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An Invisible Union for an Invisible Labor Market: College Football and the Union Substitution Effect

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NCAA FOOTBALL PLAYERS AND COLLECTIVE BARGAINING

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

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NCAA FOOTBALL PLAYERS AND COLLECTIVE BARGAINING

Abstract

Should college football players have collective bargaining rights? The NCAA’s contractual relationship with student athletes provides grants-in-aid while strictly limiting their earnings. This model is premised on the belief that players are amateurs. But this view is contradicted by the heavy commercialization of NCAA football, including a rich championship playoff. Schools reap billions of dollars from TV and licensing agreements, a championship, numerous bowls, and ticket sales, but football players rarely receive enough aid to pay their full cost of attending school. The fact that TV deals minimize competition between the NCAA and NFL, so that each purveyor of football maximizes its revenue, means that Division I football players are in a similar product market as their professional counterparts.

This Article theorizes that college football players participate in an invisible labor market, where the NCAA is a monopsony purchaser of their labor and strictly allocates these market inputs to regulate competitive balance between schools. This labor market theory is supported by analyzing the U.S. Tax Code, Fair Labor Standards Act, and worker’s compensation laws. These laws suggest that NCAA football programs are employers because they control so much of a player’s activities, and derive a direct financial benefit from this labor.

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

This proposal also draws from industrial relations research on the “union substitution” effect, which shows that when employers face a credible threat of unionization they provide more voice and benefits to employees. This Article’s use of the union substitution theory is an acknowledgement that collective bargaining for college football is an improbable idea. However, if the concept is only proposed as state or federal legislation, this would be enough to stimulate a robust union substitution effect— that is, the NCAA would likely be induced to provide players a voice in their affairs, and be more responsive to their concerns. This view is supported with historical and current union-substitution examples.

The status quo is ripe for change. The NCAA is a monopoly that generates new revenue but reforms itself slowly. Without a credible threat of unionization, the NCAA has no reason to confront the fact that it is professionalizing college football. College football exploits an invisible labor market, but traditional collective bargaining is impractical for players. An invisible union, derived from the union substitution effect, is a plausible way to address their interests.
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All of these things . . . are “terms of employment” that currently sweeten the pot for athletes choosing among college football programs. They provide, apart from tuition, room and board, the means by which colleges, as purchasers of labor, attract and compensate their players, the suppliers of labor. That the medium of exchange is non-monetary does not alter the fact that these benefits constitute the “price” of labor in the college football market, or that the categorical elimination of one of those benefits harms competition in that market. 

*Banks v. NCAA.*

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

*Agnew v. NCAA*

Clearly, the collegiate model is dead.

I. INTRODUCTION

A. Context for the Amateur-Professional Distinction

At first glance, the NCAA’s (National Collegiate Athletic Association) regulation of college athletics is far removed from collective bargaining. The mission of the NCAA is to promote academic achievement in the context of athletic competition. The NCAA’s bylaws restrict compensation and employment for student athletes. The association requires that athletes

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1. 977 F.2d 1081, 1097 (7th Cir. 1992).
2. 683 F.3d 328, 340 (7th Cir. 2012).
4. National Collegiate Athletic Ass’n v. Board of Regents of University of Oklahoma, 468 U.S. 85, 88-9 (1984), explaining that since 1905 the NCAA has enforced standards for academic eligibility while regulating athletic competition for member schools. *Also see* Rodney K. Smith, *A Brief History of the National Collegiate Athletic Association’s Role in Regulating Intercollegiate Athletics*, 11 MARQ. SPORTS L. REV. 9, 12 (2000), reporting that the death of eighteen college football players prompted President Theodore Roosevelt to pressure colleges into forming their own regulatory organization. Sixty-two schools formed the Intercollegiate Athletic Association, which was renamed the National Collegiate Athletic Association in 1910. *Id.*
5. Afif v. Loyola Marymount University, 2004 WL 2596002 (Cal. 2004), at *7, n.11. NCAA Rule 15.1 provides that “[a] student-athlete shall not be eligible to participate in intercollegiate athletics if he or she receives financial aid that exceeds the value of a full grant-in-aid . . . .” *Id.* The NCAA sets an earnings limit that includes income from “[e]mployment during semester or term time . . . except for the legitimate on- or off-campus employment of Division I student-athletes who may receive earnings per 15.2.6.1 up to the value of a full grant-in-aid plus $2,000.” *Id.* at Rule 15.1.1(a). The current rule is published in 2009-10 NCAA DIVISION I MANUAL, at
maintain their amateur status.\footnote{Oliver v. Nat’l Collegiate Athletic Assn., 920 N.E.2d 203, 209 (Oh. 2009), reporting that NCAA Bylaw 12.3.2.1 adopts the amateur model of collegiate athletics, and delineates collegiate and professional sports.} Teams must demonstrate academic progress of their athletes or face serious sanctions.\footnote{UConn Loses Appeal, PITTSBURGH POST-GAZETTE (Apr. 6, 2012), at C8, 2012 WLNR 7314246. The NCAA disqualified University of Connecticut men’s basketball team in post-season tournaments due to failure to achieve minimum Academic Progress Rate (APR) scores.} So, why should collective bargaining—a process that is predicated on an employment relationship—be considered for NCAA student athletes?

- \textit{More Equitable Distribution of Wealth}: Division I college football generates enormous wealth for schools, conferences, and the NCAA.\footnote{See Agnew, supra note 2, at *8, remarking: “Successful college football programs often lead to large profits, and to acquire those profits, schools must pay in-kind benefits, namely, grant-in-aid, access to training facilities, and instruction from premier coaching.” Also see revenues for football programs in Tables 1.1 – 1.3, infra.} These athletic competitions also enrich communities that host contests.\footnote{Derrick Fox, \textit{Fairness of Bowl Championships}, \textit{CONG. TEST.} (May 1, 2009), 2009 WLNR 8272141. In 2009 these games created “more than $1 billion in annual combined economic impact to the host sites, donate[d] a quarter of a billion dollars annually back to higher education, and [gave] millions more to charitable endeavors in their own communities.”} So much money is at stake in televised football games that universities took their revenue dispute with the NCAA to the Supreme Court, and won the right to make their own TV deals.\footnote{University of Oklahoma, \textit{supra} note 4.} The players who provide this highly marketable product were ignored in this epic litigation. Today, some universities defect from one conference to join another. They are motivated by finances, not academics.\footnote{University of Connecticut v. Atlantic Coast Conference, 2004 WL 424219 (Conn. Super. 2004). The University of Connecticut and other conference schools sued Boston College, also a conference affiliate, for jumping to the Atlantic Coast Conference. \textit{Also see} Peter Kreher, \textit{Antitrust Theory, College Sports, and Intercollegiate Rulemaking: A New Critique of the NCAA’s Amateurism Rules}, \textit{6 VA. SPORTS & ENT. L.J.} 51, 71-74 (2006).} Donors shower many millions of dollars to finance lavish sports arenas.\footnote{Anne Zimmerman & Leslie Scism, \textit{Boone Calls the Plays as Largess Complicates Life at Alma Mater}, WALL ST. J. (July 6, 2012), at \url{http://online.wsj.com/article/SB10001424052702304782404577488592793245510.html} (T. Boone Pickens donated} Coaches cash in on their players’ success with multi-
million dollar employment contracts. The on-field success of college players translates into commercial licensing agreements that benefit schools—but not star athletes. While many others prosper from college sports, the NCAA strictly caps the financial gains of players.

- **The Grant-in-Aid Contract Reflects Unequal Bargaining Power:** Student athletes sign a form contract that binds them to NCAA rules. Athletes have no bargaining power over these take-it-or-leave-it offers. In addition, the contract is drafted by a monopoly organization, with the result that standardized scholarship contracts eliminate competition in terms and conditions between schools. While players receive oral promises from coaches of a four year scholarship, their contract limits aid to annual renewals, subject to limitations. The

$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).

13 O’Brien v. Ohio State Univ., 2007 WL 2729077 (Ohio App. 2007) (affirming $2.49 million judgment for basketball coach whose employment contract was breached by university).


18 *E.g.*, Southeast Conference, infra note 147. However, the NCAA announced in 2012 a change in this policy. Also see Agnew, supra note 2, at 332, n.1 (NCAA repealed its prohibition on multi-year scholarships). This repeal does not necessarily mean that schools will offer and honor four-year scholarship agreements—only that a
agreement also fails to cover the full cost of their education.\textsuperscript{19}

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

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

While NCAA athletes enjoy vastly superior conditions and opportunities compared to

\textsuperscript{19} Christian Dennie, \textit{White Out Full Grant-in-Aid: An Antitrust Action the NCAA Cannot Afford to Lose}, 7 \textit{Va. Sports \& Ent. L. J.} 97, 103, n.39 (2007), reporting that in \textit{White v. Nat’l Collegiate Athletics Ass’n}, No. CV-06-0999 RGK (C.D. Cal. filed Sept. 8, 2006), former NCAA athletes, including a football player, sued to remove the cap on financial aid for athletes and allow them to receive aid up to the cost of attendance. Also see infra note 68, discussing the National College Players Association’s (NCPA) calculation of scholarship shortfall.

\textsuperscript{20} Clarett, infra note 49.

\textsuperscript{21} Afif, supra note 5.

\textsuperscript{22} Will, infra note 78.

\textsuperscript{23} Infra notes 88-95.

\textsuperscript{24} Van Wezel Stone, infra note 129.

\textsuperscript{25} 2009-10 NCAA DIVISION I MANUAL, Rule 12.2.4.2.3, supra note 5.

\textsuperscript{26} Lazaroff, supra note 17.
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Turn-of-the-century industrial workers, the pedestal on which they are placed is, “upon closer inspection, revealed . . . as a cage.” This is because so many college players leave school with no degree—a betrayal of the NCAA’s goal of using competitive athletics as a vehicle for promoting academic achievement. Only a few earn a living as a professional athlete. Furthering the industrial relations analogy, NCAA athletes lack due process and other fairness protections. Also, some athletes want a voice in the rules, regulations, and culture that pervade their lives.

B. Overview and Organization of the Article

I theorize that college football players participate in an invisible labor market, where the NCAA is a monopsony purchaser and strictly allocates their labor to ensure competitive balance between schools. This theory is supported by examining the U.S. Tax Code, Fair Labor


29 Only 1.2% of NCAA men’s basketball players, 0.9% of women basketball players, 1.7% of football players, and 9.1% of baseball players become pro athletes. NCAA, Probability of Going Pro: Estimated Probability of Competing in Athletics Beyond the High School Interscholastic Level (Dec. 2, 2009), at http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Basketball/Resources/Basketball+Resource+Probability+of+Going+Pro.


31 See Dana O’Neil, Student-Athletes Ask; Will NCAA Listen?, ESPN.COM (Oct. 25, 2011), at http://espn.go.com/college-sports/story/_/id/7148175/ncaa-student-athletes-ask-cut-television-revenue-cover-school-costs (300 football and men’s basketball players signed petition seeking a greater share of the wealth in their sports). Keeping with the NCAA amateur model, the petition proposes that revenues be set aside in a “lock box” for players who complete their eligibility).

32 Infra notes 48-49, & 181-186.

33 Infra notes 75-83.
Standards Act,\textsuperscript{34} the employment-at-will doctrine,\textsuperscript{35} and worker’s compensation laws.\textsuperscript{36} Specific provisions suggest that NCAA football programs are employers because they control so much of a player’s non-academic activities,\textsuperscript{37} and derive a direct financial benefit from this labor.\textsuperscript{38}

The Article proposes a unique and limited form of collective bargaining for Division I football.\textsuperscript{39} This conception accounts for the fact that NCAA football differs from the NFL model because college players are full-time students who must adhere to a code of amateurism. Thus, the proposed model of collective bargaining does not involve wage negotiations or strikes. My analysis shows, however, that players have interests apart from wages. These include (a) scholarship shortfalls (the difference between their grant-in-aid and true cost for attending college), (b) extended or improved educational benefits, (c) complete medical and hospital insurance for football-related injuries, (d) long-term disability insurance for injuries such as brain trauma, (e) transfer and eligibility rights not inconsistent with NCAA rules, and (f) a grievance process to challenge abusive treatment by coaches and administrators.\textsuperscript{40} For negotiations between players and schools that deadlock on these subjects, the proposal draws from public sector labor laws that bar strikes but allow arbitration.\textsuperscript{41}

The Article draws from industrial relations research on the “union substitution” effect which shows that when employers face a credible threat of unionization they provide more voice

\textsuperscript{34} \emph{Infra} notes 84-102.
\textsuperscript{35} \emph{Infra} notes 103-111.
\textsuperscript{36} \emph{Infra} notes 112-122.
\textsuperscript{37} \emph{Infra} note 100.
\textsuperscript{38} \emph{Infra} Tables 1-3 (Part III.B).
\textsuperscript{39} \emph{Infra} notes 68-75, \& 213-260.
\textsuperscript{40} \emph{Infra} notes 71 \& 275.
\textsuperscript{41} \emph{Infra} notes 241-243.
and benefits to employees.\textsuperscript{42} Thus, I acknowledge that collective bargaining for college football is an improbable idea. Nonetheless, this Article develops a plausible method to unionize college football players. Even if the concept is only proposed as state or federal legislation, this would be enough to stimulate the “union substitution” effect—that is, the NCAA would be induced to provide players a voice in their affairs, and be more responsive to their concerns.

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

\textbf{II. Why Collective Bargaining? Theoretical Elements}

NCAA Division I football is so similar to the NFL that the comparison invites consideration of collective bargaining for these college athletes. When NFL players entered into their first collective bargaining agreement, they sought relief from severe labor market restrictions, such as the draft and reserve clause.\textsuperscript{43} The NCAA imposes similar restrictions on Division I football players.\textsuperscript{44}

There is nothing new about comparing NCAA athletes to professional athletes. A few

\textsuperscript{42} \textit{Infra} notes 281-294.


\textsuperscript{44} Each school’s limit on scholarships is similar to the numerical limit on draft picks in the NFL. \textit{See infra} note 57, 2009-10 NCAA DIVISION I MANUAL, Rule 15.5.6. (limiting each school’s football teams to 85 “counters”), \textit{supra} note 5. The reserve system in the NFL, which prohibits players from moving to another team, compares to the NCAA’s restrictions on transfers. \textit{See id.} (Rule 14.5.1).
courts have ruled or suggested that NCAA athletes are similar to employees.\textsuperscript{45} This idea has enjoyed broader support in published studies.\textsuperscript{46} Scholarly research has also suggested that NCAA athletes should have collective bargaining rights.\textsuperscript{47}

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

\textsuperscript{45} Tanaka v. University of Southern California, 252 F.3d 1059, 1064 (9th Cir. 2001) (“restrictions on student-athlete transfers could be loosely analogized to the National Football League free agency restrictions”); Van Horn, \textit{infra} note 112 (widow and minor children of a college football team member, who was killed in a plane crash while returning from a game, were entitled to death benefits under the California Workmen’s Compensation Act, because athletic scholarship was “consideration . . . paid for services”); University of Denver v. Nemeth, 257 P.2d 423, 426 (Col. 1953) (player had a university contract for a job as long as he was on the football team). \textit{Cf.}, State Compensation Insurance Fund v. Industrial Comm., 314 P.2d 288 (Col. 1957) (college student who had received an athletic scholarship for his tuition plus a part-time job, and who was fatally injured while playing in a college football game, was not entitled to a beneficiary death benefit under the Colorado Workmen’s Compensation Act); and Rensing, \textit{infra} note 113.


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

To begin, I focus on the only college sport that serves as an unambiguous labor market to a professional sport. College football is a minor league labor market that is the sole pipeline for the NFL. The league hires, with rare exceptions, only players who have competed in NCAA football games. Moreover, because the NFL will not draft a player until three years have passed from the time his high school class has graduated, this lengthy eligibility bar turns college football a multi-year apprenticeship.

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

B. Increase Competition among Schools to Improve Benefits for Players

While a monopoly controls pricing by limiting competition to sell a product or service, a
monopsony controls pricing by limiting purchasing competition.\textsuperscript{51} As the primary outlet for professional football, the NFL is a monopsony purchaser for the labor of pro football players. The league enhances this power by greatly restricting competition among teams. This is accomplished by requiring all players to sign a uniform player contract, the terms of which limit their freedom in the labor market.\textsuperscript{52}

Similarly, NCAA football players must sign a grant-in-aid agreement.\textsuperscript{53} Its terms and conditions strictly limit player mobility,\textsuperscript{54} and freedom to earn income.\textsuperscript{55} As I show later in my analysis, the NCAA maintains its grip on the market for Division I football players by imposing “input limits” for players.\textsuperscript{56} These include roster limits,\textsuperscript{57} transfer restrictions,\textsuperscript{58} and ineligibility rules for players who engage an agent or enter the pro draft prematurely.\textsuperscript{59}

\textsuperscript{51} Generally, see \emph{In re Permian Basin Area Rate Cases}, 390 U.S. 747, 794, n.64 (1968) (“Monopsony is the term used to describe a situation in which the relevant market for a factor of production is dominated by a single purchaser.”). As the term applies to a sports labor market, see Comment, \emph{Monopsony in Manpower: Organized Baseball Meets the Antitrust Laws}, 62 YALE L.J. 576 (1953), at 591, explaining that “organized baseball’s agreements establishing a player monopsony are manifested in both the uniform player’s contract and the trade regulations.”

\textsuperscript{52} \textit{Brady v. NFL}, 644 F.3d 661, 663-667 (8th Cir. 2011).


\textsuperscript{54} See 2009-10 NCAA DIVISION I MANUAL, Rule 13.1.1.3, Four Year College Prospective Student Athletes (prohibiting a school from contacting a student at another school, or encouraging athlete to transfer), at \textit{supra} note 5. Also see id., Rule 14.5.1, which requires a transfer student to complete one full year in residence at a new school before eligible to participate in athletic competition.

\textsuperscript{55} Note, \emph{Sherman Act Invalidation of the NCAA Amateurism Rules}, \textit{supra} note 46, at 1313, citing non-compensation rule in NCAA Rule 12.1.4.

\textsuperscript{56} NCAA I-A Walk-On Football Players, \textit{infra} note 187, at 1151. A deeper discussion of input restrictions in the context of NCAA rules occurs in Law v. National Collegiate Athletic Ass’n, 134 F.3d 1010 (10th Cir. 1998), at 1023, explaining that courts tend to accept anticompetitive practices if they increase output, enhance efficiencies, introduce a new product, improve product or service quality, or improve consumer choice. However, courts frown on profitability or cost savings as antitrust defenses.

\textsuperscript{57} See 2009-10 NCAA DIVISION I MANUAL, Rule 15.5.6., \textit{supra} note 5 (football teams are limited to 85 “counters”).

\textsuperscript{58} \textit{Id.}, Rule 14.5.1.

\textsuperscript{59} See Banks, \textit{infra} notes 175 - 176; and 2009-10 NCAA DIVISION I MANUAL, \textit{supra} note 5, Rule
My reasoning draws on court opinions that view collective bargaining in professional sports as an appropriate counter-balance to league imposed labor market restrictions on players in the NFL, NBA, NHL, and MLB. Motivated to spread talent evenly across all their teams, professional leagues act as labor market monopsonies. These antitrust cases involving professional athletes are similar to antitrust lawsuits involving player challenges to NCAA

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12.2.4.2.3, permitting a football player to declare for the NFL draft only once. Rule 12.2.4.2.4 forbids a player from retaining an agent. Id.  

60 Clarett, supra note 49, at 140, explaining: “The complex scheme by which individual salaries in the NFL are set, which involves, inter alia, the NFL draft, league-wide salary pools for rookies, team salary caps, and free agency, was built around the longstanding restraint on the market for entering players imposed by the eligibility rules. . . .”  

61 Ralph Winter had two prominent occasions to explain how collective bargaining appropriately applies to the NBA’s anti-competitive labor market restrictions. As a federal appeals judge who authored the opinion in Wood v. National Basketball Ass’n, 809 F.2d 954 (2d Cir. 1987), he reasoned:  
Althought the combination of the college draft and salary cap may seem unique in collective bargaining . . . the uniqueness is strictly a matter of appearance. The nature of professional sports as a business and professional sports teams as employers calls for contractual arrangements suited to that unusual commercial context. However, these arrangements result from the same federally mandated processes as do collective agreements in the more familiar industrial context. Moreover, examination of the particular arrangements arrived at by the NBA and NBPA discloses that they have functionally identical, and identically anticompetitive, counterparts that are routinely included in industrial collective agreements. Id. at 939. This view reflected his published research in Michael S. Jacobs & Ralph Winter, Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage, 81 YALE L.J. 1, 11 (1971) (“The reserve or option clause is at the heart of the collective bargaining relationship and an issue which must be resolved if bargaining is to mature.”)  

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

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

64 Gabriel Feldman, Brady v. NFL and Anthony v. NBA: The Shifting Dynamics in Labor-Management Relations in Professional Sports, 86 TUL. L. REV. 831, 847 (2012) (the NFL and the NBA have a monopsony in the labor market for players); and Joanna Shepherd Bailey & George B. Shepherd, Baseball’s Accidental Racism: The Draft, African-American Players, and the Law, 44 CONN. L. REV. 197, 212 (2011) (“As MLB intended, the draft, by giving a team a monopsony in pay negotiations with its draftees, immediately reduced salaries for U.S. players.”).
restrictions. This comparison supports my suggestion to increase competition among schools so that players enjoy more benefits from their apprentice-like activities.

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

My theory recognizes that a comprehensive collective bargaining system, patterned after the one that exists for the NFL and its players’ association, is unrealistic. I hypothesize, however, that if a single Division I football team voted for a collective bargaining representative, and furthermore, was legally entitled to bargain over limited terms and conditions of their participation, the threat of wider player unionization would stimulate the NCAA to make more meaningful reforms that allow players to move more freely in their labor market, and to gain more financial benefits while in college (for example, full reimbursement for their actual cost of attending school).

My theory is based on an extensive research literature in industrial relations, showing that one method that employers use to avoid unionization is to substitute their own form of employee representation to address the concerns of individual workers. I suggest that that the NCAA

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65 Infra notes 146 – 210 (Part III.C).
   In a union substitution strategy, the employer establishes human resource policies and practices—such as above-market wages, job security, a formal dispute-resolution process, and a culture of respect and fair dealing—intended not only to eliminate most of the sources of discontent that motivate employees to seek union representation but also to give employees more than they could hope to gain through collective bargaining.

would respond to the possible advent of collective bargaining by providing football players a substitute form of representation. I also suggest that collective bargaining for even a handful of football players, if legislated at the federal or state level, would stimulate a broad union substitution effect. This is because football programs with a limited form of collective bargaining could offer attractive inducements to new recruits (for example, disability insurance for the long-term effects of brain trauma), and consequently, upset the NCAA’s carefully conceived balance of competition among member schools.

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

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

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67 Banks, infra notes 179 - 180.

68 A union for student players named the National College Players Association (NCPA) has identified scholarship shortfall as a problem for many NCAA athletes. The term refers to the difference between what a grant-in-aid pays and total expenses for attending school. See http://www.ncpanow.org/research?id=0022. NCPA commissioned a study based on data from the U.S. Department of Education, which measured the total cost of attending a university or college (i.e., tuition, fees, and estimated student expenses). NCPA’s study of 336 NCAA schools for the 2009-10 academic year found an average shortfall of $2,951 per year. This implies that students on a full and recurring scholarship would pay $11,804 over four years.

69 This Article a long-term disability plan for football related head injuries. NFL players have a broad disability plan, but recovery for head trauma is problematical. See Alan Schwartz, Duerson’s Case Highlights the
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from abusive coaching behaviors.\(^\text{71}\)

My theory is also unique for sports because it precludes the use of economic weapons—that is, it forbids strikes and lockouts. Given the short duration of college playing careers, and the necessity for players to continue their education while they are players, a strike/lockout model is unrealistic.\(^\text{72}\) Strike weapons are also inappropriate because the potential bargaining structure for all NCAA Division I schools would span private- and public-sectors. No single labor law covers both domains.\(^\text{73}\) It is implausible, therefore, to invent a labor law for college athletics that would transcend this fractured approach to labor policy.

To understand this point, consider a strike at a private football program which is subject

\(\text{Limits of the N.F.L.'s Disability Plan, N.Y. TIMES (May 4, 2011),}\)
\(\text{http://www.nytimes.com/2011/05/05/sports/football/05duerson.html}\). The NFL-NFLPA Collective Bargaining Agreement has a disability insurance plan in Article 61. See
\(\text{http://images.nflplayers.com/mediaResources/files/PDFs/General/2011_Final_CBA.pdf}\).

\(\text{I do not offer a specific proposal, but call attention to the problem of over-restricting athletes from transferring. An illustration appears in infra note 149, where the University of Wisconsin’s basketball coach restricted the transfer of Jarrod Uthoff beyond conference rules. Also see Afif, supra note 5, at *4-*5 (new coach refused to renew player’s grant-in-aid because he wanted to start over with his own players).}\)

\(\text{This Article does not propose a definition of coaching abuse, and leaves that for bargaining between players and schools. A possible example is the alleged mistreatment of a player by Texas Tech head coach Mike Leach, accused of forcing the player to spend time in a dark closet after disclosing he had a concussion. Adam James ‘Closet’ Video: Alleged Mike Leach Punishment Footage, Surfaces, HUFF POST (May 25, 2011), at}\)
\(\text{http://www.huffingtonpost.com/2009/12/31/adam-james-closet-video-m_n_407983.htm}\). Another example is suggested by John Taylor, Texas Tech Hires Trainer Accused of, Sued for, Mistreating Player, NBC SPORTS (July 8, 2010), http://collegefootballtalk.nbcsports.com/2010/07/08/texas-tech-hires-trainer-accused-of-sued-for-mistreating-player/. An offensive lineman for Auburn accused the strength coach of aggressively accelerating his weight lifting program after back surgery, and gave orders that directly conflicted with the treatment program prescribed by the surgeon. Allegedly, this led to a more serious second injury. Dugan Arnett, Ex-player Accuses Mangino of Mistreatment, LJWORLD.COM (Dec. 2, 2009), at http://www2.ljworld.com/news/2009/dec/02/ex-player-accuses-mangino-mistreatment/ reports player allegations against head football coach Mark Mangino, accusing him ordering extreme and injurious physical punishments. Also see Austin Knoblauch, South Florida’s Jim Leavitt Fired for Allegedly Mistreating Player, LOS ANGELES TIMES (Jan. 8, 2010),

\(\text{Unlike NFL players, who have no cap on the years they are eligible to compete, the NCAA limits player eligibility to five years. See 2009-10 NCAA DIVISION I MANUAL, Rule 14.2, supra note 5.}\)

\(\text{Infra notes 221 - 223.}\)
to the National Labor Relations Act—for example, Stanford. This would have a direct spillover effect for public school football programs who play against Stanford—for example, UCLA and Washington. These institutions are under the jurisdiction of state collective bargaining laws, not the NLRA.74 Thus, a player strike at Stanford would potentially ruin the season for public schools that are covered by state labor laws. My approach avoids this chaos: It provides for continuity of games while allowing represented players recourse to a third party neutral for resolving a dispute with a school.

III. Public Policy Predicates for Collective Bargaining in Division I Football

Collective bargaining is not possible unless certain legal and public policy pre-conditions exist. First, there must be an employment relationship. The fact that the NCAA defines the athletic experience of football players as amateur competition is a major impediment to collective bargaining. In the following analysis, I demonstrate that Division I football players are de facto employees. They should qualify for treatment as employees under a variety of federal and state law criteria that define an employment relationship: (1) the U.S. Tax Code, (2) Fair Labor Standards Act, (3) the common law doctrine known as employment-at-will, and (4) state worker’s compensation laws.

Beyond this legal pre-condition, the National Labor Relations Act (NLRA) favors collective bargaining as a method to address inequality of bargaining power between employers and employees. Division I football generates far more revenue than costs (see infra, Tables 1-3). Currently, players have no power to negotiate terms and conditions of their participation, not

74 Infra note 243 (the NLRA’s exclusion of states and political subdivisions). These schools are in states that provide public sector bargaining rights. See infra note 237.
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even on subjects that have no connection to income—for example, the right to transfer to another school without restriction.

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

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

1. U.S. Tax Code

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

77 The first factor, behavioral control, is a right to direct how the individual performs specific tasks for which he is engaged. This applies to college football players, whose game, practice, and individual training activities are controlled for more than forty hours per week during the season. See EXAMINING THE STUDENT ATHLETE EXPERIENCE, at 17-18, infra note 100. The second element, financial control, applies to college football players insofar as schools have a strictly defined right to control the business activities of players. See 2009-10 NCAA
The first factor, behavioral control, is the right to direct how a person performs specific tasks for which he is engaged. NCAA coaching staffs control more than just a player’s regular season activities—for example, off-season conditioning drills. In Will v. Northwestern University, a court approved a $16 million settlement arising from a wrongful death claim after a college football player died during an organized summer workout. Other NCAA football players have died in off-season workouts.

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

The second IRS element, financial control, also applies to college football players. Schools strictly control the financial activities of players. In re NCAA I-A Walk-On Football Players Litigation noted that “[t]he law is clear that athletes may not be ‘paid to play.’” The NCAA bylaws that protect amateurism in college athletics are simply another way of saying that
universities and colleges exert extreme financial control over football players.\(^\text{83}\)

2. The Fair Labor Standards Act (FLSA)

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

The FLSA is potentially relevant because the Wage and Hour Division of the Department of Labor has determined that some unpaid internships violate the law’s requirement of minimum compensation. This regulation has been prompted by a growing number of college students who struggle to secure employment, and engage in unpaid internships. The DoL regulates unpaid internships for the services that college students render to “for-profit” employers.\(^\text{84}\) On its face, this regulation is inapplicable to Division I football players because member schools are not chartered as profit seeking institutions. However, as I show elsewhere in this analysis,\(^\text{85}\) football

\(^{83}\) See McCormack v. NCAA, 845 F.2d 1338 (5th Cir.1988) (upholding rules that restricted compensation for football players to scholarships with limited financial benefits); Gaines v. NCAA, 746 F.Supp. 738 (M.D.Tenn.1990) (NCAA entitled to revoke an athlete’s eligibility when the individual enters a draft or signs with an agent); and Justice v. NCAA, 577 F.Supp. 356 (D.Ariz.1983) (rule denied athlete’s eligibility for accepting payment to play in the sport). \textit{But see} Oliver, supra note 6, where the NCAA tried unsuccessfully to enforce its player eligibility rules when a pitcher was represented by an attorney during an offer from the Minnesota Twins.

\(^{84}\) \textit{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. \textit{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.

\(^{85}\) See Tables 1-3, infra.
programs have much greater revenues than costs. The surplus is simply not called a profit.

The point is that this FLSA regulation has not been applied to the economic realities of college football. A case can be made for finding that this activity is an uncompensated internship. Already, the broad coverage of FLSA extends to all universities and colleges, whether private or public.\textsuperscript{86} Moreover, the FLSA’s internship regulation does not apply to educational internships because these are defined by their grant of academic credit.\textsuperscript{87} But participation in college football does not generate academic credit for players. This essential fact strengthens the case for characterizing college football as an unpaid internship.

If the DoL’s restrictions for establishing an unpaid internship were applied to college football, the NCAA would encounter challenges in satisfying this six-factor test.\textsuperscript{88} The fourth factor—the requirement that the putative employer derives no immediate advantage from the 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.\textsuperscript{89} The first factor is

\textsuperscript{86} 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.”

\textsuperscript{87} Fact Sheet #71, supra note 84.

\textsuperscript{88} Id. 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.

\textsuperscript{89} For research that relates to the fourth factor as an element for finding an employment relationship because schools derive academic benefits from football and basketball success, see Devin G. Pope & Jaren C. Pope,
challenging for exempting players as unpaid interns because Division I stadiums and football training facilities are not built or used for academic instruction.90 And the second factor— that the internship experience is for the benefit of the intern— is true for players, but must be weighed against the large and positive spillover business impact that successful college football has for the core academic enterprise of universities.91

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.”92 It then has language to suggest that football should be treated as an exempt 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.”93 Key to note, the DoL asks whether an “internship program . . . provides educational credit.”94 The fact that football does not count toward academic credit makes the activity more like employment.95

90 See Zimmerman & Scism, supra note 12, describing construction of a lavish football stadium at Oklahoma State University.
91 Pope & Pope, supra note 89, 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.”
92 Fact Sheet #71, supra note 84.
93 Id.
94 Id.
95 The advice continues: “The more the internship provides the individual with skills that can be used in multiple employment settings, as opposed to skills particular to one employer’s operation, the more likely the intern would be viewed as receiving training.” Id. Certainly, college football instills physical and mental discipline, as well as teamwork and leadership. But the DoL regulation does not easily permit vague experiential effects to negate an inference of compensable work, noting that just because a college student “may be receiving some benefits in the form of a new skill or improved work habits will not exclude them from the FLSA’s minimum wage and overtime
Apart from the internship regulation, the DoL also regulates employment for all types of students, a broad group that includes college students. The rule applies to colleges who hire full-time students. Coincidentally, full-time student status is a requirement for a Division I football player. The “Full-Time Student Program” permits the university, as an employer, to hire a student under a DoL certificate that allows the employer to pay 85% of the minimum wage. The certificate also limits the hours that the student may work to 8 hours in a day and no more than 20 hours a week when school is in session and 40 hours when school is out.

No school is known to apply this regulation to football players. The point, however, is to compare this 20-hour work limit for full-time students employed by their schools with the number of hours that Division I football players spend on athletics. In a self-study performed by the NCAA in 2011, Division I football players spent an average of 43.3 hours on their sport every week during the season. This compared to spending 38 hours per week on academic activities. The fact that football activities require so many hours per week is more evidence that these players function like employees.

In summary, the main reason that college football players are not legally regarded as employees is because they sign a grant-in-aid contract that perpetuates a legal fiction of their

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97 Id. The requirement for a player to be a full time student appears in 2009-10 NCAA DIVISION I MANUAL, Rule 12.1.1.3, supra note 5 [Eligibility for Practice or Competition].
98 U.S. Dep’t of Labor, supra note 96.
99 Id.
101 Id. at 18.
amateur status. But schools profit from players’ football activities. They closely regiment their activities during the season and off-season. The fact that players are not employees is not because schools want players to practice less and play fewer games so that players can take more classes or challenge themselves in harder classes. This section shows that when common law doctrines, employment statutes, and administrative regulations are applied to the economic realities of college football, the activities of a player tend to indicate an employment relationship.

3. Employment-at-Will

The doctrine of employment-at-will (EAW) allows either the employer or individual to terminate the work relationship at any time, for any reason. The practical significance of EAW is an employer’s freedom to discipline an employee, either by suspension or termination.\(^\text{102}\) This common law doctrine remains a bedrock principle of the American employment relationship.\(^\text{103}\)

NCAA athletes are treated more like employees than students in matters involving team discipline. Similar to fired employees, they can be summarily dismissed from teams, not only for violating rules but for sub-par performance.\(^\text{104}\) Just as discharged employees lose their benefits,

\(^{102}\) See Jack Stieber & James R. Murray, Protection Against Unjust Discharge: The Need for a Federal Statute, 16 U.Mich.J.L.Ref. 319, 323 (1983), estimating that employers unjustly dismiss 150,000 employees each year. For justification of EAW, see Payne v. Western & Atlantic R. Co., 81 Tenn. 507, 1884 WL 469 (Tenn. 1884): May I not dismiss my domestic servant for dealing, or even visiting, where I forbid? And if my domestic, why not my farm-hand, or my mechanic, or teamster? And, if one of them, then why not all four? And, if all four, why not a hundred or a thousand of them? The principle is not changed or affected by the number.

\(^{103}\) See Frank Elkouri & Edna Asper Elkouri, How Arbitration Works 650-51 (4th ed. 1985), stating: “In the absence of a collective bargaining agreement arbitrators have recognized the legal principle that the only restriction on management’s right to discharge and discipline employees not hired for a definite term is that contained in federal and state labor relations acts or other laws dealing with discrimination.”

\(^{104}\) Kate Hairopolous, SMU’s Brown Trims 4 Players from Roster, DALLAS MORNING NEWS (April 28, 2012), C11, 2012 WLNR 9165434. A new head basketball coach terminated four players’ basketball scholarships to make way for better players, prompting the athletic director to admit: “There was honest, straight-forward discussion about the future of the program.” Id.
players can lose their scholarships.\textsuperscript{105} In contrast, when an ordinary student faces disciplinary sanctions from a school, she has a right to challenge the adverse action.\textsuperscript{106} A university’s sanction is subject to an internal, independent review by faculty and administrators.\textsuperscript{107}

But NCAA athletes have no right to appeal a coach’s decision to cut them from a team.\textsuperscript{108} Courts have concluded that “even contractual athletic scholarships do not ensure a student’s right to play a sport but only constitute a promise by the university to provide the student with financial assistance in exchange for the student’s maintenance of athletic eligibility.”\textsuperscript{109} An incoming coach may cut multiple members from the team, on grounds that they cannot play to a higher level of competition, and replace them with better prospects. This behavior is indistinguishable from termination under employment-at-will.\textsuperscript{110} But when players seek to transfer to another school, a practice among some non-scholarship athletes, some coaches deny

\textsuperscript{105} See LoPiccolo v. American University, 840 F.Supp.2d 71 (D.D.C. 2012), involving an NCAA wrestler’s challenge to non-renewal of his scholarship. The athlete alleged that his coach promised a full athletic scholarship to fund four years of college, but the coach reneged after the wrestler refused to compete due to illness. Like an employer asserting the EAW doctrine, the school said the grant-in-aid was not automatically renewable.

\textsuperscript{106} See Papish v. Board of Curators of University of Missouri, 410 U.S. 667 (1973). A graduate student in journalism was expelled for distributing a student newspaper that depicted policemen raping the Statue of Liberty. She was provided a hearing to challenge her expulsion, and permitted an appeal to the Chancellor. \textit{Id.} at 668.

\textsuperscript{107} See Ward v. Members of Bd. of Control of Eastern Michigan University, 700 F.Supp.2d 803 (E.D. Mich. 2010). A state university removed a graduate student from a counseling position because she imposed her personal views on a client who sought counseling for a same-sex relationship. The graduate student was provided formal hearings procedures to challenge the charge that she violated a code of ethics. \textit{Id.} at 809.

\textsuperscript{108} See Jennings v. University of North Carolina, 482 F.3d 686 (4th Cir. 2007), involving a female soccer player who was summarily cut from the team during final exams. Prior to her departure, she complained to a high-level university official that her coach talked persistently about the players’ sex lives. \textit{Id.} at 693. The coach justified his removal of Jennings on grounds that she was not fit. \textit{Id.} at 694. The player was unable to challenge her dismissal, but the university conducted a harassment probe which led to letter of reprimand. \textit{Id.}

\textsuperscript{109} Giuliani v. Duke University, 2010 WL 1292321 (M.D.N.C. 2010), at *6. The athlete was persuaded to commit to Duke based on the coach’s verbal assurance of a four-year scholarship worth $200,000; but after the coach died, the new coach told the team he was terminating the player’s eligibility. The new coach said that the athlete’s scholarship could be restored if all twelve of his teammates wrote a letter supporting his reinstatement. The athlete tried to invoke an internal hearing but was only afforded a student’s usual grievance procedure.

\textsuperscript{110} See Hairopolous, \textit{supra} note 104.
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or limit this possibility.111 This behavior has no academic justification. It is simply a selfish practice that denies rivals access to a player who is not good enough to start on one team, but who is promising enough to develop into a competitive threat at another school. In the case of regular undergraduate students, universities never block or limit a transfer.

4. Worker’s Compensation

College football players have filed worker’s compensation and disability insurance claims against universities in which they have contended that they are employees. Worker’s compensation has been the primary focus for these disputes.112 This state insurance system provides employees who are injured in the course of employment with benefits such as medical care, rehabilitative services and equipment, payment for lost capacity, and income replacement. Most courts have denied coverage to injured NCAA athletes, reasoning that these players are student athletes rather than employees. Rensing v. Indiana State University Bd. of Trustees is a tragic illustration.113 Fred Rensing, a football player at Indiana State University, suffered an injury during spring football practice that left him a quadriplegic.114 The Indiana supreme court

111 See Kevin Scarbinsky, Players Deserve Transfer Freedom, BIRM. NEWS (Feb. 24, 2012), 2012 WLNR 4281572 (St. Joseph’s basketball coach Phil Martelli blocked transfer of Todd O’Brien to UAB, where he could have preserved a fifth year of eligibility by enrolling in a graduate degree program not available at St. Joseph’s); and Eric Prisbell, O’Brien Leaves U-Md. Program, WASH. POST (Feb. 14, 2012), D1, 2012 WLNR 3140332, noting that football coach Randy Edsall refused to allow a quarterback to transfer to Vanderbilt and 16 other schools.

112 The experience of California is informative. In Van Horn v. Ind. Acc. Comm., 219 Cal.App.2d 457 (1963), a student athlete who received financial assistance from California Polytechnic State University San Luis Obispo died in an airplane crash while returning from a game. The Court of Appeals held that the student had an employment contract with the college, and his heirs were entitled to worker’s compensation benefits. Id. at 464–466. Van Horn’s agreement to play football was a contract to render services within the meaning of worker’s compensation law. Id. at 465–466. The legislature amended the law in response to Van Horn. See Labor Code section 3352(j), excluding athletic participants as employees. More recently, see Graczyk v. Workers’ Comp. Appeals Bd., 184 Cal.App.3d 997 (1986), reporting legislative amendments.

113 444 N.E.2d 1170 (Ind. 1983).

114 Id. at 1171-72.
ruled that he was not eligible for worker’s compensation to cover the costs of his catastrophic injury.\footnote{Id. at 1175.} This was because he signed an agreement to abide by the NCAA’s rules, which treated him as a student athlete.\footnote{Id. at 1173.} The court also rejected Rensing’s argument that he was more like an employee than a student at the time of his injury.\footnote{Id. at 1173.}

However, a student athlete was awarded a worker’s compensation benefit in University of Denver v. Nemeth after he hurt his back during the team’s football practice.\footnote{127 Colo. 385 (Colo. 1953).} The school also paid him to work on the campus tennis court.\footnote{Id. at 387.} The state supreme court concluded that the claimant’s injury arose in the course of employment,\footnote{Id. at 399.} reasoning that the better players “engage in football games under penalty of losing the job and meals,” and therefore “playing football was an incident of his employment by the University, well-known to it and a requirement which it imposed on claimant.”\footnote{Id. at 395.} The school’s provision of athletic equipment and a field, plus medical care for injured athletes, brought the player’s injury within the scope of employment.\footnote{Id. at 395-96, comparing to Fishman v. Lafayette Radio Corp., 275 App.Div. 876 (award to employee-player for hand injury because employer sponsored ball team and allowed employees to quit work early to play); and Wilson v. General Motors Corp., 272 App.Div. 845 (awarding benefit to employee who was injured while playing in a softball game because the employer supported the team by furnishing equipment and nursing care for injuries).}

The insurance industry, with apparent approval by the NCAA, pays football players for the lost opportunity to compete in the NFL. Coverage does not include medical or

\begin{thebibliography}{9}
\bibitem{Id. at 1175.} Id. at 1175.
\bibitem{Id. at 1173.} Id. at 1173.
\bibitem{Id. at 1173.} The court concluded that “Rensing was not working at a regular job for the University. The scholarship benefits he received were not given him in lieu of pay for remuneration for his services in playing football any more than academic scholarship benefits were given to other students for their high scores on tests or class assignments.” \textit{Id.} at 1174.
\bibitem{127 Colo. 385 (Colo. 1953).} 127 Colo. 385 (Colo. 1953).
\bibitem{Id. at 387.} Id. at 387. As part of his football aid, he lived in campus housing and received free rent for maintaining the property.
\bibitem{Id. at 399.} Id. at 399.
\bibitem{Id. at 395.} Id. at 395.
\bibitem{Id. at 395-96, comparing to Fishman v. Lafayette Radio Corp., 275 App.Div. 876 (award to employee-player for hand injury because employer sponsored ball team and allowed employees to quit work early to play); and Wilson v. General Motors Corp., 272 App.Div. 845 (awarding benefit to employee who was injured while playing in a softball game because the employer supported the team by furnishing equipment and nursing care for injuries).} Id. at 395-96, comparing to Fishman v. Lafayette Radio Corp., 275 App.Div. 876 (award to employee-player for hand injury because employer sponsored ball team and allowed employees to quit work early to play); and Wilson v. General Motors Corp., 272 App.Div. 845 (awarding benefit to employee who was injured while playing in a softball game because the employer supported the team by furnishing equipment and nursing care for injuries).
hospitalization. In *Fireman’s Fund Ins. Co. v. University of Georgia Athletic Ass’n, Inc.* the University of Georgia Athletic Association administered a disability insurance program for football players who showed clear promise of playing at the professional level. The “Exceptional Student-Athlete Disability Insurance Program” was offered to Decory Bryant, a junior. On a Tuesday before a regular season game, Bryant told the school’s administrator that he wanted to be covered by the disability policy. Two days later, an insurance agent solicited quotes for the coverage, and received a bid to cover Bryant for a disability policy that would pay $500,000 if the player was permanently disabled from playing football. When the University of Georgia administrator sent the paperwork to bind coverage that Friday, he forgot to attach Bryant’s signed form. The next day, Bryant suffered a career-ending spinal injury. The school’s failure to complete his policy application resulted in his non-coverage, a mistake that the university refused to rectify voluntarily.

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

The theoretical underpinnings of the National Labor Relations Act (NLRA) are also relevant to college football. By way of background, Congress realized that employers usurped the voice of employees by requiring these individuals to agree not to join a union. In 1932,
lawmakers declared that these “yellow dog” contracts were no longer enforceable.\textsuperscript{130} Grant-in-aid agreements are similar to yellow dog contracts.\textsuperscript{131} Both contracts terminate an individual who engages an agent to represent his financial interests.\textsuperscript{132} Both agreements are also non-negotiable.

By 1935, Sen. Robert Wagner believed that economic power was too concentrated in the hands of employers.\textsuperscript{133} His view emphasized economic justice and morality.\textsuperscript{134} The NLRA reflected his belief that collective bargaining would lead to more stable employment relationships.\textsuperscript{135} How well this law applies to college football is a matter of debate.\textsuperscript{136} The


\textsuperscript{130} The Norris-LaGuardia Act made these contracts unenforceable in Section 3. \textit{See}\ Act of Mar. 23, 1932, c. 90, § 13, 47 Stat. 73, codified at 29 U.S.C.A. § 113 (2012). Earlier, the Supreme Court ruled that these agreements were lawful in Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 299 (1917), and Coppage v. Kansas, 236 U.S. 1 (1915).

\textsuperscript{131} Also see Lazaroff, \textit{supra} note 17, at 335-36 (players are restricted by grant-in-aid contracts from being represented by agents who would negotiate compensation for their services).

\textsuperscript{132} State v. Coppage, 125 P. 8 (Kan. 1912) reproduces this yellow dog contract:

\begin{quote}

We, the undersigned have agreed to abide by your request, that is, to withdraw from the Switchmen’s Union, while in the service of the Frisco Company. [Signed] . . . .
\end{quote}

An employee was fired after his superintendent tendered the contract and the worker refused to sign it. \textit{Compare} Oliver, \textit{supra} note 6. A high school pitcher signed a letter of intent with Oklahoma State University, and was drafted by the Minnesota Twins. His father invited an attorney/agent to be present for the Twins’ presentation of a $390,000 offer. Although counsel never spoke, and the father advised his son to reject the offer, the NCAA declared that the player was ineligible to compete in college because of this meeting with an agent. The court said:

\begin{quote}
The status of the no-agent rule, . . . is a prohibition against agents, not lawyers. Therein lies the problem. It is impossible to allow student-athletes to hire lawyers and attempt to control what that lawyer does for his client by Bylaws 12.3.2 or 12.3.2.1. These rules attempt to say to the student-athlete that he or she can consult with an attorney but that the attorney cannot negotiate a contract with a professional sport team. This surely does not retain a clear line of demarcation between amateurism and professionalism.
\end{quote}

\textit{Id.} at 214.

\textsuperscript{133} \textit{Id.} at 20, stating:

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

\textsuperscript{135} Sen. Wagner observed: “While the bill explicitly states the right of employees to organize, their
NCAA treats college football as an amateur sport played by student athletes. This premise negates consideration of collective bargaining for college football because the NLRA and parallel state labor laws require an employment relationship. Increasingly, however, the business side of college football undermines the premise of amateurism. Recently, the Big East Commissioner bluntly conceded: “Clearly, the collegiate model is dead.” Apart from the billions of dollars tied up in media contracts with the NCAA, college conferences negotiate their own lucrative TV deals.

To demonstrate that college football is highly profitable, Tables 1-3 provide financial...
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snapshot for three major conferences. The charts show revenues and costs in the 2010-11 football season for the SEC, Big Ten and PAC-12 conferences. Every school generated surplus revenue, often more than $10 million.

Table 1
SEC Football Revenue & Expenses by School (2010-11 Season in Dollars)

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Table 2
Big Ten Football Revenue & Expenses by School (2010-11 Season in Dollars)

PAC-12 Football by School (2010-11)

NCAA athletes enjoy a privileged lifestyle that turn-of-the-century industrial workers
could not imagine. Nonetheless, the business side of collegiate football pervades their academic culture.\textsuperscript{142} Still, only a few players earn an NFL paycheck.\textsuperscript{143} This strengthens the argument that football players are exploited by schools, even if these Saturday heroes are revered during their college careers. The industrial worker analogy is further advanced by the fact that college players often lack due process and other fairness protections.\textsuperscript{144} Like workers of a bygone era, they are eager to have a voice in the rules and regulations that dominate their lives.\textsuperscript{145}

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

The grant-in-aid agreement comprehensively governs athletic and academic participation by college football players. This contractual regime resembles the uniform player’s contract that has been the cornerstone of professional sports. Beginning in the 1880s, baseball leagues required players to sign form contracts that specified terms and conditions of employment.\textsuperscript{146} So, too, the grant-in-aid agreement regulates a player’s relationship to his team by incorporating a variety of NCAA rules.\textsuperscript{147} Baseball leagues imposed the uniform player contract to prevent one

\textsuperscript{142} Academic fraud adds to the NCAA’s problem of reconciling lofty ideals and incentives to cheat. \textit{E.g.}, Associated Press, \textit{Discovery of Suspect Classes at UNC Extends Lingering Aftermath of NCAA Football Probe}, WASH. POST (June 14, 2012), \url{http://www.washingtonpost.com/sports/colleges/discovery-of-suspect-classes-at-unc-extends-lingering-aftermath-of-ncaa-football-probe/2012/06/14/gJQA0EdDdV_story.html}. UNC found fraud and poor oversight in 54 classes in a single department. Problems included unauthorized grade changes and forged faculty signatures for grades. One class was populated entirely with football players.

\textsuperscript{143} \textit{Supra} note 29 (1.7\% of NCAA football players become pro athletes).

\textsuperscript{144} Johnson, \textit{supra} note 30.

\textsuperscript{145} See Dana O’Neil, \textit{Student-Athletes Ask; Will NCAA Listen?}, ESPN.COM (Oct. 25, 2011), at \url{http://espn.go.com/college-sports/story/_/id/7148175/ncaa-student-athletes-ask-cut-television-revenue-cover-school-costs}, reporting that 300 football and basketball players signed a petition for a share of the revenue they help to generate. The petition asks for part of the TV revenue to be set aside in an educational lockbox. This money would be available only to players who exhaust their eligibility.

\textsuperscript{146} Metropolitan Exhibition Co. v. Ward, 24 Abb. N. Cas. 393 (N.Y.Sup. 1890), at 395, n.1 (providing a detailed reproduction of the standard contract).

\textsuperscript{147} An example for the SEC appears at Southeastern Conference Financial Aid Agreement, at
team from gaining a competitive advantage over a rival team by offering a player better terms.\textsuperscript{148} Similarly, athletic conferences that operate under NCAA rules restrict competition by league members for a player’s athletic services in their agreements with players.\textsuperscript{149} The NCAA also deters players from transferring by imposing a one year period of ineligibility.\textsuperscript{150}

While important, these similarities pale in importance to centerpiece restraints in baseball and NCAA regulations, respectively, the reserve clause, and the one year financial commitment rule in NCAA player agreements. In baseball, a player could be terminated with a ten day notice from his team,\textsuperscript{151} but his team could bind him from year to year by invoking an option, called the reserve clause.\textsuperscript{152} This meant a player could not play for another team in the league, unless he was traded or his contract was not renewed. Nor could he bargain for better terms by seeking offers from competing teams.\textsuperscript{153} Similarly, grants-in-aid limit a school’s financial commitment to

\begin{flushright}
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\textsuperscript{148} See ROGER I. ABRAMS, LEGAL BASES: BASEBALL AND THE LAW 15-17 (1998), explaining that the National League instituted the reserve clause in 1879 to control rising player salaries. Initially, NL teams agreed that each team could reserve five players, thereby restricting any other team from negotiating with a designated player. In 1883, the NL and its rival, the American League, authorized teams to reserve 11 out of 14 players on their squads.

\textsuperscript{149} The SEC form contract states: “2: Southeast Conference institutions shall cease recruiting activities intended to result in this student’s enrollment at another SEC institution.” Southeastern Conference Financial Aid Agreement, supra note 147, at 1. For a compelling example of how coaches leverage this type of transfer restriction, see Ex-Badger Chooses Hawkeyes, DES MOINES REGISTER (June 7, 2012), 2012 WLNR 12103286, reporting that a Wisconsin basketball player, Jarrod Uthoff, was told that he could not obtain the school’s release if he transferred to any of 20 schools. To abate this controversy, Wisconsin lifted restrictions beyond those imposed by the Big Ten.

\textsuperscript{150} See 2009-10 NCAA DIVISION I MANUAL, Rule 14.5.1, at supra note 5.


\textsuperscript{152} An excellent explanation of the reserve clause appears in Comment, Organized Baseball and the Law, 46 YALE L. J. 1386, 1386-7 (1937) (“Since the contract entered into in each succeeding season will have a similar provision, the player is really signing for the duration of his baseball life.”). E.g., Metropolitan Exhibition Co. v. Ewing, 42 F. 198, 200 (C.C.N.Y. 1890).

\textsuperscript{153} Courts were not usually inclined to enforce the reserve clause against players who sought to jump their contracts, but some did. See supra note 51, Monopsony in Manpower, at 590, n. 74 (1953). For courts that refused to enforce the reserve clause, see Weeghman v. Kilfiller, 215 Fed. 289 (C. C. A. 6th, 1914), aff'd 215 Fed. 168 (W. D. Mich. 1914); Brooklyn Baseball Club v. McGuire, 116 Fed. 782 (E. D. Pa. 1902); Metropolitan Exhibition Co., id.; Allegheny Base-Ball Club v. Bennett, 14 Fed. 257 (C. C. W. D. Pa. 1882); Cincinnati Exhibition Co. v. Johnson,
These contracts also provide grounds for terminating a school’s obligation to a player by requiring individuals to adhere to eligibility rules. Thus, just as the reserve clause perpetually bound a player who would otherwise market his services to other teams, the grant-in-aid exerts this type of global restraint on a player’s mobility.

The reserve clause in baseball eventually was modified after players voted to form a union and challenged the restriction in arbitration. Football was not significantly different. In time, the NFL adopted its own version of the reserve clause, and a blacklisting rule for players who jumped to a rival league.

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154 See Southeastern Conference Financial Aid Agreement, supra note 147, at 1. The form contract states in bold text: “4: In accordance with NCAA regulations, an athletics grant-in-aid may not be awarded or promised for a period longer than one academic year.” The contract accentuates a school’s leverage over players by stipulating: “An institution will notify a student by no later than July 1, 2008 regarding the renewal of his of this grant-in-aid for an additional year.” This late date impedes earlier transfers that would advantage a player.

155 Id. The SEC agreement also states in bold print: “6: The student agrees to be bound by and to abide by the requirements, rules, and procedures (now in force and as amended from time time) of this institution, the Southeastern Athletic Conference, and the NCAA concerning his or her eligibility. The student further . . . agrees . . . that student must be deemed eligible by all three entities in order to compete in intercollegiate athletics.”


157 Kansas City Royals v. Major League Baseball Players, 532 F.2d 615, 617-18 (8th Cir. 1976). After Andy Messersmith, a star pitcher, played out his option year, he thought he was free to sign with another team. Arbitrator Peter Seitz agreed with him, and the Eighth Circuit Court of Appeals found no reason to vacate this award. Id. at 619, n.3. These events curtailed the reserve system but did not eliminate it.

158 Mackey v. NFL, 407 F.Supp. 1000 (D.Minn.1975) was an early antitrust challenge of the NFL’s version of the reserve clause. Id. at 1002. The rule required a team that signed a free agent to provide fair and equitable compensation to the player’s previous team. Judge Larson agreed with the players, holding that the Rozelle Rule was an antitrust violation, because the rule deterred free agent signings. Id. at 1007-1008. Applying the rule of reason test, the Eighth Circuit affirmed. Mackey v. NFL, 543 F.2d 606 (8th Cir. 1976).

159 Radovich v. NFL 352 U.S. 445 (1957). A player for the Detroit Lions asked the NFL to allow him to transfer to the league’s Los Angeles team to be near his ailing father. Id. at 448. When the NFL refused, he signed with a rival league’s team in California. Id. Later, when Radovich sought re-employment in the NFL, he was blacklisted by a rule that banned play in a rival league. Id. The Supreme Court held that Radovich could pursue his antitrust challenge to the blacklisting restriction. Id. at 454.
Whether the sport was baseball, football, basketball or hockey, professional players sued in antitrust to challenge these restraints. Courts understood that these restraints had an anticompetitive effect. The question was whether these restraints were permitted because antitrust law usually exempts labor agreements, even those with anticompetitive restrictions. Some courts ruled that league restraints violated antitrust law even though the restrictions were collectively bargained. Others decided that the restrictions were permissible because they were a product of collective bargaining.

This background is relevant to Division I football. Like the NFL or other professional sports leagues, the NCAA promulgates rules to enhance parity. The limit on 85 scholarships per
school is a prime illustration because it prevents elite football schools from stockpiling talent.\(^{167}\)

The following analysis demonstrates how the NCAA uses restrictions to exert its monopsony power to the detriment of players. As further background to this analysis, it is important to note that most courts have repeatedly upheld NCAA rules that preserve amateur competition.\(^{168}\)

Nonetheless, a few courts have ruled that NCAA activities violate antitrust law.\(^{169}\) I now examine three types of NCAA rules that restrict the labor market for college football players.

Blacklisting Players: The NFL and NCAA strictly penalize players who defect to another league. To demonstrate this comparison, two important decisions are considered. In *Radovich v. National Football League*,\(^{170}\) a player for the Detroit Lions asked the NFL to allow him to transfer to the league’s Los Angeles team to be near his ailing father.\(^{171}\) When the NFL refused, he signed with a rival league’s team in California.\(^{172}\) Later, when Radovich sought re-
employment in the NFL, he was blacklisted by a rule that banned play in a rival league. In a ruling for Radovich, the Supreme Court allowed him to proceed with an antitrust challenge to the blacklisting rule.

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

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

The appellate decision reveals why an NFL player was permitted in Radovich to

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173 Id.
174 Id. at 452. The court explained:
   If this ruling is unrealistic, inconsistent, or illogical, it is sufficient to answer, aside from the distinctions between the businesses, that were we considering the question of baseball for the first time upon a clean slate we would have no doubts . . . . No other business claiming the coverage of those cases has such an adjudication.
   Id.
175 Banks, supra note 1.
176 Id. at 1083 (referencing NCAA Rule 12.2.4.2 or Rule 12.3.1).
177 Id. at 1086.
178 Id. at 1094.
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challenge the NFL’s blacklisting rule under antitrust law, while an NCAA player could not do the same. Banks argued that the NCAA rules restricted the labor market in which he competed. He defined the collegiate labor market as football players who enter the draft and employ an agent. But the majority opinion refused to characterize the NCAA’s two rules in dispute as labor market restraints. Instead, the court treated the rules as a “desirable and legitimate attempt to keep university athletics from becoming professionalized to the extent that profit making objectives would overshadow educational objectives.”179 In other words, “the no-draft rule and other like NCAA regulations preserve[d] the bright line of demarcation between college and ‘play for pay’ football.”180

In a separate opinion, Judge Flaum concluded that the NCAA’s restriction on entering the draft adversely affected players as labor market participants.181 He believed that “the market at issue here is the college football labor market, and the NCAA member colleges are consumers in that market [emphasis in original].”182 If the NCAA had no draft restriction, players would benefit from more competition between schools who, in varying degrees, would allow them to test the waters for a pro career without impairing their return to the team.183 Judge Flaum theorized that “the no-draft rule operates to the detriment of the players, and that colleges benefit from the fact that their athletes feel tied to the institution for four years.”184 This is because some

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

180 Id. at 1090.

181 Id. at 1095-1099.

182 Id. at 1098.

183 Id. at 1095.

184 Id.
talented players, described by the judge as “bubble players,”\textsuperscript{185} are good enough to be considered by the NFL but are not certain to be hired. The no-draft rule resolves this uncertainty in a way that harms players and benefits schools.\textsuperscript{186}

\textit{Roster Limits and Parity: In in re NCAA I-A Walk-On Football Players Litigation,}\textsuperscript{187} a group of non-scholarship players claimed, in their antitrust lawsuit, that they would have received grants-in-aid if the NCAA did not limit each school to 85 football scholarships. The players alleged that the scholarship limit was an artificial restraint to limit costs among horizontal competitors.\textsuperscript{188} The district court rejected the NCAA’s motion to dismiss the lawsuit.\textsuperscript{189} The plaintiffs were entitled to go forward with proof that the NCAA operated as an unlawful monopsony by controlling the market for players.\textsuperscript{190} The court also ruled that the players had demonstrated possible injury by pleading that the NCAA rule left them with enormous student loans, while sparing schools hundreds of millions of dollars in scholarships.\textsuperscript{191} While the players prevailed in this phase of the lawsuit, their litigation bogged down after several

\begin{footnotesize}
\textsuperscript{185} Id.
\textsuperscript{186} Id., observing that “[t]he rule permits colleges to squeeze out of their players one or two more years of service, years the colleges might have lost had the ability to enter the draft without consequence to eligibility been the subject of bargaining between athletes and colleges [citation omitted]. . . . The rule thereby distorts the ‘price’ of labor in the college football labor market to the detriment of players.” Judge Flaum elaborated on his labor market analysis, explaining that athletes do not weigh the value of tuition, which often varies between schools, especially public and private institutions. He observed that “[s]ome athletes look primarily to the reputation of a particular program or coach as a ‘feeder’ into the NFL.” \textit{Id.} at 1096. He added that some “look to whether a college will offer them a cushy, high-paying job during the summer or school year; others might be attracted by state-of-the-art training facilities.” \textit{Id.} Returning to his point that the NCAA’s restrictions on entering the draft are a labor market restraint, he concluded: “And some athletes, if given the chance, would look to whether a college would allow them to enter the NFL draft and return if they did not join a professional team.” \textit{Id.}
\textsuperscript{187} 398 F.Supp.2d 1144 (W.D.Wash. 2005), challenging Bylaw 15.5.5 as an artificial restraint on the number of scholarships for football teams.
\textsuperscript{188} The players alleged that the NCAA operated as a classic cartel because it was “a combination of producers of a product joined together to control its production, sale, and price.” \textit{Id.} at 1051.
\textsuperscript{189} \textit{Id.} at 1152.
\textsuperscript{190} \textit{Id.} at 1151-52.
\textsuperscript{191} \textit{Id.} at 1151.
\end{footnotesize}
NCAA Football Players and Collective Bargaining

futile attempts to persuade the court to certify their class.¹⁹²

The NFL, in Brown v. Pro Football, Inc.,¹⁹³ provides a comparison to NCAA I-A Walk-On Football Players in league-imposed input limits on team rosters. In 1989, the NFL unilaterally created a developmental squad program— in effect, an enlargement of team rosters.¹⁹⁴ This rule not only regulated the supply of labor, but demonstrated the NFL’s monopsony power: The NFL required each team, under threat of sanctions, to pay every player exactly $1,000 per week for salary.¹⁹⁵ A class of 235 developmental squad players sued the NFL under the Sherman Act, claiming that the roster limit and pay plan were restraints in trade.¹⁹⁶ A federal jury awarded damages of more than $30 million to the players, but the D.C. Court of Appeals reversed, holding that the NFL was immune from antitrust liability because these restraints on competition were imposed through the collective bargaining process.¹⁹⁷ The Supreme Court affirmed, reasoning that antitrust courts should not referee labor disputes.¹⁹⁸

The NFL’s Reserve Clause and NCAA Transfer Restrictions: Professional leagues,

¹⁹⁴ Id. at 234.
¹⁹⁵ Id.
¹⁹⁶ Id. at 235.
¹⁹⁷ Id.
We recognize . . . that, in principle, antitrust courts might themselves try to evaluate particular kinds of employer understandings, finding them “reasonable” (hence lawful) where justified by collective-bargaining necessity. But any such evaluation means a web of detailed rules spun by many different nonexpert antitrust judges and juries, not a set of labor rules enforced by a single expert administrative body, namely the [National Labor Relations] Board. The labor laws give the Board, not antitrust courts, primary responsibility for policing the collective-bargaining process. And one of their objectives was to take from antitrust courts the authority to determine, through application of the antitrust laws, what is socially or economically desirable collective-bargaining policy.
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including the NFL, utilize some form of the reserve clause in the uniform player contracts that athletes must sign. The reserve clause is akin to an option, and allows a team to renew a player’s contract automatically and indefinitely.\(^{199}\) The four major league sports continue to impose some form of the reserve clause to promote competition among teams.\(^{200}\)

Similarly, the NCAA prohibits a student who transfers from one school to another from participating in its athletic competitions for one full academic year.\(^{201}\) This amounts to a transfer penalty, and has been compared to the reserve clause in professional sports.\(^{202}\) Other cases do not make this comparison, but uphold NCAA transfer restrictions with the same deference as courts that leave the reserve clause undisturbed in professional sports.\(^{203}\)

Consider the reasoning in Williams v. Hamilton.\(^{204}\) Upholding the NCAA’s restrictions on transfers by student athletes, the court thought the rule was intended “to avoid movement of ‘tramp athletes’ interested in one sport from school to school in the fond hope that such athlete might be able to participate in post-season national championship competition or in the hope that he might be able to assist the team of the school to which he transfers to enter such

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\(^{199}\) The reserve clause originated in baseball in the 1880s, when teams barred valuable players from ending their contractual relationship to sign with another team. See ABRAMS, supra note 148, at 15-17. Also see Comment, Organized Baseball and the Law, supra note 152. In the modern era of professional sports, every league uses some form of the reserve clause to promote parity and wide interest in the sport. E.g., Robertson, supra note 162 at 874.

\(^{200}\) The reserve clause continues in baseball, though it has been relaxed to permit free agency to players with six years or more of major league service. See Paul Staudohar, Have We Seen the Last of Baseball’s Labor Wars?, 61 LABOR LAW J. 192, 193 (2010), explaining limited free agency for baseball players. In football, see Brady v. National Football League, supra note 52, at 664-68 for a comprehensive history of the NFL’s restrictions on free agency. McCourt, supra note 62, at 1194-95, offers background on the NHL’s restrictions on free agency.

\(^{201}\) Nat’l Collegiate Athletic Ass’n v. Yeo, 171 S.W.3d 863, 866, ns. 5 & 6 (Tex. 2005), citing 2001–2002 NCAA Division I Manual at 158 (Bylaw 14.5.5.1), and the same rule renumbered in the 2005–2005 NCAA Division I Manual (Bylaw 14.5.5.2.10).

\(^{202}\) Konsky, supra note 46. Also see Tanaka, supra note 45.

\(^{203}\) Parish v. Nat’l Collegiate Athletic Ass’n, 506 F.2d 1028, 1034 (5th Cir. 1975).

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competition. 205 Weiss v. Eastern College Athletic Conference 206 denied a player’s motion to
enjoin a transfer restriction, reasoning that the tennis player could not demonstrate a personal or
public injury resulting from the rule. 207 In Tanaka v. University of Southern California a soccer
player sued in antitrust when her school prohibited her transfer to UCLA, a PAC-10 school. 208
She alleged that USC singled her out for reprisal because she alleged that USC arranged for
athletes to receive fraudulent academic credit through sham classes. 209 But the Ninth Circuit
Court of Appeals denied her motion to enjoin the transfer restriction, explaining that Tanaka
alleged a personal injury but no harm to a market. 210

IV. A UNIQUE APPROACH TO COLLECTIVE BARGAINING FOR COLLEGE FOOTBALL

A. Why Is a Unique Approach Appropriate?

College football does more than provide leisure for players and fans. It is a big and
growing business for schools, conferences, and media outlets. Its recent controversy over
selecting a national champion 211 shows why a unique approach is necessary if collective
bargaining is to be considered for college football. The new tournament format is itself unique,
involving only four teams. The concept is a compromise between advocates of an 8- or 16-team
tournament, and supporters of the status quo ante arrangement of choosing a champion in a
national poll. PAC-12 Commissioner Larry Scott justified the compromise approach, noting that

205 Id. at 646.
207 Id. at 194.
208 Tanaka, supra note 45.
209 Id. at 1061.
210 Id. at 1064. The court reasoned that “antitrust laws were enacted for the protection of competition, not
competitors (internal quotes omitted).” Id.
211 Ralph D. Russo, College Closes in on a Playoff—Finally, S.F. CHRON. (June 21, 2012), at
it takes into account the academic calendar that is common to NCAA schools. In short, college football has grown to resemble the NFL, but the NCAA cannot adopt the NFL’s lengthy playoff system because of its educational mission.

Therefore, I propose a unique hybrid form of collective bargaining that draws from elements in the NLRA and state collective bargaining laws. But my proposal has unusual limits that preserve the amateur character of NCAA athletic competition. For example, the subjects of bargaining are much more limited than in traditional labor laws. Notably, wages are not proposed as a subject of bargaining. Strikes and lockouts are not permitted, either. Instead, this proposal draws from labor laws that substitute arbitration for the use of economic weapons.

Chart 1.1 summarizes the Illinois Public Labor Relations Act and the Illinois Educational Labor Relations Act. Chart 1.1 highlights elements from these laws that are potentially useful for my proposal. A more detailed discussion below explains these proposals. I also explain why my proposal distinguishes between private and public schools.

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212 Id. “I’m sure it won’t satisfy everyone,” PAC-12 Commissioner Larry Scott said, adding, “But we’re trying to balance other important parties, like the value of the regular season, the bowls, the academic calendar.”

213 Compare Teamsters v. Oliver, 358 U.S. 283, 295 (1959), implying a duty under the NLRA to bargain in good faith bargaining over wages, hours, and working conditions from 29 U.S.C. §§ 158(a)(5), 158(d).

214 Compare N.L.R.B. v. Erie Resistor Corp., 373 U.S. 221, 234 (1963) (“right to strike is predicated upon the conclusion that a strike when legitimately employed is an economic weapon which in great measure implements and supports the principles of the collective bargaining system”), and N.L.R.B. v. Brown (Brown Food Store), 380 U.S. 278, 283 (1965), taking a similar view of an employer’s main weapon, a lockout (employer “may in various circumstances use the lockout as a legitimate economic weapon”).

215 Infra note 239.


218 Chart 1.1 (far right hand column) & Chart 1.2 (far right hand column).

219 Infra notes 222-223.
### B. State Law Approach

#### CHART 1.1

**STATE LAW APPROACH**

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<th>Illinois Public Labor Relations Act (Public Safety Employees)</th>
<th>Illinois Public Educational Labor Relations Act</th>
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Illinois has two laws that provide collective bargaining rights to public employees: The Illinois Public Labor Relations Act (IPLRA), and the Illinois Educational Labor Relations Act (IELRA). Both statutes extend collective bargaining rights to state and local employees, and thereby legislate for an excluded group under the National Labor Relations Act. The IELRA is

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220 Supra note 216 (IPLRA).

221 Supra note 217 (IELRA).


223 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. . . .”
specifically intended for educational employers and employees.\textsuperscript{224} This law extends to university students whose duties are more like employment (e.g., a teaching assistantship) than academic activities that count toward a degree (e.g., course related research activities).\textsuperscript{225}

While the IPLRA has broad coverage for public employees,\textsuperscript{226} it has specific rules for public safety officers that are appropriate for football players.\textsuperscript{227} Foremost, the law prohibits strikes and lockouts for safety officers because of the public interest in maintaining uninterrupted services.\textsuperscript{228} When a public safety employer and labor organization cannot agree to a contract, the law provides for mediation.\textsuperscript{229} It also allows the parties to utilize fact finding.\textsuperscript{230} The last step in resolving a contract dispute is final offer interest arbitration.\textsuperscript{231} The neutral must select one parties’ final offer.\textsuperscript{232} Also, the law dictates factors for the arbitrator to consider.\textsuperscript{233}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{224} 115 Ill. Comp. Stat. 5/1 (West’s Smith-Hurd Ill. Comp. Stat. Ann. 2012), declaring: “It is the public policy of this State and the purpose of this Act to promote orderly and constructive relationships between all educational employees and their employers.”
\item \textsuperscript{225} Graduate Employees Organization, IFT/AFT, AFL-CIO v. Illinois Educational Labor Relations Bd., 733 N.E.2d 759 (2000), at 765: 
\begin{quote}
[Research assistants usually perform work related to their dissertations or theses. However, graduate students who receive a stipend to answer phones are indistinguishable from other office workers. Therefore, we hold that the IELRB’s conclusion that the receipt of financial aid is the determinative indicia of a significant connection between assistants’ employment and their role as students is clearly erroneous.
\end{quote}
\item \textsuperscript{226} Supra note 222.
\item \textsuperscript{228} 315 Ill. Comp. Stat. 17 (West’s Smith-Hurd Ill. Comp. Stat. Ann. 2012), granting employees other than security employees, peace officers, fire fighters, and paramedics the right to strike.
\item \textsuperscript{231} 315 Ill. Comp. Stat. 5/14 (g) (West’s Smith-Hurd Ill. Comp. Stat. Ann. 2012), referring to the arbitrator’s power to choose one party’s last offer of settlement.
\item \textsuperscript{232} 315 Ill. Comp. Stat. 5/14(g) (West’s Smith-Hurd Ill. Comp. Stat. Ann. 2012) also directs the arbitration panel to adopt a last offer of settlement “[a]s to each economic issue.”
\item \textsuperscript{233} 315 Ill. Comp. Stat. 5/14(h) (West’s Smith-Hurd Ill. Comp. Stat. Ann. 2012), detailing objective criteria for the arbitrator’s decision.
\end{enumerate}
\end{footnotesize}
Both laws have appropriate elements for a model statute for college football. In the Big Ten, PAC-12, and SEC, fifteen schools are in states that have some form of public sector collective bargaining.\(^{234}\) Although Wisconsin and Ohio recently repealed their public sector collective bargaining laws,\(^{235}\) many states are not part of this recent trend (see Chart 1.3, middle column, \textit{infra}). Ohio voters reversed this legislation, and restored public sector collective bargaining.\(^{236}\) Putting aside schools in these three conferences, many states have some form of collective bargaining for public employees.\(^{237}\) A smaller but still substantial group of states have

\(^{234}\) See Chart 1.3 \textit{infra}, derived from \textit{infra} note 237.


NCAA FOOTBALL PLAYERS AND COLLECTIVE BARGAINING

interest arbitration for public employees.\(^{238}\)

In addition, the IPLRA defines bargaining subjects differently from the private sector

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counterpart, the NLRA, by deferring to managerial interests.\textsuperscript{239} My proposal takes this idea much further by preserving the NCAA’s core principle of amateur competition.

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

The IPLRA’s ban on strikes is appropriate for a model NCAA law for several reasons. The spillover effects from interrupting games would be large and disruptive for fans and commercial stakeholders, such as TV networks. Players would be harmed by a strike because their eligibility is time-bound and tied to academic progress toward degrees.\textsuperscript{240} Finally, because public and private schools are subject to different collective bargaining laws, a strike in one legal sphere would have a large and unmitigated spillover effect on schools excluded from coverage. This is because no major football conference is comprised entirely of private or public schools.

The substitution of final offer arbitration (FOA) for strikes, in contrast to conventional arbitration (which allows an arbitrator discretion to fashion an award, thereby diminishing the


\textsuperscript{240} \textit{Id.} (internal quotes omitted). 2009-10 NCAA DIVISION I MANUAL, Rule 14.2.1, \textit{supra} note 5 (Five Year Rule).
motivation for bargainers to settle), has been successful in states with these laws. FOA induces parties to make mutual concessions to minimize the risk of having an arbitrator reject their final offer. The fact that FOA is also used extensively in Major League Baseball shows both the practicality and broad applicability of this dispute resolution process.

C. Federal Law Approach

**CHART 1.2**

**FEDERAL LAW APPROACH**

<table>
<thead>
<tr>
<th>National Labor Relations Act</th>
<th>Railway Labor Act</th>
<th>Model Collective Bargaining Statute for NCAA Division I Football</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Private Sector</td>
<td>• Private Sector</td>
<td>• Private Sector</td>
</tr>
<tr>
<td>• Industry Specific Laws for Hospitals</td>
<td>• Industry Specific Laws for Railroads and Airlines</td>
<td>• Industry Specific Laws for Division I College Football</td>
</tr>
<tr>
<td>• Bargaining Subjects: Wages, Hours, Terms &amp; Conditions of Employment</td>
<td>• Mediation Required before Strike/Lockout</td>
<td>• Bargaining Subjects: Scholarship Shortfall, Medical Disability, Stipend, Transfer Policy, Grievance System</td>
</tr>
<tr>
<td>• Strike is Lawful</td>
<td>• Strike/Lockout Lawful after Mediation Exhausted</td>
<td>• Strike is Illegal</td>
</tr>
<tr>
<td>• Lockout is Lawful</td>
<td>• Congress Has Authority to Mediation Is Allowed</td>
<td>• Lockout is Illegal</td>
</tr>
<tr>
<td>• Mediation Is Allowed</td>
<td>• Interest Arbitration is Allowed but Rarely Used</td>
<td>• Mediation is Allowed</td>
</tr>
<tr>
<td>• Interest Arbitration Is Allowed but Rarely Used</td>
<td>• Congress Has Authority to Legislate Resolution to Dispute</td>
<td>• Congress Has Authority to Legislate Resolution to Dispute</td>
</tr>
</tbody>
</table>

There are two federal laws for private sector collective bargaining: the Railway Labor

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Act (RLA), 244 and the National Labor Relations Act (NLRA). 245 Both statutes have provisions that are adaptable for college football at private schools. The RLA is an industry specific law that applies only to railroad and airline employers and employees. 246 The NLRA broadly applies to most private sector employment, 247 but was amended to adapt to the unique aspects of employment in hospitals. 248

These laws do not have the IPLRA’s managerial limits on bargaining subjects. This makes wholesale adoption of the NLRA or RLA inappropriate for college football because of the practical need to maintain amateur competition. The same point is true for each law’s robust provision of economic weapons for employees and employers. 249 More appropriately, parts of these laws reflect legislative intent to shield critical industries from strikes. When the NLRA was amended to include hospital employees, Congress placed greater procedural limits on strikes. 250 Similarly, due to the public interest in rail and air service with no interruption, the RLA has procedures to delay or avoid strikes and lockouts. These interventions include mediation. 251

245 NLRA, supra note 223.
246 RLA, supra note 244, 45 U.S.C.A. § 151, First (rail carriers), and 45 U.S.C.A. § 181 (air carriers).
249 NLRA, supra note 223, 29 U.S.C.A. § 152(3).
250 The amendments required that employers and labor organizations in the health care industry provide 90-day notice of termination of a collective bargaining agreement (Act of July 26, 1974, Pub. L. No. 93-360, § 1(d)(1)(A), 8(d)(1), 8 Stat. 395, 396); provide 60-day notice of contract termination (id. at § 1(d)(1)(A), 8(d)(3), 88 Stat. at 396); and participate in mediation (id. at § 1(d)(1)(c), 8(d), 88 Stat. at 396). The law requires labor organizations to give 10-day notice to employers before engaging in any work stoppage (id. at § 1(d)(1)(e), 88 Stat. at 396 (adding current § 8(g) to Act)).
251 RLA, supra note 244, 45 U.S.C.A. §155(b)(4), providing that either party to a dispute may invoke mediation provided by the National Mediation Board, and alternatively, allowing the NMB to “proffer its services in...
presidential emergency boards,\textsuperscript{252} and congressional authority to legislate a resolution.\textsuperscript{253}

Both private sector laws have appropriate elements for college football. In the Big Ten and PAC-12, three schools are private institutions. They are therefore subject to the NLRA.\textsuperscript{254} At present, the NLRA does not apply to the employment of university students.\textsuperscript{255} However, the law has gone back-and-forth in its application to university students.\textsuperscript{256} Recently, the National Labor Relations Board expressed interest in reconsidering this issue.\textsuperscript{257} The NLRB’s pronouncement has general significance for extending collective bargaining to college football because the NLRA might be extended to college students who are engaged to play this sport outside their academic instruction.

While the RLA does not apply to higher education, its dispute resolution features are potentially instructive. Generally, strikes and lockouts under the RLA and NLRA\textsuperscript{258} are incompatible with college football for reasons I have already enumerated.\textsuperscript{259} However, the RLA designates Congress as the ultimate authority to resolve an impasse. This is a possible dispute case any labor emergency is found by it to exist at any time.”

\textsuperscript{252} \textit{Id.}, 45 U.S.C. § 159(c), provides authority for the President to create an Emergency Board if a dispute substantially threatens to interrupt interstate commerce. The Board (often called a PEB) investigates and reports facts on the dispute to the President.

\textsuperscript{253} Congress has taken three approaches to resolving an impasse under the RLA. It has imposed the recommendations of an emergency board. An example is the settlement between the Chicago & Northwestern Transportation Company and UTU, imposing P.E.B. 213’s recommendations, in Pub. L. 100-429, 102 Stat. 1617. Congress may require the parties submit their disputes to binding interest arbitration. \textit{E.g.}, Pub. L. 99-431, 100 Stat. 987. \textit{Also see} Maine Central R.R. v. BMWE, 873 F.2d 425 (1st Cir. 1989). Or, Congress may extend the status quo period. \textit{E.g.}, Pub. L. 99-385, 100 Stat. 819. \textit{Also see} Maine Central R.R. v. BMWE, 813 F.2d 484 (1st Cir. 1987), cert denied 484 U.S. 825 (1987).

\textsuperscript{254} NLRA, \textit{supra} note 247.


\textsuperscript{256} \textit{Compare id.}, and New York University, 332 N.L.R.B. 1205 (2000).

\textsuperscript{257} New York University and GSOC/UAW, 356 NLRB No. 7, 2010 WL 4386482 (Board states its intent to reconsider Brown, \textit{supra} note 255).

\textsuperscript{258} \textit{Supra} note 214.

\textsuperscript{259} \textit{Supra} note 240 and related discussion.
resolving the dispute for selecting a national champion, a possible role to arbitrate differences between players and schools cannot be dismissed as an unreasonable possibility.

V. CONCLUSION: COLLEGE FOOTBALL AND THE UNION SUBSTITUTION EFFECT

This Article does not suggest that the same collective bargaining regime for NFL players should apply to college football players. Nor does it suggest that players be paid a salary or wages, entitled to negotiate a personal service contract, or allowed to strike. This Article proposes that college football players have a right to collective bargaining because they function like employees; generate great wealth but share in little of it; are subject to a non-negotiable, one-sided agreement imposed by a monopoly; receive less than a four year scholarship; pay out of pocket or borrow money for scholarship shortfalls; and are penalized for transferring to other schools. They play in a violent sport that causes serious injury, and on rare occasions, death, but are usually disqualified for worker’s compensation. They are

261 But see Brian Carlson, Pay-for-Play to Face Debate, LINCOLN J.STAR (July 17, 2003), A1, 2003 WLNR 18568208, discussing a Nebraska bill that revives 1988 legislation, vetoed by the governor, that would pay a stipend to University of Nebraska football players.
262 Supra notes 75-83.
263 Supra Table 1-Table 3.
264 Supra note 25.
265 Supra note 154.
266 Supra note 68.
267 Supra note 149.
268 Supra note 114.
269 Supra note 78.
270 Supra note 112.
also uninsured for long term medical disabilities.271 Players are idealized as student athletes but many exhaust their eligibility without earning a degree.272 These Saturday heroes are solely dependent on a monopoly to enact regulations for their welfare. While the NCAA recently adopted a reform that address some of the problems identified in this Article, its board of trustees aborted this effort to implement change.273 Players have no voice in their welfare. These are the reasons for proposing collective bargaining for college football players.

This Article proposes a unique and limited form of collective bargaining for Division I football to address these problems without altering the NCAA’s amateur character. The fact that this idea is unlikely to be adopted, or only applied in isolated cases, is beside the point. The main thesis in this Article is that a plausible threat to unionize college football players will produce a “union substitution” effect—the NCAA will be induced to provide players a voice in their affairs, and be more responsive to their concerns. That process cannot begin unless there is a credible proposal to legislate collective bargaining for college football.

I develop the union substitution argument in two parts.

First, I simulate a plausible scenario if the proposed legislation is enacted. This “thought experiment” is meant to show the foreseeable implications that such a law would present to the NCAA. The proposed law would introduce a new element of competition, making a football program with collective bargaining potentially more attractive to recruits. That change would threaten to undermine the NCAA’s monopsony control of college football labor. To support my

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271 Supra note 123 (limiting insurance to exceptional athletes).
272 Supra note 28.
273 Rachel George, Momentum Gathers for SEC to Start TV Network, ORLANDO SENT. (June 1, 2012), B1, 2012 WLNR 11545444 (NCAA approved legislation in October 2011 to allow schools to pay athletes a $2,000 stipend, but Division I board of directors suspended the rule in January 2012).
first argument, I therefore show how a public- or private-sector law would likely have a ripple effect on this highly controlled labor market.

Second, I relate these scenarios to the union substitution theory. That concept explains how many employers respond to a plausible threat of unionization. This argument subdivides in two portions. To begin, the National Industrial Recovery Act (NIRA) is discussed. This law, which called on employers to undertake collective bargaining voluntarily with their employees, was a precursor to the NLRA. Seemingly innocuous because of its voluntary character, the law had a strong effect. Many employers rushed to form in-house unions in order to preclude external organizing. Congress came to a negative judgment about these company unions, and more recent research has shown that some of these employer-generated “unions” were actually progressive and inclusive. I conclude this argument by giving examples of how the union substitution effect is readily observable in today’s economy. Even though private sector unions represent about 1 in 20 employees in the U.S., 274 employers remain keenly sensitive to their presence. Companies strategize to limit the possibility of an organizing campaign by implementing internal voice mechanisms and improving employee benefits.

**Argument 1:** Collective Bargaining Would Have an Adverse Ripple Effect for the NCAA by Introducing More Competition between Schools for the Labor of Football Players: Chart 1.3 (infra) helps to visualize the union substitution thesis. Recall that separate labor laws regulate private and public sector employers. Let us now explore the possible impact if one state, or Congress, adopted the collective bargaining concept proposed in this Article.

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

The Illinois football team would be entitled to bargain on a range of issues, including scholarship shortfalls, extended or improved educational benefits, complete medical and hospital insurance for football-related injuries, long-term disability insurance for injuries with delayed symptoms, transfer and eligibility rights not inconsistent with NCAA rules, and a grievance
process to challenge abusive treatment by coaches and administrators.

To give a concrete illustration, recall that Wisconsin recently “over-restricted” a basketball player by refusing to grant Jarrod Uthoff a release if he transferred to any school on a list of more than 20 programs. The Illinois law would provide players a mechanism to bargain for coaching limits on transfer restrictions, keeping those restrictions to those imposed by the Big Ten Conference and NCAA. Illinois could therefore use Jarrod Uthoff’s negative experience at Wisconsin to its advantage by offering a more reasonable and regulated transfer system. A high school recruit would have more assurance of mobility at Illinois compared to Wisconsin.

Now let us consider scholarship shortfall. A football player at Illinois is estimated to spend $2,510 each year to cover a shortfall in costs related to his education. The annual scholarship shortfall at Wisconsin is $3,680. The Illinois law could enable its football team to widen its current financial-aid advantage over Wisconsin by a substantial amount. Over four years, Illinois would have a cost advantage of $14,720.

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

Now consider a private sector example. Suppose that Stanford players entered into collective bargaining with their school after Congress enacted a version of this proposal. This

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275 Supra note 149.
276 See National College Players Association, supra note 68 (click on Scholarship Shortfalls at 336 NCAA Division I Colleges).
277 Id.
football program recruits players on a more national scale than Illinois. Already highly competitive for excellent players, Stanford would find that the collective bargaining law enabled it to make better offers to players than Texas, a perennial powerhouse. While the latter program is in a state which is generally opposed to unions, the advent of losing a single quarterback prospect could induce Texas to mimic the benefits provided by the program with collective bargaining. Notably, Texas has a public collective bargaining law for police and fire fighters, and thus a precedent for applying this process to vital public services.\footnote{Id.} A football player at Stanford is estimated to spend $2,385 to cover an annual shortfall in costs related to his education,\footnote{Id.} while the estimated scholarship shortfall at Texas is $3,482.\footnote{Id.} Again, the collective bargaining law would make Stanford more attractive on the dimension of out-of-pocket costs. And again, a change at one school would likely alter the competitive balance for recruiting across a spectrum of institutions. In this case, a newly enacted private sector law could stimulate parallel developments in one or more states.

These hypothetical cases demonstrate the union substitution effect for college football. While this is a matter of conjecture, it is hard to imagine that the NCAA would let these scenarios play out to the degree I have outlined here. I suggest that if a proposal for this model advanced in a legislature, the NCAA would head-off this cascading sequence by substituting some form of player representation, while addressing at least some of the economic issues embedded in this proposed bargaining law. But this reasoning is pure conjecture. If it misses the

\footnote{Supra note 237 (Texas Fire and Police Employee Relations Act). This begs the rhetorical question whether Texas lawmakers would equate college football in their state to essential public services.}
mark, this proposed law would invite more public scrutiny of the growing wealth disparity between the NCAA and powerful schools, on the one hand, and the football players who are essential for this largess.

In other words, the union substitution concept would, in this scenario, be available as a form of cooptation. Up to this point, my conclusion is nothing more than a hypothesis. What evidence supports this prediction? Argument 2 answers this question.

**Argument 2: Historical and Current Examples Show that Employers Substitute Union Voice Mechanisms and Improve Employee Benefits When They Perceive a Plausible Threat of Unionization.** As industrial unions became popular in the early 1900s, some employers mimicked their role by creating sham bargaining organizations, called company unions. Others utilized authentic voice organs for employees to impact their work.

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

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282 Kaufman, *supra* note 66, at 735-36 (liberal employers established employee representation plans in the belief that these organizations led to mutual gains for workers and firms).


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

The law failed to promote collective bargaining, but had a profound effect, nonetheless. Employers were encouraged by trade associations to adopt “ERPs” — Employee Representation Plans.\(^{286}\) Many ERPs were called company unions\(^{287}\) and they mirrored the functions of traditional labor organizations. In 1935, Congress learned that company unions had broad mandates to deal with employers concerning working conditions and pay. Carnegie Steel had a plan that served as model for others in that industry. The Carnegie Steel Plan explained that “negotiations may be carried on between representatives of the employees and the representatives of management.”\(^{288}\) The subjects of bargaining were typical for collective bargaining: work rules, safety, wages, piecework, scheduling, working conditions, health and workplace sanitation, and continuity of employment.\(^{289}\)

Congress viewed NIRA’s voluntary model as a failure,\(^{290}\) in large part because employers imposed sham unions on their workforce. They replaced the law with the NLRA, and enacted a prohibition against creating company unions.\(^{291}\) While the NLRA is enforced to eliminate the

\(^{286}\) Hearings on S. 2926 Before the Senate Comm. on Labor and Education, 73d Cong., 2d Sess. 40, 43 (1934) (Statistics of Work of National Labor Board), reprinted in 1 NLRB, supra note 133, at 46.

\(^{287}\) Id. at 110 (statement of Sen. Robert Wager):
Yesterday we had a hearing in the automobile industry and it came out very clearly that the company union was formed by sending to each worker a constitution and bylaws telling him, “This is now your organization.” As the result of that an election was held, and the workers testified that they voted because they knew very well if they did not vote their jobs were gone.

\(^{288}\) Id. at 121-22.

\(^{289}\) Id. at 122.


\(^{291}\) Congress addressed this situation by enacting two closely related provisions. First, in Section 2(5), Congress brought company unions within the definition of a labor organization by describing the wide range of functions that these organizations. *See* 29 U.S.C. § 152(5), defining a labor organization as:

- any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.
most overt and direct forms of foisting an in-house union on employees, it does little to impede the union substitution effect.

When foreign auto makers locate large manufacturing plants in the U.S., they often target southern states, where unionization occurs less frequently. This fits a broader migration of industrial plants to the South as a union avoidance strategy. In auto factories run by foreign firms, companies offer sophisticated voice substitutes, such as employee involvement teams.

The historical lesson is clear: Even if a workplace has no union, there is some possibility that its

Congress then made it unlawful in Section 8(a)(2) for an employer to dominate or interfere with such an organization. See 29 U.S.C. § 158(a)(2).

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

293 Andrew Strom, Boeing and the NLRB— a Sixty-Four Year-Old Time BombExplodes, 68 NAT’L L. W. GUILD REV. 109 (2011), describing Boeing’s plan to build a major production facility in the largely nonunion state of South Carolina. Also see Misty Williams, Caterpillar Latest Sign of Manufacturing Muscle, ATLANTA J. & CONST. (Feb. 19, 2012), D1, 2012 WLNR 3567682, reporting that Caterpillar’s plan to build a new manufacturing plant near Athens, Georgia may have been motivated in part by the lack of unions in the region. Some states with little union presence promote their status as “right-to-work” states, a euphemism for a policy that makes unions dues clauses unenforceable. See http://www.okcommerce.gov/Site-Selection/Cost-Of-Doing-Business/Labor-And-Employment.

294 Aero Detroit, Inc., 321 N.L.R.B. 1101 (1996) (employee committee was organized in response to a union organizing campaign); Reno Hilton Resorts Corp., 319 N.L.R.B. 1154 (1995) (employer ordered to disestablish committees it set up during organizing campaign); and Garney Morris, Inc., 313 N.L.R.B. 101 (1993) (employer instituted employee committees during union organizing drive). More generally, see PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 33 (1990), stating: “Unfortunately, in many of its manifestations the contemporary participatory management movement appears to run afoul of both the letter and the original intent of [§ 8(a)(2) of] the NLRA.” Also see Peter B. Doeringer, Christine Evans-Klock, & David G. Terkla, Hybrids or Hodgepogdes? Workplace Practices of Japanese Domestic Startups in the United States, 51 INDUS. & LAB. REL. REV. 171, 172 (1998), concluding that Japanese plants adopted practices such as intensive employee participation, team work, and total quality management. The study also concluded that these hybrid workplace systems “emphasize social and organizational learning, employee participation in problem-solving, and worker commitment as the principal means of motivating labor efficiency. They typically reward their employees with career employment, as well as high wages, and their employees reciprocate with high labor productivity.” Id. at 182.
employment policies are made more appealing to workers because the firm endeavors to minimize the possibility of collective bargaining.

Conclusions: What do the foregoing examples imply for college football players and the NCAA? Already, there is a rudimentary labor organization called the National College Players Association (NCPA). When the NCAA adopted a playoff in 2012 to determine a football champion, the NCPA applauded the policy change but also sought to have a voice in allocating the additional $5 billion from a playoff. While NCPA had no say in this policy change, it may have had influenced the NCAA proposal to allow schools to award an additional $2,000 in annual stipends to scholarship athletes. The NCPA maintains a detailed database that tracks and publicizes scholarship shortfalls at 336 NCAA schools. The group estimates that grants-in-aid fail to pay an average of $2,928 each year for a player’s cost of attending school. Given the fact that there is little transparency to the NCAA’s recent policy proposal for awarding stipends, it is impossible to estimate the effect, if any, of NCPA’s publication of these data. But it is plausible to infer that the NCAA’s stipend policy is evidence of a union substitution effect.

The NCAA’s adoption of a new method for determining a national champion is another step in the inexorable direction of emulating the NFL’s huge financial success. The move is expected to generate billions of dollars, lengthen the college schedule, and strain the amateur

295 National College Players Association, supra note 68.
296 David Steele, College Football Playoff: NCPA Wants Players at Negotiating Table, SPORTINGNEWS NCAAF (June 26, 2012), at http://aol.sportingnews.com/ncaa-football/story/2012-06-26/college-football-playoff-ncpa-wants-plays-at-negotiating-table. Ramogi Huma, president of the National College Players Association, urged the BCS and NCAA to give the players a voice at the table. Huma, a former UCLA player, observed that no players or athlete representatives were part of the discussion to adopt the playoff system.
297 Id. (internal quotes omitted).
298 National College Players Association, supra note 68, at “Scholarship Shortfalls at 336 NCAA Division I Colleges.” The median is the value for Rank 168 (Charleston Southern University).
athlete model by pushing the football season into the spring semester at some universities. The competitive pressures that have led some programs to lose sight of the best interests of their student-athletes will likely intensify.

As NCAA football continues to soar in popularity and stature, it will likely face greater scrutiny. How will NCAA schools treat football players who are too injured to continue their athletic careers? Will they continue to end scholarships for disabled players?²⁹⁹ Who will pay to treat college players who never play pro football but suffer dementia from too many concussions,³⁰⁰ and have no access to an NFL disability benefit plan? When the players who generate billions of dollars in revenue for their schools exhaust their eligibility, how many will have student loans to pay? Will college players be able to negotiate the equivalent of an NFL free agency policy that allows them greater mobility to move to another team without incurring out-of-pocket costs and significant ineligibility periods?

The status quo is ripe for change because the NCAA is an immense monopoly that makes new revenue quickly but reforms itself slowly. Schools have little incentive to face the reality that they are professionalizing college football.³⁰¹ This Article demonstrates that college football exploits an invisible labor market. The NCAA’s paradoxical embrace of the amateur athlete

²⁹⁹ Coleman v. Western Michigan University, 336 N.W.2d 224, 226 (Mi. 1983) (after player sustained career-ending injury, the football program did not renew his scholarship, and he was therefore unable to continue his education at this school).


³⁰¹ U.S. v. Walters, 997 F.2d 1219, 1225 (7th Cir. 1993), stating:
The NCAA depresses athletes’ income—restricting payments to the value of tuition, room, and board, while receiving services of substantially greater worth. The NCAA treats this as desirable preservation of amateur sports; a more jaundiced eye would see it as the use of monopsony power to obtain athletes’ services for less than the competitive market price.
model precludes the adoption of a traditional collective bargaining model. But a limited form of player bargaining with the NCAA on subjects that are not inconsistent with NCAA rules and policies offers a path toward better treatment of the primary contributors to this wealth. Even if the proposed form of collective bargaining is never enacted, all that is needed to spur reform is a plausible effort to legislate this concept. The union substitution effect shows that employers respond to credible threats of unionization by providing individuals more voice and better financial treatment. This cooptation of union representation is at the heart of my proposal for collective bargaining in college football. Today, players have no representation, and traditional collective bargaining is infeasible for them. But I demonstrate that an invisible union is a plausible approach to address the interests of college football players.