Nevada: Local Government Employee-Management Relations Act, NEV. REV. STAT. ANN. §288.215 (LexisNexis 2008 & Supp. 2011); New Jersey: New Jersey Employer-Employee Relations Act, N.J. STAT. ANN. § 34:13A-16 (West 2011 & Supp. 2012); New York: Public Employees' Fair Employment Act, N.Y. CIV. SERV. LAW § 209 (McKinney 2011 & Supp. 2012); Ohio: OHIO REV. CODE ANN.

In addition, the IPLRA defines bargaining subjects differently from the private-sector counterpart, the NLRA, by deferring to managerial interests.²⁶⁴ My proposal takes this idea much further by preserving the NCAA's core principle of amateur competition.

Thus, my proposal limits the subjects of bargaining to scholarship shortfalls (the difference between grant-in-aid funding and the true cost for attending college), extended or improved educational benefits (additional scholarship assistance for degree completion after playing eligibility is exhausted), complete medical and hospital insurance for football-related injuries, long-term disability insurance for injuries with delayed symptoms such as brain trauma, transfer and eligibility rights not inconsistent with NCAA rules, and a grievance process to challenge abusive treatment by coaches and administrators.

The IPLRA's ban on strikes is appropriate for a model NCAA law for several reasons. First, the spillover effects from interrupting games would be large and disruptive for fans and commercial stakeholders, such as TV networks. Second, players would be harmed by a strike because their eligibility is time-bound and tied to academic progress toward degrees.²⁶⁵ Finally, because public and private schools are subject to different collective bargaining laws, a strike in one legal sphere would have a large and unmitigated spillover effect on schools excluded from coverage. This is because no major football conference is comprised entirely of private or public schools.

The substitution of final offer arbitration for strikes, in contrast to conventional arbitration (which allows an arbitrator discretion to fashion an award, thereby diminishing the motivation for bargainers to settle), has been successful in states with these laws.²⁶⁶ Final offer arbitration induces parties to make mutual concessions to minimize the risk of having an arbitrator reject their final offer.²⁶⁷ The fact that final

§ 4117.14(C)(1)(a) (LexisNexis 2007 & Supp. 2012); Oregon: Public Employee Collective Bargaining Act, OR. REV. STAT. § 243.746 (2011 & Supp. 2012); Pennsylvania: Public Employee Relations Act, PA. STAT. § 1101.805 (West 2009 & Supp. 2012); Rhode Island: R.I. GEN. LAWS § 36-11-9 (2011); Washington: WASH. REV. CODE ANN. § 41.56.465 (West 2012).

264. 5 ILL. COMP. STAT. ANN. 315/4 (a management rights provision stating that employers are not required to bargain over matters of inherent managerial policy).

265. DIVISION I MANUAL, *supra* note 5, art. 14.2.1 (Five-Year Rule).

266. Arvid Anderson & Loren A. Krause, *Interest Arbitration: The Alternative to the Strike*, 56 FORDHAM L. REV. 153, 157-58 (1987).

267. Janet Currie & Sheena McConnell, *Collective Bargaining in the Public Sector: The Effect of Legal Structure on Dispute Costs and Wages*, 81 AM. ECON. REV. 693, 707 (1991); Henry S. Farber, *An Analysis of Final-Offer Arbitration*, 24 J. CONFLICT RESOL. 683, 684-85 (1980); Peter Feuille, *Final Offer Arbitration and the Chilling Effect*, 14 INDUS. REL. 302, 307-09 (1975); Carl M. Stevens, *Is Compulsory Arbitration Compatible with Bargaining?*, 5 INDUS. REL. 38 (1966).

offer arbitration is also used extensively in Major League Baseball shows both the practicality and broad applicability of this dispute resolution process.²⁶⁸

C. Federal Law Approach

TABLE 2
FEDERAL LAW APPROACH

National Labor Relations Act	Railway Labor Act	Model Collective Bargaining Statute for NCAA Division 1 Football
<ul style="list-style-type: none"> • Public sector • Industry specific laws for public safety employees & employers • Bargaining subjects: wages, hours, terms & conditions of Employment • Strike is illegal • Lockout is illegal • Mediation is allowed • Final offer interest arbitration is terminal stop to resolve disputes for negotiating agreements 	<ul style="list-style-type: none"> • Public sector • Industry specific: educational employees and employers, including graduate students • Bargaining subjects: wages, hours, terms and conditions of employment • Strike is lawful • Lockout is lawful • Mediation is allowed • Final offer interest arbitration not provided by law 	<ul style="list-style-type: none"> • Public sector • Industry specific: Division I college football players at public universities or colleges • Bargaining subjects: scholarship shortfall, medical disability, stipend, transfer policy, grievance system • Strike is illegal • Lockout is illegal • Mediation is allowed • Final offer interest arbitration resolves dispute over a new agreement

There are two federal laws for private sector collective bargaining: the Railway Labor Act (RLA)²⁶⁹ and the National Labor Relations Act

268. Benjamin A. Tulis, *Final-Offer "Baseball" Arbitration: Contexts, Mechanics & Applications*, 20 SETON HALL J. SPORTS & ENT. L. 85 (2010).

269. Railway Labor Act, ch. 347, 44 Stat. 577 (1926) (codified as amended at 45 U.S.C. §§ 151-88 (2006)).

(NLRA).²⁷⁰ Both acts have provisions that are adaptable for college football at private schools. The RLA is an industry-specific law that applies only to railroad and airline employers and employees.²⁷¹ The NLRA broadly applies to most private sector employment,²⁷² but was amended to adapt to the unique aspects of employment in hospitals.²⁷³

These laws do not have the IPLRA's managerial limits on bargaining subjects. This makes wholesale adoption of the NLRA or RLA inappropriate for college football because of the practical need to maintain amateur competition. The same point is true for each law's robust provision of economic weapons for employees and employers.²⁷⁴ More appropriately, parts of these laws reflect legislative intent to shield critical industries from strikes. When the NLRA was amended to include hospital employees, Congress placed greater procedural limits on strikes.²⁷⁵ Similarly, due to the public interest in rail and air service with no interruption, the RLA has procedures to delay or avoid strikes and lockouts. These interventions include mediation,²⁷⁶ presidential

270. National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–69 (2006)).

271. 45 U.S.C. § 151 (rail carriers); § 181 (air carriers).

272. 29 U.S.C. § 151.

273. The Taft-Hartley Act amended the Wagner Act (NLRA) to exempt most hospital employees from collective bargaining. Labor Management Relations Act, ch. 120, sec. 101, § 2(2), 61 Stat. 136, 137 (1947) (amending the definition of employer to exclude hospitals). Congress modified this policy in 1974, permitting hospital employees to have collective bargaining rights. *See* 29 U.S.C. § 152(14).

274. National Labor Relations Act (NLRA), ch. 372, 49 Stat. 449 (1935); 29 U.S.C. § 152(3). The Supreme Court has provided employers with right to hire permanent striker replacements, *Nat'l Labor Relations Bd. v. Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938), and the right to lockout employees during contract negotiations, *Am. Ship Bldg., Co. v. Nat'l Labor Relations Bd.*, 380 U.S. 300 (1965). *See also Nat'l Labor Relations Bd. v. Truck Drivers Local Union No. 449*, 353 U.S. 87, 90 n.7 (1957) (a whipsaw strike “is the process of striking one at a time the employer members of a multi-employer association”). *See generally Brown v. Pro Football, Inc.*, 50 F.3d 1040, 1052 (D.C. Cir. 1995) (“As the terms of the NLRA amply demonstrate, federal labor policy favors neither party to the collective bargaining process, but instead stocks the arsenals of both unions and employers with economic weapons of roughly equal power and leaves each side to its own devices.”).

275. The amendments required that employers and labor organizations in the health care industry provide ninety-day notice of termination of a collective bargaining agreement, Act of July 26, 1974, Pub. L. No. 93-360, § 1(d)(1)(A), 88 Stat. 395, 396; provide sixty-day notice of contract termination, *id.*; and participate in mediation, *id.* § 1(d)(1)(C). The law requires labor organizations to give ten-day notice to employers before engaging in any work stoppage. *Id.* § 1(e) (adding current § 8(g) to the Act).

276. 44 Stat. at 579–82, as amended; 45 U.S.C. § 155(b) (providing that either party to a dispute may invoke mediation provided by the National Mediation Board and, alternatively, allowing the Board to “proffer its services in case any labor emergency is found by it to exist at any time”).

emergency boards,²⁷⁷ and congressional authority to legislate a resolution.²⁷⁸

Both private sector laws have appropriate elements for college football. In the Big Ten and PAC-12, three schools are private institutions.²⁷⁹ They are therefore subject to the NLRA.²⁸⁰ At present, the NLRA does not apply to the employment of university students.²⁸¹ However, the law has gone back and forth in its application to university students.²⁸² Recently, the National Labor Relations Board (NLRB) expressed interest in reconsidering this issue.²⁸³ The NLRB's pronouncement has general significance for extending collective bargaining to college football because the NLRA might be extended to college students who are engaged to play this sport outside their academic instruction.

While the RLA does not apply to higher education, its dispute resolution features are potentially instructive. Generally, strikes and lockouts under the RLA and NLRA²⁸⁴ are incompatible with college football for reasons I have already enumerated.²⁸⁵ However, the RLA designates Congress as the ultimate authority to resolve an impasse. This is a possible dispute resolution model for college football. Indeed, insofar as Congress has already shown interest in resolving the dispute

277. *Id.* The President has authority to create an Emergency Board if a dispute substantially threatens to interrupt interstate commerce. 45 U.S.C. § 159(c) (2006). The Board (often called a PEB) investigates and reports facts on the dispute to the President. *Id.*

278. Congress has taken three approaches to resolving an impasse under the RLA. It has imposed the recommendations of an emergency board. An example is the settlement between the Chicago & Northwestern Transportation Company and UTU, imposing P.E.B. 213's recommendations. Joint Resolution of Sept. 9, 1988, Pub. L. 100-429, 102 Stat. 1617 (1988). Congress may require the parties submit their disputes to binding interest arbitration. *E.g.*, Joint Resolution of Sept. 30, 1986, Pub. L. 99-431, 100 Stat. 987 (1986); *see also Maine Central R.R. v. Bhd. of Maint. of Way Emps.*, 873 F.2d 425 (1st Cir. 1989). Or, Congress may extend the status quo period. *E.g.*, Joint Resolution of Aug. 21, 1986, Pub. L. 99-385, 100 Stat. 819 (1986); *see also Maine Central R.R. v. Bhd. of Maint. of Way Emps.*, 813 F.2d 484 (1st Cir. 1987), *cert. denied*, 484 U.S. 825 (1987).

279. *See Education: Colleges*, U.S. NEWS & WORLD REPORT, <http://colleges.usnews.rankingsandreviews.com/best-colleges> (last visited Oct. 25, 2012) (search by school name for Northwestern University (Big Ten), Stanford University (PAC-12), and University of Southern California (PAC-12)).

280. 29 U.S.C. §§ 151-52 (2006).

281. *See Brown University*, 342 N.L.R.B. 483, 493 (2004).

282. *See New York University*, 332 N.L.R.B. 1205, 1209 (2000).

283. *New York University*, 356 2010-2011 NLRB Dec. (CCH) ¶ 15,326 (Oct. 25, 2010) (stating its intent to reconsider *Brown*, *supra* note 281).

284. *See supra* note 239 and accompanying text.

285. *See supra* note 240 and accompanying text.

for selecting a national champion,²⁸⁶ a possible role to arbitrate differences between players and schools cannot be dismissed as an unreasonable possibility.

IV. THE UNION SUBSTITUTION ARGUMENT

I develop the union substitution argument in two parts. First, I simulate a plausible scenario if the proposed legislation is enacted. This “thought experiment” is meant to show the foreseeable implications that such a law would present to the NCAA. The proposed law would introduce a new element of competition, making a football program with collective bargaining potentially more attractive to recruits. That change would threaten to undermine the NCAA’s monopsony control of college football labor. To support my first argument, I therefore show how a public or private sector law would likely have a ripple effect on this highly controlled labor market.

Second, I relate these scenarios to the union substitution theory. That concept explains how many employers respond to a plausible threat of unionization. This argument subdivides in two portions. To begin, the National Industrial Recovery Act (NIRA) is discussed. This law, which called on employers to undertake collective bargaining voluntarily with their employees, was a precursor to the NLRA. Seemingly innocuous because of its voluntary character, the law had a strong effect. Many employers rushed to form in-house unions in order to preclude external organizing. Congress came to a negative judgment about these company unions, and more recent research has shown that some of these employer-generated “unions” were actually progressive and inclusive. I conclude this argument by giving examples of how the union substitution effect is readily observable in today’s economy. Even though private sector unions represent about one in twenty employees in the United States,²⁸⁷ employers remain keenly sensitive to their presence. Companies strategize to limit the possibility of an organizing campaign by implementing internal voice mechanisms and improving employee benefits.

Argument One: Collective Bargaining Would Have an Adverse Ripple Effect for the NCAA by Introducing More Competition between Schools for the Labor of Football Players: Table 3 helps to visualize the

286. See Leslie Bauknight Nixon, *Playoff or Bust: The Bowl Championship Series Debate Hits Congress (Again)*, 21 ST. THOMAS L. REV. 365, 366 n.7 (2009) (reporting on H.R. 7330, 110th Cong. (2008)).

287. Press Release, Bureau of Labor Statistics, U.S. Dep’t of Labor, Union Members—2010 (Jan. 21, 2011), <http://www.bls.gov/news.release/pdf/union2.pdf> (finding private sector unionization measured at 6.9%).

union substitution thesis. Recall that separate labor laws regulate private and public sector employers. Let us now explore the possible impact if one state, or Congress, adopted the collective bargaining concept proposed in this Article.

TABLE 3
CURRENT RELATIONSHIP OF SEC, BIG TEN, AND PAC-12 SCHOOLS TO
FEDERAL AND STATE COLLECTIVE BARGAINING LAWS

NLRA and Private Sector Schools	State Collective Bargaining Laws and Public Schools	No State or Federal Collective Bargaining Law
<ul style="list-style-type: none"> • Northwestern (Big Ten) • USC (PAC-12) • Stanford (PAC-12) 	<ul style="list-style-type: none"> • Illinois (Big Ten) • Iowa (Big Ten) • Michigan (Big Ten) • Michigan State (Big Ten) • Minnesota (Big Ten) • Ohio State (Big Ten) • Penn State (Big Ten) • Florida (SEC) • Kentucky (SEC) • Washington (PAC-12) • Washington State (PAC-12) • Cal-Berkeley (PAC-12) • UCLA (PAC-12) • Oregon (PAC-12) • Oregon State (PAC-12) 	<ul style="list-style-type: none"> • Indiana (Big Ten) • Nebraska (Big Ten) • Purdue (Big Ten) • Wisconsin (Big Ten) • Alabama (SEC) • Auburn (SEC) • LSU (SEC) • Arkansas (SEC) • Georgia (SEC) • South Carolina (SEC) • Mississippi (SEC) • Mississippi State (SEC) • Tennessee (SEC) • Colorado (PAC-12) • Arizona (PAC-12) • Arizona State (PAC-12)

To illustrate, let us suppose two scenarios. In one setting, the state enacts the proposed collective bargaining law for University of Illinois football players. Historically, this team rarely wins conference championships and is not viewed as a national program. Nevertheless, Illinois competes directly for recruits with better football programs at nearby Wisconsin, Iowa, and Michigan State. The collective bargaining law would enable Illinois to attract players more competitively against these better football schools.

The Illinois football team would be entitled to bargain on a range of issues, including scholarship shortfalls, extended or improved

educational benefits, complete medical and hospital insurance for football-related injuries, long-term disability insurance for injuries with delayed symptoms, transfer and eligibility rights not inconsistent with NCAA rules, and a grievance process to challenge abusive treatment by coaches and administrators.

To give a concrete illustration, recall that Wisconsin recently “over-restricted” a basketball player by refusing to grant Jarrod Uthoff a release if he transferred to any school on a list of more than twenty programs.²⁸⁸ The Illinois law would provide players a mechanism to bargain for coaching limits on transfer restrictions, keeping those restrictions to those imposed by the Big Ten Conference and NCAA. Illinois could therefore use Jarrod Uthoff’s negative experience at Wisconsin to its advantage by offering a more reasonable and regulated transfer system. A high school recruit would have more assurance of mobility at Illinois compared to Wisconsin.

Now let us consider scholarship shortfall. A football player at Illinois is estimated to spend \$2510 each year to cover a shortfall in costs related to his education.²⁸⁹ The annual scholarship shortfall at Wisconsin is \$3680.²⁹⁰ The Illinois law could enable its football team to widen its current financial-aid advantage over Wisconsin by a substantial amount. Over four years, Illinois would have a cost advantage of \$14,720.

Even if the Illinois law influenced only one recruit to favor Illinois over Wisconsin, the competitive balance would be altered. Perhaps the Wisconsin football program would adopt the procedures and policies in Illinois. Maybe the Big Ten would intervene and provide players more voice in their affairs. The point is that just a little change would likely have a ripple effect.

Now consider a private sector example. Suppose that Stanford players entered into collective bargaining with their school after Congress enacted a version of this proposal. This football program recruits players on a more national scale than Illinois. Already highly competitive for excellent players, Stanford would find that the collective bargaining law enabled it to make better offers to players than Texas, a perennial powerhouse. While the latter program is in a state which is generally opposed to unions,²⁹¹ the advent of losing a

288. See *supra* note 160 and accompanying text.

289. See Huma & Staurowsky, *supra* note 19 (click on Scholarship Shortfalls at 336 NCAA Division I Colleges).

290. *Id.*

291. Shannon Gleeson, *Labor Rights for All? The Role of Undocumented Immigrant Status for Worker Claims Making*, 35 LAW & SOC. INQUIRY 561, 573 (2010) (Texas is a right-to-work state, with unionization of workforce at 5.3% versus 16.5%

single quarterback prospect could induce Texas to mimic the benefits provided by the program with collective bargaining. Notably, Texas has a public collective bargaining law for police and firefighters, and thus a precedent for applying this process to vital public services.²⁹² A football player at Stanford is estimated to spend \$2385 to cover an annual shortfall in costs related to his education,²⁹³ while the estimated scholarship shortfall at Texas is \$3482.²⁹⁴ Again, the collective bargaining law would make Stanford more attractive on the dimension of out-of-pocket costs. And again, a change at one school would likely alter the competitive balance for recruiting across a spectrum of institutions. In this case, a newly enacted private sector law could stimulate parallel developments in one or more states.

These hypothetical cases demonstrate the union substitution effect for college football. While this is a matter of conjecture, it is hard to imagine that the NCAA would let these scenarios play out to the degree I have outlined here. I suggest that if a proposal for this model advanced in a legislature, the NCAA would head off this cascading sequence by substituting some form of player representation, while addressing at least some of the economic issues embedded in this proposed bargaining law. But this reasoning is pure conjecture. If it misses the mark, this proposed law would invite more public scrutiny of the growing wealth disparity between the NCAA and powerful schools, on the one hand, and the football players who are essential for this largess.

In other words, the union substitution concept would, in this scenario, be available as a form of cooptation. Up to this point, my conclusion is nothing more than a hypothesis. What evidence supports this prediction? Argument Two answers this question.

Argument Two: Historical and Current Examples Show that Employers Substitute Union Voice Mechanisms and Improve Employee Benefits When They Perceive a Plausible Threat of Unionization. As industrial unions became popular in the early 1900s, some employers mimicked their role by creating sham bargaining organizations, called

for California). A “right-to-work” state has legislation that prohibits a union security clause from being enforced—and thereby reduces a union’s ability to collect dues from employees. See BLACK’S LAW DICTIONARY 1441 (9th ed. 2009).

292. TEX. LOC. GOV. CODE ANN. § 174.023 (West 2008). This begs the rhetorical question whether Texas lawmakers would equate college football in their state to essential public services.

293. See Huma & Staurowsky, *supra* note 19.

294. *Id.*

company unions.²⁹⁵ Others utilized authentic voice organs for employees to impact their work.²⁹⁶

The National Industrial Recovery Act (NIRA) caused many employers to adopt a union substitution approach. The NIRA was passed in 1933 to foster fair competition.²⁹⁷ Congress used this terminology to combat yellow dog contracts, an employer coercion to inhibit collective bargaining.²⁹⁸ The NIRA also set forth a blueprint for voluntary collective bargaining.²⁹⁹

The law failed to promote collective bargaining, but had a profound effect, nonetheless. Employers were encouraged by trade associations to adopt Employee Representation Plans (ERPs).³⁰⁰ Many ERPs were called company unions³⁰¹ and they mirrored the functions of traditional labor organizations. In 1935, Congress learned that company unions had broad mandates to deal with employers concerning working conditions and pay.³⁰² Carnegie Steel had a plan that served as model for others in that industry.³⁰³ The Carnegie Steel Plan explained that “negotiations may be carried on between representatives of the employees and the representatives of management.”³⁰⁴ The subjects of

295. For a contemporaneous account of company unions, see Edwin E. Witte, *The Background of the Labor Provisions of the N.I.R.A.*, 1 U. CHI. L. REV. 572 (1934). An employer counterpoint appears in Cornelius W. Wickersham, *The NIRA from the Employers' Viewpoint*, 48 HARV. L. REV. 954, 965–67 (1935).

296. Kaufman, *supra* note 60, at 735–36 (liberal employers established employee representation plans in the belief that these organizations led to mutual gains for workers and firms).

297. National Industrial Recovery Act, ch. 90, 48 Stat. 195 (1933), *invalidated by A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 541–42 (1935).

298. See Comment, *Impact of the Courts upon the NRA Program: Judicial Administration of NIRA*, 44 YALE L.J. 90, 106 (1934) (“A supplemental right to that of collective bargaining has also been acquired by labor through the medium of Section 7(a). This is the negative, but nevertheless, important, right of freedom from ‘yellow dog’ contracts.”).

299. See Laura J. Cooper, *Letting the Puppets Speak: Employee Voice in the Legislative History of the Wagner Act*, 94 MARQ. L. REV. 837, 839–40 (2011) (quoting section 7(a) of NIRA).

300. *National Labor Relations Act, Hearings on S. 2926 Before the Comm. on Education and Labor*, 73d Cong., 2d Sess. 40 (1934), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 262 (1985).

301. *Id.* at 110 (statement of Sen. Robert Wagner) (“Yesterday we had a hearing in the automobile industry and it came out very clearly that the company union was formed by sending to each worker a constitution and bylaws telling him, ‘This is now your organization.’ As the result of that an election was held, and the workers testified that they voted because they knew very well if they did not vote their jobs were gone.”).

302. *Id.*

303. *Id.* at 120.

304. *Id.* at 121.

bargaining were typical for collective bargaining: work rules, safety, wages, piecework, scheduling, working conditions, health and workplace sanitation, and continuity of employment.³⁰⁵

Congress viewed the NIRA's voluntary model as a failure,³⁰⁶ in large part because employers imposed sham unions on their workforces. They replaced the law with the NLRA and enacted a prohibition against creating company unions.³⁰⁷ While the NLRA is enforced to eliminate the most overt and direct forms of foisting an in-house union on employees, it does little to impede the union substitution effect.

When foreign auto makers locate large manufacturing plants in the U.S., they often target southern states, where unionization occurs less frequently.³⁰⁸ This fits a broader migration of industrial plants to the South as a union-avoidance strategy.³⁰⁹ In auto factories run by foreign

305. *Id.* at 121–22.

306. Michael H. LeRoy, *Can TEAM Work? Implications of an Electromation and DuPont Compliance Analysis for the TEAM Act*, 71 NOTRE DAME L. REV. 215, 229 (1996).

307. 29 U.S.C. § 152(5) (2006). Congress addressed this situation by enacting two closely related provisions. First, in § 152(5), Congress brought company unions within the definition of a labor organization by describing the wide range of functions that these organizations. *Id.* Congress defined a labor organization as

any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

Id. Congress then made it unlawful in section § 158(a)(2) for an employer to dominate or interfere with such an organization. § 158(a)(2).

308. See Peter B. Doeringer et al., *Hybrids or Hodgepodes? Workplace Practices of Japanese and Domestic Startups in the United States*, 51 INDUS. & LAB. REL. REV. 171, 172 (1998) (studying workplace practices in Japanese manufacturing plants in Georgia and Kentucky). Some employers prefer to locate to southern states to avoid unionization. See THOMAS A. KOCHAN ET AL., *THE TRANSFORMATION OF AMERICAN INDUSTRIAL RELATIONS* 70 (1994) (“One of the best guarantees for keeping a plant unorganized was to locate it in a southern state.”); Charles B. Craver, *The Impact of Financial Crises upon Collective Bargaining Relationships*, 56 GEO. WASH. L. REV. 465, 482 (1988) (“Because of both historical antiunion sentiment and the prevalence of state ‘right-to-work’ statutes—which prohibit the negotiation of union security arrangements—the labor movement will probably find it arduous to organize workers in the south and southwest regions of the country.”).

309. See Andrew Strom, *Boeing and the NLRB—A Sixty-Four Year-Old Time Bomb Explodes*, 68 NAT’L LAW. GUILD REV. 109 (2011) (describing Boeing’s plan to build a major production facility in the largely nonunion state of South Carolina); Misty Williams, *Caterpillar Latest Sign of Manufacturing Muscle*, ATLANTA J.-CONST., Feb. 19, 2012, at D1 (reporting that Caterpillar’s plan to build a new manufacturing plant near Athens, Georgia may have been motivated in part by the lack of unions in the region). Some states with little union presence promote their status as right-to-work

firms, companies offer sophisticated voice substitutes, such as employee involvement teams.³¹⁰ The historical lesson is clear: even if a workplace has no union, there is some possibility that its employment policies are made more appealing to workers because the firm endeavors to minimize the possibility of collective bargaining.

CONCLUSION

As NCAA football continues to soar in popularity and stature, it will likely face greater scrutiny. How will NCAA schools treat football players who are too injured to continue their athletic careers? Will they continue to end scholarships for disabled players?³¹¹ Who will pay to treat college players who never play pro football but suffer dementia from too many concussions³¹² and have no access to an NFL disability benefit plan? When the players who generate billions of dollars in revenue for their schools exhaust their eligibility, how many will have student loans to pay? Will college players be able to negotiate the equivalent of an NFL free agency policy that allows them greater

states, a euphemism for a policy that makes union dues clauses unenforceable. *See, e.g., Cost of Doing Business*, OKLA. DEP'T COMMERCE, <http://www.okcommerce.gov/location-or-expansion/cost-of-doing-business/> (last visited Sept. 26, 2012).

310. *See* *Aero Detroit, Inc.*, 321 N.L.R.B. 1101 (1996) (employee committee was organized in response to a union organizing campaign); *Reno Hilton Resorts Corp.*, 319 N.L.R.B. 1154 (1995) (employer ordered to disestablish committees it set up during organizing campaign); *Garney Morris, Inc.*, 313 N.L.R.B. 101 (1993) (employer instituted employee committees during union organizing drive). *See generally* WEILER, *supra* note 60, at 33 (“Unfortunately, in many of its manifestations the contemporary participatory management movement appears to run afoul of both the letter and the original intent of [section 8(a)(2) of] the NLRA.”); Doeringer, *supra* note 308, at 172 (concluding that Japanese plants adopted practices such as intensive employee participation, team work, and total quality management). The study also concluded that these hybrid workplace systems “emphasize social and organizational learning, employee participation in problem-solving, and worker commitment as the principal means of motivating labor efficiency. They typically reward their employees with career employment, as well as high wages, and their employees reciprocate with high labor productivity.” *Id.* at 182.

311. *Coleman v. W. Mich. Univ.*, 336 N.W.2d 224, 226 (Mich. Ct. App. 1983) (after a player sustained a career-ending injury, the football program did not renew his scholarship and he was therefore unable to continue his education at this school).

312. Cari Nierenberg, *College Football Players' Concussion Rates Double*, WEBMD (July 12, 2012), <http://www.webmd.com/fitness-exercise/news/20120712/college-football-players-concussion-rates-double> (concussions doubled in NCAA football from 2010 to 2011, though the increase was likely due to more stringent rules and medical protocols).

mobility to move to another team without incurring out-of-pocket costs and significant ineligibility periods?

The status quo is ripe for change because the NCAA is an immense monopsony that makes new revenue quickly but reforms itself slowly. Schools have little incentive to face the reality that they are professionalizing college football.³¹³ This Article demonstrates that college football exploits an invisible labor market. The NCAA's paradoxical embrace of the amateur athlete model precludes the adoption of a traditional collective bargaining model. But a limited form of player bargaining with the NCAA on subjects that are not inconsistent with NCAA rules and policies offers a path toward better treatment of the primary contributors to this wealth. Even if the proposed form of collective bargaining is never enacted, all that is needed to spur reform is a plausible effort to legislate this concept. The union substitution effect shows that employers respond to credible threats of unionization by providing individuals more voice and better financial treatment. This cooptation of union representation is at the heart of my proposal for collective bargaining in college football. Today, players have no representation and traditional collective bargaining is infeasible for them. But I demonstrate that an invisible union is a plausible approach to address the interests of college football players.

313. *United States v. Walters*, 997 F.2d 1219, 1225 (7th Cir. 1993) (“The NCAA depresses athletes’ income—restricting payments to the value of tuition, room, and board, while receiving services of substantially greater worth. The NCAA treats this as desirable preservation of amateur sports; a more jaundiced eye would see it as the use of monopsony power to obtain athletes’ services for less than the competitive market price.”).