COURTS AND THE FUTURE OF "ATHLETIC LABOR" IN COLLEGE SPORTS

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Summary

How will courts shape labor rights in college sports? For decades, judges have fostered changes in how professional athletes are paid. Recently, "labor" has entered the lexicon of NCAA litigation involving antitrust and union organizing. "Athletic labor," a term coined by a federal appeals court, signals a favorable turn for students. Already, an NLRB regional director's ruling in *Northwestern University* has accelerated the NCAA's efforts to compensate students.

This study, based on 81 state and federal court rulings from 1973 to 2014, forecasts how courts will apply labor law to student complaints against the NCAA. Students won all or part of 49% first-round court rulings, but the NCAA won in 71% of second-round cases, and won another 71% of third-round appeals. Venue played a key role: Students won 75% of first-round state rulings, while the NCAA won 61% of first-round federal rulings. Football comprised 40% of cases, with nine other sports in the remaining cases.

The future will likely bring be more court rulings involving the National Labor Relations Act (NLRA), Norris-LaGuardia Act (NLGA), and Sherman Act (antitrust). Eventually, a federal appeals court, and possibly Supreme Court, will decide if college football players are employees under the NLRA. This study's finding that the NCAA wins most appeals suggests that students will not be classified as employees. Under the Sherman Act, courts will probably find that college football players are in a labor market, but also conclude that NCAA rules have a pro-competitive effect on the business of college football— again, favoring the NCAA. The most vexing problem for the NCAA could be boycotts and protests directed by a players union against NCAA sponsors and business partners. Most actions would be sheltered from an injunction under the NLGA— thereby pressuring the NCAA to make significant reforms.

Future courts are unlikely to order the NCAA to abandon its definition of amateur athletics. Without enabling legislation, courts have no authority to surgically snip the amateur competition clause in NCAA bylaws for football. Even if a district court favors students in a football case involving antitrust, it will be hamstrung because treble damages would jeopardize women's sports that are funded by football.

In sum, the facts favor classifying college football players as employees, but the law supports the NCAA's amateur athlete model. Thus, while schools profit off the sweat of football players, a federal appeals court is unlikely to alter the NCAA's amateurism model. But the forecast for occasional first-round victories by students— based on empirical findings in this study— means that the NCAA will be pressured to adopt a radically new model of amateurism that mimics the employment relationship.

TABLE OF CONTENTS

> [C]ourts cannot 'make rules' to govern amateur athletics. All we can do is to apply legal precedents to the rules promulgated by the associations involved.[1]
>
> This appears to be a clear monopsony case, since the NCAA is the only purchaser of student ***athletic labor*** (emphasis added).[2]

I. INTRODUCTION

In 1889, a Philadelphia baseball player ignored a clause in his contract and signed with a rival team.[3] In 2014, a Northwestern University student ignored a clause in his football scholarship agreement,[4] and signed a union authorization card. Both wanted a bigger cut of the money they earned for their team.[5] Both agreed to terms, however, that restricted their ability to compete for another team.[6] By challenging the status quo, that baseball player pioneered rights for contemporary football, hockey, and basketball players.[7] Courts played a crucial role in

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[1] National Collegiate Athletic Ass'n v. Gillard, 352 So.2d 1072 (Miss. 1977).

[2] Agnew v. National Collegiate Athletic Ass'n, 683 F.3d 328 (7th Cir. 2012) (Agnew II), at 337, n.3.

[3] Philadelphia Ball Club, Ltd., v. Hallman, 8 Pa.C.C. 57 (Pa.Com.Pl. 1890), at 60.

[4] Northwestern University and College Athletes Players Ass'n, 2014 WL 1246914 (2014), at *13, describing the grant-in-aid agreement in college football, which includes NCAA limits on compensation. I use "student" to describe the plaintiffs in this study. My purpose is to use neutral terminology that does not imply support for CAPA or the NCAA. The union in Northwestern University refers to "players," a term that implies status as employees. *See* College Athletes Players Association, *What We're Doing*, at http://www.collegeathletespa.org/what. The NCAA Bylaws refer to these same individuals as "student-athletes." *See* 2009-10 NCAA DIVISION I MANUAL, Rule 2.2 [The Principle of Student-Athlete Well-Being], at http://www.ncaapublications.com/productdownloads/D110.pdf.

[5] Clarence Page, *Could Union Change NCAA's Game*, CHI. TRIBUNE (Feb. 5, 2014), at 2014 WLNR 3187042. In the Hallman case, there is no explicit statement that the ball player left for another team to pursue money; but that is the clear implication. *See* Hallman, *supra* note 3, at 61-62, reporting that "Hallman did not covenant to serve them at the same salary which they paid him for 1889, but only to serve them for some salary to be agreed upon, which should not be less than that which he received before." The court noted: "The salary was not to be less than $1,400. Does not that plainly imply that it might be more. In case they did not agree upon the amount who was to decide?" *Id*. at 62.

[6] Northwestern University, *supra* note 4, at *3 (players who transfer to another school to play football are prohibited from playing the next year for the new school); and Hallman, *supra* note 3, at Para. 18, at 61 (team shall have right "to reserve" player for next year).

[7] *See* Michael H. LeRoy, *The Narcotic Effect of Antitrust Law in Professional Sports: How the Sherman Act Subverts Collective Bargaining*, 86 TUL. L. REV. 859 (2012), at 864, and relating Hallman to the evolution of free agency in other sports at 866-871.

regulating change in professional sports.[8] Now students are asking courts to play a similar role in college athletics. There is a major difference, however: College athletics is defined as an amateur enterprise in furtherance of academic goals set by the NCAA, the umbrella group for more than 1,200 universities and college.[9] And yet, some NCAA sports— especially Division I football— are similar to a professional league. The Northwestern student who is leading an organizing drive claims that he and his teammates are employees, and therefore, are eligible to form a union. What is not clear is how courts will define labor rights for these students.

This study predicts how courts will behave in this time of transformation.[10] Over the past forty years, federal courts have played an essential role in steering the future of professional sports.[11] Now, they are poised to play a similar role for college football and other sports. Students are suing the NCAA for damages arising from restrictions on compensation,[12] failure to pay all educational costs,[13] restrictions on student pay for using their likeness in commercial video games,[14] medical monitoring and compensation for brain injuries,[15] failure to warn about

[8] *See* Stephen F. Ross, *The Misunderstood Alliance Between Sports Fans, Players, and the Antitrust Laws*, 1997 U. ILL. L. REV. 519 (1997); Joseph P. Bauer, *Antitrust and Sports: Must Competition on the Field Displace Competition in the Marketplace?* 60 TENN. L. REV. 263 (1993); and Richard E. Bartok, Note, *NFL Free Agency Restrictions Under Antitrust Attack*, 1991 DUKE L.J. 503 (1991), at 506-508.

[9] The association is discussed in more detail at *infra* notes 56-64.

[10] Courts will probably have more influence than Congress in defining "athletic labor" in college football. Nonetheless, congressional interest has begun to stir. *See* Verbatim Transcript, *Rep. John Kline Holds a Hearing on Unionizing Student Athletes*, ROLL CALL, INC., 2014 WL 1879234 (May 8, 2014).

[11] Gabriel Feldman, *Brady v. NFL and Anthony v. NBA: The Shifting Dynamics in Labor-Management Relations in Professional Sports and Intercollegiate Athletics*, 86 TUL. L. REV. 831 (2012), explaining how courts influenced collective bargaining in professional football, basketball, and hockey.

[12] Jenkins v. Nat'l Collegiate Athletic Ass'n, 2014 WL 1008526 (D.N.J.) (Trial Pleading), alleging that NCAA rules for FBS football and D-I men's basketball illegally limit player pay for athletic services. *See* Para. 42.

[13] Gregory-McGhee v. Nat'l Collegiate Athletic Ass'n, 2014 WL 1509247 (N.D.Cal.) (Trial Pleading), alleging that the NCAA's cap on grants-in-aid restrains schools from competing against each other with respect to the amount of financial aid for students. This arrangement has failed to cover the true cost of education. Para. 98.

[14] A concise summary of this complex litigation appears in Keller v. Electronic Arts, Inc., 2010 WL 530108 (N.D. Cal. 2010) (Keller I), a case that joined the NCAA as a defendant. The complaint alleged that the

concussions,[16] and a limit on multiyear scholarships.[17] Some lawsuits are similar to NFL cases,[18] suggesting that legal duties grounded in professional employment could migrate to NCAA sports. Adding to this possibility, "labor" recently entered the lexicon of student lawsuits against the NCAA, and a federal appeals court in 2012 signaled approval of the term "athletic labor."[19]

In Part II, I present a detailed empirical analysis of 81 state and federal court rulings from 1973 and 2014.[20] Part III provides a textual assessment of student cases against the NCAA. The analysis covers constitutional issues, academic standards, discrimination, antitrust, and team sanctions.[21] Part IV analyzes three "athletic labor" scenarios that are likely to confront the NCAA.[22] Judges could ignore evidence of heavy commercialization of college football, much

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NCAA violated its own bylaws that prohibit the commercial licensing of a student's name, picture or likeness. The Keller case settled, but a related antitrust case, involving Ed O'Bannon, continued to trial. Tom Van Riper, *As O'Bannon Case Opens, NCAA Settles Offshoot Case For $20 Million*, FORBES (June 9, 2014), at http://www.forbes.com/sites/tomvanriper/2014/06/09/as-obannon-case-opens-ncaa-settles-offshoot-case-for-20-million/. For the particulars of the O'Bannon complaint, *see* O'Bannon v. Nat'l Collegiate Athletic Ass'n, 2010 WL 445190 (N.D. Cal. 2010), claiming that the NCAA and its licensing arm, Collegiate Licensing Company (CLC), violated the Sherman Act by prohibiting pay for students whose likeness was used in a commercial video game.

[15] Arrington v. Nat'l Collegiate Athletic Ass'n, 2011 WL 4374451 (N.D.Ill.), alleging that the NCAA has failed to monitor and detect when students suffer concussions in practice and games. Para. 37 & 38.

[16] Jackson v. Nat'l Collegiate Athletic Ass'n, 2014 WL 1314151 (E.D.N.Y.) (Trial Pleading), alleging that the NCAA subjected football players to repetitive brain injuries without warning about health risk associated with these injuries, and also failing to furnish procedures to monitor and mitigate these risks. Para. 27.

[17] Rock v. Nat'l Collegiate Athletic Ass'n, 2012 WL 3096760 (S.D.Ind.) (Trial Pleading). Although the NCAA rescinded its ban on multi-year grants-in-aid in 2012, the ban created arbitrary limits on the number of athletics-based scholarships. Para. 51. To highlight the exploitation of students by the NCAA, the Complaint also alleges that the NCAA President is paid $1.6 million annually, while other officers are paid hefty salaries. Para. 32.

[18] Jackson, *supra* note 16. *Compare*, *with* Ken Belson, *N.F.L. Makes Open-Ended Commitment to Retirees in Concussion Suit*, N.Y. TIMES (June 25, 2014), reporting on a class action settlement for retired NFL players who suffer from brain injuries, at http://www.nytimes.com/2014/06/26/sports/football/nfl-makes-open-ended-commitment-to-retirees-in-concussion-suit.html?hp&action=click&pgtype=Homepage&version=HpSum&module=second-column-region&region=top-news&WT.nav=top-news.

[19] Student complaints using the term "labor" are discussed at *infra* note 197. The Seventh Circuit Court of Appeals' use of "athletic labor" appears in *supra* note 1, and text associated with *infra* note 94.

[20] *Infra* notes 25-43, and related text.

[21] *Infra* notes 44-102, and related text.

[22] *Infra* notes 103-196, and related text.

like they did for baseball when they created a bizarre antitrust immunity for a sport they put on a pedestal. This would maintain the status quo for students and the NCAA. Or, courts could rule that students are employees under federal labor law. Their analysis could draw from regulations pertaining to college students under the Fair Labor Standards Act. Finally, a union could target NCAA business partners and sponsors with boycotts and pickets. Courts would be unable to enjoin many of these activities under the Norris-LaGuardia Act, even if a union targeted athletic wear companies that do business with NCAA schools. Part V presents my forecast for judicial regulation of athletic labor in college sports,[23] while Part VI lists cases in the database.[24]

II. STUDENTS V. NCAA: RESEARCH METHODS AND STATISTICAL RESULTS

A. The Importance of Case Law

While statutes regulate labor law, courts play a major role in defining employment law. The most basic employment law doctrine, employment-at-will, was created by courts in the 1800s.[25] More recently, courts created the tort of wrongful discharge.[26] Common law doctrines also play a key role in employment contracts.[27]

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[23] *Infra* notes 197-209, and related text.

[24] *Infra* notes 210-221, and cases.

[25] The doctrine was first recognized in HORACE G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT (1877). Comparing American and English law, Wood wrote that:

> With us the rule is inflexible, that a general or indefinite hiring is prima facie a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. . . . It is an indefinite hiring and is determinable at the will of either party, and in this respect there is no distinction between domestic and other servants.

Id. § 134 at 272. English law presumed that master and servant were bound to each other for one year, unless varied by contract.

[26] Early cases include Petermann v. Teamsters Local 396, 344 P.2d 25 (Cal.App.1959) (finding a public policy exception to employment-at-will); and Monge v. Beebe Rubber Co., 316 A.2d 549 (1974) (finding covenant of good faith dealing exception to employment-at-will).

[27] Groundbreaking employment contract cases include Pugh v. See's Candies, Inc., 171 Cal.Rptr. 917 (Cal.App. 1981), which found an implied oral contract exception to employment-at-will; Toussaint v. Blue Cross

COURTS AND "ATHLETIC LABOR"

Similarly, courts help to resolve ambiguities in labor law. This has been the experience in professional sports. Several Supreme Court rulings exempted major league baseball from antitrust law.[28] As a result, players have used arbitration and strikes, instead of antitrust, to achieve limited free agency.[29] Paradoxically, the Supreme Court has ruled that football players can use antitrust to challenge NFL labor market restrictions.[30] After losing a strike in 1987, NFL players won an antitrust challenge to the league's limits on free agency.[31] In the NBA, a court approved an antitrust settlement that modified the draft and free agency.[32]

My study asks: What role will courts play in defining "athletic labor" in college sports? This question has not been answered empirically by the extensive research literature that examines labor and employment issues in NCAA sports.[33] For context, the NCAA is a private

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and Blue Shield of Michigan, 292 N.W.2d 880 (Mich. 1980), which found a handbook exception to employment-at-will; and Fortune v. National Cash Register Co., 364 N.E.2d 1251 (Mass. 1971), which adapted the doctrine of good faith and fair dealing to the employment relationship.

[28] Federal Baseball Club, *infra* note 111. This ruling was affirmed in Toolson (II), *infra* note 117, and Flood (II), *infra* note 119.

[29] LeRoy, *supra* note 7, at 884-85.

[30] Radovich v. Nat'l Football League, 352 U.S. 445 (1957).

[31] White v. National Football League, 822 F.Supp. 1389 (D.Minn. 1993), at 1395. As a result of this complex litigation, pensions increased by 40%, and players received $110 million in damages. *See* http://web.archive.org/web/20101011092613/http://www.nflplayers.com/About-us/History/.

[32] Robertson v. National Basketball Ass'n, 389 F.Supp. 867 (D.C.N.Y. 1975).

[33] Research takes several different perspectives. Much of the literature analyzes NCAA regulations from an antitrust perspective. *See* Jeffrey J.R. Sundram, Comment, *The Downside of Success: How Increased Commercialism Could Cost the NCAA Its Biggest Antitrust Defense*, 85 TUL. L. REV. 543 (2010); Andrew B. Carrabis, *Strange Bedfellows: How the NCAA and EA Sports May Have Violated Antitrust and Right of Publicity Laws to Make a Profit at the Exploitation of Intercollegiate Amateurism*, 15 BARRY L. REV. 17 (2010); Daniel Lazaroff, *The NCAA In Its Second Century: Defender of Amateurism or Antitrust Recidivist*, 86 OR. L. REV. 329 (2007); Sarah M. Konsky, Comment, *An Antitrust Challenge to the NCAA Transfer Rules*, 70 U. CHI. L. REV. 1581 (2003); and Chad W. Pekron, *The Professional Student-Athlete: Undermining Amateurism as an Antitrust Defense in NCAA Compensation Challenges*, 24 HAMLINE L. REV. 24 (2000).

For a novel and interesting contract analysis, *see* Debra D. Burke, *The NCAA Letter of Intent: A Voidable Agreement for Minors?* 81 MISS. L.J. 265 (2011). A proposal to reform the NCAA is developed in Nicolas A. Novy, *"The Emperor Has No Clothes": The NCAA's Last Chance as the Middle Man in College Athletics*, 21 SPORTS LAW. J. 227 (2014). A polemical analysis that focuses on the exploitation of students in college sports is offered in Robert A. McCormick & Amy Christian McCormick, *A Trail of Tears: The Exploitation of the College Athlete*, 11

association of colleges and universities that enjoys a legal presumption to make and enforce its rules.[34] It is unincorporated, a fact that the NCAA occasionally argues to avoid a lawsuit.[35] NCAA rules and sanctions are subject to limited judicial review.[36] There is no way to answer my research question without comprehensively examining NCAA litigation involving students.

B. Method for Creating the Sample

The sample was derived from Westlaw's internet service. Federal and state databases were searched for cases involving students as plaintiffs and the NCAA as defendant. In other words, my research focused on direct challenges by students against this association. It did not include, for example, a student's claim for worker's compensation for a football injury.[37] Although this type of case considered whether a student is an employee, it did not challenge an NCAA rule or penalty. I also excluded cases that only involved a student and university.[38]

The sample began with a 1973 decision,[39] and ended with cases decided in 2014.[40]

FLA. COASTAL L. REV. 639 (2010). For an empirical assessment of the NCAA's educational mission, *see* Patrick James Rishe, *A Reexamination of How Athletic Success Impacts Graduation Rates*, 62 AM. J. OF ECO. & SOCIOLOGY 407, 415 (2003) (football graduation rate at Division I schools was 52.46%), and Jordan Grimm, *A Study of Collegiate Football Success on Student-Athlete Graduation Rates* (2004), at 13, available in 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 %).

[34] *Infra* note 53.

[35] Cohane v. Nat'l Collegiate Athletic Ass'n, 2014 WL 1820782 (D. Mass. 2014), at *1. Conversely, the NCAA occasionally joins a lawsuit as an indispensable party. *E.g.*, Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179 (1988), at 188, citing University of Nevada v. Tarkanian, 594 P.2d 1159 (1979).

[36] *E.g.*, Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, *infra* note 85.

[37] *E.g.*, Van Horn v. Ind. Acc. Comm., 219 Cal.App.2d 457 (1963); Rensing, *infra* note 90; and Graczyk v. Workers' Comp. Appeals Bd., 184 Cal.App.3d 997 (1986).

[38] *E.g.*, Guiliani v. Duke Univ., 2010 WL 1292321 (M.D.N.C. 2010) (new coach refused to honor four year scholarship promise from former coach); Jennings v. University of North Carolina, 482 F.3d 686 (4th Cir. 2007) (female soccer player alleged that her coach sexually harassed her); and Knapp v. Northwestern University, 101 F.3d 473 (7th Cir. 1997) (basketball player whose scholarship was revoked after cardiac arrest sued university over its failure to perform on its contract).

[39] Buckton v. National Collegiate Athletic Ass'n, 366 F.Supp. 1152 (D.Mass. 1973).

[40] Keller v. Electronic Arts, Inc., 2014 WL 2191464 (N.D. Cal. 2014) (Keller II).

Relevant data were taken from each case. Variables included (1) the law or laws that the NCAA allegedly violated, (2) the type of court (state or federal; trial or appellate), (3) year of court ruling, (4) remedy sought, (5) NCAA rule or action challenged by a student, (6) winner of ruling, (7) ruling on injunctions, and (8) court's reasoning. I repeated this data extraction for additional court rulings. I refer to these as round-two and round-three cases, rather than appellate cases, because some involved federal district court rulings which resulted from state court removal or state court rulings on remand from federal court. These were not appellate cases. Where cases had a complex procedural trail, I used rulings on the merits of the student's complaint.[41]

C. Statistical Findings and Quantitative Assessment

The sample had 45 cases involving students and the NCAA. Many had two or three courts issue a ruling. Part VI lists these federal and state cases.

Finding A: The flow of NCAA and student cases has been steady over the past 41 years. Cases were distributed fairly evenly over this time. Among first-round decisions, 25% occurred from 1973 to 1978. The pace slowed for the second quartile, with 1990 as the median year for a first-round case. The 75th percentile for first-round cases was reached in 1999. The remaining quartile was decided between 2000 and 2014.

Finding B: Most cases involved men's sports, particularly football and basketball. Most cases (89%) involved men's sports. Football (40%), basketball (20%), and hockey (13%) were the most common sports. Others were track (7%); soccer, wrestling and swimming (each with 5%); and tennis, volleyball, and baseball (each with 2%).

[41] The Westlaw history section shows more than 40 cases related to NCAA Student-Athlete Name & Likeness Licensing Litigation, 724 F.3d 1268 (9th Cir. 2013), including a prominent case, O'Bannon, *supra* note 14.

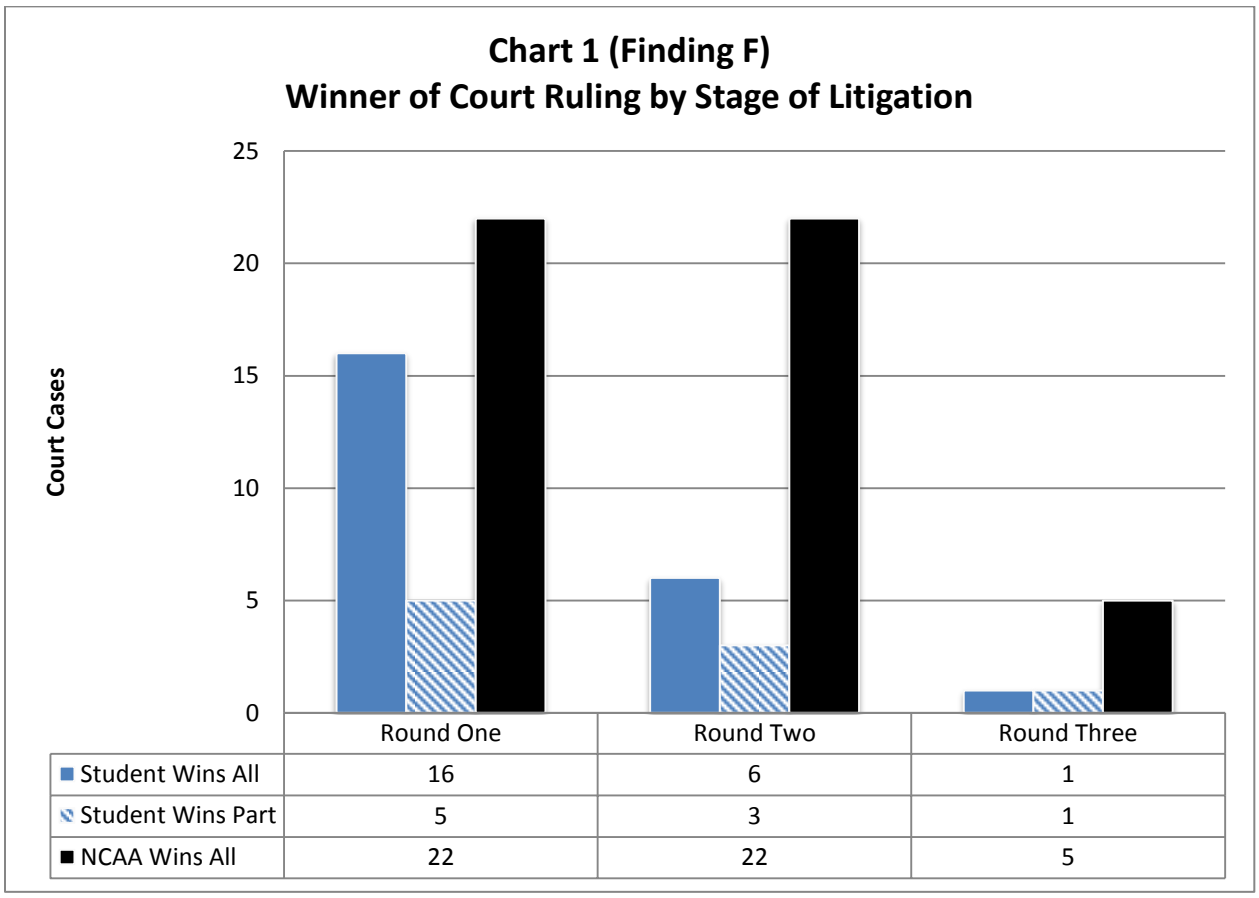
Finding C: Eligibility was the most litigated NCAA rule or action. Students sued over a variety of NCAA actions. The most common was loss of eligibility to participate in a sport (56%). Team sanctions ranked second, comprising 15% of cases, followed by student transfer restrictions (7%). Students also filed complaints about scholarships. Challenges focused on removal from a team, loss or monetary limit on a scholarship, single-year limit on scholarships, and cap on scholarships (each action comprised 4%, and some cases involved a combination of these NCAA actions). NCAA drug testing and restrictions on pay for publicity were 2% of cases.

Finding D: The most common legal complaint by students was infringement of a constitutional right. Student lawsuits alleged various statutory and common law violations. Federal constitutional claims were the leading complaint (37%), followed by antitrust (23%) and contracts (21%). Other claims involved the Americans with Disabilities Act (6%), torts (4%), fraud (2%), Title IX (3%), publicity (2%), Section 1983 (2%), and a state constitution (2%).

Finding E: Class action lawsuits against the NCAA were uncommon, while most cases involved individual plaintiffs. Students usually sued the NCAA as individuals (82% of cases). Class actions were uncommon (11%). In two cases (combining for 10%), a university was a litigant because it was caught between the NCAA's sanctioning authority and a preliminary court ruling that favored a student.

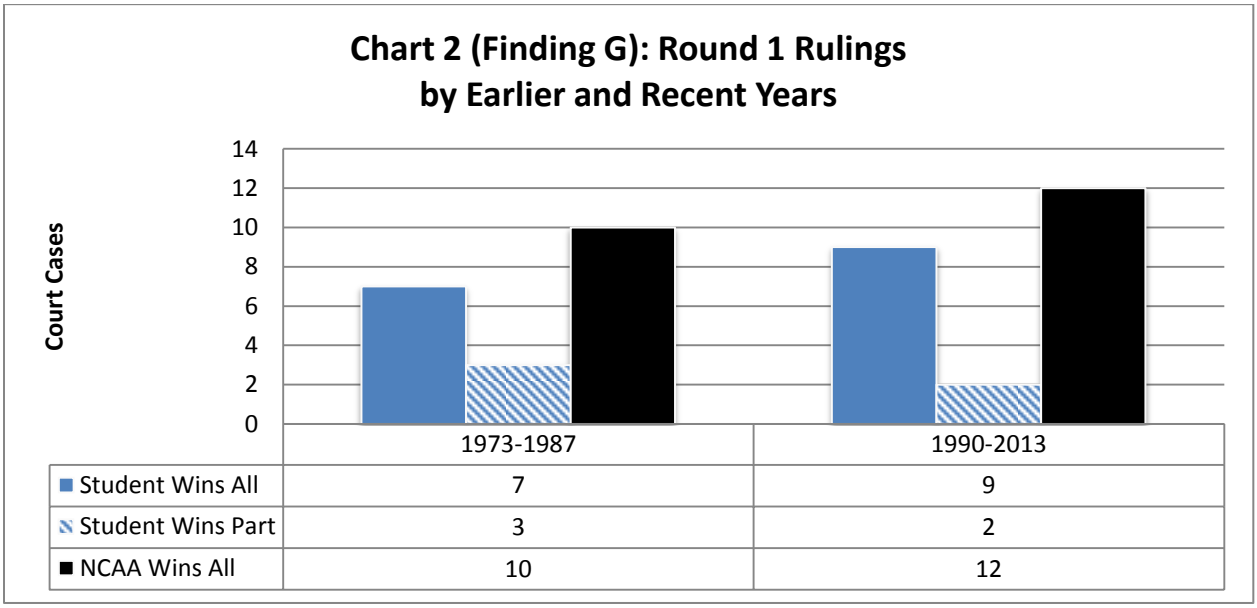
Finding F: The NCAA evenly split first-round cases with students, but won most cases in later rounds of litigation. Chart 1 (*infra*) shows 43 court rulings in the first round of a case. Students won 16 cases (37.2%), and had split wins in 5 more cases (11.6%). The NCAA won 22 cases (51.1%). On appeal, however, the NCAA erased this nearly equal division of wins. In 31 second-round cases, the NCAA won 22 times (71.0%). Students completely won 6 cases

(19.4%), and had split-wins in 3 more cases (9.7%). The NCAA's lopsided win rate continued in cases that were litigated in a third round. The NCAA won 5 of 7 cases (71.4%), leaving students with one complete victory (14.3%) and one split win (14.3%). Overall, courts ruled in 81 times, with the NCAA winning 60.5%. Students completely won in 28.4% of decisions, and partly won in the remaining 11.1% of decisions.

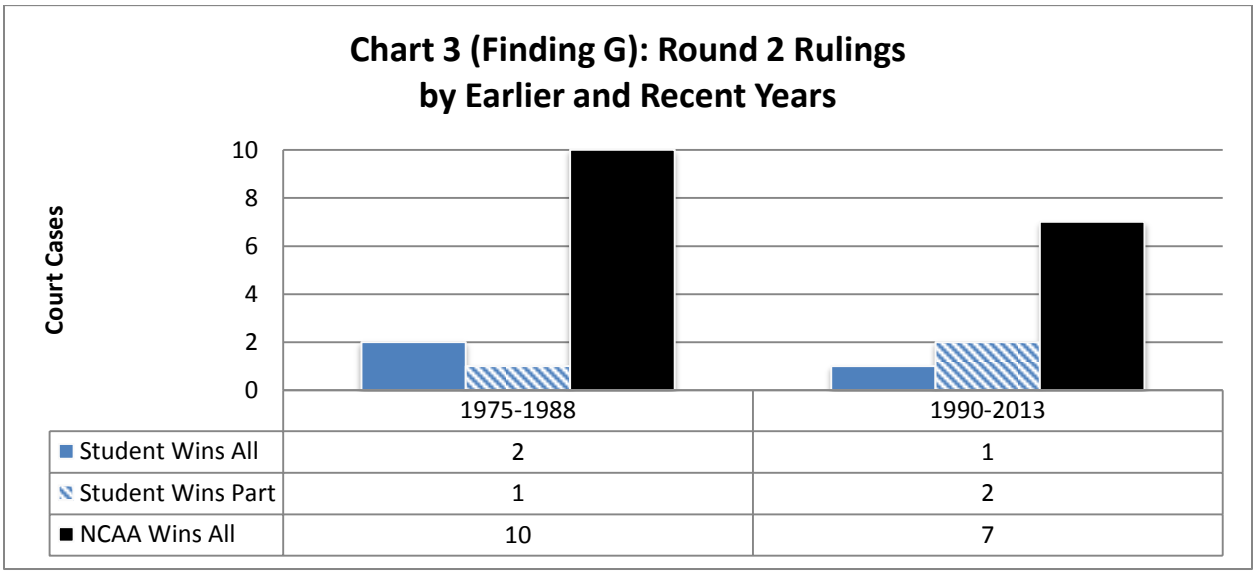


	Round One	Round Two	Round Three
Student Wins All	16	6	1
Student Wins Part	5	3	1
NCAA Wins All	22	22	5

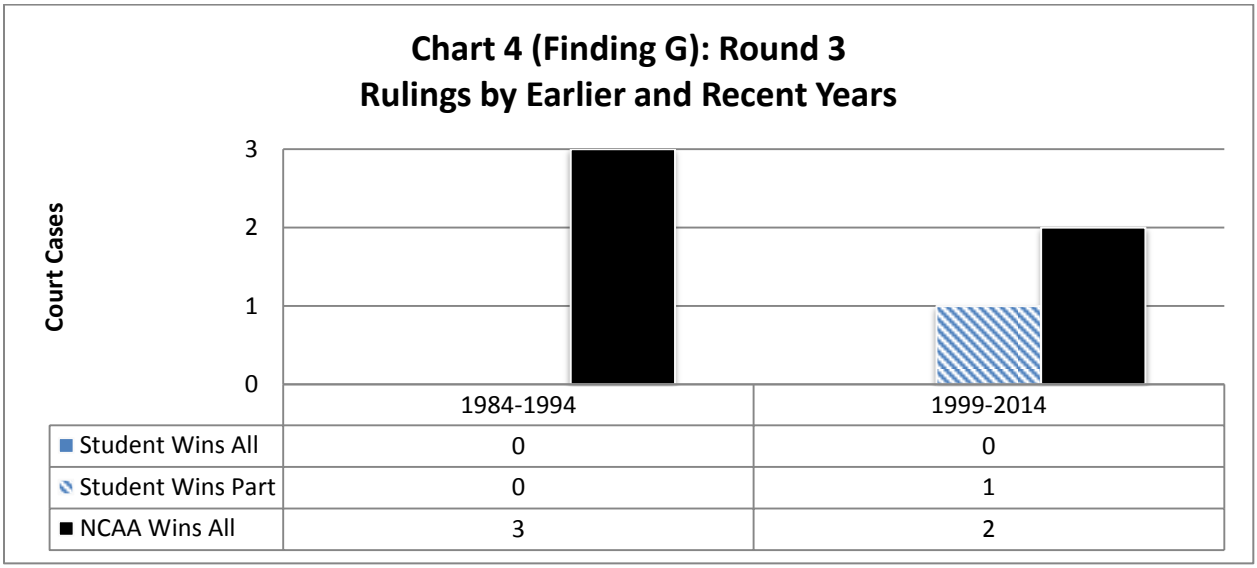
Finding G: The NCAA's dominating win-rates did not change between the early and most recent periods. Chart 2 (*infra*) shows that the NCAA won 10 out of 20 first rulings from 1973-1987 (50.0%). Recently (1990-2013), the NCAA won 12 of 23 of these rulings (52.2%).



In Chart 3 (*infra*), the NCAA had a similar win rate in second round cases. It won 10 of 13 decisions from 1973-1988 (76.9%). Recently (1990-2013), it won 7 of 10 decisions (70%).

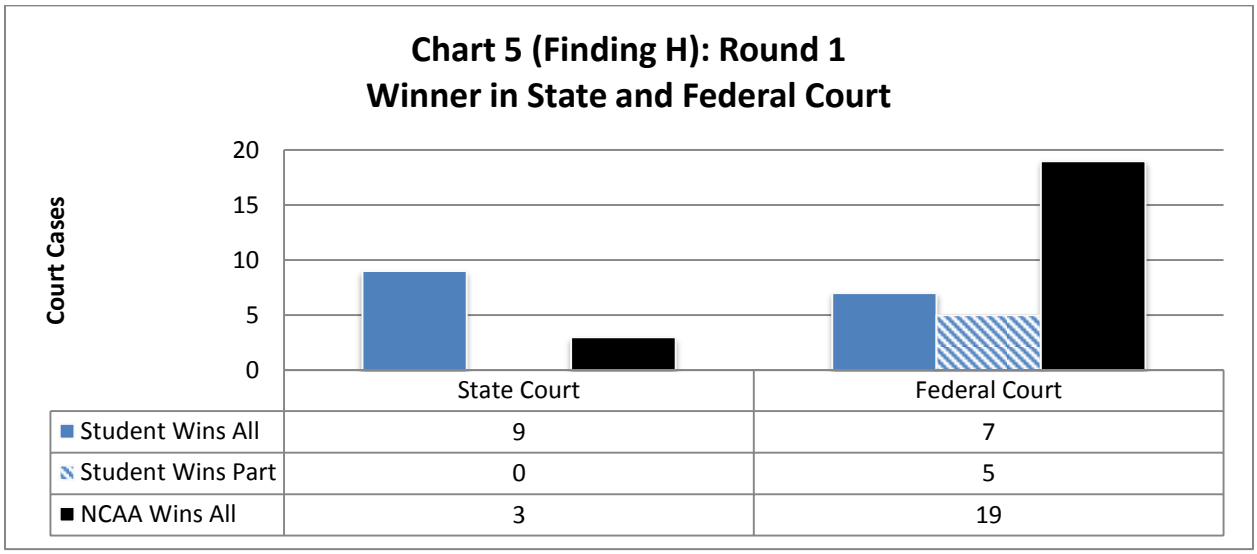


In third round cases in Chart 4 (*infra*), the NCAA won all 3 cases (100%) from 1984-1994, and 2 of 3 cases (66.7%) from 1999-2013.



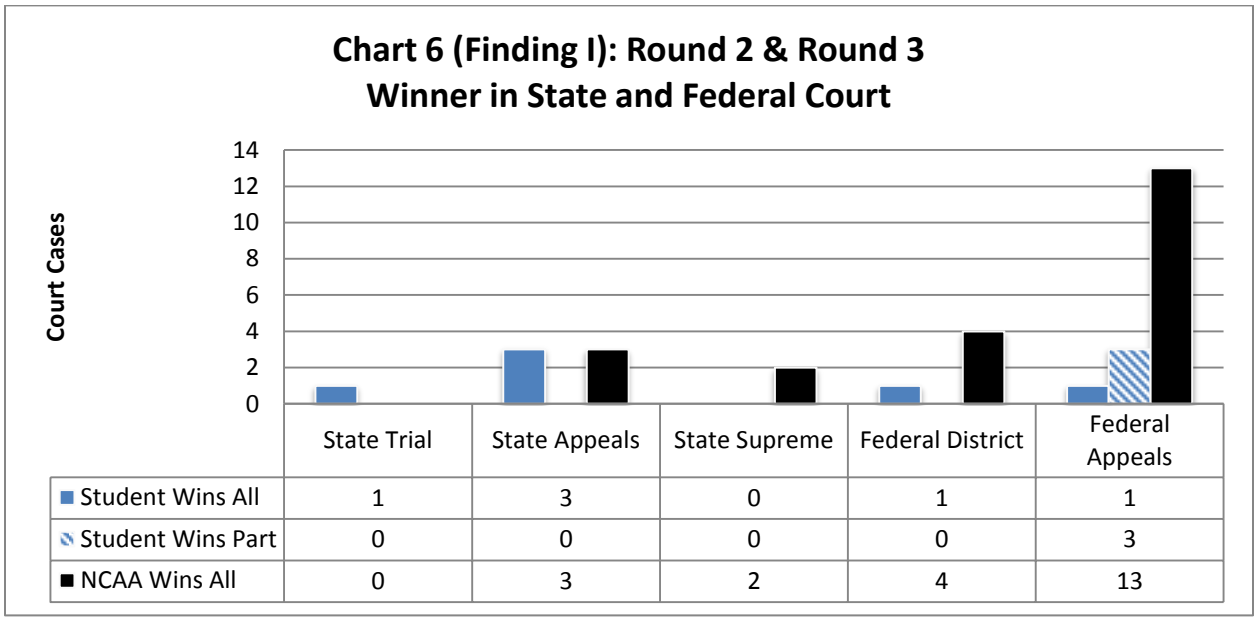
Finding H: Venue affected outcomes, as students won most state cases while the NCAA won most federal cases. Chart 5 (*infra*) shows that students won most state decisions in the first-round (75%), while the NCAA won most first-round federal cases (19 of 31 cases, or 61%). The difference in win rates was statistically significant.[42]

[42] The result for this crosstabs analysis in SPSS was χ^2 10.551, df = 2, .005.

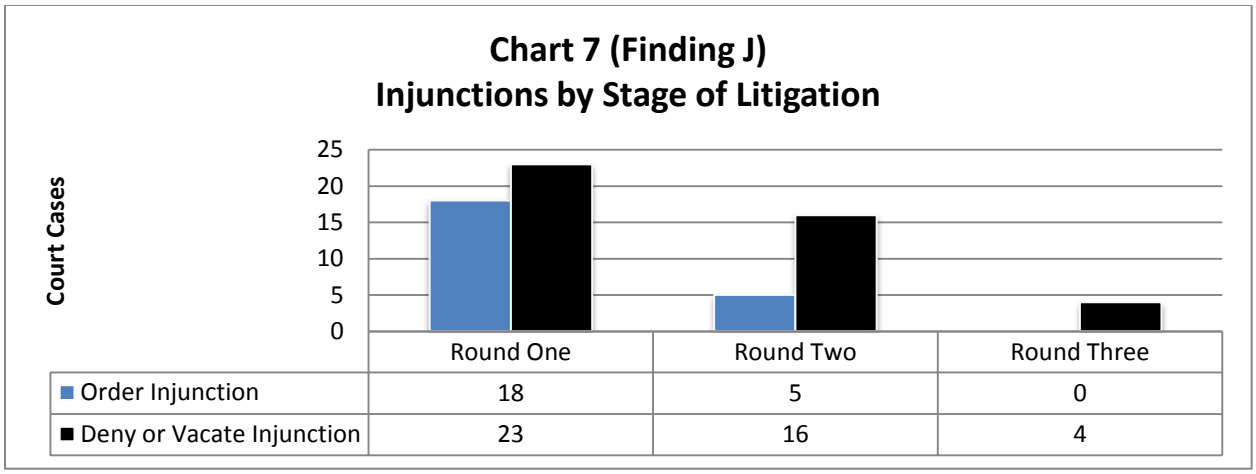


Finding I: The NCAA won most second- and third-round decisions in state and federal court. Chart 6 (*infra*) shows that the NCAA won 13 out of 17 times (76.5%) in round-two cases decided by a federal appeals court. In five cases where a federal district court ruled in second-round litigation, the NCAA won four times (80%). The NCAA won two decisions in a state supreme court. Students were limited to three wins in six state appellate cases (50.0%), and won in the only second-round case decided by a state trial court. Although the NCAA won more cases than students in later rounds, its higher success rate in federal court, compared to state court, was statistically significant.[43]

[43] The result for this crosstabs analysis in SPSS was χ^2 14.000, df = 6, .030.

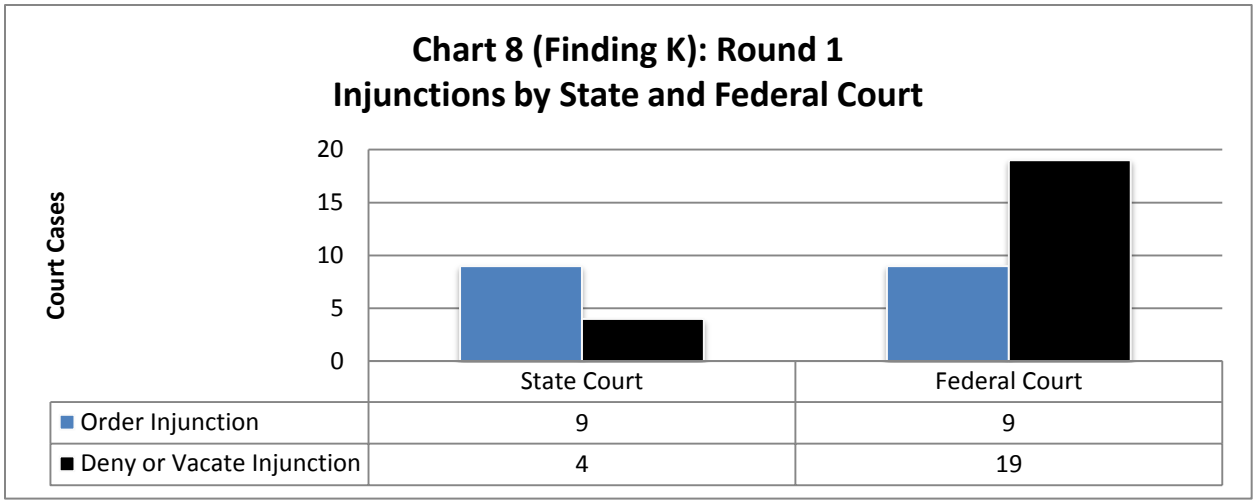


Finding J: First round courts ordered or affirmed more injunctions for a student than second- and third-round courts. Courts in Chart 7 (*infra*) ordered injunctions in 18 of 41 (43.9%) cases. Later, most courts vacated this relief (76.1%, second-round; 100%, third-round).



Finding K: State courts were more likely than federal courts to order an injunction. Chart 8 (*infra*) shows that nine state courts and four federal courts enjoined the NCAA or a school from enforcing a rule or acting against a student. The state court rate for ordering an injunction

was 69.2%, compared to 32.1% for federal courts. This difference was statistically significant.[44]



Finding L: Most cases did not cite legal precedents from professional sports. In each case, Westlaw's "Table of Authorities" was checked for a citation to a pro sports decision. Eleven NCAA cases cited such a precedent, and are footnoted in Part VI.

III. A QUALITATIVE ASSESSMENT OF STUDENT CASES AGAINST THE NCAA

A. *The National Collegiate Athletic Association*

The NCAA has a monopoly over major intercollegiate athletic programs in the U.S.[45] Its purpose is to combine intercollegiate athletics with college degree programs while maintaining a

[44] The result for this crosstabs analysis in SPSS was χ^2 4.958, df = 1, .026.

[45] Hill v. Nat'l Collegiate Athletic Ass'n, 865 P.2d 633 (Cal. App. 1994), at 660 ("The NCAA is, without doubt, a highly visible and powerful institution, holding, as it does, a virtual monopoly on high-level intercollegiate athletic competition in the United States."). For a surprisingly critical discussion, *see* WALTER BYERS, UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES (1995). Although Byers was the Executive Director of the NCAA from 1951-1988, he turned against the association, stating that it was "a nationwide money-laundering scheme." *Id*. at 73. Byers also said that: "[c]ollegiate amateurism is not a moral issue; it is an economic camouflage for monopoly practice. . . that operat[es] an air-tight racket of supplying cheap athletic labor." *Id*. at 376 & 388. *But cf*., Gaines v. Nat'l Collegiate Athletic Ass'n, 746 F.Supp. 738 (M.D.Tenn. 1990), at 746, concluding that "the legitimate business reasons of the NCAA justifying enforcement of the eligibility rules negate any attempt by Gaines to show the second element of a § 2 claim—willful maintenance of monopoly power."

demarcation between amateur and professional sports.[46] A student crosses this line by signing a contract to play a professional sport.[47] Over time, the NCAA has expanded its amateurism principle.[48] The association believes that its educational mission transcends commercialism.[49]

Forty years ago, the NCAA was smaller and less wealthy.[50] Now, it generates $16 billion a year.[51] Recently, the organization entered into multi-billion TV contracts to broadcast its athletic competitions.[52] Its membership has doubled since the 1970,[53] and is comprised of more

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[46] Justice v. Nat'l Collegiate Athletic Ass'n, 577 F.Supp. 356 (D. Az. 1983), at 361 (quoting NCAA constitution, Article 2, Section 2). *Also see* Banks v. Nat'l Collegiate Athletic Ass'n, 746 F.Supp. 850 (N.D. Ind. 1990) (Banks I), at 852 (NCAA organizes amateur intercollegiate athletics "as an integral part of the educational program and . . . retain[s] a clear line of demarcation between intercollegiate athletics and professional sports.").

[47] Shelton v. Nat'l Collegiate Athletic Ass'n, 539 F.2d 1197 (9th Cir. 1976), at 1198.

[48] Bloom v. Nat'l Collegiate Athletic Ass'n, 93 P.3d 621 (Colo. 2004), quoting NCAA Const. art. 2.9. at 626:

> Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises.

[49] *Investing Where It Matters*, NCAA, at http://www.ncaa.org/about/resources/media-center/investing-where-it-matters (visited on April 17, 2013), where the association promotes its charitable purpose: "There is a lot of talk about how much money college sports generates. But did you know that more than 90 percent of the NCAA's revenue goes to support student-athletes? Of more than 1,100 member colleges and universities in the NCAA, only 23 schools make more money than they spend on sports each year." *Also see* Ass'n for Intercollegiate Athletics for Women v. Nat'l Collegiate Athletic Ass'n, 558 F.Supp. 487 (D.C.D.C. 1983), at 495, stating: "Eleemosynary organizations such as the NCAA and the AIAW are not engaged in the sort of trade or commerce the Sherman Act originally contemplated."

[50] Howard University v. Nat'l Collegiate Athletic Ass'n, 367 F.Supp. 926 (D.D.C. Cir. 1973)(Howard I) (NCAA's 664 colleges generated $14 million).

[51] Paul M. Barrett, *When Students Fight the NCAA in Court, They Usually Lose*, BUSINESSWEEK (July 2, 2014), http://www.businessweek.com/articles/2014-07-02/when-students-fight-the-ncaa-in-court-they-usually-lose (college sports is a $16 billion a year business).

[52] *See* Lindsay J. Rosenthal, *From Regulating Organization to Multi-Billion Dollar Business: The NCAA is Commercializing the Amateur Competition It Has Taken Almost a Century to Create*, 13 SETON HALL J. SPORT L. 321, 336 (2003) (NCAA signed a $6.2 billion contract with CBS). More recently, the NCAA has added to its coffers. *See National Collegiate Athletic Association and Subsidiaries Consolidated Financial Statements as of the Years Ended August 3, 2011 and 2010*, at 16, in http://www.ncaa.org/wps/wcm/connect/public/ncaa/finances/ncaa+consolidated+financial+statements, reporting a $10.8 billion TV contract from 2010-2024.

[53] Howard (I), *supra* note 49, at 928.

than 1,200 schools.[54] As an unincorporated association, the NCAA establishes academic standards.[55] Its rules equalize access to students by capping each school's scholarships.[56]

B. *Student Cases Against the NCAA*

Because the NCAA is a voluntary association, courts are reluctant to intervene in its internal affairs.[57] Courts treat a voluntary association's constitution and bylaws as a contract between members of the group.[58] Associations are presumed to know better than judges how to administer their rules.[59] Courts apply this principle to athletic associations.[60]

But these organizations are not immune from judicial scrutiny.[61] And interesting to note, CAPA is not the first group to represent college athletes. In the 1970s, an association represented students against the NCAA.[62] Since then, students have periodically sued the NCAA or member school.[63] On rare occasion, courts have dismissed a case over threshold issues, such as standing.[64] Courts have tended to reject these arguments.[65]

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[54] *See* NCAA membership website at http://www.ncaa.org/about/who-we-are/membership .

[55] *See* Bowers v. Nat'l Collegiate Athletic Ass'n, 974 F.Supp. 459 (D.N.J. 1997), at 461.

[56] Agnew v. Nat'l Collegiate Athletic Ass'n, 2011 WL 3878200 (S.D. 2012) (Agnew I), at *5, n.6 (the NCAA believes that its cap on scholarships are necessary because "some schools would offer extra scholarships to stockpile players so that those players would be unable to play for a competitor.").

[57] Bloom, *supra* note 47, at 624; and Yeo (II), *infra* note 65, at 870 ("judicial intervention in [student athletic disputes] often does more harm than good").

[58] Sult v. Gilbert, 3 So.2d 729 (Fla. 1941), at 731, affirming the authority of athletic association to expel a member school for failing to perform its contract to play another team.

[59] Gillard, *supra* note 1, at 1081.

[60] Nat'l Collegiate Athletics Ass'n v. Lasege, 53 S.W.3d 77 (Ky. 2001), at 83, stating that "courts are a very poor place in which to conduct interscholastic athletic events,…"

[61] Indiana High School Athletic Association v. Carlberg, 694 N.E.2d 222, 230-232 (Ind.1997) (finding review of IHSAA decisions subject to "arbitrary and capricious" review).

[62] Associated Students, Inc. v. Nat'l Collegiate Athletic Ass'n, 493 F.2d 1251 (9th Cir. 1974) (plaintiff was a group organized to represent student interests, including athletes with an eligibility issue).

[63] *Infra* Roster of Cases, Part VI.

[64] McCormack v. Nat'l Collegiate Athletic Ass'n, 845 F.2d 1338 (5th Cir. 1988).

[65] Rock v. Nat'l Collegiate Athletic Ass'n, 2013 WL 4479815 (S.D. Ind. 2013), at * 7 (plaintiff had

COURTS AND "ATHLETIC LABOR"

1. Constitutional Issues

Many courts have found that students lack a constitutionally protected interest in participating in extracurricular activities.[66] Some have ruled that the NCAA is not a state actor,[67] while others have disagreed.[68] While most constitutional cases have presented a federal issue, at least one court applied a state constitution.[69]

Nonetheless, students have won constitutional cases against the NCAA, especially when the facts demonstrated potential for an economic injury. As early as 1976, a federal court concluded that the "opportunity to participate in intercollegiate athletics is of substantial economic value to many students."[70] Thus, participation in college athletics was treated as a property right under the due process clause. Forty years ago, courts realized that a "chance to

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standing to sue under antitrust law).

[66] Nat'l Collegiate Athletic Ass'n v. Yeo, 114 S.W.3d 584 (Tex. 2005)(Yeo II). *Also see* Gillard, *supra* note 1, at 1081 ("the basic decision of the case then is the simple statement that Gillard's 'right' to engage in intercollegiate football is not a 'property' right that falls within the due process clause"); Albach v. Odle, 531 F.2d 983 (10th Cir. 1975); Howard University, et al. v. Nat'l Collegiate Athletic Ass'n, 510 F.2d 213 (D.C. Cir. 1975) (Howard II); Parish v. Nat'l Collegiate Athletic Ass'n, 506 F.2d 1028 (5th Cir. 1975); Associated Students, *supra* note 61; Mitchell v. Louisiana High School Athletic Ass'n., 430 F.2d 1155 (5th Cir. 1970); Scott v. Kilpatrick, 237 So.2d 652 (1970); and Oklahoma High School Athletic Ass'n v. Bray, 321 F.2d 269 (10th Cir. 1963). For state cases, *see* State, ex rel. Missouri, State High School Activities Ass'n. v. Schoenlaub, 507 S.W.2d 354 (Mo.1974); Sanders v. Louisiana High School Athletic Ass'n., 242 So.2d 19 (La.1970); and Tennessee Secondary School Athletic Ass'n. v. Cox, 425 S.W.2d 597 (1968); and Sult, *supra* note 57.

[67] *E.g.*, Collier v. Nat'l Collegiate Athletic Ass'n, 783 F.Supp. 1576 (D.R.I. 1992), at 1578; and McHale v. Cornell Univ., 620 F.Supp. 67 (N.D.N.Y.1985), at 70: "Although the NCAA may perform a public function in overseeing the nation's intercollegiate athletics, it remains a private institution." *Also see* Hawkins v. Nat'l Collegiate Athletic Ass'n, 625 F.Supp. 602 (C.D.Ill. 1987); and McDonald v. Nat'l Collegiate Athletic Ass'n, 370 F.Supp. 625 (C.D. Cal. 1974).

[68] Many courts have found that the NCAA falls within the test of acting under color of state law. *See* Stanley v. Big Eight Athletic Conference, 463 F.Supp. 920 (W.D.Mo.1978), at 927; Regents of University of Minnesota v. Nat'l Collegiate Athletic Ass'n, 560 F.2d 352 (8th Cir. 1977), at 364-65; Hennessey v. Nat'l Collegiate Athletic Ass'n, 564 F.2d 1136 (5th Cir. 1977), at 1144 (involving lawsuit by coaches); Howard (II), *supra* note 65, at 220; and Associated Students, *supra* note 61, at 1254.

[69] A Mississippi state court reasoned that "the opportunity for a professional football career is more than just a possibility for this minor complainant and is, therefore, a protected right under section 14 of the Mississippi Constitution of 1890, …'" Gillard, *supra* note 1, at 1080 (quoting from a lower state court).

[70] Behagen v. Intercollegiate Conference of Faculty Rep., 346 F.Supp. 602 (D.Minn. 1976), at 604.

display . . . athletic prowess in college stadiums and arenas throughout the country is worth more in economic terms than the chance to get a college education."[71]

A court ruled that the NCAA's strict rules limiting student compensation was not rational under the equal protection clause.[72] The NCAA's age limits on students have created special problems for aliens who competed in another country before enrolling in a U.S. school. A trial court ruled that the NCAA's eligibility rules, as applied to foreign students, violated equal protection.[73] Affirming this ruling, an appeals court ruled that the NCAA's classification was arbitrary.[74] The NCAA's drug testing protocol also has led to a successful court challenge.[75]

2. Academic Standards

There were numerous challenges to the NCAA's academic standards.[76] The outcomes have been mixed. One court sympathized with a basketball player who faced ineligibility for failing to meet academic standards.[77] Another court, presented with a learning disability claim by

[71] *Id*.

[72] Wiley v. Nat'l Collegiate Athletic Ass'n, 612 F.2d 473 (10th Cir. 1979), at 475, reporting on an unpublished ruling. This occurred when an impoverished student was granted a $2,621 scholarship for track, and a $1,400 federal grant, which together pushed his compensation above the NCAA's limit. The appeals court ruled that his graduation did not moot the case; but there was no substantial federal question. *Id*. at 476.

[73] Howard (II), *supra* note 65. *Also see* Buckton, *supra* note 39, at 1160 (NCAA's classification system irrationally discriminates against Canadian hockey players who attend U.S. schools as resident aliens).

[74] Howard (II), *supra* note 65, at 222.

[75] The state court ruling is reported in O'Halloran v. University of Washington, 672 F.Supp. 1380 (W.D. Wash. 1988). After a soccer player refused to sign a consent form, a state court enjoined a university from administering the NCAA's mandatory drug-testing program on constitutional grounds. Eventually, the school altered its plan to screen for drugs only upon individualized suspicion. O'Halloran v. University of Washington, 856 F.2d 1375 (9th Cir. 1998), at 1378-80.

[76] Associated Students, *supra* note 61.

[77] See the court's sympathetic treatment of the student whose math sequence was counted as one-third rather than one-half of a credit in Phillip v. Nat'l Collegiate Athletic Ass'n, 960 F.Supp. 552 (D.Conn. 1997), at 557-558: "Darren Phillip testified at the preliminary injunction hearing, and his testimony was persuasive. . . . He feels, perhaps justifiably so, that he has done all one could be expected to do to meet the eligibility requirements." The Second Circuit also appeared to sympathize with the student by reversing the district court but allowing four months for a rehearing on the matter. Phillip v. Fairfield Univ., 118 F.3d 131 (2d Cir.1997), at 135.

a swimmer, also ruled for a student.[78] As high schools began to offer special education classes, these accommodations caused eligibility problems for students. The conflict between the NCAA and high schools was epitomized in protracted litigation involving a student who committed suicide while his case was on appeal.[79] In another case, a trial court found that an NCAA academic rule had a disparate impact that harmed minority students.[80] This decision had potential to interfere with the NCAA's standards, but was reversed.[81] Similarly, a trial court ruled that an NCAA academic standard denied students equal protection, but was overturned on appeal.[82]

3. Discrimination

After his girlfriend became pregnant, a student left school to work and care for his

[78] Ganden v. Nat'l Collegiate Athletic Ass'n, 1996 WL 680000 (N.D. Ill. 1996), granting the swimmer's motion for a preliminary injunction. The court agreed with the student that the NCAA could have made a reasonable accommodation by allowing remedial courses to substitute for certain core courses.

[79] When the NCAA refused to count a football player's special education sections of regular high school courses as part of an academic core necessary to qualify for an athletic scholarship, Michael Bowers was ineligible to play football during his freshman year. *See* Bowers (I), *supra* note 54, at 446 ("[w]hile the ADA requires 'evenhanded treatment' of individuals with disabilities, it does not require 'affirmative action'"). The following cases are cited, notwithstanding the length of the list, to show how far the NCAA will go to litigate. This ruling triggered protracted litigation. *See* Bowers v. Nat'l Collegiate Athletic Ass'n, 9 F.Supp.2d 460 (D.N.J.1998) ("Bowers II"); Bowers v. Nat'l Collegiate Athletic Ass'n, 118 F.Supp.2d 494 (D.N.J.2000) ("Bowers III"); Bowers v. Nat'l Collegiate Athletic Ass'n, 130 F.Supp.2d 610 (D.N.J. 2001) ("Bowers IV"); Bowers v. Nat'l Collegiate Athletic Ass'n, 2001 WL 1850089 (D.N.J. 2001) ("Bowers V"); Bowers v. Nat'l Collegiate Athletic Ass'n, 2001 WL 1772801 (D.N.J. 2001) ("Bowers VI"); Bowers v. Nat'l Collegiate Athletic Ass'n, 151 F.Supp.2d 526 (D.N.J. 2001) ("Bowers VII"); Bowers v. Nat'l Collegiate Athletic Ass'n, 171 F.Supp.2d 389 (D.N.J. 2001) ("Bowers VIII"), *rev'd in part* by Bowers v. Nat'l Collegiate Athletic Ass'n, 346 F.3d 402 (3d Cir. 2003); Bowers v. Nat'l Collegiate Athletic Ass'n, 188 F.Supp.2d 473 (D.N.J. 2002) ("Bowers IX"), and Bowers v. Nat'l Collegiate Athletic Ass'n, 2005 WL 5155198 (D.N.J. 2005) ("Bowers X") (dismissing the case). On appeal again to the Third Circuit, and after the suicide of the player, the Third Circuit remanded the matter to determine whether another school, the University of Iowa, violated the player's rights under the ADA. Bowers v. Nat'l Collegiate Athletic Ass'n, 475 F.3d 524 (3d Cir. 2007).

[80] Cureton v. Nat'l Collegiate Athletic Ass'n, 37 F.Supp.2d 687 (E.D. Pa. 1999) found that African–American student-athletes were adversely affected by the NCAA's "Proposition 16" academic standards. Data showed that 26.6% of these students did not meet the standard, while 21.4% did not qualify in 1997. For white student athletes, the disqualification rate was 6.4% in 1996, and 4.2% in 1997. The district court declared Proposition 16 illegal under Title VI of the 1964 Civil Rights Act, and permanently enjoined these standards.

[81] Cureton v. Nat'l Collegiate Athletic Ass'n, 198 F.3d 107 (3d Cir. 1999), at 118.

[82] Associated Students, Inc., *supra* note 61, at 1256, concluding that "a rule must be enforced. Without some form of penalty, the Rule would be meaningless, leaving member schools free to do as they pleased in recruiting high school athletes."

daughter. When he tried to resume football, he discovered he lost a year of eligibility. He sued under Title IX after the NCAA denied him a pregnancy extension of eligibility.[83] The NCAA's rule dealt with pregnancy but not parental leave.[84] Thus, the court ruled for association.[85]

4. Antitrust

The Supreme Court has ruled that the Sherman Act applies to some aspects of the NCAA.[86] Early antitrust cases found that NCAA rules did not regulate commercial activity.[87] Similarly, some courts refused to view NCAA regulation of students as market transactions.[88] Courts also rejected player attempts under the Sherman Act to challenge NCAA mobility restrictions.[89] Players could not show that they were in a labor market.[90] Instead, courts were

[83] Butler v. Nat'l Collegiate Athletic Ass'n, 2006 WL 2398683 (D. Kan. 2006) (referring to Title IX of the Education Amendments Act of 1972, 20 U.S.C. § 1681 et seq.).

[84] *Id*. at *3 (referring to NCAA Bylaws, Art. 14.2.1.3).

[85] *Id*. at *5.

[86] In Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85 (1984), the Supreme Court held that an NCAA plan to restrict the televising of football games violated § 1 of the Sherman Act because it restrained a free market. The Court agreed with the trial finding that NCAA football telecasts generated "an audience uniquely attractive to advertisers and that competitors are unable to offer programming that can attract a similar audience," and consequently, this fact meant that the NCAA possessed market power. *Id*. at 112.

[87] Smith v. Nat'l Collegiate Athletic Ass'n, 139 F.3d 180 (3d Cir.1998), held that the NCAA's eligibility rules are not related to the NCAA's commercial interests. Thus, the Sherman Act did not apply to these student regulations. *Id*. at 182. Gaines, *supra* note 44, at 743–44 (M.D.Tenn.1990), distinguished between the NCAA's commercial rules and noncommercial rules, ruling that eligibility standards were not commercial. Taking a different approach, the Fifth Circuit assumed without deciding that the Sherman Act applies to the NCAA's student eligibility rules. *See* McCormack, *supra* note 63, at 1343-44 (5th Cir.1988). Jones v. Nat'l Collegiate Athletic Ass'n, 392 F.Supp. 295 (D.Ma.1975) held that the Sherman Act does not apply to NCAA eligibility standards: "plaintiff is currently a student, not a businessman in the traditional sense, and certainly not a 'competitor' within the contemplation of the antitrust laws." *Id*. at 303. Smith v. Nat'l Collegiate Athletic Ass'n, 978 F.Supp. 213 (W.D. Pa. 1997) explained that "it is clear that the Sherman Act is applicable to the NCAA with respect to those actions of the Defendant that are related to its commercial or business activities, but only to those such activities." *Id.* at 217.

[88] Jones, *supra* note 86. A hockey player who received compensation for playing junior hockey in Canada was deemed ineligible to compete by Northeastern University, which applied the NCAA's amateur-player rule. The court rejected the player's theory that the NCAA's rule was a restraint on trade. *Id*. at 303. The court added that "plaintiff has so far not shown how the action of the N.C.A.A. in setting eligibility guidelines has any nexus to commercial or business activities in which the defendant might engage." *Id.*

[89] Nat'l Collegiate Athletic Ass'n v. Yeo, 171 S.W.3d 863 (Tex. 2005)(Yeo II); Banks v. Nat'l Collegiate Athletic Ass'n, 977 F.2d 1081 (7th Cir. 1992) (Banks II); and Tanaka, *infra* note 91.

persuaded by the fact that NCAA players are students.[91]

But the trend has begun to shift. Courts have begun to recognize that NCAA rules relate to a cognizable market in college football. *Tanaka v. Univ. of Southern California* was willing to compare NCAA restrictions to NFL rules that limit player free agency.[92] *Agnew v. Nat'l Collegiate Athletics Ass'n* broadened the labor market concept.[93] Scholarships advance a school's economic interests while attracting gifted athletes in a labor market.[94] Coining the term "athletic labor," the court described college football's competitive labor market:

> [C]olleges may compete to hire the coach that will be best able to launch players from the NCAA to the National Football League, an attractive component for a prospective college football player. Colleges also engage in veritable arms races to provide top-of-the-line training facilities which, in turn, are supposed to attract

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[90] When a Notre Dame football player remained undrafted after declaring for the NFL draft after his junior year, he was blocked by NCAA eligibility rules from returning to school for a senior year of competition. Banks (II), *supra* note 88, at 1091. The Seventh Circuit rejected the player's Sherman Act claim because the player failed to demonstrate that the NCAA rules were connected to a labor market. *Id*. The court disagreed with the dissenting opinion's view that NCAA member schools are purchasers of labor. In an interesting passage, the majority was concerned that elimination of NCAA's draft and agent restrictions would undercut the NCAA's amateurism requirements: "The involvement of professional sports agents in NCAA football would turn amateur intercollegiate athletics into a sham because the focus of college football would shift from educating the student to creating a 'minor-league' farm system out of college football that would operate solely to improve players' skills for professional football in the NFL." *Id*.

[91] Justice, *supra* note 45, at 373 ("case law flatly rejects the notion that student-athletes' expectations of future athletic careers are constitutionally protected"); and Yeo, *supra* note 65, at 870 ("student-athletes remain amateurs"). *Also see* Rensing v. Ind. State Univ. Bd. of Trustees, 444 N.E.2d 1170 (Ind. 1983), at 1175 ("benefits Rensing received were subject to strict regulations by the NCAA which were designed to protect his amateur status).

[92] 252 F.3d 1059 (9th Cir. 2001), at 1064-65. The court did not find a close connection, however, between the athletic conference's transfer rules and the free agency restrictions in Mackey v. NFL, 543 F.2d 606 (8th Cir. 1976) because the PAC-10 imposed a one year penalty, while the NFL's "Rozelle Rule" was unlimited in duration.

[93] Agnew II, *supra* note 2, at 338.

[94] *Id*. at 338: "It is undeniable that a market of some sort is at play in this case. A transaction clearly occurs between a student-athlete and a university: the student-athlete uses his athletic abilities on behalf of the university in exchange for an athletic and academic education, room, and board." Citing the economic realities of major college football programs today, Agnew concluded that "full scholarships in exchange for athletic services . . . are not noncommercial." *Id*. at 340. The court observed reasoned: "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." *Id*. The fact that schools are non-profit organizations was immaterial to the court because "schools can make millions of dollars as a result of these transactions." The court cited the fact that some schools are willing to pay "up to $5 million a year rather than invest that money into educational resources (citation omitted)." *Id*.

> collegiate athletes. Many future student-athletes also look to the strength of a college's academic programs in deciding where to attend. These are all part of the competitive market to attract student-athletes whose *athletic labor* can result in many benefits for a college, including economic gain (emphasis added).[95]

This reasoning has potential to bring student lawsuits under a broad stream of precedent, where courts have ruled that a monopoly's labor market restraints violate the Sherman Act.[96] In the early stages of litigation, the court in *Rock v. Nat'l Collegiate Athletic Ass'n* did not rule out the idea that college football has a labor market.[97] The student sufficiently alleged that NCAA bylaws created anticompetitive effects that caused injury in this market.[98]

While these cases are encouraging for students, they deal with only part of the complex proof that antitrust plaintiffs need to secure relief. Courts have said that NCAA rules and regulations are subject to a rule of reason test.[99] If a rule has a pro-competitive effect for

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[95] *Id*. at 347. Agnew lost his scholarship when Rice University did not renew it following his injury, and as a result, he had to pay to complete his degree. *Id*. at 332. Although the court was receptive to the concept of "athletic labor," it upheld the district court's dismissal of Agnew's complaint because he failed to state a conspiracy or combination to restrain a labor market. The NCAA has since revoked its one-year limit on scholarships and allowed schools to make multi-year scholarship commitments to players. *Id*. at 347-48.

[96] Nichols v. Spencer Intern. Press, Inc., 371 F.2d 332 (7th Cir. 1967), at 335-36 (agreements by competitors not to employ each other's employees may limit the supply of labor to the public); Quinonez v. Nat'l Assoc. of Secs. Dealers, Inc., 540 F.2d 824 (5th Cir.1976), at 829, n.9 (since brokerage firms are not labor organizations, their agreements to restrict the movement of the labor force did not promote a legitimate objective); Tugboat, Inc. v. Mobile Towing Co., 534 F.2d 1172 (5th Cir.), at 1176 ("There can be little doubt that an employee who is deprived of a work opportunity has been injured in his 'commercial interests or enterprise,' because the selling of one's labor is a commercial interest."); and Eichorn v. AT&T Corp., 248 F.3d 131 (3d Cir. 2001), at 140-41, "employees may challenge antitrust violations that are premised on restraining the employment market (quotation omitted)."

[97] *Supra* note 65, at *11. The court explained: "… Mr. Rock has narrowed his proposed market to one sport in one division of the NCAA. The buyers of labor (the schools) are all members of NCAA Division I football and are competing for the labor of the sellers (the prospective student-athletes who seek to play Division I football)."

[98] *Id*. at *16. Rock alleged that he did not receive a scholarship offer from the upper tier of NCAA football schools, and only received offers from second-tier schools, due to the NCAA's strict limit on the number of scholarships for FBS programs. The court concluded that Rock had sufficiently alleged an anti-competitive market restraint. *Id*. at 13.

[99] Tanaka, *supra* note 91, at 1063, explaining that a "restraint violates the rule of reason if the restraint's harm to competition outweighs its procompetitive effects." More generally, *see* Bd. of Regents, *supra* note 85, stating that while the Sherman Act applies to NCAA regulations, most rules regulations will be a "justifiable means

horizontal competitors, these restraints do not violate antitrust law.[100]

5. Team Sanctions

The NCAA has persuaded courts that college athletics are above commercialism. A court deferred to NCAA sanctions of a football team because the "protection and fostering of amateurism in intercollegiate athletics is a legitimate objective of the NCAA."[101] In another case of team sanctions, an appeals court said the "NCAA markets football as a distinct product from professional football"[102] in order "to integrate athletics with academics."[103]

IV. FUTURE SCENARIOS

The NCAA is as at a legal crossroad. On the one hand, the association has ultimately prevailed in most legal cases involving students as plaintiffs. Appellate courts, in particular, have deferred to the NCAA's view that sports are integral to a college's educational mission. But recent and current litigation has chipped away at this view. Part of this change is due to the fact that the NCAA has gone overboard on commercializing its main revenue sports, football and basketball. The association is hard pressed to explain how licensing video games with the likeness of college players is so integral to education that students should not be paid.[104] This

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of fostering competition among amateur athletic teams," and are therefore procompetitive. *Id*. at 117 ("It is reasonable to assume that most of the regulatory controls of the NCAA are . . . procompetitive because they enhance public interest in intercollegiate athletics.").

[100] Tanaka, *supra* note 91, at 1064 ("If the relevant market is national in scope, as Tanaka's own complaint suggests, the transfer rule most certainly does not have a significant anticompetitive effect.").

[101] Justice, *supra* note 45, at 371.

[102] McCormack, *supra* note 63, at 1344.

[103] *Id*. at 1345.

[104] As an executive testified in the O'Bannon trial about how the NCAA distributes $850 million annually, Judge Wilken asked: "Are we done with all the money? Where's the rest of it?" The testimony could not explain why $55 million was missing in this accounting. Mark Schlabach, *Big 10's Delany Hurts NCAA's Case*, ESPN OUTSIDE THE LINES (June 20, 2014), at http://espn.go.com/espn/otl/story/_/id/11114473/big-10-jim-delany-hurts-ncaa-case-testimony.

example is unrelated, however, to lawsuits that broadly target the NCAA's core— the bylaws that balance academics and athletics, the interests of large and small schools, revenue and non-revenue sports, and men's and women's sports. Courts are poised to consider whether certain students are employees, and relatedly, whether they participate in a labor market. Courts are likely to confront three scenarios that implicate labor law and closely related antitrust principles.

A. *Judicial Idealization of a Sport Could Maintain the Status Quo*

So far, only one court has said that college players engage in athletic labor.[105] Perhaps this concept will fade. This possibility is suggested by a line of precedent from major league baseball. The baseball example suggests that courts could maintain the status quo in Finding G— in other words, the NCAA could continue to win cases in the later stages of litigation.

The beginning point for this analysis is antitrust lawsuits involving college football. Students allege that the NCAA conspires to underpay the true cost of attending college; [106] restrict player transfers by capping scholarships;[107] and prohibit schools from competing with each other by paying students.[108]

Similarly, major league baseball players alleged that a league with monopoly powers unlawfully restrained their terms and conditions of employment, and depressed their pay, by perpetually reserving them to one team.[109] For more nearly a century, federal courts have ruled

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[105] Agnew II, *supra* note 94.

[106] Gregory-McGhee, *supra* note 13.

[107] Rock, *supra* note 17.

[108] Jenkins, *supra* note 12. *Also see* Tom Farrey, *Jeffrey Kessler Files Against NCAA*, ESPN COLLEGE SPORTS (March 18, 2014), at http://espn.go.com/college-sports/story/_/id/10620388/anti-trust-claim-filed-jeffrey-kessler-challenges-ncaa-amateur-model.

[109] *See* American League Baseball Club of Chicago v. Chase, 86 Misc. 441 (N.Y.Sup. 1914), at 461-62 observing: "The quasi peonage of baseball players under the operations of this plan and agreement is contrary to the spirit of American institutions, and is contrary to the spirit of the Constitution of the United States." The court

that baseball is exempt from antitrust— except in an anomalous case.[110] Baseball mooted that case by settling with the disgruntled player.[111]

This legal fiction originates in a 1922 case, *Federal Baseball Club*,[112] where the Supreme Court ruled that the Sherman Act did not apply to baseball.[113] The Court ruled that baseball was exempt from antitrust law.[114] Explaining that baseball is not in interstate commerce, Justice Holmes wrote: "The business is giving exhibitions of base ball, which are purely state affairs. . . . [T]he fact that . . . Leagues must induce free persons to cross state lines and must arrange and pay for their doing so is not enough to change the character of the business."[115] In dictum, he suggested that the uniform player contract— with its reserve clause that binds a player perpetually to one team— is also immune from antitrust.[116]

Later, courts applied this precedent to the employment of players. A New York Yankee

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considered, too, whether baseball was an illegal combination under the Sherman Act. *Id*. at 461-462. *Also see* Toolson (II), *infra* note 117; and Flood (II), *infra* note 119. Courts that enforced the reserve clause against players who sought to jump their contracts are noted in Comment, *Monopsony in Manpower: Organized Baseball Meets the Antitrust Laws*, 62 YALE L.J. 576, 590, n. 74 (1953) (*e.g*., American Association Base Ball Club of Kansas City v. Pickett, 8 Pa. County Ct. 232 (C.P. 1890); Cincinnati Exhibition Co. v. Marsans, 216 Fed. 269 (E.D. Mo., 1914); Cincinnati Exhibition Co. v. Johnson, No. 612, C.P., Pittsburgh, Pa., Sept. 2, 1914; and Indianapolis Athletic Ass'n, Inc. v. Burk, No. 740, C.P., Pittsburgh, Pa., Aug. 12, 1915).

[110] Gardella v. Chandler, 172 F.2d 402 (2d Cir. 1949) is a notable exception to baseball's antitrust exemption. Danny Gardella, a player who had run-ins with management and left the country to play in Mexico, sued the New York Giants under the Sherman Act after his return to American baseball was blocked by the league's blacklisting rule. His lawsuit was dismissed by a district court in Gardella v. Chandler, 79 F.Supp. 260 (D.C.N.Y. 1948), but reinstated by the Second Circuit.

[111] *See* Note, Craig F. Arcella, *Major League Baseball's Disempowered Commissioner: Judicial Ramifications for the 1994 Restructuring*, 97 COLUM. L. REV. 2420 (1997), at 2440-41 (commissioner settled with Gardella to avoid the possibility of a successful challenge to baseball's antitrust exemption).

[112] 259 U.S. 200 (1922).

[113] The Baltimore team, a member of the Federal Baseball League, filed an antitrust complaint against the National League after the latter absorbed all their competitors but not them. *Id*. at 207.

[114] *Id*. at 208.

[115] *Id*. at 208-209.

[116] *Id*. at 209, reasoning: "If we are right the plaintiff's business is to be described in the same way, . . . *the restrictions by contract that prevented the plaintiff from getting players to break their bargains* . . . were not an interference with commerce among the States (emphasis added)."

challenged the reserve clause when his contract was assigned to a lower minor league team.[117] By this time, professional baseball was played throughout the country. Its radio revenue was a form of interstate commerce, and baseball maintained minor league teams in the U.S. and Mexico.[118] Nonetheless, the Supreme Court in *Toolson v. New York Yankees, Inc.* rejected the player's antitrust action.[119] Another generation later, a star player who built a career in St. Louis strenuously objected to being traded to Philadelphia.[120] Bowing again to precedent, the Supreme Court in *Flood v. Kuhn* ruled that baseball was exempt from antitrust law.[121]

During this long history, a few judges thought that baseball was clearly in the stream of commerce.[122] Some made a special effort to document the sport's expanding business model.[123] But the root problem was that many judges put baseball on a pedestal of blind veneration. They seemed incapable of disinterested judging of the players' antitrust claims. Instead of facing up to the economic realities of baseball, they fawned over the sport.[124] But in similar antitrust cases

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[117] Toolson v. New York Yankees, Inc., 101 F.Supp. 93 (D.Cal. 1951) (Toolson I).

[118] Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953) (Toolson II), at 357-58.

[119] *Id*. at 357.

[120] Flood v. Kuhn, 407 U.S. 258 (1972).

[121] *Id*. at 285, declaring that '"the (judgment) below (is) affirmed on the authority of Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs . . . so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws.'"

[122] Judge Learned Hand refused to find that baseball was exempt under antitrust law because the game was so integrated with commercial activities in interstate commerce. He reasoned that ball "players are the actors, the radio listeners and the television spectators are the audiences; together they form as indivisible a unit as do actors and spectators in a theatre. I am therefore in accord with my brother Frank that the defendants are *pro tanto* engaged in interstate commerce." Gardella, *supra* note 109, at 408.

[123] Hallman, *supra* note 3, at 60.

[124] The following passages contain lengthy quotes to demonstrate my complaint that judges lacked judicial objectivity:

> Baseball has been the national pastime for over one hundred years and enjoys a unique place in our American heritage. Major league professional baseball is avidly followed by millions of fans, looked upon with fervor and pride and provides a special source of inspiration and competitive team spirit especially for the young. Baseball's status in the life of the nation is so pervasive that it would not strain credulity to say the Court can

involving other sports— football,[125] hockey,[126] and basketball[127]— they came to their senses and confined this exemption to baseball.

The question going forward is whether federal judges will accept the NCAA's declaration that college football players are amateur athletes in the uncritical way that earlier courts viewed

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> take judicial notice that baseball is everybody's business. To put it mildly and with restraint, it would be unfortunate indeed if a fine sport and profession, which brings surcease from daily travail and an escape from the ordinary to most inhabitants of this land, were to suffer in the least because of undue concentration by any one or any group on commercial and profit considerations. The game is on higher ground; it behooves every one to keep it there.

Justice Blackmun was more of a baseball fan than a judge when he began his decision upholding baseball's antitrust exemption with this lengthy paean:

> The ardent follower and the student of baseball know of General Abner Doubleday; the formation of the National League in 1876; Chicago's supremacy in the first year's competition under the leadership of Al Spalding and with Cap Anson at third base; the formation of the American Association and then of the Union Association in the 1880's; the introduction of Sunday baseball; interleague warfare with cut-rate admission prices and player raiding; the development of the reserve 'clause'; the emergence in 1885 of the Brotherhood of Professional Ball Players, and in 1890 of the Players League; the appearance of the American League, or 'junior circuit,' in 1901, rising from the minor Western Association; the first World Series in 1903, disruption in 1904, and the Series' resumption in 1905; the short-lived Federal League on the majors' scene during World War I years; the troublesome and discouraging episode of the 1919 Series; the home run ball; the shifting of franchises; the expansion of the leagues; the installation in 1965 of the major league draft of potential new players; and the formation of the Major League Baseball Players Association in 1966.
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> ….
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> Then there are the many names, celebrated for one reason or another, that have sparked the diamond and its environs and that have provided tinder for recaptured thrills, for reminiscence and comparisons, and for conversation and anticipation in-season and off-season: (long list omitted)
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> ….
>
> And one recalls the appropriate reference to the 'World Serious,' attributed to Ring Lardner, Sr.; Ernest L. Thayer's 'Casey at the Bat'; the ring of 'Tinker to Evers to Chance'; and all the other happenings, habits, and superstitions about and around baseball that made it the 'national pastime' or, depending upon the point of view, 'the great American tragedy.

Flood (II), *supra* note 119, at 261-264.

[125] Radovich, *supra* note 30.

[126] Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F.Supp. 462, 518 (E.D.Pa. 1972).

[127] Robertson, *supra* note 32.

baseball as a "game … on higher ground" such that "it behooves everyone to keep it there."[128] NCAA litigation could track baseball's oddly successful history in resisting antitrust if judges see college sports as an idyll and not a business. And to this point, the Seventh Circuit's use of "athletic labor" in *Agnew*[129] could amount to a blip— much like baseball's aberrant case, *Gardella v. Chandler*, evoked rare but fleeting judicial candor.[130] In sum, courts could continue to declare the NCAA the winner in these disputes, perhaps drawing inspiration from Judge Friendly's frail apology for professional baseball's antitrust exemption.[131]

B. *Judicial Recognition of Players as Employees Could Lead to Limited Collective Bargaining*

1. Scope of Appropriate Labor Law

The fragmentation of U.S. labor law means that courts cannot possibly transform the landscape of college football by ordering all schools to bargain collectively with players. The NLRA applies only to private sector employment.[132] Since most football programs are at state universities,[133] the NLRA excludes them. The PAC-12 Conference, for example, has ten public

[128] Flood v. Kuhn (Flood I), 309 F.Supp. 793 (S.D.N.Y. 1970), at 797.

[129] Agnew II, *supra* note 94.

[130] Gardella, *supra* note 108, at 409, where Judge Frank criticized baseball as "a monopoly which, in its effect on ball-players like the plaintiff, possesses characteristics shockingly repugnant to moral principles . . . basic in America. . . ." He added that players labored under conditions that are "something resembling peonage." *Id*.

[131] Salerno v. American League, 429 F.2d 1003 (2d Cir. 1970), at 1005, *cert. denied, sub nom*. Salerno v. Kuhn, 400 U.S. 1001 (1971), stating: "We freely acknowledge our belief that Federal Baseball was not one of Mr. Justice Holmes' happiest days, that the rationale of Toolson is extremely dubious and that, to use the Supreme Court's own adjectives, the distinction between baseball and other professional sports is 'unrealistic,' 'inconsistent' and 'illogical.'"

[132] National Labor Relations Act (NLRA), ch. 372, 49 Stat. 449 (1935), 29 U.S.C.A. §§151-169 (2012), §152(3), defining employee as "any employee, . . . unless this subchapter explicitly states otherwise, . . ." The same section then excludes "any individual . . . or any individual employed by . . any other person who is not an employer as herein defined." In §152(2), an employer excludes "any State or political subdivision thereof. . . ."

[133] Michael H. LeRoy, *An Invisible Union for an Invisible Labor Market: College Football and the Union Substitution Effect*, 2012 WIS. L. REV. 1077 (2012), at 1130-31 & Table 3.

universities.[134] Six schools are located in states that have some form of public sector collective bargaining.[135] However, the other four schools are in states that lack a collective bargaining law.[136] Two universities are private. Like Northwestern, they are covered by the NLRA.[137] Other conferences are subject to this legal fragmentation. Thus, courts are not in a position to rule broadly on unionization for college football.

2. Classification of Students as Employees

While courts cannot order collective bargaining for college football, they will play a major role as they consider how to classify students under Section 152(3) of the NLRA.[138] In the near term, the unionization effort by Northwestern players could end with a court ruling that college football players are not employees. The regional director's decision, which favored the players, contradicts the Board's precedent in *Brown University*.[139] Assuming, as experts believe,

[134] The schools are University of Arizona; Arizona State University; University of California, Berkeley; University of Colorado; University of Oregon; Oregon State University; University of California, Los Angeles; University of Utah; University of Washington; and Washington State University.

[135] California: Meyers-Milias-Brown Act, Cal. Gov't Code tit. 1, §§ 3500-3511 (West 2012); Higher Education Employer-Employee Relations, Cal. Gov't Code tit. 1, §§3512-3511 (West 2012); West's Ann.Cal.Gov.Code § 3560 (West 2012); Oregon: Public Employee Collective Bargaining Act, Or.Rev.Stat. tit. 22 §§ 243.650 to 243.782 (West 2012); and Washington: W.R.C. tit. 41, §§ 41.56.010 to 41.56.950 (West 2012); Educational Employment Relations Act, W.R.C. tit. 41, §§ 41.59.0001 to 41.59.950 (West 2012); and W.R.C. tit. 47, §§ 47.64.005 to 47.64.910 (West 2012).

[136] Colorado has an executive order authorizing partnership agreements with employees. However, this policy is not in a state statute that legalizes bargaining between a union and governmental employer. *See* Executive Order Authorizing Partnership Agreements with State Employees (11/02/2007), http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheader=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1251616366875&ssbinary=true (visited on June 24, 2014). Also, Arizona has no collective bargaining law.

[137] The schools are Stanford University and Southern California University.

[138] NLRA, *supra* note 131.

[139] Brown University and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW AFL-CIO, 342 NLRB 483 (2004), at 492. The regional director ruled that Brown is inapposite because scholarship football players are not primarily students. Northwestern University, *supra* note 4, at *16.

that an appeals court will eventually decide this issue,[140] the regional director's analysis would face difficulty because its novel approach conflicts with precedent. Instead, it concentrates on the fact that Northwestern coaches expect students to treat football as a full-time job.[141] Also, the decision glossed over the fact that students signed a contract that bound them to the NCAA rules on amateur competition.[142]

On the other hand, the fact that the decision took a unique approach would not preclude a court from using more conventional doctrines to conclude that members of the Northwestern football team are employees under the NLRA.[143] The Fair Labor Standards Act (FLSA)— the federal law that regulates minimum wage and overtime pay— could provide useful tools for determining if Northwestern players are employees.

a. The Department of Labor's Full-Time Student Program

FLSA's broad coverage extends to universities and colleges, whether private or public.[144] Apart from the internship regulation, the Department of Labor (DoL) also regulates employment for all types of students, including college students.[145] This rule regulates colleges who employ

[140] *Next Steps in Northwestern University Case*, 3/31/14 BUS. INS. 38 (March 31, 2014).

[141] Northwestern University, *supra* note 4, at *4-*8 (detailing the demands on a player's time outside of classroom activities).

[142] A word search of the regional director's decision shows that he never used "amateur" or "bylaws"— words that are common in NCAA court cases. *Compare*, *with* Agnew II, *supra* note 2, where the appellate court mentioned "bylaws" 43 times, and "amateur" or "amateurism" 23 times. The regional director referred to the "tender" letter that players sign, but in conclusory fashion he called this an "employment contract." *Id*. at *13.

[143] Northwestern University, *supra* note 4, at *16 (superficially applying a common law definition of employee).

[144] Fair Labor Standards Act of 1938, (June 25, 1938, c. 676, § 1, 52 Stat. 1060), codified at 29 U.S.C.A. §§ 201-219 (2012). Employer is defined comprehensively in § 203(d) as "any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency. . . ." A "person" is defined in § 203(a) as "an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons."

[145] *See* U.S. Dep't of Labor, *Full-Time Student Program*, at http://www.dol.gov/elaws/esa/flsa/docs/ftsplink.asp.

full-time students. Coincidentally, the NCAA requires students to maintain full-time enrollment to be eligible to play.[146] The DoL's "Full-Time Student Program" permits the university to hire a student under a certificate that allows the employer to pay 85% of the minimum wage.[147] The certificate also limits employment of a student to eight hours in a day and twenty hours a week when school is in session.[148]

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, these students reported spending an average of 43 hours on their sport every week during the season.[149] This compared to spending 38 hours per week on academic activities.[150] A court could apply this type of analysis to conclude that Northwestern students who play college football are also employees.

b. The Department of Labor's Unpaid Internship Regulation

The FLSA is potentially relevant to college football in a different respect. The DoL's Wage and Hour Division has determined that some unpaid internships for college students violate the law's requirement of minimum pay. This regulation responds to a growing number of college students who struggle to find employment and turn to unpaid internships. The DoL

[146] *Id*. The requirement for a player to be a full time student appears in NCAA DIVISION, *supra* note 4, at Rule 12.1.1.3.

[147] U.S. Dep't of Labor, *supra* note 144.

[148] *Id*.

[149] *See* EXAMINING THE STUDENT ATHLETE EXPERIENCE THROUGH THE NCAA GOALS AND SCORE STUDIES, at 17-18, http://www.ncaa.org/sites/default/files/%E2%80%A2Examining%20the%20Student-Athlete%20Experience%20Through%20the%20NCAA%20GOALS%20and%20SCORE%20Studies.pdf.

[150] *Id*. at 18.

regulates unpaid internships for college students who render service to for-profit employers.[151] On its face, this regulation does not apply to Division I football players because member schools are not-profit institutions. However, a court could find that there is no practical difference between "for-profit" entities under this FLSA regulation and major football programs, given the immense commercialization of NCAA football and ability of programs to generate surplus revenue.[152]

The FLSA's internship regulation does not apply to educational programs where academic credit is blended with work.[153] But college football does not generate academic credit for students. A court could find that this distinction strengthens the case for characterizing college football as employment that qualifies for minimum wages and overtime under the FLSA.

If the DoL's restrictions for an unpaid internship were applied to college football, an NCAA school would encounter challenges in satisfying this six-factor test.[154] The fourth factor— the requirement that the putative employer derives no immediate advantage from the

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[151] *Fact Sheet #71: Internship Programs under The Fair Labor Standards Act*, http://www.dol.gov/whd/regs/compliance/whdfs71.htm, explaining that the Fair Labor Standards Act (FLSA) defines "employ" very broadly as to "suffer or permit to work." Individuals who work must be compensated for services they perform. 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 40 hours in a workweek.

[152] Barrett, *supra* note 50.

[153] Fact Sheet #71, *supra* note 150.

[154] The 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.

Id.

activities of the intern— is the most problematical element for Division I football schools because of the revenue and reputational benefits that inure to them.[155] The first factor is worrisome for schools because Division I stadiums and football training facilities are not used for academic instruction.[156] And the second factor— the internship experience is for the benefit of the intern— is true for students, but could be outweighed by the business benefits that college football brings to the academic enterprise of universities.[157]

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."[158] In more specific language, it implies that college football is a compensable activity: "In 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."[159] Again, the DoL asks whether an "internship program . . . provides educational credit."[160] The fact that football does not count for academic

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[155] For research that relates to the fourth factor as an element for finding an employment relationship, *see* Devin G. Pope & Jaren C. Pope, *The Impact of College Sports on the Quantity and Quality of Student Applications*, 75 SOUTHERN ECO. J. 750 (2009), 2009 WLNR 609395 (schools derive academic benefits from football and basketball success).

[156] Anne Zimmerman & Leslie Scism, *Boone Calls the Plays as Largess Complicates Life at Alma Mater*, WALL ST. J. (July 6, 2012), at http://online.wsj.com/article/SB10001424052702304782404577488592793245510.html (T. Boone Pickens donated $165 million to Oklahoma State University; Ralph Englestad donated $100 million to the University of North Dakota; Phil Knight donated $100 million to the University of Oregon; and John Hammonds donated $32.5 Missouri State University for sports programs).

[157] Pope & Pope, *supra* note 154, at 751, stating: "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."

[158] FactSheet #71, *supra* note 150.

[159] *Id*.

[160] *Id*.

credit makes the activity more like employment.[161]

In sum, courts would encounter conceptual challenges in concluding whether Northwestern football players are employees under the NLRA. If they relied on a contractual analysis, they would rule for the school because players signed a grant-in-aid agreement that defines their amateur status and binds them to NCAA bylaws. But if courts applied FLSA tests, they would more likely conclude that the economic realities of college football indicate an employment relationship between the school and its players.

C. *Judicial Reluctance to Enjoin a "Labor Dispute" under the Norris-LaGuardia Act Could Shelter Boycotts and Pickets*

Whatever the outcome of *Northwestern University*, it will not be the final labor law issue in college football. Suppose that the Supreme Court rules that the Northwestern University players are employees under the NLRA. This landmark ruling would not necessarily lead to collective bargaining. The vote taken on April 25, 2014 might show that less than a majority of players favor union representation. Northwestern's new quarterback denounced the union.[162] A "no" vote would push back this organizing effort for at least one year due an election bar in the NLRA,[163] or end it completely if the vote discourages organizers.

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[161] 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 benefits 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*.

[162] Eric Olson, *Northwestern QB Says Players Should Have Taken Concerns to Higher-Ups before Pushing for Union*, STARTRIBUNE (April 9, 2014), at http://www.startribune.com/sports/gophers/254595541.html.

[163] *See* John D. Finerty, *One Year of Quiet: Honoring the Decision to Vote No*, 11 LAB. LAW. 353 (1996), explaining that Section 9(c)(3) of the NLRA prohibits an election for one year after the date of balloting in a prior election.

Even if players voted for a union, they would face obstacles in securing a labor agreement. Northwestern would be required to bargain over wages, hours, and terms and conditions of employment.[164] The university could bargain so slowly that players could become frustrated and petition the NLRB to decertify their union.[165] Or, the school might reach an agreement that is modelled after the expanded benefits model the NCAA is currently planning.[166] In another scenario, the school could engage in hard bargaining by offering players less than the NCAA model of expanded benefits.[167] More alarming, Northwestern students could find themselves without a conference to play games.[168]

No particular outcome can be predicted with confidence. These possibilities do suggest, however, that the outcome of the NLRB representation election will trigger new legal controversies and issues for courts. This cascading effect is suggested by the labor movement's past and present use of economic pressure tactics that are used *outside* the NLRA's processes. The main tools that labor unions use today are short walkouts by employees, public rallies, picketing to discourage the public from purchasing a product or service, mixing political and organizing campaigns, and personalizing labor disputes by staging protests near company

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[164] NLRA, *supra* note 131, 29 U.S.C. § 158(d) (employer and labor organization must bargain with each other in good faith with respect to wages, hours, and terms and conditions of employment).

[165] For a comparable situation, *see* Mark Burnett Productions and Stephen R. Frederick (Petitioner), 349 N.L.R.B. 706 (2007).

[166] Steve Eder, *N.C.A.A. Planning to Address Benefits for Some of Its Players, Officials Say*, N.Y. TIMES (April 6, 2014), at http://www.nytimes.com/2014/04/07/sports/ncaafootball/ncaa-planning-to-address-benefits-for-some-of-its-players-officials-say.html?_r=0.

[167] For an illustration of the NFL's tough bargaining stance in 2011— which proposed numerous player concessions— *see* Chris Deubert et al., *All Four Quarters: A Retrospective and Analysis of the 2011 Collective Bargaining Process and Agreement in the National Football League*, 19 UCLA ENT. L. REV. 1 (2012), at *69-*75.

[168] Associated Press, *Jim Delany Takes Stand at Trial*, ESPN COLLEGE SPORTS (June 20, 2014), at http://espn.go.com/college-sports/story/_/id/11113811/big-ten-commissioner-jim-delany-takes-stand-ed-obannon-trial. The Big Ten Commissioner doubted that most schools would agree to pay players. Consequently, if some paid their students, they likely would be expelled from the conference because the employment model would upset the competitive balance among schools.

headquarters or homes of executives.[169] The targets of these tactics often seek court protection.

In the following discussion, I suggest various ways that students and unions could adapt these tactics to advance their goal of pay-for-play. My purpose is not to guess whether a tactic would be successful or even used. Whatever the tactic, it would force a court to consider the concept of athletic labor in college sports. A court would start its analysis by grappling with the definition of a "labor dispute" under the NLGA.[170]

The NLGA forbids federal courts from issuing an injunction, and asserting jurisdiction, in a labor dispute.[171] The law has a long connection to antitrust law.[172] By way of helpful

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[169] In general, *see* Scott L. Cummings, *Hemmed In: Legal Mobilization in the Los Angeles Anti-Sweatshop Movement*, 30 BERKELEY J. EMP. & LAB. L. 1 (2009); and Craig Becker, *"Better Than a Strike": Protecting New Forms of Collective Work Stoppages under the National Labor Relations Act*, 61 U. CHI. L.REV. 351 (1994). These tactics are described more specifically in Charlotte Garden, *Labor Values Are First Amendment Values: Why Union Comprehensive Campaigns Are Protected Speech*, 79 FORDHAM L. REV. 2617 (2011), at 2621-2623; Kati L. Griffith, *The NLRA Defamation Defense: Doomed Dinosaur or Diamond in the Rough?* 59 AM. U. L. REV. 1 (2009), at 32-37; Allison M. Woodall, *Union Organizing in Assisted Living*, 56 CATH. U. L. REV. 1273 (2008), at 1274-75; and Rachael M. Simon, Comment, *Workers on the March: Work Stoppages, Public Rallies, and the National Labor Relations Act*, 56 CATH. U. L. REV. 1273 (2007).

[170] For more background, *see* Michael H. LeRoy, *How a 'Labor Dispute' Would Help the NCAA*, 81. U. CHI. L. REV. DIALOGUE 44 (2014).

[171] Norris-LaGuardia Act, Act of Mar. 23, 1932, c. 90, § 4, 47 Stat. 70, codified at 29 U.S.C. § 104, states that "[n]o court of the United States shall have jurisdiction to issue any restraining order" involving these acts:

> (a) Ceasing or refusing to perform any work or to remain in any relation of employment;
> (b) Becoming or remaining a member of any labor organization or of any employer organization…;
> (c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;
> (d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;
> (e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;
> (f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;
> (g) Advising or notifying any person of an intention to do any of the acts heretofore specified;
> (h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and
> (i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, ...

[172] Ralph K. Winter, *Labor Injunctions and Judge-Made Labor Law: The Contemporary Role of Norris-*

background, Congress enacted the Sherman Act, and amended it in the Clayton Act,[173] to combat anti-competitive business practices.[174] When industrial employers challenged union practices such as strikes and boycotts under antitrust,[175] Congress believed that judges misapplied the law by enjoining these activities.[176] To shield labor unions from antitrust actions, Congress passed a labor exemption in the Clayton Act.[177] But federal courts continued to order injunctions in labor

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LaGuardia, 70 YALE L. J. 70 (196), at 87-88 (describing conflicts between Norris-LaGuardia and Sherman Act).

[173] Clayton Act, c. 323, 38 Stat. 730 (1914), codified as amended at 15 U.S.C.A. §§ 12-37 (2011). The law amended the Sherman Antitrust Act, c. 647, § 26 Stat. 209 (1890), codified as amended at 15 U.S.C.A. §§ 1, providing that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

[174] *See* FELIX FRANKFURTER & NATHAN GREENE, THE LABOR INJUNCTION (1930), explaining how courts misused injunctions under antitrust law to undercut lawful union activities. To make their point about judicial bias, Frankfurter and Greene explained that businesses often contrived a way to obtain federal diversity jurisdiction in their pursuit of a so-called labor injunction. *Id*. at 13-14. They observed: "A device of modest beginnings, the injunction assumed new and vast significance in a national economy in which effective organization and collective action had attained progressive mastery." *Id*. at 24. *Also see* William Draper Lewis, *Strikes and Courts of Equity*, 46 AM. L. REG. (N.S. 37) 1, 2 (1898), remarking: "The courts still say that these injunctions are not criminal, yet the language of the opinions indicates very clearly their essentially criminal nature." F. J. Stimson, *The Modern Use of Injunctions*, 10 POL. SC. Q. 189, 192 (1895), condemned contempt proceedings because they ignored "the criminal law and its safeguards of indictment, proof by witnesses, jury trial, and a fixed and uniform punishment." A particularly severe critique appears in Charles Claflin Allen, *Injunction and Organized Labor*, 28 AM. L. REV. 828, 847 (1895), observing that "(i)njunction writs have covered the sides of cars, deputy marshals have patrolled the yards of railway termini, and chancery process has been executed by bullets and bayonets."

[175] *See* the widely cited Vegelahn v. Guntner, 167 Mass. 92 (1896), where an employer successfully sued to enjoin strikers from picketing. Other examples in the period include: Casey v. Cincinnati Typographical Union No. 3, 45 F. 135 (S.D. Ohio 1891); United States v. Workingmen's Council of New Orleans, 54 F. 994 (D. La. 1893); Toledo, Ann Arbor & Northern Mich. R.R. Co. v. Pennsylvania R.R. Co., 54 F. 730 (D. Mich. 1893); Farmers Loan & Trust Co. v. North Pacific R.R. Co., 60 F. 803 (D. Wis. 1894); U.S. v. Debs, 64 F. 724 (N.D. Ill. 1894); Thomas v. Cincinnati, 62 F. 803 (S.D. Ohio 1894); Pope Motor Car Co. v. Keegan, 150 F. 148 (N.D. Ohio 1906); Goldfield Consol. Mining Co. v. Goldfield Miners Union No. 220, 159 F. 500 (D. Nev. 1908); and Kolley v. Robinson, 187 F. 415 (8th Cir. 1911).

[176] Robert H. Jerry, II & Donald E. Knebel, *Antitrust and Employer Restraints in Labor Markets*, 6 INDUS. REL. L.J. 173 (1984), quoting Sen. Jones: "Let the Sherman law affect trade and commerce and those who deal in and with trade and commerce as it, in fact, was intended when it was passed. Take labor and labor organizations out from under the law entirely, and let us formulate a statute governing labor and its organizations . . . ." *Id*. at 195, n. 84, quoting 51 Cong.Rec. 13979-80 (1914).

[177] Clayton Act, *supra* note 172, stating "(t)hat the labor of a human being is not a commodity or article of commerce. Nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor . . . organizations . . . instituted for the purpose of mutual help." That section also stated: "nor shall (labor) organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws."

disputes.[178] The NLGA was passed to keep courts out of these controversies by stripping their jurisdiction.[179] To accomplish this purpose, the NLGA broadly defined a labor dispute.[180]

Currently, students are using antitrust lawsuits to pressure the NCAA to make fundamental reforms.[181] The question is whether a union's orchestration of pressure against the NCAA or a member school to further its goal of pay for students would be considered a labor dispute. A well-timed strike— for example, during a nationally televised football game— would put pressure on the NCAA by interfering with its TV contracts and attracting critical publicity. In the early years of the NBA players union, all-stars threatened to interrupt this feature game by walking off the court. Their strike was averted just before tip-off.[182] For the moment, CAPA has said, "We have never advocated for a strike and *are not advocating for one now* (emphasis added)." [183] By its terms, however, this statement renounced a strike only temporarily.

Whether the players would strike or organize a boycott, the NCAA or member school would have little chance to enjoin this action in federal court. The NLGA broadly prohibits

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[178] Frankfurter & Greene, *supra* note 173.

[179] *Supra* note 170.

[180] Brady v. Nat'l Football League, 644 F.3d 661 (8th Cir. 2011), at 670, explaining: "Section 13(c) of the Act states that '[t]he term 'labor dispute' includes *any controversy concerning terms or conditions of employment*, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee (emphasis in original)."

[181] Rock, *supra* note 17; Jenkins, *supra* note 12; O'Bannon, *supra* note 14; and Gregory-McGhee, *supra* note 13.

[182] Alexandra Baumann, *Play Ball: What Can Be Done to Prevent Strikes and Lockouts in Professional Sports and Keep the Stadium Lights On*, 32 J. NAT'L ASS'N ADMIN. L. JUDICIARY 251(2012), at 271, n.12 (strike was averted when owners agreed to pay players a pension). The players threatened another strike three years later and won a limit of eighty-two games per season and other concessions from the NBA. *Id*.

[183] CAPA (College Athletes Players Association), http://www.collegeathletespa.org/faq (visited June 3, 2014).

injunctions involving labor disputes.[184] In the following scenarios, the NCAA would argue that these tactics are not part of a labor dispute in a petition for a federal court injunction. Conversely, students would characterize the controversy as a labor dispute within the reach of the NLGA.

- Instead of striking for union recognition, suppose a team refused to play a game following a paralyzing injury to a teammate. While rare, these injuries occur in college football.[185] Because football players are not employees, they fall outside of worker's compensation coverage.[186] A strike over such an injury would cause a court to consider whether this walkout could be enjoined under a narrow exception to the NLGA to use arbitration as a strike-substitute for resolving a dispute.[187] This exception would not apply because students have no labor agreement with an arbitration clause. Thus, this walkout could not be enjoined.

- Suppose that a team wore athletic shoes, supplied by their union, in violation of their school's exclusive contract with a footwear sponsor.[188] A university would seek a court order to enjoin this boycott. Given that the NLGA broadly applies to disputes that include non-

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[184] For an overview of Norris-LaGuardia, *see* Michael C. Duff, *Labor Injunctions in Bankruptcy: The Norris-LaGuardia Firewall*, 2009 MICH. ST. L. REV. 669, explaining that federal courts cannot enjoin private sector employees from peacefully striking, picketing, or leafleting in connection with labor disputes. *Also see* Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers v. Pauly Jail Bldg. Co., 118 F.2d 615 (8th Cir. 1941), at 617, explaining that injunctions issued during a labor dispute generally tips the scale in the controversy.

[185] Mark Viera, *Rutgers Player Is Paralyzed Below the Neck*, N.Y. TIMES (Oct. 17, 2010), at D1, at http://www.nytimes.com/2010/10/18/sports/ncaafootball/18rutgers.html?scp=1&sq=eric% 20legrand&st=cse.

[186] Rensing, *supra* note 90.

[187] When coal miners walked off the job to protest unsafe conditions, they contended that their work stoppage was protected under a safety provision in Section 502 of the NLRA. *See* Gateway Coal Co. v. United Mine Workers of America, 414 U.S. 368 (1974), at 372. *Id.* at 373. The law provides that the quitting of labor by employees in good faith because of abnormally dangerous conditions for work shall not be deemed a strike. *Id.* at 385. The Supreme Court ruled that the safety issue they were protesting was meant for arbitration, a procedure to which the union and employer agreed in their contract. Thus, the dispute presented an exception to the Norris-LaGuardia limitation on injunctions. *Id.* at 387.

[188] Darren Rovell, *Under Armour Signs Notre Dame*, ESPN.COM (Jan. 21, 2014), at http://espn.go.com/college-football/story/_/id/10328133/notre-dame-fighting-irish-armour-agree-most-valuable-apparel-contract-ncaa-history (school and sports-wear company signed agreement worth $90 million).

labor groups,[189] the fact that students were not union members would be irrelevant. A federal court would likely dismiss the school's petition.[190]

- Suppose that players taped-over a sponsor's official uniform logo to protest that they are not paid for wearing sports gear that generates revenue for their university. Further suppose that a union announced a consumer boycott of the sportswear company. This would involve a boycott of a secondary target— the school's business partner.[191] A court would likely conclude this is a labor dispute under the NLGA— because the goal would be pay for alleged employees— and the protest *and* boycott would be immune from an injunction.[192]

- Suppose that a union lobbied state lawmakers to withhold or reduce funding for a public university until that school's football program bargained with the player's union.[193] An

[189] In New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552 (1938), a company sought to enjoin picketing and boycotting conducted by a group named the New Negro Alliance, a civil rights group. *Id*. at 555. The Alliance used these tactics to pressure a grocery store to hire African-Americans. *Id*. at 555–56. The company persuaded a federal district court and appeals court that these actions were a restraint of trade; and because New Alliance was not a labor union, it was outside the reach of Norris-LaGuardia. The Supreme Court reversed, reasoning that the boycott was a labor dispute even though it did not involve a union. *Id*. at 552.

[190] *See* Smith's Management Corp. v. International Broth. of Elec. Workers, Local Union No. 357, 737 F.2d 788 (9th Cir. 1984), ruling that a boycott of a secondary party (not the actual employer) would not be excluded from Norris-LaGuardia.

[191] NLGA does not allow courts to enjoin a union's involvement an employer's customers in a secondary boycott. *See* Wilson & Co. v. Birl, 105 F.2d 948 (3d Cir 1939).

[192] *See* Burlington Northern Railroad Co. v. Brotherhood of Maintenance & Way Employes, 481 U.S. 429 (1987), where the Supreme Court unanimously held that the Norris-LaGuardia Act forbids injunctive relief against a secondary boycott. The Court recalled that Congress defined "labor dispute" broadly because "it believed previous measures looking toward the same policy against non-judicial intervention in labor disputes had been given unduly limited constructions by the Courts." *Id*. at 441. The Court concluded: "[W]e refuse to narrow the definition of 'labor dispute' under § 13(c) to exclude those battles involving secondary activity." *Id*. at 442.

[193] Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Ass'n, 457 U.S. 702 (1982), demonstrates the far-reach of Norris-LaGuardia's restrictions on the use of injunctions. To protest the Soviet Union's takeover in Afghanistan, the Longshoremen refused to load chemical fertilizer bound for Soviet ports. Caught in the middle, U.S. fertilizer companies sought an injunction to halt this targeted work stoppage. They argued that the union's actions were politically motivated; and because the boycott had nothing to do with the employment relationship, it was not a labor dispute for purposes of the Norris-LaGuardia limits on injunctions. The Supreme Court disagreed, reasoning: "The language of the Norris-LaGuardia Act does not except labor disputes having their genesis in political protests." *Id*. at 711.

injunction to stop this type of political campaign would be unlikely.[194]

- Suppose supporters from the labor movement engaged in informational picketing of a meeting for the university's board of trustees, or picketed near the home of a highly paid football coach.[195] As long as these activities were peaceful and did not pose a public safety threat, a federal court would not enjoin them.[196] Even if the protest distorted the facts surrounding the dispute, it would be immune from an NLGA injunction.[197]

In sum, the NCAA and its members face several types of labor issues. Their most immediate concern is the possibility that they will be legally obligated to bargain with student-employees who play football. At a practical level, this problem is more of a concern for

[194] *Id*. at 717: "Congress rejected a proposal to repeal the Norris-LaGuardia Act with respect to one broad category of political strikes." *Also see* U. S. Steel Corp. v. United Mine Workers of America, 519 F.2d 1236 (5th Cir. 1975), where coal miners walked off the job as a "memorial protest" against Alabama Power Company for its importation of South African coal. The miners' employer, a steel company, sought an injunction to compel the workers to arbitrate this dispute. The appellate court, reversing the grant of the petition, noted that the employer believed the work stoppage was like a political strike, common in Europe but not in the U.S. Accepting that statement as true, the court vacated the injunction, noting that the "Norris-LaGuardia Act was designed to prevent federal judges from halting strikes by means of sweeping injunctions. In broad language the Act removed from federal courts jurisdiction to issue injunctions in any case involving or growing out of any labor dispute (quotes and citations omitted). *Id*. at 1242.

[195] For a detailed account of a labor dispute that featured union picketing near the homes of company executives, *see* Herbert R. Northrup & Charles H. Steen, *Union 'Corporate Campaign' as Blackmail: The RICO Battle at Bayou Steel*, 22 HARV. J.L. & PUB. POL'Y 771 (1999), at 829.

[196] Union supporters may publicize a labor controversy by walking in streets and sidewalks with banners and signs; and this publicity may request the public to boycott the organization involved in a labor dispute. *See* Donnelly Garment Co. v. Dubinsky, 154 F.2d 38 (8th Cir. 1946) (dismissing a petition to enjoin informational picketing). Section 4(e) of NLGA reflected congressional intent to allow publicity of a labor controversy in public places with banners and signs, and appeals to boycott products involved in a labor dispute. *Id*. at 45. More recently, an employer sought to enjoin picketing of an executive's neighborhood and residence in Dunbar v. United Union of Roofers, 1998 WL 35172049 (W.D.N.Y. 1998). The case contains a detailed description of the specific instructions that the union gave to supporters to keep its march peaceful and law-abiding (e.g., picket peacefully; stay on sidewalks; do not step on private property; do not block driveways; limit loud chanting; focus on the content—not volume— of the union's message; refrain from abusive or threatening language; do not litter; obey police; do not impede sidewalk traffic; and walk away from people who try to argue.

[197] *See* United States v. Hutcheson, 312 U.S. 219 (1941), at 232, explaining that the lawfulness of conduct by a union and its supporters "are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means."

Northwestern than for the NCAA and its members. However, at some point a union is likely to broaden its campaign to schools with powerhouse football programs. Pickets, boycotts, and political protests— common tools of union pressure— pose a threat to NCAA interests, especially if they enmesh neutral parties such as corporate sponsors and donors. My analysis suggests that the NLGA would shelter most of these actions from an injunction. This would expose the NCAA to intense pressure, which could force it to make significant concessions.

V. IMPLICATIONS AND CONCLUSIONS: THE FUTURE OF "ATHLETIC LABOR" IN COLLEGE SPORTS

This empirical research opens a unique window for viewing and forecasting the course of athletic labor in college sports. Student lawsuits talk now about "labor."[198] The timing suggests they are responding to an appeals court that introduced the concept of "athletic labor." These recent developments do not mean, however, that a court will order the NCAA to alter its definition of amateur athletics.

Venue is usually the difference between winning and losing, according to Finding H.[199] Even if students can defeat a motion to remove an action from state court, where they have an advantage, to federal court, where the NCAA usually wins cases, these plaintiffs are unlikely to find a court that will strike down the NCAA's amateur competition principle. Without enabling legislation that regulates this private association, courts are not authorized to surgically snip the

[198] McGhee Complaint, *supra* note 14, alleging: "The relevant market is the nationwide market for the labor of NCAA Division I college football players. In this labor market, current and prospective college students compete for roster spots on Division I football teams." Para. 67. *Also see* Rock, *supra* note 17, alleging: "The relevant market is the nationwide market for the labor of student athletes. In this labor market, student athletes compete for spots on athletic teams of NCAA member institutions and NCAA member institutions compete for the best collegiate student athletes by paying in-kind benefits, namely, athletics-based scholarships, academic programs, access to training facilities, and instruction from premier coaches." Para. 21.

[199] *Supra*, Chart 5.

amateur competition clause in NCAA bylaws for football, and leave that principle intact for non-revenue sports. This implies that landmark antitrust cases that modified the reserve clause in basketball,[200] hockey,[201] and football[202] have little relevance to NCAA football. This conclusion is supported by Finding L, showing that most NCAA court cases do not cite a single precedent from professional sports. In sum, while there are comparisons between pro and college football, the NCAA's educational component diminishes the precedential value of NFL cases.

Even if a district court favors students in an antitrust case involving football, it will be hamstrung in ordering remedies because damages and court supervision would come back to hurt women's sports that depend on football for financial support.[203] Finding B, which shows that football cases comprise less than half of the NCAA's litigation, suggests that courts cannot reform college football without creating serious problems for other NCAA sports. There is no limiting principle that allows a court to draw the professionalism line at college football. Division I basketball is also heavily commercialized, but most of its 300-plus programs are closer to the amateur model than the NBA's developmental league. Where would courts draw the amateurism line for that sport? Meanwhile, NCAA baseball and hockey provide important labor pools for MLB and the NHL— even though these are non-revenue college sports. Does the fact that these college students are frequently drafted by professional teams mean that a court is

[200] Robertson, *supra* note 32.

[201] Philadelphia World Hockey Club, *supra* note 125.

[202] White, *supra* note 31.

[203] Brief for Amici Curiae Members of the U.S. Senate Committee of Health, Education, Labor & Pensions, and the U.S. House of Representatives Committee on Education and the Workforce, at 24-25, Northwestern University v. College Athletes Players Ass'n (CAPA), Case No. 13-RC-121359, at http://edworkforce.house.gov/uploadedfiles/ncaa_amicus.pdf ("Because revenue from some sports helps funds others, more "compensation" for football players may lead those schools to eliminate other non-revenue athletic teams or other programs.").

authorized to strike down NCAA rules requiring these students to compete as amateurs?

And yet, some administrative and court decisions will likely rule or imply that college football players are employees, or rule that they participate in a labor market. Indeed, one should expect the NLRB to affirm the regional director's in the Northwestern University case.[204] These rulings are likely to increase pressure on the NCAA to reform itself.[205]

While students win nearly 50% of the first round rulings, according to Finding F, they also lose about 70% of second round appeals, and another 70% of third round appeals. This empirical fact puts the students' win before the NLRB regional director in a sobering light. Relatedly, other research shows that federal courts do not always defer to the NLRB.[206]

Moreover, the NCAA— like other large and powerful defendants— is likely to force students and their contingency-fee attorneys to engage in costly litigation. Besides maximizing its chance of winning, the NCAA could weaken the resolve of students, or at least soften them up for settlement. The association has already shown its tolerance for extreme litigation by spending more than a decade in court to vindicate its position.[207] And like Major League Baseball in

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[204] John B. Langel, a lawyer who specializes in college employment law, said he would not be surprised to see the NLRB, under the current administration, uphold the regional director's decision. Lawrence E. Dube, *University Can Take Football Case to NLRB, But Courts May Make Call on Player Rights*, DAILY LAB. REP'T (March 31, 2014), at http://www.bna.com/university-football-case-n17179889214/.

[205] There is already evidence of this trend. *See* Jon Solomon, *NCAA Releases Football Hitting and Concussion Safety Guidelines*, CBSSPORTS.COM (July 8, 2014), at http://www.cbssports.com/collegefootball/writer/jon-solomon/24610143/ncaa-releases-football-hitting-and-concussion-safety-guidelines.

[206] James J. Brudney, *A Famous Victory: Collective Bargaining Protections and the Statutory Aging Process*, 74 N.C. L. REV. 939 (1996). For an example of judicial hostility to the Board's orders under Section 9 of the NLRA— the section that is the basis for the ruling in the Northwestern University case— Brudney concluded: "The D.C. Circuit took the lead, rebuking the Board on several occasions for failing to balance competing interests and to explain clearly its reasons for requiring bargaining over an extended period of time. Several other circuits have refused to enforce [NLRB] . . . bargaining orders, . . ." *Id*. at 1012.

[207] The NCAA's endurance is underscored by Nat'l Collegiate Athletics Ass'n v. Tarkanian, 488 U.S. 179 (1988). The association proposed sanctions in 1977 against a successful basketball coach, and continued to litigate

Gardella,[208] the NCAA is able to settle a case that might set a crippling precedent.[209]

Nonetheless, the concept of "athletic labor" marks a turning point in favor of students. It will likely advance the cause of students to seek pay and other enhancements in exchange for participating in college football. Already, the regional director's ruling in *Northwestern University* has accelerated NCAA efforts to share more wealth with students.[210] Certainly, the facts support classifying college football players as employees. However, the law supports the NCAA's amateur athlete model. Thus, while schools profit off the sweat of college football players, a federal appeals court is unlikely to view this commercial reality as legal justification to alter the NCAA's amateurism model. But the forecast for occasional first-round victories by students— based on empirical findings in this study— means that the NCAA will be pressured to adopt a radically new model of amateurism that mimics the employment relationship.

VI. ROSTER OF CASES

Federal Court Decisions Organized by "Case" in the Database

1. Agnew v. National Collegiate Athletic Ass'n [Agnew I], 2011 WL 3878200 (S.D. Ind. 2012);[211] and Agnew v. National Collegiate Athletic Ass'n [Agnew II], 683 F.3d 328 (7th Cir. 2012)[212]
2. Arlosoroff v. Nat'l Collegiate Athletics Ass'n, 746 F.2d 1019 (4th Cir. 1984)

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the matter before the Supreme Court in 1988.

[208] Gardella, *supra* note 109.

[209] Indeed, the NCAA recently spent $20 million to settle a likeness-image lawsuit by student-athletes that was set for trial after lengthy procedural wrangling. Van Riper, *supra* note 14.

[210] Jerry Hinnen, *PAC-12 Presidents Send Letter Asking Other Leagues to Back Reforms*, CBSSPORTS.COM (may 20, 2014), at http://www.cbssports.com/collegefootball/eye-on-college-football/24568341/pac-12-presidents-send-letter-asking-other-leagues-to-back-reforms (proposal includes ensuring that scholarships cover the full cost of attendance, improved medical care for injured athletes, and guaranteed scholarships for students who remain in good academic standing.

[211] American Needle, Inc. v. National Football League, 130 S.Ct. 2201 (2010); Chicago Professional Sports Ltd. Partnership v. National Basketball Ass'n, 961 F.2d 667 (7th Cir. 1992).

[212] American Needle, Inc. v. National Football League, 130 S.Ct. 2201 (2010); Chicago Professional Sports Ltd. Partnership v. National Basketball Ass'n, 961 F.2d 667 (7th Cir. 1992).

3. Associated Students, Inc. v. Nat'l Collegiate Athletics Ass'n, 493 F.2d 1251 (9th Cir. 1974)
4. Banks v. Nat'l Collegiate Athletics Ass'n, 746 F.Supp. 850 (N.D. Ind. 1990)[Banks I]; Banks v. Nat'l Collegiate Athletics Ass'n, 977 F.2d 1081 (7th Cir. 1992)[Banks II][213]
5. Bowers v. Nat'l Collegiate Athletics Ass'n, 974 F.Supp. 459 (D.N.J. 1997); Bowers v. Nat'l Collegiate Athletics Ass'n, 475 F.3d 524 (3d Cir. 2007)[214]
6. Buckton v. Nat'l Collegiate Athletic Ass'n, 366 F.Supp. 1152 (D.Mass 1973)
7. Butler v. Nat'l Collegiate Athletics Ass'n, 2006 WL 2398683 (D. Kan. 2006)
8. Cole v. Nat'l Collegiate Athletic Ass'n, 120 F.Supp.2d 1060 (N.D. Ga. 2000)
9. Collier v. NCAA, 783 F.Supp. 1576 (D. R.I. 1992)
10. Colorado Seminary (Denver University) v. National Collegiate Athletic Ass'n, 417 F.Supp. 885 (D.Colo. 1976)[Denver I]; Colorado Seminary v. National Collegiate Athletic Ass'n (Denver University), 570 F.2d 320 (10th Cir. 1978)[Denver II]
11. Cureton v. Nat'l Collegiate Athletic Ass'n, 37 F.Supp.2d 687 (E.D. Pa. 1999)[Cureton I]; Cureton v. Nat'l Collegiate Athletic Ass'n, 198 F.3d 107 (3d Cir. 2000)[Cureton II]
12. Fluitt v. Univ. of Nebraska, 489 F.Supp. 1194 (D.Neb.1980)
13. Gaines v. Nat'l Collegiate Athletics Ass'n, 746 F.Supp. 738 (M.D. Tenn. 2008)
14. Ganden v. Nat'l Collegiate Athletics Ass'n, 1996 WL 680000 (N.D. Ill. 1996)[215]
15. Graham v. Nat'l Collegiate Athletics Ass'n, 804 F.2d 953 (6th Cir.1986)
16. Hairston v. Pacific 10 Conference, 101 F.3d 1315 (9th Cir. 1996)
17. Hall v. Nat'l Collegiate Athletics Ass'n, 985 F.Supp. 782 (N.D. Ill. 1997)
18. Hawkins v. Nat'l Collegiate Athletics Ass'n, 652 F.Supp. 602 (C.D. Ill. 1987)
19. Howard University v. Nat'l Collegiate Athletics Ass'n, 367 F.Supp. 926 (D.D.C. Cir. 1973)[Howard I]; Howard University v. Nat'l Collegiate Athletics Ass'n NCAA, 510 F.2d 213 (D.C. Cir. 1975)[Howard II]
20. Jones v. Nat'l Collegiate Athletics Ass'n, 392 F.Supp. 295 (D.Ma.1975)
21. Jones v. Wichita State University, 698 F.2d 1082 (10th Cir. 1983)
22. Justice v. Nat'l Collegiate Athletics Ass'n, 577 F.Supp. 356 (D. Az. 1983) [216]
23. In re NCAA Student-Athlete Name & Likeness Licensing Litigation, 724 F.3d 1268 (9th Cir. 2013);[217] Keller v. Electronic Arts, Inc., 2010 WL 530108 (N.D.

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[213] Radovich, *supra* note 30; and Chicago Professional Sports Ltd. Partnership v. National Basketball Ass'n, 961 F.2d 667 (7th Cir. 1992).

[214] National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976).

[215] Stoutenborough v. National Football League, Inc., 59 F.3d 580 (6th Cir. 1995).

[216] Denver Rockets v. All-Pro Management, Inc., 325 F.Supp. 1049 (C.D.Cal. 1971); Linseman v. World Hockey Ass'n, 439 F.Supp. 1315 (D.Conn. 1977); Los Angeles Memorial Coliseum Commission v. National Football League, 634 F.2d 1197 (9th Cir. 1980); and Neeld v. National Hockey League, 594 F.2d 1297 (9th Cir. 1979); Smith v. Pro Football, Inc., 593 F.2d 1173 (D.C.Cir. 1978).

[217] C.B.C. Distribution and Marketing, Inc. v. Major League Baseball Advanced Media, L.P., 505 F.3d 818 (8th Cir. 2007); Cardtoons, L.C. v. Major League Baseball Players Ass'n, 95 F.3d 959 (10th Cir. 1996); and

Cal. 2010)[Keller I];[218] Keller v. Electronic Arts, Inc., 2014 WL 2191464 (N.D. Cal. 2014)[Keller II][consolidated cases]

24. Karmanos v. Baker, 617 F.Supp. 809 (D.C.Mich.1985); Karmanos v. Baker, 816 F.2d 258 (6th Cir. 1987)
25. McCormack v. Nat'l Collegiate Athletics Ass'n, 845 F.2d 1338 (5th Cir. 1988)[219]
26. McDonald v. Nat'l Collegiate Athletic Ass'n, 370 F.Supp. 625 (C.D. Cal. 1974)
27. McHale v. Cornell Univ., 620 F.Supp. 67 (N.D.N.Y.1985)
28. O'Halloran v. University of Washington, 672 F.Supp. 1380 (W.D. Wash. 1988)[O'Halloran I]; O'Halloran v. University of Washington, 856 F.2d 1375 (9th Cir. 1988)[O'Halloran II]
29. Parish v. Nat'l Collegiate Athletics Ass'n, 361 F.Supp. 1220 (W.D.La. 1973)[Parish I]; Parish v. Nat'l Collegiate Athletics Ass'n, 506 F.2d 1028 (5th Cir. 1975)[Parish II]
30. Phillip v. Nat'l Collegiate Athletics Ass'n, 960 F.Supp. 552 (D.Conn. 1997)[Phillip I]; Phillip v. Fairfield Univ., 118 F.3d 131 (2d Cir.1997)[Phillip II]
31. Regents of University of Minnesota v. NCAA, 422 F.Supp. 1158 (D.Minn. 1976)[Minnesota I]; Regents of University of Minnesota v. NCAA, 560 F.2d 352 (8th Cir. 1977)[Minnesota II]
32. Rock v. Nat'l Collegiate Athletics Ass'n, 2013 WL 4479815 (S.D. Ind. 2013)[220]
33. Shelton v. National Collegiate Athletic Ass'n, 539 F.2d 1197 (9th Cir. 1976)
34. Smith v. Nat'l Collegiate Athletics Ass'n, 978 F.Supp. 213 (W.D. Pa. 1997)[Smith I]; Smith v. Nat'l Collegiate Athletics Ass'n, 139 F.3d 180 (3d Cir. 1998)[Smith II]; Nat'l Collegiate Athletics Ass'n v. Smith, 525 U.S. 459 (1999)[Smith III]; Smith v. Nat'l Collegiate Athletics Ass'n, 266 F.3d 152 (3d Cir. 2001)[Smith IV]
35. Tanaka v. Univ. of Southern California, 252 F.3d 1059 (9th Cir. 2001)[221]
36. Wiley v. Nat'l Collegiate Athletics Ass'n, 612 F.2d 473 (10th Cir. 1979)

State Decisions Organized by "Case" in the Database

37. Bloom v. Nat'l Collegiate Athletics Ass'n, 93 P.3d 621 (Colo. App. 2004)
38. English v. Nat'l Collegiate Athletics Ass'n, 439 So.2d 1218 (La. App. 1983)
39. Hart v. Nat'l Collegiate Athletics Ass'n, 209 W.Va. 543 (W.Va. App. 2001)
40. Hill v. Nat'l Collegiate Athletics Ass'n, 230 Cal.App.3d 1714 (1990)[Hill I]; Hill v. Nat'l Collegiate Athletics Ass'n, 230 Cal.App.3d 1714 (Cal.App. 1990)[Hill II]; Hill v. Nat'l Collegiate Athletics Ass'n, 801 P.2d 1070 (Cal. App. 1990)[Hill

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Gionfriddo v. Major League Baseball, 114 Cal.Rptr.2d 307 (Cal.App. 2001).

[218] C.B.C. Distribution and Marketing, Inc. v. Major League Baseball Advanced Media, L.P., 505 F.3d 818 (8th Cir. 2007).

[219] Radovich; *supra* note 30; and Smith v. Pro Football, Inc., 593 F.2d 1173 (D.C.Cir. 1978).

[220] Clarett v. National Football League, 306 F.Supp.2d 379 (S.D.N.Y. 2004).

[221] Mackey v. National Football League, 543 F.2d 606 (8th Cir. 1976).

III]; Hill v. Nat'l Collegiate Athletics Ass'n, 865 P.2d 633 (Cal. App. 1994)[Hill IV]

41. Nat'l Collegiate Athletics Ass'n v. Lasege, 53 S.W.3d 77 (Ky. 2001)
42. Nat'l Collegiate Athletics Ass'n v. Yeo, 114 S.W.3d 584 (Tex. App. 2003)[Yeo I]; NCAA v. Yeo, 171 S.W.3d 863 (Tex. 2005)[Yeo II]
43. Oliver v. Nat'l Collegiate Athletics Ass'n, 920 N.E.2d 196 (Oh. App. 2008)[Oliver I],[222] and Oliver v. Nat'l Collegiate Athletics Ass'n, 920 N.E.2d 203 (Oh. App. 2009)[Oliver II]
44. Nat'l Collegiate Athletics Ass'n v. Gillard, 352 So.2d 1072 (Miss. 1977)
45. McAdoo v. University of North Carolina at Chapel Hill, 2011 WL 8363728 (N.C.Super. 2011)[McAdoo I]; McAdoo v. University of North Carolina at Chapel Hill, 736 S.E.2d 811 (N.C. App. 2013)[McAdoo II]

[222] Marinaro v. Major Indoor Soccer League, 610 N.E.2d 450 (Ohio App. 1991).