

COURTS AND THE FUTURE OF “ATHLETIC LABOR” IN COLLEGE SPORTS

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Recently, “labor” has entered the lexicon of NCAA litigation involving antitrust and union organizing. Athletic labor, a term coined by a federal appeals court, signals a favorable turn for students—as illustrated by a recent antitrust decision holding that student athletes are participants in a labor market. In addition, a National Labor Relation’s Board regional director’s ruling in Northwestern University has accelerated the NCAA’s efforts to compensate students. This study is based on 82 state and federal court rulings from 1973 to 2014—and predicts how courts will apply labor law to student complaints against the NCAA. My research shows that students won in 50% of first-round court rulings, but the NCAA won in 71% of second-round cases, and won another 71% of third-round appeals. I conclude that the facts in these cases favor classifying college football players as employees, but the law supports the NCAA’s amateur-athlete model. Thus, while schools profit from the sweat of football players, a federal appeals court is unlikely to alter the NCAA’s amateurism model. But, based on empirical findings in this study, the occasional first-round student victory means that the NCAA will be pressured to adopt a radically new model of amateurism that mimics the employment relationship.

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INTRODUCTION

[C]ourts cannot ‘make rules’ to govern amateur athletics. All we can do is to apply legal precedents to the rules promulgated by the associations involved.¹

This appears to be a clear monopsony case, since the NCAA is the only purchaser of student athletic labor.²

While professional sports leagues and associations are free to make their own rules for competition, courts have intervened from time to time to strike down unlawful regulations. It now appears that collegiate athletics—largely immune from judicial oversight—is entering a period when its rules, much like professional sports, are challenged in lawsuits. To illustrate, consider that in 1889, a professional baseball player ignored a clause in his contract and signed with a rival team.³ In 2014, a Northwestern University student ignored a clause in his football scholarship agreement, and signed a union-authorization card.⁴ Both wanted a

1. Nat’l Collegiate Athletic Ass’n v. Gillard, 352 So.2d 1072, 1083 (Miss. 1977).

2. Agnew v. Nat’l Collegiate Athletic Ass’n (*Agnew II*), 683 F.3d 328, 337 n.3 (7th Cir. 2012) (emphasis added).

3. Phila. Ball Club, Ltd., v. Hallman, 8 Pa. C.C. 57, 60 (Pa. Ct. Com. Pl. 1890).

4. Nw. Univ. & Coll. Athletes Players Ass’n, 2014 WL 1246914, at *13, 2014-15 NLRB Dec. P 15781 (2014). *Northwestern University* describes the grant-in-aid agreement in college football that the NCAA utilizes to limit compensation. I use “student” to describe the plaintiffs in this study. My purpose is to use neutral terminology that does not imply support for College Athlete Players Association or the NCAA. The union in *Northwestern University* refers to “players,” a term that implies employee status. See COLL. ATHLETES PLAYERS ASS’N, *What We’re Doing*, <http://www.collegeathletespa.org/what> (last visited Feb. 8, 2015). The NCAA Constitution refers to these same individuals as “student-

bigger cut of the money that they earned for their team.⁵ However, both agreed to terms that restricted their ability to play for another team.⁶ By challenging the status quo, that professional baseball player pioneered rights for contemporary football, hockey, and basketball players.⁷ Courts have played a crucial role in regulating change in professional sports,⁸ and now students are asking courts to play a similar role in college athletics. There is a major difference, however: college athletics is defined as an amateur enterprise in furtherance of academic goals set by the National Collegiate Athletic Association (“NCAA”), the umbrella group for more than 1,200 universities and colleges.⁹ Yet, some NCAA sports—Division I football in particular—are strikingly similar to professional leagues. The Northwestern student, who is leading an organizing drive, claims that he and his teammates are employees, and therefore eligible to unionize. The premise for this union campaign is that college football players work and compete like professional athletes, and generate billions of dollars—without being able to negotiate over compensation. It is unclear how courts will define labor rights for these students.

This study predicts how courts will behave in this time of transformation.¹⁰ Over the past 40 years, federal courts have played an essential role in steering the future of professional sports.¹¹ Now they are poised to play a

athletes.” See NAT’L COLLEGIATE ATHLETIC ASS’N, 2009–10 NCAA DIVISION I MANUAL, at art. 2.2 (2009), available at <http://www.ncaapublications.com/productdownloads/D110.pdf> [hereinafter NCAA DIVISION I MANUAL].

5. Clarence Page, *Could Union Change NCAA’s Game*, CHI. TRIB. (Feb. 5, 2014), http://articles.chicagotribune.com/2014-02-05/news/ct-oped-page-0205-20140205_1_college-sports-football-ramogi-huma. In the *Hallman* case, there is no explicit statement that the ball player left for another team to pursue money; but that is the clear implication. See *Hallman*, 8 Pa. C.C. at 61–62 (reporting that “Hallman did not covenant to serve them at the same salary which they paid him for 1889, but only to serve them for some salary to be agreed upon, which should not be less than that which he received before.”). The court noted: “The salary was not to be less than \$1,400. Does not that plainly imply that it might be more. In case they did not agree upon the amount who was to decide?” *Id.* at 62.

6. *Nw. Univ.*, 2014 WL 1246914, at *3 (players who transfer to another school to play football are prohibited from playing the next year for the new school); *Hallman*, 8 Pa. C.C. at 61 (team shall have right “to reserve” player for next year).

7. See Michael H. LeRoy, *The Narcotic Effect of Antitrust Law in Professional Sports: How the Sherman Act Subverts Collective Bargaining*, 86 TUL. L. REV. 859, 864, 866–71 (2012) (relating *Hallman* to the evolution of free agency in other sports).

8. See Richard E. Bartok, Note, *NFL Free Agency Restrictions Under Antitrust Attack*, 1991 DUKE L.J. 503, 506–08 (1991); Joseph P. Bauer, *Antitrust and Sports: Must Competition on the Field Displace Competition in the Marketplace?* 60 TENN. L. REV. 263 (1993); Stephen F. Ross, *The Misunderstood Alliance Between Sports Fans, Players, and the Antitrust Laws*, 1997 U. ILL. L. REV. 519 (1997).

9. See *infra* notes 39–50 and accompanying text (discussing the Association in more detail).

10. Courts will probably have more influence than Congress in defining “athletic labor” in college football. Nonetheless, congressional interest has begun to stir. See *Rep. John Kline Holds a Hearing on Unionizing Student Athletes*, ROLL CALL, INC., May 8, 2014, available at 2014 WL 1879234 (verbatim transcript of committee hearing on unionizing student athletes before the House Committee on Education & the Workforce).

11. Gabriel Feldman, *Brady v. NFL and Anthony v. NBA: The Shifting Dynamics in Labor-Management Relations in Professional Sports and Intercollegiate*

similar role for college football and other sports. In response to the NCAA's anticompetitive behavior, student athletes are suing for: damages arising from restrictions on compensation;¹² failure to pay all educational costs;¹³ restrictions on student pay for using their likenesses in commercial video games;¹⁴ medical monitoring and compensation for brain injuries;¹⁵ failure to warn about concussions;¹⁶ and a limit on multiyear scholarships.¹⁷ Some lawsuits are similar to the National Football League ("NFL") cases,¹⁸ suggesting that legal duties

Athletics, 86 TUL. L. REV. 831 (2012) (explaining how courts influenced collective bargaining in professional football, basketball, and hockey); *see also* *White v. Nat'l Football League*, 822 F. Supp. 1389, 1395 (D. Minn. 1993); *Robertson v. Nat'l Basketball Ass'n*, 389 F. Supp. 867 (S.D.N.Y. 1975).

12. *See* Complaint at para. 42, *Jenkins v. Nat'l Collegiate Athletic Ass'n*, No. 3:14CV01678, 2014 WL 1008526 (D.N.J. March 17, 2014) (alleging that NCAA rules for FBS football and D-I men's basketball illegally limit player pay for athletic services); *see also* *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955 (N.D. Cal. 2014).

13. Complaint at para. 98, *Gregory-McGhee v. Nat'l Collegiate Athletic Ass'n*, No. 3:14CV01777, 2014 WL 1509247 (N.D. Cal. Apr. 17, 2014) (alleging that the NCAA's cap on grants-in-aid restrains schools from competing against each other with respect to the amount of financial aid for students). This arrangement has failed to cover the true cost of education.

14. A concise summary of this complex litigation appears in *Keller v. Electronic Arts, Inc. (Keller I)*, No. C09-1967CW, 2010 WL 530108 (N.D. Cal. 2010), a case that joined the NCAA as a defendant. The complaint alleged that the NCAA violated its own bylaws that prohibit the commercial licensing of a student's name, picture, or likeness. The *Keller* case settled, but a related antitrust case, involving Ed O'Bannon, continued to trial. Tom Van Riper, *As O'Bannon Case Opens, NCAA Settles Offshoot Case For \$20 Million*, FORBES (June 9, 2014, 4:24 PM), <http://www.forbes.com/sites/tomvanriper/2014/06/09/as-obannon-case-opens-ncaa-settles-offshoot-case-for-20-million/>. For the particulars of the O'Bannon complaint, *see O'Bannon v. Nat'l Collegiate Athletic Ass'n*, Nos. C09-1967CW, C09-3329CW, C09-4882CW, 2010 WL 445190 (N.D. Cal. Feb. 8, 2010) (claiming that the NCAA and its licensing arm, Collegiate Licensing Company ("CLC"), violated the Sherman Act by prohibiting pay for students whose likeness was used in a commercial video game).

15. Complaint at paras. 37–38, *Arrington v. Nat'l Collegiate Athletic Ass'n*, No. 11CV06356, 2011 WL 4374451 (N.D. Ill. Sept. 12, 2011) (alleging that the NCAA has failed to monitor and detect when students suffer concussions in practice and games).

16. Complaint at para. 27, *Jackson v. Nat'l Collegiate Athletic Ass'n*, No. CV 14-2103, 2014 WL 1314151 (E.D.N.Y. Apr. 2, 2014) (alleging that the NCAA subjects football players to repetitive brain injuries without warning about health risks associated with these injuries, and also failing to furnish procedures to monitor and mitigate these risks).

17. Complaint at para. 51, *Rock v. Nat'l Collegiate Athletic Ass'n*, No. 1:12-CV-1019 JMS-DKL, 2012 WL 3096760 (S.D. Ind. July 25, 2012) (although the NCAA rescinded its ban on multi-year grants-in-aid in 2012, the ban created arbitrary limits on the number of athletics-based scholarships); *Id.* at para. 32 (to highlight the exploitation of students by the NCAA, the Complaint also alleges that the NCAA President is paid \$1.6 million annually, while other officers are paid hefty salaries).

18. Complaint, *Jackson*, No. CV 14-2103, 2014 WL 1314151. *Contra* Ken Belson, *N.F.L. Makes Open-Ended Commitment to Retirees in Concussion Suit*, N.Y. TIMES, June 26, 2014, at B16 (reporting on a class action settlement for retired NFL players who suffer from brain injuries).

grounded in professional employment could migrate to NCAA sports. Adding to this possibility, “labor” recently entered the lexicon of student lawsuits against the NCAA, and a federal appeals court in 2012 signaled approval of the term “athletic labor.”¹⁹

Part I presents a detailed empirical analysis of 82 state and federal court rulings from 1973 to 2014. Part II provides a textual assessment of student cases against the NCAA, and covers constitutional issues, academic standards, discrimination, antitrust, and team sanctions. Part III analyzes three “athletic labor” scenarios that are likely to confront the NCAA. Judges could ignore evidence of heavy commercialization of college football—much like they did for baseball when they created a bizarre antitrust immunity for a sport they put on a pedestal. This would maintain the status quo for students and the NCAA. Or courts could rule that students are employees under federal labor law. Their analysis could draw from regulations pertaining to college students under the Fair Labor Standards Act (“FLSA”). Finally, a union could target NCAA business partners and sponsors with boycotts and picketing. Courts would be unable to enjoin many of these activities under the Norris–LaGuardia Act of 1932 (“NLGA”), even if a union targeted athletic wear companies that do business with NCAA schools. Part IV presents my forecast for judicial regulation of athletic labor in college sports. The Appendix lists cases in the database that were used for the study.

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

A. *The Importance of Case Law*

While statutes regulate labor law, courts play a major role in defining employment law. Courts created the most basic employment law doctrine, employment-at-will, in the 1800s.²⁰ More recently, courts created the tort of

19. See *infra* note 187 (discussing student complaints using the term “labor”); see also *Agnew v. Nat’l Collegiate Athletic Ass’n (Agnew II)*, 683 F.3d 328, 337 at n.3 (7th Cir. 2012) (U.S. Court of Appeals for the Seventh Circuit’s use of “athletic labor”); *infra* note 88 (same). In a similar vein, see *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 7 F. Supp. 3d 955 (N.D. Cal. 2014) (describing athletic service provided by students to schools in exchange for certain educational benefits).

20. The doctrine was first recognized in HORACE G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT: COVERING THE RELATION, DUTIES, AND LIABILITIES OF EMPLOYERS AND EMPLOYEES (1877). Comparing American and English law, Wood wrote that:

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

Id. at 272. English law presumed that master and servant were bound to each other for one year, unless varied by contract. *Id.* at 271.

wrongful discharge.²¹ Common law doctrines also play a key role in employment contracts.²²

Similarly, courts help to resolve ambiguities in labor law. This has been the experience in professional sports—for example, the Supreme Court awarded Major League Baseball (“MLB”) an exemption from antitrust law.²³ As a result, players were forced to use arbitration and strikes, instead of antitrust laws, to achieve limited free agency.²⁴ Yet, despite this boon for baseball, the Supreme Court has refused to grant similar exemptions to any other professional sports league. For example, in *Radovich v. National Football League*, the Court ruled that football players could use antitrust laws to challenge NFL labor-market restrictions.²⁵ Accordingly, after losing a strike in 1987, NFL players won an antitrust challenge to the league’s limits on free agency.²⁶ Similarly, a court approved an antitrust settlement with the National Basketball Association (“NBA”) that modified the player draft and free agency.²⁷

Given the substantial role that courts have played in defined professional players’ labor rights, my study asks: what role will courts play in defining “athletic labor” in college sports? This question has not been answered empirically by the extensive research literature that examines labor and employment issues in NCAA sports.²⁸ For context, the NCAA is a private association of colleges and

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

22. Groundbreaking employment contract cases include *Pugh v. See’s Candies, Inc.*, 171 Cal. Rptr. 917 (Ct. App. 1981), which found an implied oral contract exception to employment-at-will; *Toussaint v. Blue Cross & Blue Shield of Mich.*, 292 N.W.2d 880 (Mich. 1980), which found a handbook exception to employment-at-will; and *Fortune v. National Cash Register Co.*, 364 N.E.2d 1251 (Mass. 1971), which adapted the doctrine of good faith and fair dealing to the employment relationship.

23. *Fed. Base Ball Club of Balt. v. Nat’l League of Prof’l Base Ball Clubs*, 259 U.S. 200 (1922). This ruling was confirmed in *Toolson v. N.Y. Yankees, Inc. (Toolson II)*, 346 U.S. 356 (1953) and *Flood v. Kuhn (Flood II)*, 407 U.S. 258 (1972).

24. LeRoy, *supra* note 7, at 884–85.

25. *Radovich v. Nat’l Football League*, 352 U.S. 445, 454 (1957).

26. *White v. Nat’l Football League*, 822 F. Supp. 1389, 1395 (D. Minn. 1993). As a result of this complex litigation, pensions increased by 40%, and players received \$110 million in damages. See *History, NFL PLAYERS ASS’N*, <http://web.archive.org/web/20101011092613/http://www.nflplayers.com/About-us/History/> (last visited Mar. 8, 2015).

27. *Robertson v. Nat’l Basketball Ass’n*, 389 F. Supp. 867 (S.D.N.Y. 1975).

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

universities that enjoys a legal presumption to make and enforce its rules.²⁹ It is unincorporated—a fact that the NCAA occasionally presents to avoid lawsuits.³⁰ NCAA rules and sanctions are subject to limited judicial review.³¹ There is no way to answer this research question without comprehensively examining NCAA litigation involving students.

B. Method for Creating the Sample

The sample was derived from Westlaw's internet service, whereby I conducted searches of both federal and state databases for cases brought by student-plaintiffs against the NCAA. In other words, my research focused on direct challenges by students against the NCAA. It did not include, for example, a student's claim for worker's compensation for a football injury.³² Further, although this type of case considers whether a student is an employee, it does not challenge NCAA rules or penalties. I also excluded cases that only involved conflicts between a single student and a university.³³

The sample began with a 1973 decision,³⁴ and ended with cases decided in 2014.³⁵ Relevant data variables were taken from each case, including: (1) the

Jeffrey J.R. Sundram, Comment, *The Downside of Success: How Increased Commercialism Could Cost the NCAA Its Biggest Antitrust Defense*, 85 TUL. L. REV. 543 (2010). For a novel and interesting contract analysis, see Debra D. Burke & Angela J. Grube, *The NCAA Letter of Intent: A Voidable Agreement for Minors?*, 81 MISS. L.J. 265 (2011). A proposal to reform the NCAA is developed in Nicolas A. Novy, "The Emperor Has No Clothes": *The NCAA's Last Chance as the Middle Man in College Athletics*, 21 SPORTS LAW. J. 227 (2014). A polemical analysis that focuses on the exploitation of students in college sports is offered in Robert A. McCormick & Amy Christian McCormick, *A Trail of Tears: The Exploitation of the College Athlete*, 11 FLA. COASTAL L. REV. 639 (2010). For an empirical assessment of the NCAA's educational mission, see Patrick James Rishe, *A Reexamination of How Athletic Success Impacts Graduation Rates*, 62 AM. J. ECON. & SOC. 407, 415 (2003) (football graduation rate at Division I schools was 52.46%).

29. See *Membership*, NCAA, <http://www.ncaa.org/about/who-we-are/membership> (last visited Feb. 22, 2015).

30. *Cohane v. Nat'l Collegiate Athletic Ass'n*, No. 14-10494-RGS, 2014 WL 1820782, at *1 (D. Mass. May 8, 2014). Conversely, the NCAA occasionally joins a lawsuit as an indispensable party. *E.g.*, *Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 188 (1988) (citing *Univ. of Nev. v. Tarkanian*, 594 P.2d 1159 (1979)).

31. *E.g.*, *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents*, 468 U.S. 85 (1984).

32. *E.g.*, *Van Horn v. Ind. Acc. Comm.*, 33 Cal. Rptr. 169 (Ct. App. 1963); *Rensing v. Ind. State Univ. Bd. of Trs.*, 444 N.E.2d 1170 (Ind. 1983); *Graczyk v. Workers' Comp. Appeals Bd.*, 229 Cal. Rptr. 494 (Ct. App. 1986).

33. *E.g.*, *Guiliani v. Duke Univ.*, No. 1:08CV02, 2010 WL 1292321 (M.D.N.C. Mar. 30, 2010) (new coach refused to honor four year scholarship promise from former coach); *Jennings v. Univ. of N.C.*, 482 F.3d 686 (4th Cir. 2007) (female soccer player alleged that her coach sexually harassed her); *Knapp v. Nw. Univ.*, 101 F.3d 473 (7th Cir. 1997) (basketball player whose scholarship was revoked after cardiac arrest sued university over its failure to perform on its contract).

34. *Buckton v. Nat'l Collegiate Athletic Ass'n*, 366 F. Supp. 1152 (D. Mass. 1973).

35. *Keller v. Elec. Arts, Inc. (Keller II)*, Nos. C09-1067CW, C09-3329CW, 2014 WL 2191464 (N.D. Cal. May 23, 2014).

law(s) that the NCAA allegedly violated; (2) the type of court (state or federal, trial or appellate); (3) the year of the court's ruling; (4) remedy sought; (5) the NCAA rule or action challenged by a student; (6) winner of ruling; (7) ruling on injunctions; and (8) court's reasoning. I repeated this data extraction for additional court rulings. I refer to these as round-two and round-three cases, rather than appellate cases, because some involved federal district court rulings that resulted from state court removal or state court rulings on remand from federal court. These were not appellate cases. Where cases had a complex procedural trail, I used rulings on the merits of the student's complaint.³⁶

C. Statistical Findings and Quantitative Assessment

The sample had 46 cases involving students and the NCAA. Many had two or three courts issue a ruling. The Appendix lists these federal and state cases.

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

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

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

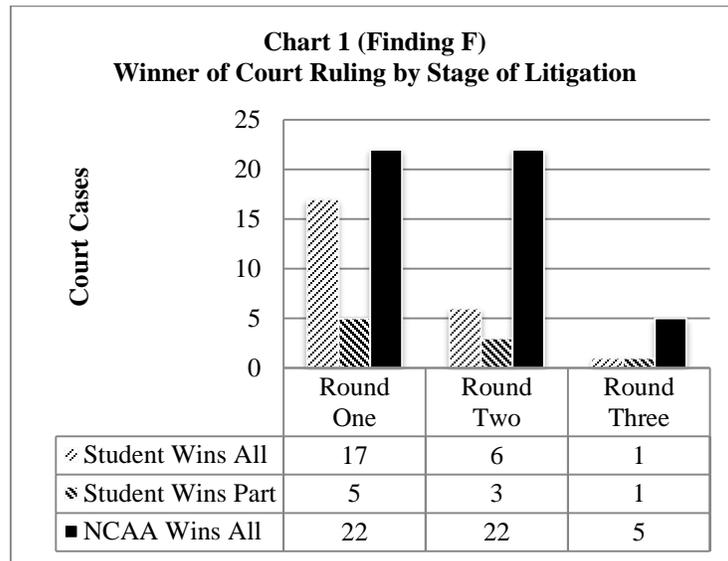
Finding D: *The most common legal complaint by students was infringement of constitutional rights.* Student lawsuits alleged various statutory and common law violations. Federal constitutional claims were the leading complaint (36%), followed by antitrust (24%) and contracts (20%). Other claims involved the Americans with Disabilities Act (6%), torts (4%), fraud (2%), Title IX (2%), publicity (2%), § 1983 (2%), and a state constitution (2%).

Finding E: *Class action lawsuits against the NCAA were uncommon.* Students usually sued the NCAA as individuals (80%), while class actions were

36. The Westlaw history section shows more than 40 cases related to *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268 (9th Cir. 2013), including a prominent case, *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, Nos. C09-1067CW, C09-3329CW, C09-4882CW, 2010 WL 445190 (N.D. Cal. Feb. 8, 2010).

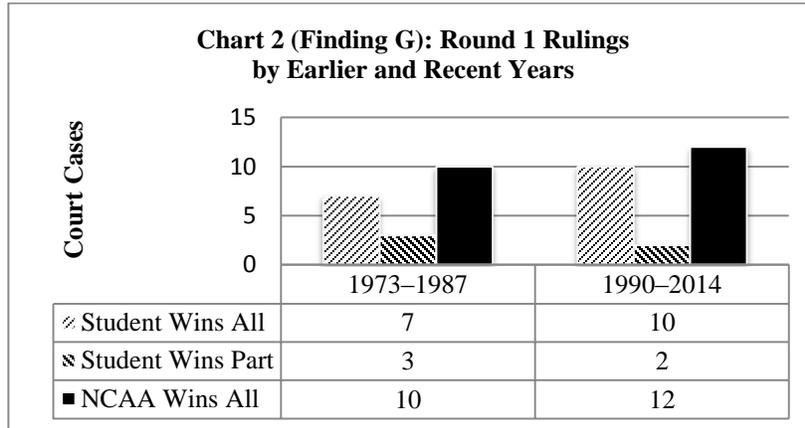
uncommon (13%). In two cases (combining for 10%), a university was a litigant because it was caught between the NCAA’s sanctioning authority and a preliminary court ruling that favored a student.

Finding F: *The NCAA evenly split first-round cases with students, but won most cases in later rounds of litigation.* Chart 1 shows 44 court rulings in the first round of a case. Students won 17 cases (39%), and split wins in 5 more cases (11%). The NCAA won 22 cases (50%). On appeal, however, the NCAA erased this nearly equal division of wins. In 31 second-round cases, the NCAA won 22 times (71%). Students completely won 6 cases (19%), and had split wins in 3 more cases (10%). The NCAA’s lopsided win rate continued in cases that were litigated in a third round. The NCAA won 5 of 7 of these cases (71%). Overall, courts ruled 82 times, with the NCAA winning 60% of the rulings. Students completely won in 29% of decisions, and partly won in the remaining 11% of decisions.

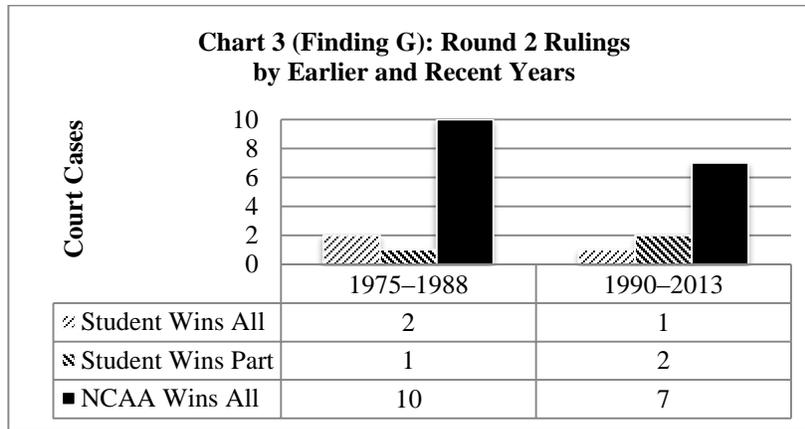


Finding G: *The NCAA’s dominating win-rates did not change between the early and most recent periods.* Chart 2 shows that the NCAA won 10 out of 20

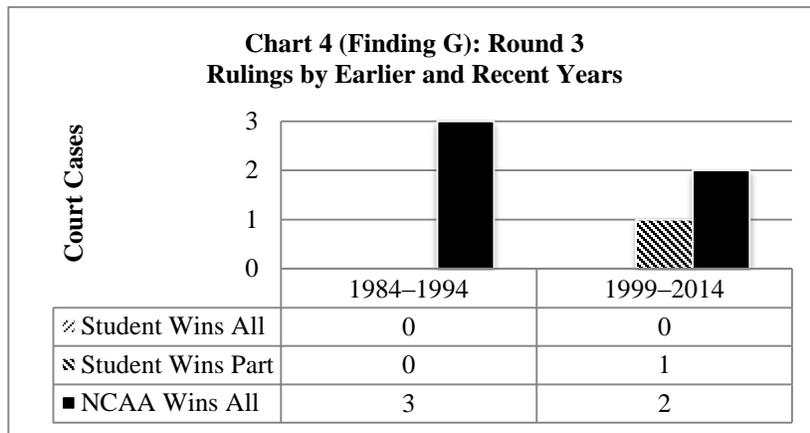
first rulings from 1973 to 1987 (50%). There were no cases for 1988–1989. Recently (1990–2014), the NCAA won 12 of 24 of these rulings (50%).



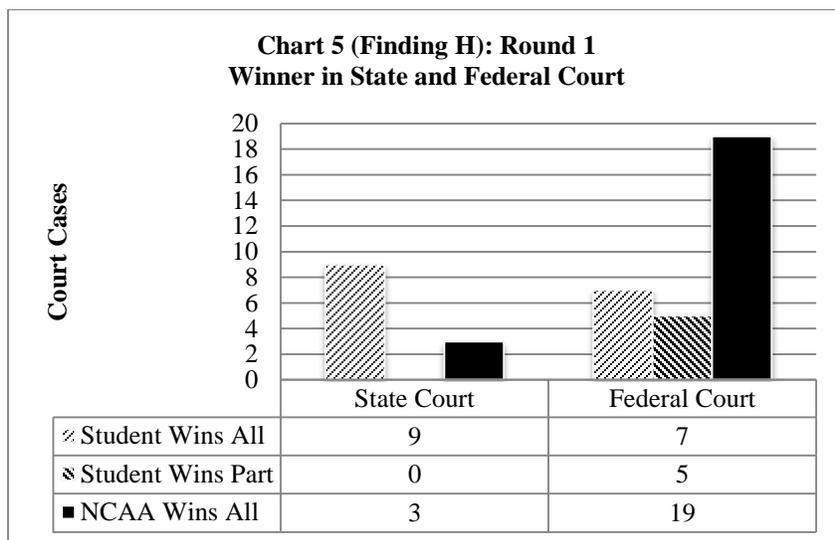
In Chart 3, the NCAA had a similar win rate in second-round cases. It won 10 of 13 decisions from 1973 to 1988 (77%). There were no cases in 1989. More recently (1990–2013), it won 7 of 10 decisions (70%).



In third-round cases in Chart 4, the NCAA won all 3 cases (100%) from 1984 to 1994. There were no third-round cases for 1995–1998. From 1999–2013, the NCAA won 2 of 3 cases (67%).



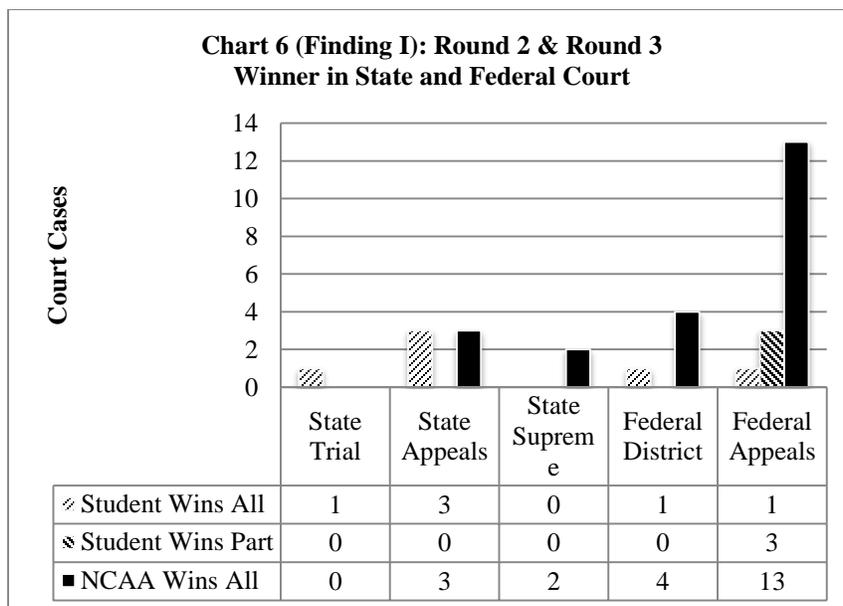
Finding H: *Venue affected outcomes, as students won most state cases while the NCAA won most federal cases.* Chart 5 shows that students won most state decisions in the first round (75%), while the NCAA won most first-round federal cases, 19 of 31 cases (61%). The difference in win rates was statistically significant.³⁷



Finding I: *The NCAA won most second- and third-round decisions in state and federal court.* Chart 6 shows that the NCAA won 13 out of 17 times (76%) in round-two cases decided by a federal appeals court. In 5 cases where a federal district court ruled in second-round litigation, the NCAA won 4 times (80%). The NCAA also won 2 decisions in a state supreme court. Students were

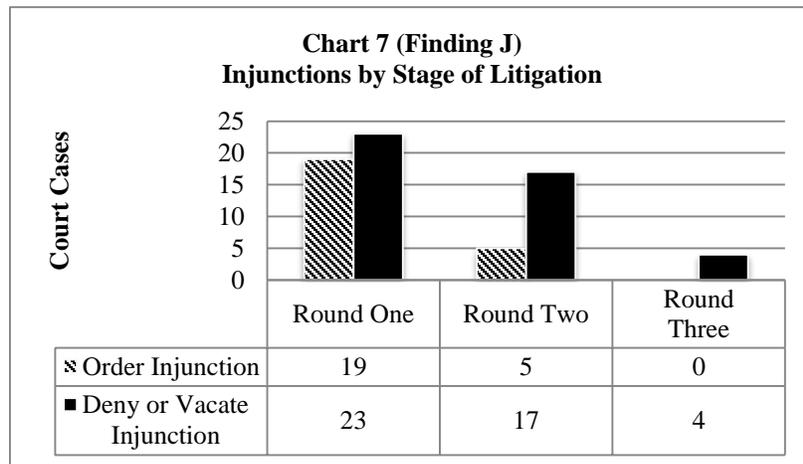
37. The result for this crosstabs analysis in SPSS was χ^2 10.551, $df = 2$, .005.

limited to 3 wins in 6 state appellate cases (50%), and won in the only second-round case decided by a state trial court. Although the NCAA won more cases than students in later rounds, its higher success rate in federal court, compared to state court, was statistically significant.³⁸

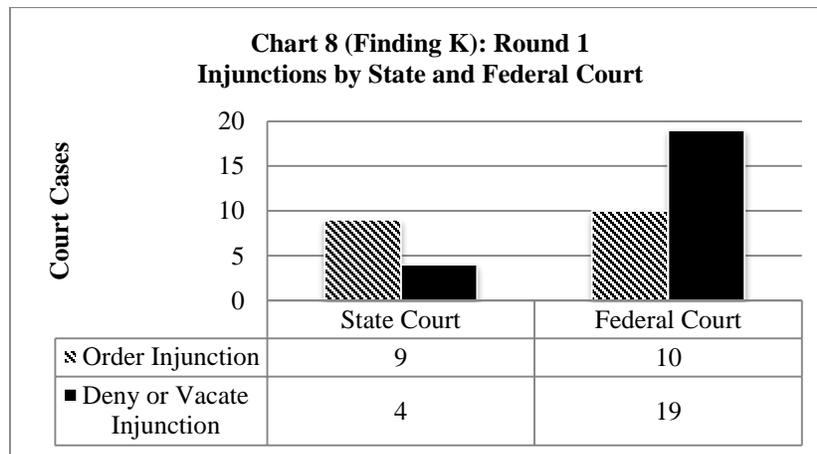


Finding J: *First-round courts ordered or affirmed more injunctions for a student than second- and third-round courts.* Courts in Chart 7 ordered injunctions in 19 of 42 (45%) cases. Most second-round and third-round courts vacated this relief (76% and 100%, respectively).

38. The result for this crosstabs analysis in SPSS was χ^2 14.000, $df = 6$, .030.



Finding K: *State courts were more likely than federal courts to order an injunction.* Chart 8 shows that 9 out of 13 state courts enjoined the NCAA or a school from enforcing a rule or acting against a student (69% of cases). In contrast, only 10 out of 29 federal courts ruled in favor of granting an injunction (34.5% of cases).



Finding L: *Most cases did not cite legal precedents from professional sports.* In each case, Westlaw’s “Table of Authorities” was checked for a citation to a professional sports decision. Eleven NCAA cases cited such a precedent, and are noted in the Appendix.

II. A QUALITATIVE ASSESSMENT OF STUDENT CASES AGAINST THE NCAA

A. *The National Collegiate Athletic Association*

The NCAA has a monopoly over major intercollegiate athletic programs in the United States.³⁹ Its purpose is to combine intercollegiate athletics with college-degree programs while maintaining a demarcation between amateur and professional sports.⁴⁰ A student crosses this line by signing a contract to play a professional sport.⁴¹ Over time, the NCAA has expanded its amateurism principle.⁴² It believes that its educational mission transcends commercialism.⁴³

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

40. *Justice v. Nat'l Collegiate Athletic Ass'n*, 577 F. Supp. 356, 361 (D. Ariz. 1983) (quoting NCAA DIVISION I MANUAL, *supra* note 4, at art. 2, § 2); *see also* *Banks v. Nat'l Collegiate Athletic Ass'n (Banks I)*, 746 F. Supp. 850, 852 (N.D. Ind. 1990) (NCAA organizes amateur intercollegiate athletics “as an integral part of the educational program and . . . retain[s] a clear line of demarcation between intercollegiate athletics and professional sports.”).

41. *Shelton v. Nat'l Collegiate Athletic Ass'n*, 539 F.2d 1197, 1198 (9th Cir. 1976).

42. *Bloom v. Nat'l Collegiate Athletic Ass'n*, 93 P.3d 621 (Colo. 2004) (“Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises.” (quoting NCAA DIVISION I MANUAL, *supra* note 4, at art. 2.9.)).

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

Forty years ago, the NCAA was a smaller, less wealthy organization;⁴⁴ today it generates \$16 billion a year.⁴⁵ Recently, the organization entered into several multibillion dollar television contracts to broadcast its athletic competitions.⁴⁶ Its membership has doubled since the 1970s,⁴⁷ and it is comprised of more than 1,200 schools.⁴⁸ As an unincorporated association, the NCAA establishes academic standards.⁴⁹ Its rules equalize access to students by capping each school's scholarships.⁵⁰

B. Student Cases Against the NCAA

Because the NCAA is a voluntary association, courts are reluctant to intervene in its internal affairs.⁵¹ Courts treat a voluntary association's constitution and bylaws as a contract between members of the group.⁵² Associations are presumed to know better than judges how to administer their rules.⁵³ Courts apply this principle to athletic associations.⁵⁴

44. *Howard Univ. v. Nat'l Collegiate Athletic Ass'n (Howard I)*, 367 F. Supp. 926, 928 (D.D.C. Cir. 1973) (NCAA's 664 colleges generated \$14 million), *aff'd*, 510 F.2d 213 (D.C. Cir. 1975).

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

46. *See* Lindsay J. Rosenthal, Comment, *From Regulating Organization to Multi-Billion Dollar Business: The NCAA is Commercializing the Amateur Competition It Has Taken Almost a Century to Create*, 13 *SETON HALL J. SPORT L.* 321, 336 (2003) (NCAA signed a \$6.2 billion contract with CBS). More recently, the NCAA has added to its coffers. *See* NATIONAL COLLEGIATE ATHLETIC ASSOCIATION AND SUBSIDIARIES: NOTES TO CONSOLIDATED FINANCIAL STATEMENTS AS OF AND FOR THE YEAR ENDED AUGUST 31, 2012 AND 2011, at 16 (2012), available at <http://www.ncaa.org/sites/default/files/Annual%2BReport%2B2011-12.pdf> (reporting a \$10.8 billion television contract from 2010–2024).

47. *Howard I*, 367 F. Supp. at 928.

48. *See* NCAA, *supra* note 29.

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

50. *Agnew v. Nat'l Collegiate Athletic Ass'n (Agnew I)*, No. 1:11-CV-0293-JMS-MJD, 2011 WL 3878200, at *5 n.6 (S.D. Ind. Sept. 1, 2011) (the NCAA believes that its cap on scholarships are necessary because “some schools would offer extra scholarships to stockpile players so that those players would be unable to play for a competitor.”).

51. *Bloom v. Nat'l Collegiate Athletic Ass'n*, 93 P.3d 621, 624 (Colo. Ct. App. 2004); *Nat'l Collegiate Athletic Ass'n v. Yeo (Yeo II)*, 171 S.W.3d 863, 870 (Tex. 2005) (“[J]udicial intervention in [student athletic disputes] often does more harm than good.” (internal quotations omitted)).

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

53. *Nat'l Collegiate Athletic Ass'n v. Gillard*, 352 So. 2d 1072, 1081 (Miss. 1977).

54. *Nat'l Collegiate Athletics Ass'n v. Lasege*, 53 S.W.3d 77, 83 (Ky. 2001) (“[C]ourts are a very poor place in which to conduct interscholastic athletic events . . .” (citation omitted)).

But these organizations are not immune from judicial scrutiny.⁵⁵ College Athletes Players Association (“CAPA”) is a labor union that is seeking to collectively bargain on behalf of Division I football and basketball players. It is not the first group to represent college athletes. In the 1970s, an association represented students against the NCAA, and was part of the earliest plaintiffs to sue on behalf of college athletes.⁵⁶ Since then, students themselves have periodically sued the NCAA or member schools.⁵⁷ On rare occasion, courts have dismissed cases over threshold issues, such as standing;⁵⁸ however, most courts reject these arguments and allow student-brought suits to proceed on the merits.⁵⁹ The following discussion examines how courts have ruled on the legal theories relied upon by students in these lawsuits.

I. Constitutional Issues

Many courts have found that students lack a constitutionally protected interest in participating in extracurricular activities.⁶⁰ Some have ruled that the NCAA is not a state actor,⁶¹ while others have disagreed.⁶² While most

55. *Ind. High Sch. Athletic Ass’n v. Carlberg*, 694 N.E.2d 222, 230–32 (Ind. 1997) (finding review of Indiana High School Athletic Association decisions subject to “arbitrary and capricious” review).

56. *Associated Students, Inc. of Cal. State Univ.–Sacramento v. Nat’l Collegiate Athletic Ass’n*, 493 F.2d 1251 (9th Cir. 1974) (plaintiff was a group organized to represent student interests, including athletes with an eligibility issue).

57. *See infra* Appendix.

58. *McCormack v. Nat’l Collegiate Athletic Ass’n*, 845 F.2d 1338 (5th Cir. 1988).

59. *Rock v. Nat’l Collegiate Athletic Ass’n*, No. 1:2-CV-1019-JMS-DKL, 2013 WL 4479815, at *7 (S.D. Ind. Aug. 16, 2013) (plaintiff had standing to sue under antitrust law).

60. *E.g., Yeo II*, 171 S.W.3d 863; *Nat’l Collegiate Athletic Ass’n v. Gillard*, 352 So. 2d 1072, 1081 (Miss. 1977) (“[T]he basic decision of the case then is the simple statement that Gillard’s ‘right’ to engage in intercollegiate football is not a ‘property’ right that falls within the due process clause”); *Albach v. Odle*, 531 F.2d 983 (10th Cir. 1975); *Howard Univ. v. Nat’l Collegiate Athletic Ass’n (Howard II)*, 510 F.2d 213 (D.C. Cir. 1975); *Parish v. Nat’l Collegiate Athletic Ass’n*, 506 F.2d 1028 (5th Cir. 1975); *Associated Students*, 493 F.2d at 1251; *Mitchell v. La. High Sch. Athletic Ass’n*, 430 F.2d 1155 (5th Cir. 1970); *Scott v. Kilpatrick*, 237 So. 2d 652 (Ala. 1970); *Okla. High Sch. Athletic Ass’n v. Bray*, 321 F.2d 269 (10th Cir. 1963); *State ex rel. Mo. State High Sch. Activities Ass’n v. Schoenlaub*, 507 S.W.2d 354 (Mo. 1974); *Sanders v. La. High Sch. Athletic Ass’n*, 242 So. 2d 19 (La. 1970); *Tenn. Secondary Sch. Athletic Ass’n v. Cox*, 425 S.W.2d 597 (Tenn. 1968); *Sult v. Gilbert*, 3 So. 2d 729, 731 (Fla. 1941).

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

62. Many courts have found that the NCAA falls within the test of acting under color of state law. *See, e.g., Stanley v. Big Eight Athletic Conference*, 463 F. Supp. 920, 927 (W.D. Mo. 1978); *Regents of Univ. of Minn. v. Nat’l Collegiate Athletic Ass’n*, 560 F.2d 352, 364–65 (8th Cir. 1977); *Hennessey v. Nat’l Collegiate Athletic Ass’n*, 564 F.2d

constitutional cases have presented a federal issue, at least one court applied a state constitution.⁶³

Nonetheless, students have won constitutional cases against the NCAA,⁶⁴ especially when the facts demonstrated potential for an economic injury. As early as 1976, a federal court concluded that the “opportunity to participate in intercollegiate athletics is of substantial economic value to many students.”⁶⁵ Forty years ago, courts realized that a “chance to display . . . athletic prowess in college stadiums and arenas throughout the country is worth more in economic terms than the chance to get a college education.”⁶⁶ This court was specifically referring to the fact that NCAA competition leads to great wealth for some athletes who are successful in professional leagues.

A court ruled that the NCAA’s strict rules limiting student compensation were not rational under the Equal Protection Clause.⁶⁷ The NCAA’s student age limits have created special problems for aliens who competed in another country before enrolling in a U.S. school. Accordingly, a trial court ruled that the NCAA’s eligibility rules, as applied to foreign students, violated Equal Protection.⁶⁸ Most recently, in *O’Bannon v. National Collegiate Athletic Ass’n*, a federal district ruled in favor of Ed O’Bannon and his class action co-plaintiffs in a landmark antitrust ruling that the NCAA’s procompetitive goals did not justify the association’s sweeping prohibition on compensating players with any share of licensing revenue; the NCAA is currently appealing this decision.⁶⁹ Also, the NCAA’s drug-testing protocol has led to a successful court challenge.⁷⁰

1136, 1144 (5th Cir. 1977) (involving lawsuit by coaches); *Howard II*, 510 F.2d at 220; *Associated Students*, 493 F.2d at 1254.

63. A Mississippi state court reasoned that “the opportunity for a professional football career is more than just a possibility for this minor complainant and is, therefore, a protected right under section 14 of the Mississippi Constitution of 1890, . . .” *Gillard*, 352 So. 2d at 1080 (quoting from a lower state court).

64. Students have won due process rulings. *E.g.*, *Nat’l Collegiate Athletics Ass’n v. Yeo (Yeo I)*, 114 S.W.3d 584 (Tex. App. 2003), *rev’d*, 171 S.W.3d 863 (Tex. 2005); *Hill v. Nat’l Collegiate Athletics Ass’n*, 230 Cal. App. 3d 1714 (1990); *Gillard*, 352 So. 2d at 1072 (reporting on the unpublished ruling by the lower court); *Behagen v. Intercollegiate Conference of Faculty Rep.*, 346 F. Supp. 602 (D. Minn. 1976).

65. *Behagen*, 346 F. Supp. at 604.

66. *Id.*

67. *Wiley v. Nat’l Collegiate Athletic Ass’n*, 612 F.2d 473, 478 (10th Cir. 1979) (reporting on an unpublished ruling). This occurred when an impoverished student was granted a \$2,621 scholarship for track, and a \$1,400 federal grant, which together pushed his compensation above the NCAA’s limit. The appeals court ruled that his graduation did not moot the case; but there was no substantial federal question. *Id.* at 474–76.

68. *Howard II*, 510 F.2d 213; *see also* *Buckton v. Nat’l Collegiate Athletic Ass’n*, 366 F. Supp. 1152, 1160 (D. Mass. 1973) (NCAA’s classification system irrationally discriminates against Canadian hockey players who attend U.S. schools as resident aliens). An appeals court also ruled that the NCAA’s classification was arbitrary. *Howard II*, 510 F.2d at 222.

69. *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 7 F. Supp. 3d 955, 1009 (N.D. Cal. 2014). The court ruled that the NCAA violated the Sherman Act by imposing its amateur competition rules that restrict players from any compensation for use of their

2. Academic Standards

The NCAA has consistently required student-athletes to meet certain academic standards while in high school to be eligible to participate in college athletics, and then to maintain a minimum GPA in college. Over time, lawsuits have challenged these standards.⁷¹ The outcomes have been mixed. One court sympathized with a basketball player who faced ineligibility for failing to meet academic standards.⁷² Another court, presented with a swimmer's learning disability claim, also ruled for the student.⁷³ As high schools began to offer special education classes, these accommodations caused eligibility problems for students. The conflict between the NCAA and high schools was epitomized in protracted litigation involving a student who committed suicide while his case was on appeal.⁷⁴ In that case, the NCAA declared a football player ineligible because his

names, images, and avatars in commercial outlets such as video games and television broadcasts. *Id.* at 1007. The court found that the NCAA offered football and basketball recruits a unique bundle of goods and services in exchange for their athletic services and use of their names, images, and likenesses for commercial and promotional purposes. *Id.* at 987. Finding that this arrangement created a cognizable harm to competition under the rule of reason test, the judge enjoined FBS football and Division I basketball programs from enforcing any rule to prohibit players from being paid for these images, avatars, and likenesses, and also ordered payment of up to \$5,000 per year for each player. *Id.* at 1007–08.

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

71. See, e.g., *Associated Students, Inc. of Cal. State Univ.—Sacramento v. Nat'l Collegiate Athletic Ass'n*, 493 F.2d 1251 (9th Cir. 1974).

72. See the court's sympathetic treatment of the student whose math sequence was counted as one-third rather than one-half of a credit in *Phillip v. Nat'l Collegiate Athletic Ass'n*, 960 F. Supp. 552, 557–58 (D. Conn. 1997) (“Darren Phillip testified at the preliminary injunction hearing, and his testimony was persuasive He feels, perhaps justifiably so, that he has done all one could be expected to do to meet the eligibility requirements.”). The Second Circuit also appeared to sympathize with the student by reversing the district court but allowing four months for a rehearing on the matter. *Phillip v. Fairfield Univ.*, 118 F.3d 131, 135 (2d Cir. 1997).

73. *Ganden v. Nat'l Collegiate Athletic Ass'n*, No. 96-C-6953, 1996 WL 680000 (N.D. Ill. Nov. 21, 1996) (granting the swimmer's motion for a preliminary injunction). The court agreed with the student that the NCAA could have made a reasonable accommodation by allowing remedial courses to substitute for certain core courses. *Id.* at *15.

74. When the NCAA refused to count a football player's special education sections of regular high school courses as part of an academic core necessary to qualify for an athletic scholarship, Michael Bowers was ineligible to play football during his freshman year. See *Bowers I*, 974 F. Supp. at 466 (“While the ADA requires ‘evenhanded treatment’ of individuals with disabilities, it does not require ‘affirmative action.’”). This ruling triggered protracted litigation. The following cases are cited to show how long litigation with the NCAA can last. See *Bowers v. Nat'l Collegiate Athletic Ass'n (Bowers II)*, 9 F. Supp. 2d 460 (D.N.J. 1998); *Bowers v. Nat'l Collegiate Athletic Ass'n (Bowers III)*, 118 F. Supp. 2d 494 (D.N.J. 2000); *Bowers v. Nat'l Collegiate Athletic Ass'n (Bowers IV)*, 130 F.

special education high school courses—offered in light of his learning disability—were not counted toward the NCAA’s core requirements.⁷⁵ In another case, a trial court found that an NCAA academic rule had a disparate impact that disproportionately harmed minority students.⁷⁶ This decision had the potential to interfere with the NCAA’s standards, but was later reversed on appeal.⁷⁷ Similarly, a trial court ruled that an NCAA academic standard denied students equal protection, but was overturned on appeal.⁷⁸

3. Discrimination

On rare occasions, student–athletes have sued when an NCAA rule has had a discriminatory effect. In one case, a student football player left school to work and care for his daughter after his girlfriend became pregnant.⁷⁹ When he tried to resume football, he discovered he had lost a year of eligibility. He sued under Title IX after the NCAA denied him a pregnancy extension of eligibility.⁸⁰ Since the NCAA’s rule dealt with pregnancy but not parental leave,⁸¹ the court ruled for the Association.⁸² As previously discussed, students have alleged that the

Supp. 2d 610 (D.N.J. 2001); *Bowers v. Nat’l Collegiate Athletic Ass’n (Bowers V)*, No. 97-CV-2600, 2001 WL 1850089 (D.N.J. Feb. 6, 2001); *Bowers v. Nat’l Collegiate Athletic Ass’n (Bowers VI)*, No. 97-2600, 2001 WL 1772801 (D.N.J. July 3, 2001); *Bowers v. Nat’l Collegiate Athletic Ass’n (Bowers VII)*, 151 F. Supp. 2d 526 (D.N.J. 2001); *Bowers v. Nat’l Collegiate Athletic Ass’n (Bowers VIII)*, 171 F. Supp. 2d 389 (D.N.J. 2001), *rev’d in part*, 346 F.3d 402 (3d Cir. 2003); *Bowers v. Nat’l Collegiate Athletic Ass’n (Bowers IX)*, 188 F. Supp. 2d 473 (D.N.J. 2002); *Bowers v. Nat’l Collegiate Athletic Ass’n (Bowers X)*, No. 97-260 (JBS), 2005 WL 5155198 (D.N.J. Mar. 21, 2005) (dismissing the case). On appeal again to the Third Circuit, and after the suicide of the player, the Third Circuit remanded the matter to determine whether another school, the University of Iowa, violated the player’s rights under the ADA. *Bowers v. Nat’l Collegiate Athletic Ass’n (Bowers XI)*, 475 F.3d 524 (3d Cir. 2007).

75. *Bowers II*, 9 F. Supp. 2d at 468–69.

76. *Cureton v. Nat’l Collegiate Athletic Ass’n*, 37 F. Supp. 2d 687, 698 (E.D. Pa. 1999) (finding that African-American student–athletes were adversely affected by the NCAA’s “Proposition 16” academic standards). Data showed that 26.6% of these students did not meet the standard, while 21.4% did not qualify in 1997. *Id.* at 700. For white student–athletes, the disqualification rate was 6.4% in 1996, and 4.2% in 1997. *Id.* at 698. The district court declared Proposition 16 illegal under Title VI of the 1964 Civil Rights Act, and permanently enjoined these standards. *Id.*

77. *Cureton v. Nat’l Collegiate Athletic Ass’n*, 198 F.3d 107, 118 (3d Cir. 1999).

78. *Associated Students, Inc. of Cal. State Univ.–Sacramento v. Nat’l Collegiate Athletic Ass’n*, 493 F.2d 1251, 1256 (9th Cir. 1974) (concluding that “a rule must be enforced. Without some form of penalty, the Rule would be meaningless, leaving member schools free to do as they pleased in recruiting high school athletes”).

79. *Butler v. Nat’l Collegiate Athletic Ass’n*, No. 06-319-KHV, 2006 WL 2398683, at *1–2 (D. Kan. Aug. 15, 2006) (claiming violations of Title IX of the Education Amendments Act of 1972, 20 U.S.C. § 1681(a)).

80. *Id.*

81. *Id.* at *3 (referring to NCAA DIVISION I MANUAL, *supra* note 4, at art. 14.2.1.3).

82. *Id.* at *5.

NCAA's college admissions criteria discriminate by race, as applied to eligibility for athletic competition.⁸³

4. Antitrust

The point of the NCAA Bylaws is to create conditions for fair athletic competitions that are also consistent with the educational standards of member schools. But the complaints in the following antitrust cases identify regulations that are, in some sense, unfair to student-athletes. To begin, it is important to note that the Supreme Court has ruled that the Sherman Act applies to some aspects of the NCAA.⁸⁴ This ruling, involving NCAA limits on television broadcasts of college football games, was significant because early antitrust cases found that NCAA rules do not regulate commercial activity.⁸⁵

But the boundary between NCAA regulations that promote academic interests and others that have the effect of making NCAA sports commercially viable for schools is not easy to distinguish. Some courts have refused to view the NCAA's regulation of students as market transactions.⁸⁶ Courts also rejected

83. See *Cureton*, 37 F. Supp. 2d at 687.

84. *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85 (1984) (holding that an NCAA plan to restrict the televising of football games violated § 1 of the Sherman Act because it restrained a free market). The Court agreed with the trial finding that NCAA football telecasts generated "an audience uniquely attractive to advertisers and that competitors are unable to offer programming that can attract a similar audience," and consequently, this fact meant that the NCAA possessed market power. *Id.* at 111.

85. *Smith v. Nat'l Collegiate Athletic Ass'n*, 139 F.3d 180, 185-86 (3d Cir. 1998). The Supreme Court held that the NCAA's eligibility rules are not related to the NCAA's commercial interests. Thus, the Sherman Act did not apply to these student regulations. *Id.* at 182. In *Gaines v. National Collegiate Athletic Ass'n*, 746 F. Supp. 738, 743-44 (M.D. Tenn. 1990), the district court distinguished between the NCAA's commercial rules and noncommercial rules, ruling that eligibility standards were not commercial. Taking a different approach, the Fifth Circuit assumed without deciding that the Sherman Act applies to the NCAA's student eligibility rules. See *McCormack v. Nat'l Collegiate Athletic Ass'n*, 845 F.2d 1338, 1343-44 (5th Cir.1988). The district court in *Jones v. National Collegiate Athletic Ass'n*, 392 F. Supp. 295, 303 (D. Mass.1975) held that the Sherman Act does not apply to NCAA eligibility standards: "plaintiff is currently a student, not a businessman in the traditional sense, and certainly not a 'competitor' within the contemplation of the antitrust laws." The district court in *Smith v. National Collegiate Athletic Ass'n*, 978 F. Supp. 213, 217 (W.D. Pa. 1997) explained that "it is clear that the Sherman Act is applicable to the NCAA with respect to those actions of the Defendant that are related to its commercial or business activities, but only to those such activities."

86. *Jones*, 392 F. Supp. at 304. A hockey player who received compensation for playing junior hockey in Canada was deemed ineligible to compete by Northeastern University, which applied the NCAA's amateur-player rule. *Id.* at 296-98. The court rejected the player's theory that the NCAA's rule was a restraint on trade. *Id.* at 303. The court added that "plaintiff has so far not shown how the action of the [NCAA] in setting eligibility guidelines has any nexus to commercial or business activities in which the defendant might engage." *Id.*

player attempts under the Sherman Act to challenge NCAA mobility restrictions.⁸⁷ Players could not show that they were in a labor market.⁸⁸ Instead, courts were persuaded by the fact that NCAA players are students, rather than employees.⁸⁹

But the trend favoring the NCAA has begun to shift. Courts have begun to recognize that NCAA rules relate to a cognizable market in college football. The court in *Tanaka v. University of Southern California* was willing to compare NCAA restrictions to NFL rules that limit player free agency.⁹⁰ *Agnew v. National Collegiate Athletic Ass'n* broadened the labor market concept.⁹¹ Scholarships advance a school's economic interests while attracting gifted athletes in a labor market.⁹² Coining the term "athletic labor," the court described college football's competitive labor market:

87. *Yeo II*, 171 S.W.3d 863; *Banks v. Nat'l Collegiate Athletic Ass'n (Banks II)*, 977 F.2d 1081 (7th Cir. 1992); *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1065 (9th Cir. 2001).

88. When a Notre Dame football player remained undrafted after declaring for the NFL draft following his junior year, he was blocked by NCAA eligibility rules from returning to school for a senior year of competition. *Banks II*, 977 F.2d at 1091. The Seventh Circuit rejected the player's Sherman Act claim because the player failed to demonstrate that the NCAA rules were connected to a labor market. *Id.* The court disagreed with the dissenting opinion's view that NCAA member schools are purchasers of labor. In an interesting passage, the majority was concerned that elimination of NCAA's draft and agent restrictions would undercut the NCAA's amateurism requirements: "The involvement of professional sports agents in NCAA football would turn amateur intercollegiate athletics into a sham because the focus of college football would shift from educating the student-athlete to creating a 'minor-league' farm system out of college football that would operate solely to improve players' skills for professional football in the NFL." *Id.*

89. *E.g.*, *Justice v. Nat'l Collegiate Athletic Ass'n*, 577 F. Supp. 356, 373 (D. Ariz. 1983) ("[C]ase law flatly rejects the notion that student-athletes' expectations of future athletic careers are constitutionally protected."); *Yeo II*, 171 S.W.3d at 870 ("[S]tudent-athletes remain amateurs."); *see also* *Rensing v. Ind. State Univ. Bd. of Trs.*, 444 N.E.2d 1170, 1175 (Ind. 1983) ("[B]enefits Rensing received were subject to strict regulations by the NCAA which were designed to protect his amateur status.").

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

91. *Agnew II*, 683 F.3d at 338.

92. *Id.* at 338 ("It is undeniable that a market of some sort is at play in this case. A transaction clearly occurs between a student-athlete and a university: the student-athlete uses his athletic abilities on behalf of the university in exchange for an athletic and academic education, room, and board."). Citing the economic realities of major college football programs today, *Agnew* concluded that "full scholarships in exchange for athletic services . . . are not noncommercial." *Id.* at 340. The court reasoned: "No knowledgeable observer could earnestly assert that big-time college football programs competing for highly sought-after high school football players do not anticipate economic gain from a successful recruiting program." *Id.* The fact that schools are non-profit organizations was immaterial to the court because "schools can make millions of dollars as a result of these transactions." The court cited the fact that some schools are willing to pay "up to \$5 million a year rather than invest that money into educational resources." *Id.* at 341 (citation omitted).

[C]olleges may compete to hire the coach that will be best able to launch players from the NCAA to the National Football League, an attractive component for a prospective college football player. Colleges also engage in veritable arms races to provide top-of-the-line training facilities which, in turn, are supposed to attract collegiate athletes. Many future student-athletes also look to the strength of a college's academic programs in deciding where to attend. These are all part of the competitive market to attract student-athletes whose *athletic labor* can result in many benefits for a college, including economic gain.⁹³

This reasoning has the potential to bring student lawsuits under a broad stream of precedent holding that a monopolist's restraint of a labor market constitutes a violation of the Sherman Act.⁹⁴ In the early stages of litigation, the court in *Rock v. National Collegiate Athletic Ass'n* did not rule out the idea that college football has a labor market.⁹⁵ The *O'Bannon* antitrust ruling is the most far-reaching antitrust victory for student athletes, but it is unlikely to be the final ruling in this long-running dispute.⁹⁶

93. *Id.* at 347 (emphasis added). Agnew lost his scholarship when Rice University did not renew it following his injury, and as a result, he had to pay to complete his degree. *Id.* at 332. Although the court was receptive to the concept of "athletic labor," it upheld the district court's dismissal of Agnew's complaint because he failed to state a conspiracy or combination to restrain a labor market. *Id.* at 347–48. The NCAA has since revoked its one-year limit on scholarships and allowed schools to make multi-year scholarship commitments to players. *Id.* at 331 n.1.

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

95. *Rock v. Nat'l Collegiate Athletic Ass'n*, No. 1:2-CV-1019-JMS-DKL, 2013 WL 4479815, at *11 (S.D. Ind. Aug. 16, 2013) ("Mr. Rock has narrowed his proposed market to one sport in one division of the NCAA. The buyers of labor (the schools) are all members of NCAA Division I football and are competing for the labor of the sellers (the prospective student-athletes who seek to play Division I football)."). The student sufficiently alleged that NCAA bylaws created anticompetitive effects that caused injury in this market. *Id.* at *16. Rock alleged that he did not receive a scholarship offer from the upper tier of NCAA football schools, and only received offers from second-tier schools, due to the NCAA's strict limit on the number of scholarships for FBS programs. *Id.* at *2–3. The court concluded that Rock had sufficiently alleged an anticompetitive market restraint. *Id.* at *13–14.

96. *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955, 1009 (N.D. Cal. 2014). A group of 15 law professors filed a brief in support of the NCAA's appeal of the district court ruling, contending that affirmance of this ruling would inappropriately expand the power of federal courts to alter organizational rules that serve important social

While these cases are encouraging for students, they deal with only part of the complex proof that antitrust plaintiffs need to secure relief. Courts have said that NCAA rules and regulations are subject to the Rule of Reason.⁹⁷ If a rule has a procompetitive effect for horizontal competitors, these restraints are legal.⁹⁸ Though not cited in any of the cases in this study's database, the best summary of this rationale was succinctly stated by Robert Bork, who aptly said that "some activities can only be carried out jointly. Perhaps the leading example is league sports. When a league of professional lacrosse teams is formed, it would be pointless to declare their cooperation illegal on the ground that there are no other professional lacrosse teams."⁹⁹ His point was that a degree of anticompetitive restraints, imposed by a sports league, must be tolerated to promote real competition among all the teams in the league. In the absence of restraints, a few teams would possibly monopolize talent and other resources, causing weaker competitors to drop out—thereby causing the league to decline over time.

5. Team Sanctions

The NCAA was created by universities and colleges to harmonize standards for athletic competition with the academic purposes of its members. These institutions agree to abide equally by the rules; if a member cheats or otherwise violates an NCAA rule, it may be sanctioned. In a tiny fraction of cases in this study, student athletes claimed some type of injury arising out of an NCAA sanction imposed on a school. In one case, a court deferred to NCAA sanctions of a football team because the "protection and fostering of amateurism in intercollegiate athletics is a legitimate objective of the NCAA."¹⁰⁰ In another case of team sanctions, an appeals court said the "NCAA markets college football as a product distinct from professional football"¹⁰¹ in order "to integrate athletics with academics."¹⁰²

and educational purposes. See Jon Solomon, *Antitrust-law Professors Support NCAA's O'Bannon Appeal*, CBSSPORTS.COM (Nov. 21, 2014, 12:15 PM), <http://www.cbssports.com/collegefootball/writer/jon-solomon/24826158/antitrust-law-law-professors-support-ncaas-obannon-appeal>.

97. *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1063 (9th Cir. 2001) ("[R]estrainment violates the rule of reason if the restraint's harm to competition outweighs its procompetitive effects."); see also generally *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 117 (1984) (stating that while the Sherman Act applies to NCAA regulations, most rules regulations will be a "justifiable means of fostering competition among amateur athletic teams," and are therefore precompetitive). "It is reasonable to assume that most of the regulatory controls of the NCAA are . . . procompetitive because they enhance public interest in intercollegiate athletics." *Id.*

98. *Tanaka*, 252 F.3d at 1064 ("If the relevant market is national in scope, as *Tanaka's* own complaint suggests, the transfer rule most certainly does not have a significant anticompetitive effect.")

99. ROBERT H. BORK, *THE ANTITRUST PARADOX* 278 (1978).

100. *Justice v. Nat'l Collegiate Athletic Ass'n*, 577 F. Supp. 356, 371 (D. Ariz. 1983).

101. *McCormack v. Nat'l Collegiate Athletic Ass'n*, 845 F.2d 1338, 1344 (5th Cir. 1988).

102. *Id.* at 1345.

In sum, the NCAA cases in this discussion reflect this organization's paradoxical aim of promoting education and athletic competition for college athletes. In early cases, individuals challenged the NCAA's eligibility standards that were implemented to promote academic pursuits—in other words, to make sure that athletes could also be successful in the classroom. However, as NCAA football and basketball have evolved into multi-billion dollar industries, players have raised questions about the NCAA's amateurism model—a model that seems outdated and uniquely adapted to thwart meaningful compensation for the labor they supply to generate this immense wealth.

III. FUTURE SCENARIOS

The NCAA is at a legal crossroads. On one hand, the Association has prevailed in the majority of disputes brought by student-plaintiffs, particularly on appeal, where courts have deferred to the NCAA's view that sports are integral to a college's educational mission. But recent and current litigation has confronted monetary aspects of NCAA sports. Part of this change is due to the excessive commercialization of the NCAA's main revenue sports: football and basketball. For example, the Association has been hard pressed to explain how licensing video games with the likeness of college players is so integral to education so as to justify not compensating the students.¹⁰³ However, lawsuits that broadly target the NCAA's core pose a far greater concern for the NCAA—specifically, suits targeting the Bylaws, the interests of large and small schools, revenue and nonrevenue sports, and men's and women's sports. Courts are poised to consider whether certain students are employees, and relatedly, whether they participate in a labor market.

Courts are likely to respond to three primary scenarios that implicate labor law and closely related antitrust principles. These scenarios include: (1) maintaining the status quo of deferring to NCAA rules that strictly define student athletes as amateurs who are ineligible for compensation related to their athletic participation; (2) recognizing that some Division I student-athletes are employees, and thereby opening the door to allowing these players to vote for union representation; and (3) allowing student athletes to exert financial pressure on schools by ruling that boycotts, pickets, and other forms of protests are allowable under labor law, even if these athletes are not determined to be employees in a legal sense. At this early juncture, there is no reasonable way to predict how courts will ultimately decide on these matters—and it is also important to note that the third scenario has not even been presented to a court in a complaint. The student boycott scenario is merely hypothetical, but also suggested as a possibility if CAPA pressures employers like many other labor unions—and if the NCAA or schools respond like many employers who try to get a court to enjoin these

103. As an executive testified in the *O'Bannon* trial about how the NCAA distributes \$850 million annually, Judge Wilken asked: "Are we done with all the money? Where's the rest of it?" Mark Schlabach, *Big 10's Delany Hurts NCAA's Case*, ESPN OUTSIDE THE LINES (June 20, 2014, 10:36 PM), http://espn.go.com/espn/otl/story/_/id/11114473/big-10-jim-delany-hurts-ncaa-case-testimony. The testimony could not explain why \$55 million was missing in this accounting. *Id.*

activities. But this much can be said with confidence: any development that favors student athletes, in any of these scenarios, will ratchet up pressure on the NCAA to make swift and significant reforms that are responsive to player grievances. In other words, litigation is, by itself, a useful pressure tactic for student athletes.

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

On significant occasions, as the following discussion shows, courts have treated popular sports more as a game than a commercial activity. This has been especially evident in professional baseball, where the Supreme Court has persistently ruled that the sport is not subject to the Sherman Act because the game itself is not an activity in interstate commerce.¹⁰⁴ No NCAA case in this study has romanticized college sports in the way that federal courts have paid homage to Major League Baseball (“MLB”).¹⁰⁵ But as this discussion shows, courts have tended to readily accept the idea that Division I athletes are essentially college students who happen to play a competitive sport—with the implication, similar to professional baseball, that their athletic participation is less than, or different from, a commercial activity.

Recently, however, two courts explicitly said that college players engage in athletic labor.¹⁰⁶ But two cases do not necessarily make a dominant trend. Perhaps the labor-market concept for college athletics will fade, especially if courts idealize college sports as something other than a labor market—Supreme Court precedent involving professional baseball suggests this possibility. The baseball example suggests that courts could maintain the status quo in Finding G, meaning that the NCAA may continue to win cases in the later stages of litigation.¹⁰⁷

The beginning point for this analysis is antitrust lawsuits involving college football. In current lawsuits that have not been settled or reached a point of final disposition, students allege that the NCAA conspires to underpay the true

104. See *Flood II*, 407 U.S. 258; *Toolson II*, 346 U.S. 356; *Fed. Base Ball Club of Balt. v. Nat’l League of Prof’l Base Ball Clubs*, 59 U.S. 200 (1922).

105. See *Flood II*, 407 U.S. at 260–64 (Justice Blackmun’s paean to baseball).

106. *Agnew II*, 683 F.3d at 346. The *O’Bannon* court said that players provide athletic services. *O’Bannon v. NCAA*, 7 F. Supp. 3d 955, 986 (N.D. Cal. 2014). The court also said that the players “presented sufficient evidence to show an analogous anticompetitive effect in a similar labor market.” *Id.* at 993.

107. The maintenance of such an outdated view has been widely criticized. A succinct and powerful condemnation of this judicial practice is found in Justice Douglas’s dissenting opinion in *Flood v. Kuhn*, where he said that the Court should declare the Federal Baseball Club precedent “a derelict in the stream of the law that we, its creator, should remove.” *Flood II*, 407 U.S. at 286–88,

cost of attending college,¹⁰⁸ restrict player transfers by capping scholarships,¹⁰⁹ and prohibit schools from competing with each other by paying students.¹¹⁰

Similarly, professional baseball players have brought many cases against MLB alleging that a league with monopoly powers unlawfully restrained their terms and conditions of employment, and depressed their pay by perpetually reserving them to one team.¹¹¹ For almost a century, federal courts have obediently applied the precedent that professional baseball is exempt from antitrust—except for one anomalous case, where appellate judges were willing to argue over a wide range of issues related to baseball’s anticompetitive labor practices.¹¹² Baseball mooted that case by settling with the disgruntled player.¹¹³

This legal fiction dates back to the 1922 case *Federal Base Ball Club of Baltimore v. National League of Base Ball Clubs*, where the Supreme Court ruled that the Sherman Act did not apply to baseball,¹¹⁴ and thus, that baseball was exempt from antitrust law.¹¹⁵ Writing for the Court, Justice Holmes reasoned: “The

108. Complaint, Gregory-McGhee v. Nat’l Collegiate Athletic Ass’n, No. 3:14CV01777, 2014 WL 1509247 (N.D. Cal. Apr. 17, 2014).

109. Rock v. Nat’l Collegiate Athletic Ass’n, No. 1:2-CV-1019-JMS-DKL, 2013 WL 4479815, at *11 (S.D. Ind. Aug. 16, 2013).

110. Complaint, Jenkins v. Nat’l Collegiate Athletic Ass’n, No. 3:14CV01678, 2014 WL 1008526 (D.N.J. March 17, 2014); see also Tom Farrey, *Jeffrey Kessler Files Against NCAA*, ESPN COLLEGE SPORTS (March 18, 2014, 6:09 PM), http://espn.go.com/college-sports/story/_/id/10620388/anti-trust-claim-filed-jeffrey-kessler-challenges-ncaa-amateur-model.

111. See *Am. League Baseball Club of Chi. v. Chase*, 86 Misc. 441, 461–62 (N.Y. Sup. Ct. 1914) (“The quasi peonage of baseball players under the operations of this plan and agreement is contrary to the spirit of American institutions, and is contrary to the spirit of the Constitution of the United States.”). The court considered, too, whether baseball was an illegal combination under the Sherman Act. *Id.* at 461–62; see also *Flood II*, 407 U.S. at 258; *Toolson II*, 346 U.S. 356. Courts that enforced the reserve clause against players who sought to jump their contracts are noted in Comment, *Monopsony in Manpower: Organized Baseball Meets the Antitrust Laws*, 1, 590 n.74 (1953) (noting as examples: *Am. Ass’n Base Ball Club of Kan. City v. Pickett*, 8 Pa. County Ct. 232 (C.P. 1890); *Cincinnati Exhibition Co. v. Marsans*, 216 Fed. 269 (E.D. Mo., 1914); *Cincinnati Exhibition Co. v. Johnson*, No. 612, (C.P. Sept. 2, 1914); *Indianapolis Athletic Ass’n, Inc. v. Burk*, No. 740, (C.P. Aug. 12, 1915)).

112. *Gardella v. Chandler* is a notable exception to baseball’s antitrust exemption. 172 F.2d 402 (2d Cir. 1949). Danny Gardella, a player who had run-ins with management and left the country to play in Mexico, sued the New York Giants under the Sherman Act after his return to American baseball was blocked by the league’s blacklisting rule. *Id.* at 403–04. His lawsuit was dismissed by a district court in *Gardella v. Chandler*, 79 F. Supp. 260 (S.D.N.Y. 1948), but reinstated by the Second Circuit.

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

114. *Fed. Base Ball Club of Balt. v. Nat’l League of Prof’l Base Ball Clubs*, 259 U.S. 200 (1922). The Baltimore team, a member of the Federal Baseball League, filed an antitrust complaint against the National League after the latter absorbed all their competitors but not them. *Id.* at 207.

115. *Id.* at 208.

business is giving exhibitions of base ball, which are purely state affairs [T]he fact that . . . Leagues must induce free persons to cross state lines and must arrange and pay for their doing so is not enough to change the character of the business.”¹¹⁶ Further, in dictum, Justice Holmes suggested that MLB’s uniform player contract—including the reserve clause which bound players to their signing team indefinitely—was also immune from antitrust.¹¹⁷

Following *Federal Baseball*, many lower courts interpreted baseball’s antitrust exemption broadly, and held that the exemption applied to player employment. A New York Yankee challenged the reserve clause when his contract was assigned to a minor league team.¹¹⁸ By this time, professional baseball was most certainly engaged in interstate commerce—not only was it played throughout the country, but also its radio revenue was a form of interstate commerce, and baseball maintained minor league teams in the United States and Mexico.¹¹⁹ Nonetheless, the Supreme Court in *Toolson v. New York Yankees, Inc.* rejected the player’s antitrust action.¹²⁰ Another generation later, a star player who built a career in St. Louis strenuously objected to being traded to Philadelphia.¹²¹ Yet, the Supreme Court in *Flood v. Kuhn* ruled that baseball was exempt from antitrust law.¹²²

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

116. *Id.* at 208–09.

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

118. *Toolson I*, 101 F. Supp. 93.

119. *Toolson II*, 346 U.S. at 357–58.

120. *Id.* at 357.

121. *Flood II*, 407 U.S. 258.

122. *Id.* (“[T]he (judgment) below (is) affirmed on the authority of *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs . . . so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws.*” (internal citations omitted)).

123. Judge Learned Hand refused to find that baseball was exempt under antitrust law because the game was so integrated with commercial activities in interstate commerce. He reasoned that ball “players are the actors, the radio listeners and the television spectators are the audiences; together they form as indivisible a unit as do actors and spectators in a theatre. I am therefore in accord with my brother Frank that the defendants are *pro tanto* engaged in interstate commerce.” *Gardella v. Chandler*, 172 F.2d 402, 408 (2d Cir. 1949). Interesting to note, even Justice Blackmun, author of the majority opinion in *Flood*, readily conceded that baseball is engaged in interstate commerce. *See Flood II*, 407 U.S. at 282 (“[I]t seems appropriate now to say that: 1. Professional baseball is a business and it is engaged in interstate commerce.”).

124. *Phila. Ball Club, Ltd. v. Hallman*, 8 Pa. C.C. 57, 60 (Pa. Com. Pl. 1890).

baseball, they fawned over the sport.¹²⁵ But in similar antitrust cases involving other sports—football,¹²⁶ hockey,¹²⁷ and basketball¹²⁸—they came to their senses

125. The following passages contain lengthy quotes to demonstrate my complaint that judges lacked judicial objectivity:

Baseball has been the national pastime for over one hundred years and enjoys a unique place in our American heritage. Major league professional baseball is avidly followed by millions of fans, looked upon with fervor and pride and provides a special source of inspiration and competitive team spirit especially for the young. Baseball's status in the life of the nation is so pervasive that it would not strain credulity to say the Court can take judicial notice that baseball is everybody's business. To put it mildly and with restraint, it would be unfortunate indeed if a fine sport and profession, which brings surcease from daily travail and an escape from the ordinary to most inhabitants of this land, were to suffer in the least because of undue concentration by any one or any group on commercial and profit considerations. The game is on higher ground; it behooves every one to keep it there.

Flood II, 407 U.S. at 266–67. Justice Blackmun was more of a baseball fan than a judge when he began his decision upholding baseball's antitrust exemption with this lengthy paean:

The ardent follower and the student of baseball know of General Abner Doubleday; the formation of the National League in 1876; Chicago's supremacy in the first year's competition under the leadership of Al Spalding and with Cap Anson at third base; the formation of the American Association and then of the Union Association in the 1880's; the introduction of Sunday baseball; interleague warfare with cut-rate admission prices and player raiding; the development of the reserve "clause"; the emergence in 1885 of the Brotherhood of Professional Ball Players, and in 1890 of the Players League; the appearance of the American League, or "junior circuit," in 1901, rising from the minor Western Association; the first World Series in 1903, disruption in 1904, and the Series' resumption in 1905; the short-lived Federal League on the majors' scene during World War I years; the troublesome and discouraging episode of the 1919 Series; the home run ball; the shifting of franchises; the expansion of the leagues; the installation in 1965 of the major league draft of potential new players; and the formation of the Major League Baseball Players Association in 1966.

...

Then there are the many names, celebrated for one reason or another, that have sparked the diamond and its environs and that have provided tinder for recaptured thrills, for reminiscence and comparisons, and for conversation and anticipation in-season and off-season: [long list omitted]

...

And one recalls the appropriate reference to the "World Serious," attributed to Ring Lardner, Sr.; Ernest L. Thayer's "Casey at the Bat"; the ring of "Tinker to Evers to Chance"; and all the other happenings, habits, and superstitions about and around baseball that made it the "national pastime" or, depending upon the point of view, "the great American tragedy."

Id. at 261–64.

126. *Radovich v. Nat'l Football League*, 352 U.S. 445 (1957).

and confined this exemption to baseball. In all likelihood, they were able to separate their cases from *Federal Baseball* because these modern versions of sports were, by that time, clearly commercialized via television, radio, and the mass marketing of ticket sales. There could be no more pretending that the game was strictly confined to the actual field of play.

The question going forward is whether federal judges will accept the NCAA's declaration that college football players are amateur athletes in the uncritical way that earlier courts viewed baseball as a "game . . . on higher ground" such that "it behooves everyone to keep it there."¹²⁹ In *O'Bannon* the NCAA argued that "[its] amateurism rules are not 'commercial' for purposes of the Sherman Act."¹³⁰ The Association further argued that "[u]nrebutted survey evidence shows that the public values amateur college sports and that fewer consumers would watch, listen to, and attend college sports if athletes began to receive payments beyond those necessary to cover their college expenses."¹³¹ Judge Wilken's ruling in *O'Bannon* did not accept this idea, citing recent courts that have found that NCAA athletics are, at least to a degree, a commercial product.¹³² For now, courts have begun to challenge the NCAA's position that its Division I sports are purely amateur competitions that fall outside of the Sherman Act's definition of commerce. What is not clear, however, is whether this judicial skepticism will gather force with similar court rulings in pending actions.¹³³

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

1. Scope of Appropriate Labor Law

The fragmentation of U.S. labor law means that courts cannot possibly transform the landscape of college football by ordering all schools to bargain

127. Phila. World Hockey Club, Inc. v. Phila. Hockey Club, Inc., 351 F. Supp. 462, 518 (E.D. Pa. 1972).

128. Robertson v. Nat'l Basketball Ass'n, 389 F. Supp. 867 (S.D.N.Y. 1975).

129. Flood v. Kuhn (*Flood I*), 309 F. Supp. 793, 797 (S.D.N.Y. 1970).

130. Defendant NCAA's Post-Trial Brief, *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, No. 4:09-CV-3329-CW, 2014 WL 3854062 (N.D. Cal. July 8, 2014).

131. *Id.*

132. *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955, 988–89 (N.D. Cal. 2014) ("[T]ransactions between NCAA schools and student-athletes are, to some degree, commercial in nature, and therefore take place in a relevant market with respect to the Sherman Act." (quoting *Agnew II*, 683 F.3d at 341; *O'Bannon*, 7 F. Supp. 3d at 993 ("[A] court . . . recently rejected the NCAA's argument that a student-athlete would need to plead a market-wide impact on the price or output of any commercial product in order to state a valid Sherman Act claim" (citing *Rock v. Nat'l Collegiate Athletic Ass'n*, No. 1:2-CV-1019-JMS-DKL, 2013 WL 4479815, at *14 (S.D. Ind. Aug. 16, 2013))).

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

collectively with players. The National Labor Relations Act (“NLRA”) applies only to private-sector employment.¹³⁴ Since most football programs are at state universities,¹³⁵ the NLRA excludes them. The PAC-12 Conference, for example, has ten public universities.¹³⁶ Six PAC-12 public schools are located in states that have some form of public-sector collective bargaining.¹³⁷ However, the other four PAC-12 public schools are in states that do not have collective bargaining laws.¹³⁸ Two universities are private,¹³⁹ and are covered by the NLRA. Because other conferences are similarly situated, they are subject to the same legal fragmentation. Thus, courts are not in a position to rule broadly on unionization for college football.

134. The National Labor Relations Act is codified at 29 U.S.C. §§ 151–169 (2012). The statute defines “employee” as “any employee, . . . unless this subchapter explicitly states otherwise . . .” *Id.* § 152(3). The same section then excludes “any individual . . . or any individual employed by . . . any other person who is not an employer as herein defined.” *Id.* “Employer” excludes “any State or political subdivision thereof . . .” *Id.* § 152(2).

135. Michael H. LeRoy, *An Invisible Union for an Invisible Labor Market: College Football and the Union Substitution Effect*, 2012 WIS. L. REV. 1077, 1130–31, tbl.3.

136. The schools are: University of Arizona; Arizona State University; University of California, Berkeley; University of Colorado; University of Oregon; Oregon State University; University of California, Los Angeles; University of Utah; University of Washington; and Washington State University.

137. University of California, Berkeley and University of California, Los Angeles are located in the State of California, which has the following statutes: Meyers-Milias-Brown Act, CAL. GOV’T CODE §§ 3500–3511 (West 2012); Higher Education Employer-Employee Relations, CAL. GOV’T CODE §§ 3512–3511; CAL. GOV’T CODE § 3560. University of Oregon and Oregon State University are located in the State of Oregon, which has the following statute: Public Employee Collective Bargaining Act, OR. REV. STAT. ANN. §§ 243.650–243.782 (West 2012). University of Washington and Washington State University are located in the State of Washington, which has the following statutes: WASH. REV. CODE ANN. §§ 41.56.010–41.56.950 (West 2012); Educational Employment Relations Act, WASH. REV. CODE ANN. §§ 41.59.0001–41.59.950; and WASH. REV. CODE ANN. §§ 47.64.005–47.64.910 (West 2012).

138. University of Colorado is in the State of Colorado, which has an executive order authorizing partnership agreements with employees. *See* Colo. Exec. Order No. D 028 07, *Authorizing Partnership Agreements with State Employees* (Nov. 2, 2007), available at <http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheader=application/pdf&blobheadername1=Content-Disposition&blobheadername2=MDT-Type&blobheadervalue1=inline;+filename=101/997/D+028+07+%28Partnership+Agreements%29+2.pdf&blobheadervalue2=abinary;+charset=UTF-8&blobkey=id&blobtable=MungoBlobs&blobwhere=1234074249212&ssbinary=true>. However, this policy is not in a state statute that legalizes bargaining between a union and governmental employer. University of Arizona and Arizona State University are in the State of Arizona, which has no collective bargaining law. University of Utah is in the State of Utah, which has no public sector collective bargaining. *See* Park City Educ. Ass’n v. Bd. of Educ. of the Park City Sch. Dist., 879 P.2d 267, 272 (Utah Ct. App. 1994).

139. The schools are Stanford University and University of Southern California.

2. Classification of Students as Employees

While courts cannot order collective bargaining for college football, they will answer the critical, preliminary question, whether players are employees under § 152(3) of the NLRA.¹⁴⁰ In the near term, the unionization effort by Northwestern players could end with a court ruling that college football players are not employees. The regional director's decision, which favored the players, contradicts the NLRB's precedent in *Brown University*.¹⁴¹ Assuming, as experts believe, that an appeals court will eventually decide this issue,¹⁴² the regional director's analysis could face difficulty because its novel approach will then be in conflict with precedent. The regional director concentrated on the fact that Northwestern coaches expect students to treat football as a full-time job.¹⁴³ Also, the decision glossed over the fact that students signed contracts that subjected them to the NCAA rules on amateur competition.¹⁴⁴

On the other hand, the fact that the decision took a unique approach will not preclude a court from using more conventional doctrines to conclude that members of the Northwestern football team are employees under the NLRA.¹⁴⁵ The Federal Labor Standards Act ("FLSA")—the federal law that regulates minimum wage and overtime pay—could be useful in determining whether Northwestern players are employees.

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

FLSA's broad coverage extends to universities and colleges, whether private or public.¹⁴⁶ Apart from the internship regulation, the Department of Labor ("DOL") also regulates employment for all types of students, including full-time

140. See 29 U.S.C. §§ 151–169 (2012).

141. *Brown Univ. and Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW AFL-CIO*, 342 N.L.R.B. 483, 492 (2004). The regional director ruled that *Brown University* is inapposite because scholarship football players are not primarily students. *Nw. Univ. & Coll. Athletes Players Ass'n*, 2014 WL 1246914, at *16, 2014–15 NLRB Dec. P 15781 (2014).

142. *Next Steps in Northwestern University Case*, BUS. INSIDER, Mar. 31, 2014, at 38.

143. *Nw. Univ.*, 2014 WL 1246914, at *4–8 (detailing the demands on a player's time outside of classroom activities).

144. Compare *Nw. Univ.*, 2014 WL 1246914 (where a word search of the regional director's decision shows that he never used "amateur" or "bylaws"—words that are common in NCAA court cases), with *Agnew II*, 683 F.3d 328 (where the appellate court mentioned "bylaws" 43 times, and "amateur" or "amateurism" 23 times). The regional director referred to the "tender" letter that players sign, but in conclusory fashion he called this an "employment contract." *Nw. Univ.*, 2014 WL 1246914, at *13.

145. *Nw. Univ.*, 2014 WL 1246914, at *16 (superficially applying a common law definition of employee).

146. The Fair Labor Standards Act of 1938 is codified at 29 U.S.C. §§ 201–19 (2012). "Employer" is defined comprehensively as "any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency . . ." *Id.* § 203(d). A "person" is defined as "an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons." *Id.* § 203(a).

college students.¹⁴⁷ Coincidentally, the NCAA requires students to maintain full-time enrollment to be eligible to play.¹⁴⁸ The DOL's *Full-Time Student Program* permits universities to hire students under certificates allowing the employer to pay 85% of the minimum wage.¹⁴⁹ These certificates also limit employment of a student to 8 hours per day, and 20 hours per week while school is in session.¹⁵⁰

No school is known to apply this regulation to football players. However, the point 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, these students reported spending an average of 43 hours per week during the football season,¹⁵¹ and spending 38 hours per week on academic activities.¹⁵² A court could apply this type of analysis to conclude that Northwestern students who play college football are also employees.

b. The Department of Labor's Unpaid Internship Regulation

The FLSA is potentially relevant to college football in a different respect as well. The DOL's determination that some unpaid internships for college students violate the law's requirement of minimum pay has been cited by recent courts in denying motions to dismiss lawsuits filed by interns.¹⁵³ Using the following six-factor test, the DOL regulates unpaid internships for college students who render service to for-profit employers.¹⁵⁴

147. See *Full-Time Student Program*, DOL.GOV, <http://www.dol.gov/elaws/esa/flsa/docs/ftsplink.asp> (last visited Mar. 10, 2015).

148. NCAA DIVISION I MANUAL, *supra* note 4, at art. 14.01.2.

149. *Full-Time Student Program*, *supra* note 147.

150. *Id.*

151. See EXAMINING THE STUDENT ATHLETE EXPERIENCE THROUGH THE NCAA GOALS AND SCORE STUDIES, at 17–18 (Jan. 13., 2011), <http://www.ncaa.org/sites/default/files/%E2%80%A2Examining%20the%20Student-Athlete%20Experience%20Through%20the%20NCAA%20GOALS%20and%20SCORE%20Studies.pdf>.

152. *Id.* at 18.

153. *Wolfe v. AGV Sports Group, Inc.*, No. CCB-14-1601, 2014 WL 5595295, at *5 (D. Md. Nov. 3, 2014) (denying motion to dismiss by putative employer). The court cited the Department of Labor's guidance on unpaid interns, but decided, on different grounds, to deny AGV's motion to dismiss the student's lawsuit. *Id.* at *2–3. See also *Glatt v. Fox Searchlight Pictures, Inc.*, 293 F.R.D. 516 (S.D.N.Y. 2013) (granting summary judgment motion of unpaid interns that they were “employees” under federal and state wage and hour laws).

154. *Fact Sheet #71: Internship Programs Under The Fair Labor Standards Act*, DOL.GOV (Apr. 2010), <http://www.dol.gov/whd/regs/compliance/whdfs71.htm> (explaining that the FLSA defines “employ” very broadly as to “suffer or permit to work”). Individuals who work must be compensated for services they perform. *Id.* Internships with “for-profit” entities are viewed as employment, unless the test for a trainee is met. *Id.* Interns who qualify as employees rather than trainees must be paid at least the minimum wage and overtime for more than 40 hours in a work week. *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.¹⁵⁵

As a threshold matter, the NCAA will likely argue that this regulation does not apply to Division I football players because member schools are non-profit institutions. In addition, the NCAA is likely to dispute that they employ football players. However, a court could find that there is no practical difference between “for-profit” entities under this FLSA regulation and major football programs, given the immense commercialization of NCAA football and ability of programs to generate surplus revenue.¹⁵⁶

The NCAA will also be expected to contend that the FLSA’s internship regulation does not apply to educational programs where academic credit is blended with putative work.¹⁵⁷ By integrating academic standards with eligibility to play football, the NCAA could be expected to argue that players cannot compete on the field unless they first meet academic prerequisites. But college football does not generate academic credit for students. A court could find that this distinction strengthens the case for characterizing college football as employment that qualifies for minimum wages and overtime under the FLSA.

Turning now to the six factors, most—but not all—of the factors would count against finding that Division I football players are employees. But this is not an open-and-shut case. Factor four, requiring that the putative employer derives no immediate advantage from the activities of the intern would be the most problematic element for Division I football schools because of the revenue and reputational benefits that inure to these institutions.¹⁵⁸ In addition, the first DOL factor would count against schools because Division I stadiums and football training facilities are not used for academic instruction.¹⁵⁹ And the second factor—

155. *Id.*

156. Barrett, *supra* note 45.

157. *Fact Sheet #71: Internship Programs Under The Fair Labor Standards Act*, *supra* note 154.

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

159. Anne Zimmerman & Leslie Scism, *Boone Calls the Plays as Largess Complicates Life at Alma Mater*, WALL ST. J. WEEKEND, July 7–8, 2012, at A1, A10 (T. Boone Pickens donated \$165 million to Oklahoma State University; Ralph Englestad donated \$104 million to the University of North Dakota; Phil Knight donated \$100 million to the University of Oregon; and John Hammonds donated \$32.5 million to Missouri State University for sports programs).

the internship experience is for the benefit of the intern—is true for students, but could be outweighed by the business benefits that college football brings to the academic enterprise of universities.¹⁶⁰

The DOL elaborates on the internship exemption in a way that suggests the possibility for this analysis 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.”¹⁶¹ More specific language could be read to imply that college football is a compensable activity: “In general, the more an internship program is structured around a classroom or academic experience as opposed to the employer’s actual operations, the more likely the internship will be viewed as an extension of the individual’s educational experience.”¹⁶² Again, the DOL asks whether an “internship program . . . provides educational credit.”¹⁶³ The fact that football does not count for academic credit makes the activity more like employment.¹⁶⁴

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

C. Judicial Reluctance to Enjoin a “Labor Dispute” under the Norris–LaGuardia Act Could Shelter Boycotts and Pickets

Whatever the outcome of *Northwestern University*, it will not be the final labor-law issue in college football. Suppose the Supreme Court rules that the Northwestern University players are employees under the NLRA.¹⁶⁵ This landmark

160. Pope & Pope, *supra* note 158, at 751 (“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.”).

161. *Fact Sheet #71: Internship Programs Under The Fair Labor Standards Act*, *supra* note 154.

162. *Id.*

163. *Id.*

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

165. The NCAA President believes the matter will ultimately be decided by the Supreme Court. See Dan Hart & Dex McLuskey, *NCAA Says Northwestern Union Case Will Wind Up in Supreme Court*, BLOOMBERG (Mar. 30, 2014, 9:48 PM), <http://www.bloomberg.com/news/2014-03-30/ncaa-says-northwestern-union-case-will-wind-up-in-supreme-court.html>.

ruling would not necessarily lead to collective bargaining. For example, on April 25, 2014 the vote might show that less than a majority of players favor union representation. A year later, the votes have not yet been counted, awaiting resolution of the question whether college players are employees. What is known is that Northwestern's new quarterback has denounced the union.¹⁶⁶ A "no" vote would push back this organizing effort for at least one year, due to an election bar in the NLRA,¹⁶⁷ or end it completely if the vote discourages organizers.

Even if players voted for a union, they would face obstacles in securing a labor agreement.¹⁶⁸ Northwestern would be required to bargain over wages, hours, and terms and conditions of employment.¹⁶⁹ The university could bargain so slowly that players could become frustrated and petition the National Labor Relations Board ("NLRB") to decertify their union.¹⁷⁰ Or, the school might reach an agreement that is modeled after the expanded-benefits model that the NCAA is currently planning.¹⁷¹ In another scenario, the school could engage in hard bargaining by offering players less than the NCAA model of expanded benefits.¹⁷² More alarmingly, Northwestern students could find themselves without a conference in which to play games.¹⁷³

No particular outcome can be predicted with confidence. These possibilities do suggest, however, that the outcome of the NLRB representation election will trigger new legal controversies and issues for courts. This cascading

166. Eric Olson, *Northwestern QB says union push was rushed, wrong*, YAHOO! SPORTS (Apr. 9, 2014, 6:01 PM), <http://sports.yahoo.com/news/northwestern-qb-criticizes-colter-over-171204516--ncaaf.html>.

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

168. For a remarkable testimonial to the early challenges of running the newly formed players union in baseball, see Marvin Miller, *Remarks: Reflections on Baseball and the MLBPA*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 352 (2013). No one can say how little or much the bargaining experiences between pro and college athletes would compare. Miller's account illustrates, however, how newly unionized employees learn about collective bargaining, and figure out how to apply this institution to their circumstances. See *id.*

169. 29 U.S.C. § 158(d) (2012) (employer and labor organization must bargain with each other in good faith with respect to wages, hours, and terms and conditions of employment).

170. For a comparable situation, see Mark Burnett Prods. & Stephen R. Frederick, *Petitioner & Int'l Alliance of Stage Emps.*, 349 N.L.R.B. 706 (2007).

171. See Steve Eder, *N.C.A.A. Planning to Address Benefits for Some of Its Players, Officials Say*, N.Y. TIMES, Apr. 7, 2014, at D4.

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

173. AP, *Jim Delany Takes Stand at Trial*, ESPN COLLEGE SPORTS (June 20, 2014, 9:48 PM), http://espn.go.com/college-sports/story/_/id/11113811/big-ten-commissioner-jim-delany-takes-stand-ed-obannon-trial. The Big Ten Commissioner doubted that most schools would agree to pay players. *Id.* Consequently, if some paid their students, they likely would be expelled from the conference because the employment model would upset the competitive balance among schools. *Id.*

effect is suggested by the labor movement's past and present use of economic-pressure tactics that are used *outside* the NLRA's processes.¹⁷⁴ The main tools that labor unions use today are short walkouts by employees, public rallies, picketing to discourage the public from purchasing a product or service, mixing political and organizing campaigns, and personalizing labor disputes by staging protests near company headquarters or homes of executives.¹⁷⁵

The following discussion suggests various ways that students and unions could adapt these tactics to advance their goal of pay-for-play. The purpose in this is not to guess whether a tactic would be successful or even used. Whatever the tactic, it will force a court to consider the concept of athletic labor in college sports. A court might start its analysis by grappling with the definition of a "labor dispute" under the NLGA.¹⁷⁶

The NLGA forbids federal courts from issuing injunctions or asserting jurisdiction in labor disputes.¹⁷⁷ The NLGA has a long connection to antitrust

174. After the United Auto Workers lost a union representation election at a Tennessee Volkswagen plant, the union allied with a German auto union to pressure the car company to recognize the American union. This tactic succeeded. *See* Christina Ramsey & Mike Rodgers, *Volkswagen Paves Way For Unions at U.S. Factory*, WALL ST. J. (Nov. 12, 2014, 12:15 PM), <http://www.wsj.com/articles/volkswagen-policy-change-at-tennessee-plant-paves-way-for-union-1415799090>.

175. *See generally* Craig Becker, "Better Than a Strike": *Protecting New Forms of Collective Work Stoppages under the National Labor Relations Act*, 61 U. CHI. L. REV. 351 (1994); Scott L. Cummings, *Hemmed In: Legal Mobilization in the Los Angeles Anti-Sweatshop Movement*, 30 BERKELEY J. EMP. & LAB. L. 1 (2009). These tactics are described more specifically in Charlotte Garden, *Labor Values Are First Amendment Values: Why Union Comprehensive Campaigns Are Protected Speech*, 79 FORDHAM L. REV. 2617, 2621–23 (2011); Kati L. Griffith, *The NLRA Defamation Defense: Doomed Dinosaur or Diamond in the Rough?* 59 AM. U. L. REV. 1, 32–37 (2009); Rachael M. Simon, Comment, *Workers on the March: Work Stoppages, Public Rallies, and the National Labor Relations Act*, 56 CATH. U. L. REV. 1273, 1274–75 (2007); Allison M. Woodall, Practice Resource, *Union Organizing in Assisted Living*, 1 J. HEALTH & LIFE SCI. L. 163 (2008).

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

177. The Norris-LaGuardia Act states that "[n]o court of the United States shall have jurisdiction to issue any restraining order" involving these acts:

- (a) Ceasing or refusing to perform any work or to remain in any relation of employment;
- (b) Becoming or remaining a member of any labor organization or of any employer organization . . . ;
- (c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;
- (d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;
- (e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;
- (f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

law.¹⁷⁸ This anti-injunction law came about after Congress grew frustrated with so many courts using antitrust law to meddle in labor disputes on the side of employers. The original intent behind antitrust law¹⁷⁹ was to combat anticompetitive business practices.¹⁸⁰ When industrial employers challenged union practices such as strikes and boycotts under antitrust law,¹⁸¹ Congress believed that judges misapplied the law by enjoining these activities.¹⁸² To shield labor unions

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified,

29 U.S.C. § 104 (2012).

178. Ralph K. Winter, *Labor Injunctions and Judge-Made Labor Law: The Contemporary Role of Norris-LaGuardia*, 70 YALE L.J. 70, 87–88 (1960) (describing conflicts between Norris-LaGuardia and Sherman Act).

179. Clayton Act, c. 323, 38 Stat. 730 (1914) (codified as amended at 15 U.S.C. §§ 12–37 (2012)). The law amended the Sherman Antitrust Act, 15 U.S.C. § 1 (2012), providing that “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.” Clayton Act, c. 323, 38 Stat. 730.

180. See FELIX FRANKFURTER & NATHAN GREENE, *THE LABOR INJUNCTION* (1930) (explaining how courts misused injunctions under antitrust law to undercut lawful union activities). To make their point about judicial bias, Frankfurter and Greene explained that businesses often contrived a way to obtain federal diversity jurisdiction in their pursuit of a so-called labor injunction. *Id.* at 13–14. They observed: “A device of modest beginnings, the injunction assumed new and vast significance in a national economy in which effective organization and collective action had attained progressive mastery.” *Id.* at 24; see also William Draper Lewis, *Strikes and Courts of Equity*, 46 AM. L. REG. (37 N.S.) 1, 2 (1898), available at http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=5571&context=penn_law_review (“The courts still say that these injunctions are not criminal, yet the language of the opinions indicates very clearly their essentially criminal nature.”). F.J. Stimson condemned contempt proceedings because they ignored “the criminal law and its safeguards of indictment, proof by witnesses, jury trial, and a fixed and uniform punishment.” F.J. Stimson, *The Modern Use of Injunctions*, 10 POL. SCI. Q. 189, 192 (1895). A particularly severe critique appears in Charles Claflin Allen, *Injunction and Organized Labor*, 28 AM. L. REV. 828, 847 (1895) (observing that “(i)njunction writs have covered the sides of cars, deputy marshals have patrolled the yards of railway termini, and chancery process has been executed by bullets and bayonets”).

181. See the widely cited *Vegeahn v. Guntner*, 44 N.E. 1077 (Mass. 1896), where an employer successfully sued to enjoin strikers from picketing. Other examples in the period include: *Casey v. Cincinnati Typographical Union No. 3*, 45 F. 135 (S.D. Ohio 1891); *United States v. Workingmen’s Amalgamated Council of New Orleans*, 54 F. 994 (E.D. La. 1893); *Toledo, Ann Arbor & N. Mich. Ry. Co. v. Pa. Co.*, 54 F. 730 (N.D. Ohio 1893); *Farmers’ Loan & Trust Co. v. N. Pac. R.R. Co.*, 60 F. 803 (E.D. Wis. 1894); *United States v. Debs*, 64 F. 724 (N.D. Ill. 1894); *Thomas v. Cincinnati, New Orleans & Tex. Pac. Ry. Co.*, 62 F. 803 (S.D. Ohio 1894); *Pope Motor Car Co. v. Keegan*, 150 F. 148 (N.D. Ohio 1906); *Goldfield Consol. Mines Co. v. Goldfield Miners’ Union No. 220*, 159 F. 500 (D. Nev. 1908); *Kolley v. Robinson*, 187 F. 415 (8th Cir. 1911).

182. Robert H. Jerry, II & Donald E. Knebel, *Antitrust and Employer Restraints in Labor Markets*, 6 INDUS. REL. L.J. 173, 195 (1984). Sen. Jones said, “[l]et the Sherman

from antitrust actions, Congress placed a labor exemption in the Clayton Act.¹⁸³ But federal courts continued to order injunctions in labor disputes.¹⁸⁴ Thus, the NLGA was passed to keep courts out of these controversies by explicitly stripping their jurisdiction to handle such suits.¹⁸⁵ To accomplish this purpose, the NLGA broadly defined a labor dispute as “any controversy concerning terms or conditions of employment.”¹⁸⁶

Currently, students are using antitrust lawsuits to pressure the NCAA to make fundamental reforms.¹⁸⁷ The question is whether a union’s orchestration of pressure against the NCAA or a member school to further its goal of pay for students would be considered a labor dispute. A well-timed strike—for example, during a nationally televised football game—would put pressure on the NCAA by interfering with its television contracts and attracting critical publicity. In the early years of the NBA players union, players that were participating in the NBA All-Star Game threatened to strike if their demands for increased pension benefits were not met; however, their protest was averted just before tip-off when their main demand was met.¹⁸⁸ For the moment, CAPA has said, “We have never advocated for a strike and *are not advocating for one now*.”¹⁸⁹ By its terms, however, this statement only temporarily renounces a strike.

law affect trade and commerce and those who deal in and with trade and commerce as it, in fact, was intended when it was passed. Take labor and labor organizations out from under the law entirely, and let us formulate a statute governing labor and its organizations . . .” *Id.* at 195 n.84 (quoting 51 CONG. REC. 13,979–80 (1914)).

183. 15 U.S.C. § 17 (2012) (“(t)hat the labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor . . . organizations, instituted for the purpose of mutual help . . . nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.”).

184. FRANKFURTER & GREENE, *supra* note 180.

185. *See* 29 U.S.C. § 101 (2012).

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

187. *See, e.g., Rock v. Nat’l Collegiate Athletic Ass’n*, No. 1:2-CV-1019-JMS-DKL, 2013 WL 4479815 (S.D. Ind. Aug. 16, 2013); Complaint, *Jenkins v. Nat’l Collegiate Athletic Ass’n*, No. 3:14CV01678, 2014 WL 1008526 (D.N.J. March 17, 2014); *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 7 F. Supp. 3d 955 (N.D. Cal. 2014); Complaint, *Gregory-McGhee v. Nat’l Collegiate Athletic Ass’n*, No. 3:14CV01777, 2014 WL 1509247 (N.D. Cal. Apr. 17, 2014).

188. Alexandra Baumann, *Play Ball: What Can Be Done to Prevent Strikes and Lockouts in Professional Sports and Keep the Stadium Lights On*, 32 J. NAT’L ASS’N ADMIN. L. JUDICIARY 251, 271 n.12 (2012) (strike was averted when owners agreed to pay players a pension). The players threatened another strike three years later and won a limit of 82 games per season and other concessions from the NBA. *Id.*

189. *FAQS*, CAPA COLL. ATHLETES PLAYERS ASS’N, <http://www.collegeathletespa.org/faq> (last visited Mar. 11, 2015) (emphasis added).

Looking to the future, suppose that the unionization effort falls short, and that antitrust lawsuits drag on while player unrest grows. In theory, and perhaps in practice, some student athletes could stage protests to further their overall goal of securing a bigger piece of the college football revenue pie. As I explain below in several hypothetical scenarios, the NCAA or a member school would have little chance to enjoin these actions—boycotts and strikes—in federal court. This is because the NLGA broadly prohibits injunctions involving labor disputes.¹⁹⁰

In the following hypothetical scenarios, the NCAA would argue that these tactics are not part of a labor dispute in a petition for a federal court injunction. They would emphasize that *students* participated in these boycotts and other protests. Conversely, the football players would characterize the controversy as a labor dispute within the reach of the NLGA because they were disputing their lack of appropriate compensation.

Scenario 1: Instead of striking for union recognition, suppose a team refused to play a game following a paralyzing injury to a teammate. While rare, these injuries have occurred in college football.¹⁹¹ Because football players are not employees, they fall outside of worker's compensation coverage.¹⁹² A strike over such an injury would cause a court to consider whether this walkout could be enjoined under a narrow exception to the NLGA to use arbitration as a strike-substitute for resolving a dispute.¹⁹³ This exception would not apply because students have no labor agreement with an arbitration clause. Thus, this walkout could not be enjoined.

Scenario 2: Suppose that a team wore athletic shoes supplied by their union in violation of their school's exclusive contract with a footwear sponsor.¹⁹⁴ A university would seek a court order to enjoin this boycott. Given that the NLGA

190. For an overview of Norris—LaGuardia, see Michael C. Duff, *Labor Injunctions in Bankruptcy: The Norris-LaGuardia Firewall*, 2009 MICH. ST. L. REV. 669–70 (explaining that federal courts cannot enjoin private sector employees from peacefully striking, picketing, or leafleting in connection with labor disputes); see also *Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers v. Pauly Jail Bldg. Co.*, 118 F.2d 615, 617 (8th Cir. 1941) (explaining that injunctions issued during a labor dispute generally tips the scale in the controversy).

191. Mark Viera, *Rutgers Player Is Paralyzed Below the Neck*, N.Y. TIMES, Oct. 17, 2010, at D1.

192. *Rensing v. Ind. State Univ. Bd. of Trs.*, 444 N.E.2d 1170 (Ind. 1983),

193. When coal miners walked off the job to protest unsafe conditions, they contended that their work stoppage was protected under a safety provision in § 502 of the NLRA. See *Gateway Coal Co. v. United Mine Workers of Am.*, 414 U.S. 368, 372 (1974). The law provides that the quitting of labor by employees in good faith because of abnormally dangerous conditions for work shall not be deemed a strike. *Id.* at 385–86. The Supreme Court ruled that the safety issue they were protesting was meant for arbitration, a procedure to which the union and employer agreed in their contract. *Id.* 386–87. Thus, the dispute presented an exception to the Norris—LaGuardia limitation on injunctions. *Id.* at 387.

194. Darren Rovell, *Under Armour Signs Notre Dame*, ESPN (Jan. 21, 2014, 3:06 PM), http://espn.go.com/college-football/story/_/id/10328133/notre-dame-fighting-irish-armour-agree-most-valuable-apparel-contract-ncaa-history (school and sportswear company signed agreement worth \$90 million).

broadly applies to disputes that include non-labor groups,¹⁹⁵ the fact that students were not union members would be irrelevant. A federal court would likely dismiss the school's petition.¹⁹⁶

Scenario 3: Suppose that players taped over a sponsor's official uniform logo to protest that they are not paid for wearing sports gear that generates revenue for their university. Further suppose that a union announced a consumer boycott of the sportswear company. This would involve a boycott of a secondary target: the school's business partner.¹⁹⁷ A court would likely conclude this is a labor dispute under the NLGA—because the goal would be pay for alleged employees—and the protest *and* boycott would be immune from an injunction.¹⁹⁸

Scenario 4: Suppose that a union lobbied state lawmakers to withhold or reduce funding for a public university until that school's football program bargained with the player's union.¹⁹⁹ An injunction to stop this type of political campaign would be unlikely.²⁰⁰

195. In *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552, 555 (1938), a company sought to enjoin picketing and boycotting conducted by the New Negro Alliance, a civil rights group. The Alliance used these tactics to pressure a grocery store to hire African Americans. *Id.* at 555–56. The company persuaded a federal district court and appeals court that these actions were a restraint of trade; and because New Alliance was not a labor union, it was outside the reach of Norris–LaGuardia. *Id.* at 559–61. The Supreme Court reversed, reasoning that the boycott was a labor dispute even though it did not involve a union. *Id.* at 562–63.

196. See *Smith's Mgmt. Corp. v. Int'l Bhd. of Elec. Workers, Local Union No. 357*, 737 F.2d 788 (9th Cir. 1984) (ruling that a boycott of a secondary party (not the actual employer) would not be excluded from Norris–LaGuardia).

197. The possibility of such a protest is suggested by a provocative “hands-up” protest by St. Louis Rams football players in support of the unarmed black teenager in Ferguson, Missouri who was killed by a police officer. See *Rams' 'Hands Up, Don't Shoot' gesture condemned by St. Louis cops*, CBC SPORTS (Dec. 1, 2014, 10:48 AM), <http://www.cbc.ca/sports/football/nfl/rams-hands-up-don-t-shoot-gesture-condemned-by-st-louis-cops-1.2855964>. As for the possibility of a labor protest by NCAA football players, the NLGA does not allow courts to enjoin a union's involvement of an employer's customers in a secondary boycott. See *Wilson & Co. v. Birl*, 105 F.2d 948 (3d Cir. 1939).

198. See *Burlington N. R.R. Co. v. Bhd. of Maint. of Way Emps.*, 481 U.S. 429 (1987) (holding unanimously that the Norris–LaGuardia Act forbids injunctive relief against a secondary boycott). The Court recalled that Congress defined “labor dispute” broadly because “it believed previous measures looking toward the same policy against non-judicial intervention in labor disputes had been given unduly limited constructions by the Courts.” *Id.* at 441. The Court concluded: “[W]e refuse to narrow the definition of ‘labor dispute’ under § 13(c) to exclude those battles involving secondary activity.” *Id.* at 442.

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

Scenario 5: Suppose supporters from the labor movement engaged in informational picketing of a meeting for the university's board of trustees, or picketed near the home of a highly paid football coach.²⁰¹ As long as these activities were peaceful and did not pose a public safety threat, a federal court would not enjoin them.²⁰² Even if the protest distorted the facts surrounding the dispute, it would be immune from an NLGA injunction.²⁰³

In sum, the NCAA and its members face several types of labor issues. Their most immediate concern is the possibility that they would be legally obligated to bargain with student-employees who play football. In a direct and immediate sense, this problem is more of a concern for Northwestern than other schools because it is the putative employer in the current NLRB case. However, at some point a union is likely to broaden its campaign to schools with powerhouse football programs. Picketing, boycotts, and political protests—common tools of union pressure—pose a threat to NCAA interests, especially if they enmesh neutral

“The language of the Norris–LaGuardia Act does not except labor disputes having their genesis in political protests.” *Id.* at 711.

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

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

202. Union supporters may publicize a labor controversy by walking in streets and sidewalks with banners and signs, and this publicity may request the public to boycott the organization involved in a labor dispute. *See* Donnelly Garment Co. v. Dubinsky, 154 F.2d 38 (8th Cir. 1946) (dismissing a petition to enjoin informational picketing). Section 4(e) of the NLGA reflects congressional intent to allow publicity of a labor controversy in public places with banners and signs, and appeals to boycott products involved in a labor dispute. *Id.* at 45. More recently, an employer sought to enjoin picketing of an executive’s neighborhood and residence in *Dunbar v. United Union of Roofers*, No. 98-CV-682A(S), 1998 WL 35172049 (W.D.N.Y. Nov. 13, 1998). The case contains a detailed description of the specific instructions that the union gave to supporters to keep its march peaceful and law-abiding (e.g., picket peacefully; stay on sidewalks; do not step on private property; do not block driveways; limit loud chanting; focus on the content—not volume—of the union’s message; refrain from abusive or threatening language; do not litter; obey police; do not impede sidewalk traffic; and walk away from people who try to argue). *Id.*

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

parties such as corporate sponsors and donors. My analysis suggests that the NLGA would shelter most of these actions from an injunction. This would expose the NCAA to intense pressure that would induce significant concessions. The immediate possibilities are greater stipends to cover the full cost of attending college, greater transfer mobility, disability and long-term healthcare coverage related to athletic injuries, and some form of deferred compensation arising out of revenues generated during a player's status.

IV. IMPLICATIONS AND CONCLUSIONS: THE FUTURE OF “ATHLETIC LABOR” IN COLLEGE SPORTS

This empirical research opens a unique window for viewing and forecasting the course of athletic labor in college sports. Student lawsuits now talk about “labor,”²⁰⁴ and the timing suggests that this development is the result of the *Northwestern University* court's use of the term “athletic labor.” These recent developments do not mean, however, that a court would order the NCAA to alter its definition of amateur athletics.

Venue is usually the difference between winning and losing, according to Finding H.²⁰⁵ Even if students can defeat a motion to remove an action from a student-friendly state court to federal court—where the NCAA usually wins cases—these plaintiffs are unlikely to find a court that will strike down the NCAA's amateur-competition principle. This is because, without enabling legislation that regulates this private association, courts are not authorized to surgically snip the amateur competition clause in NCAA bylaws for football, and leave that principle intact for non-revenue sports. This implies that landmark antitrust cases that modified the reserve clause in basketball,²⁰⁶ hockey,²⁰⁷ and football²⁰⁸ have little relevance to NCAA football; Finding L, which shows that most NCAA court cases do not cite a single precedent from professional sports, supports this conclusion. In sum, while there are comparisons between professional and college football, the NCAA's educational component diminishes the precedential value of cases involving professional sports organizations.

204. Complaint at para. 67, *Gregory-McGhee v. Nat'l Collegiate Athletic Ass'n*, No. 3:14CV01777, 2014 WL 1509247 (N.D. Cal. Apr. 17, 2014) (alleging “[t]he relevant market is the nationwide market for the labor of NCAA Division I college football players. In this labor market, current and prospective college students compete for roster spots on Division I football teams”); see also *Rock v. Nat'l Collegiate Athletic Ass'n*, No. 1:2-CV-1019-JMS-DKL, 2013 WL 4479815, at *3 (S.D. Ind. Aug. 16, 2013) (alleging “[t]he relevant market is the nationwide market for the labor of Division I football student athletes. In this labor market, student athletes compete for spots on Division I football athletic teams of NCAA member institutions, and NCAA member institutions compete for the best Division I collegiate student athletes by paying in-kind benefits, namely, Division I football scholarships, academic programs, access to training facilities, and instruction from premier coaches”).

205. See *supra* Chart 5.

206. *Robertson v. Nat'l Basketball Ass'n*, 389 F. Supp. 867 (S.D.N.Y. 1975).

207. *Phila. World Hockey Club, Inc. v. Phila. Hockey Club, Inc.*, 351 F. Supp. 462 (E.D. Pa. 1972).

208. *White v. Nat'l Football League*, 822 F. Supp. 1389 (D. Minn. 1993).

Even with a district court ruling in favor of students in *O'Bannon*, the effect is quite unsettling—and potentially far-reaching. If the monetary remedy in *O'Bannon* proves too costly for schools, this might hurt women's sports that depend on men's football for financial support.²⁰⁹ Finding B, which shows that football cases comprise less than half of the NCAA's litigation, suggests that courts cannot implement new compensation policies for college football without repercussions for other NCAA sports. Like football, Division I basketball is also heavily commercialized—and interesting to note, the lead plaintiff in *O'Bannon* is a former basketball player, not a football star. The fact that *O'Bannon* applies alike to football and basketball players means that reforms for football would probably apply to basketball and any other sports that generate revenues that exceed costs.²¹⁰ Nonrevenue sports are potentially affected by *O'Bannon*, too. If the Sherman Act applies to NCAA Bylaws that limit player eligibility for professional sports, does the *O'Bannon* ruling impair regulations in nonrevenue sports? NCAA baseball and hockey are such sports. Nonetheless, they provide important labor pools for MLB and the NHL. Does *O'Bannon* mean that a court may enjoin NCAA rules that make baseball players ineligible if they compete in the minor leagues during summer, when school is not in session? Is an NCAA rule that disqualifies a hockey player who has been paid in a semi-professional league immune from an injunction, now that *O'Bannon* has applied the Sherman Act to benefit football and basketball players?

Apart from antitrust cases, some administrative and court decisions will likely rule or imply that college football players are employees, or rule that they participate in a labor market. Indeed, one should expect the NLRB to affirm the regional director's ruling in *Northwestern University*.²¹¹ These rulings are likely to increase pressure on the NCAA to reform its policies.²¹²

209. Brief for Amici Curiae Members of the U.S. Senate Comm. of Health, Educ., Labor & Pensions, and the U.S. House of Representatives Comm. on Educ. & the Workforce at 24–25, Nw. Univ. Empl'r & College Athletes Players Ass'n (CAPA) Petitioner, No. 13-RC-121359, 2014 WL 165118 (N.L.R.B. Apr. 24, 2014), available at http://edworkforce.house.gov/uploadedfiles/ncaa_amicus.pdf (“Because revenue from some sports helps fund others, more ‘compensation’ for football players may lead those schools to eliminate other non-revenue athletic teams or other programs.”). In *O'Bannon v. National Collegiate Athletic Ass'n*, the court capped its financial remedy at \$5,000 per player and also made payment of the penalty prospective in nature—thereby allowing some time for colleges to budget for this cost. 7 F. Supp. 3d 955, 1008 (N.D. Cal. 2014) (“The injunction will not be stayed pending any appeal of this order but will not take effect until the start of next FBS football and Division I basketball recruiting cycle.”).

210. *O'Bannon*, 7 F. Supp. 3d at 1007 (injunction applies to schools that participate in Division I football and basketball).

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

212. There is already evidence of this trend. See Jon Solomon, *NCAA releases football hitting and concussion safety guidelines*, CBS SPORTS (July 7, 2014, 2:01 PM),

While students win nearly 50% of the first-round rulings, according to Finding F, they also lose about 70% of second-round appeals, and another 70% of third-round appeals. This empirical fact puts the students' win before the NLRB regional director in a sobering light. Relatedly, other research shows that federal courts do not always defer to the NLRB.²¹³

Moreover, the NCAA—like other large and powerful defendants—is likely to force students and their contingency-fee attorneys to engage in costly litigation. Besides maximizing its chance of winning, the NCAA could weaken the resolve of students, or at least soften them up for settlement. The Association has already shown that it can weather the storm—and expense—of consent litigation by spending more than a decade in court to vindicate its position.²¹⁴ And like MLB in *Gardella v. Chandler*,²¹⁵ the NCAA is able to settle a case that might set a crippling precedent.²¹⁶

Nonetheless, the concept of “athletic labor” marks a turning point in favor of students. It will likely advance the cause of students to seek pay and other enhancements in exchange for participating in college football. Already, the regional director's ruling in *Northwestern University* has accelerated NCAA efforts to share more wealth with students.²¹⁷ Certainly, the facts support classifying college football players as employees; however, the law supports the NCAA's amateur-athlete model. Thus, while schools profit off the sweat of college football players, a federal appeals court is unlikely to view this commercial reality as legal justification to alter the NCAA's amateurism model. But the forecast for occasional first-round victories by students—based on empirical

<http://www.cbssports.com/collegefootball/writer/jon-solomon/24610143/ncaa-releases-football-hitting-and-concussion-safety-guidelines>.

213. James J. Brudney, *A Famous Victory: Collective Bargaining Protections and the Statutory Aging Process*, 74 N.C. L. REV. 939, 988 (1996). For an example of judicial hostility to the Board's orders under § 9 of the NLRA—the section that is the basis for the ruling in the *Northwestern University* case—Brudney concluded: “The D.C. Circuit took the lead, rebuking the Board on several occasions for failing to balance competing interests and to explain clearly its reasons for requiring bargaining over an extended period of time. Several other circuits have refused to enforce [NLRB] . . . bargaining orders, . . .” *Id.* at 1012.

214. The NCAA's endurance is underscored by *National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179 (1988). The association proposed sanctions in 1977 against a successful basketball coach, and continued to litigate the matter before the Supreme Court in 1988.

215. *Gardella v. Chandler*, 172 F.2d 402, 408 (2d Cir. 1949).

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

217. Jerry Hinnen, *PAC-12 Presidents Send Letter Asking Other Leagues to Back Reforms*, CBS SPORTS (May 20, 2014, 8:39 PM), <http://www.cbssports.com/collegefootball/eye-on-college-football/24568341/pac-12-presidents-send-letter-asking-other-leagues-to-back-reforms> (proposal includes ensuring that scholarships cover the full cost of attendance, improved medical care for injured athletes, and guaranteed scholarships for students who remain in good academic standing).

findings in this study—means that the NCAA will be pressured to adopt a radically new model of amateurism that mimics the employment relationship.

APPENDIX: ROSTER OF CASES

This Appendix lists cases in the database that were used for the study. The sample had 46 cases involving students and the NCAA. Many had two or three courts issue a ruling. These federal and state cases are listed below. In each case, Westlaw's "Table of Authorities" was checked for a citation to a professional sports decision. Eleven NCAA cases cited such a precedent, and are noted parenthetically below.

Federal Court Decisions Organized by "Case" in the Database

1. *Agnew v. Nat'l Collegiate Athletic Ass'n (Agnew I)*, No. 1:11-CV-0293-JMS-MJD, 2011 WL 3878200 (S.D. Ind. Sept. 1, 2011) (citing *Am. Needle, Inc. v. Nat'l Football League*, 130 S. Ct. 2201 (2010); *Chi. Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 961 F.2d 667 (7th Cir. 1992)); *Agnew v. Nat'l Collegiate Athletic Ass'n (Agnew II)*, 683 F.3d 328 (7th Cir. 2012) (citing *Am. Needle*, 130 S. Ct. at 2201; *Chi. Prof'l Sports*, 961 F.2d at 667).
2. *Arlosoroff v. Nat'l Collegiate Athletics Ass'n*, 746 F.2d 1019 (4th Cir. 1984).
3. *Associated Students, Inc. of Cal. State Univ.—Sacramento v. Nat'l Collegiate Athletic Ass'n*, 493 F.2d 1251 (9th Cir. 1974).
4. *Banks v. Nat'l Collegiate Athletics Ass'n (Banks I)*, 746 F. Supp. 850 (N.D. Ind. 1990); *Banks v. Nat'l Collegiate Athletics Ass'n (Banks II)*, 977 F.2d 1081 (7th Cir. 1992) (citing *Radovich v. Nat'l Football League*, 352 U.S. 445 (1957); *Chi. Prof'l Sports*, 961 F.2d at 667).
5. *Bowers v. Nat'l Collegiate Athletics Ass'n (Bowers I)*, 974 F. Supp. 459 (D.N.J. 1997); *Bowers v. Nat'l Collegiate Athletics Ass'n (Bowers XI)*, 475 F.3d 524 (3d Cir. 2007) (citing *Nat'l Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639 (1976)).
6. *Buckton v. Nat'l Collegiate Athletic Ass'n*, 366 F. Supp. 1152 (D. Mass. 1973).
7. *Butler v. Nat'l Collegiate Athletics Ass'n*, No. 06-2319 KHV, 2006 WL 2398683 (D. Kan. Aug. 15, 2006).
8. *Cole v. Nat'l Collegiate Athletic Ass'n*, 120 F. Supp. 2d 1060 (N.D. Ga. 2000).
9. *Collier v. Nat'l Collegiate Athletic Ass'n*, 783 F. Supp. 1576 (D.R.I. 1992).
10. *Colo. Seminary (Univ. of Denver) v. Nat'l Collegiate Athletic Ass'n (Denver I)*, 417 F. Supp. 885 (D. Colo. 1976); *Colo. Seminary (Univ. of Denver) v. Nat'l Collegiate Athletic Ass'n (Denver II)*, 570 F.2d 320 (10th Cir. 1978).
11. *Cureton v. Nat'l Collegiate Athletic Ass'n (Cureton I)*, 37 F. Supp. 2d 687 (E.D. Pa. 1999); *Cureton v. Nat'l Collegiate Athletic Ass'n (Cureton II)*, 198 F.3d 107 (3d Cir. 2000).
12. *Fluitt v. Univ. of Neb.*, 489 F. Supp. 1194 (D. Neb. 1980).
13. *Gaines v. Nat'l Collegiate Athletics Ass'n*, 746 F. Supp. 738 (M.D. Tenn. 2008).

14. *Ganden v. Nat'l Collegiate Athletics Ass'n*, No. 96 C 6953, 1996 WL 680000 (N.D. Ill. Nov. 21, 1996) (citing *Stoutenborough v. Nat'l Football League, Inc.*, 59 F.3d 580 (6th Cir. 1995)).
15. *Graham v. Nat'l Collegiate Athletics Ass'n*, 804 F.2d 953 (6th Cir. 1986).
16. *Hairston v. Pac. 10 Conference*, 101 F.3d 1315 (9th Cir. 1996).
17. *Hall v. Nat'l Collegiate Athletics Ass'n*, 985 F. Supp. 782 (N.D. Ill. 1997).
18. *Hawkins v. Nat'l Collegiate Athletics Ass'n*, 652 F. Supp. 602 (C.D. Ill. 1987).
19. *Howard Univ. v. Nat'l Collegiate Athletics Ass'n (Howard I)*, 367 F. Supp. 926 (D.D.C. 1973); *Howard Univ. v. Nat'l Collegiate Athletics Ass'n (Howard II)*, 510 F.2d 213 (D.C. Cir. 1975).
20. *Jones v. Nat'l Collegiate Athletics Ass'n*, 392 F. Supp. 295 (D. Mass. 1975).
21. *Jones v. Wichita State Univ.*, 698 F.2d 1082 (10th Cir. 1983).
22. *Justice v. Nat'l Collegiate Athletics Ass'n*, 577 F. Supp. 356 (D. Ariz. 1983) (citing *Denver Rockets v. All-Pro Mgmt., Inc.*, 325 F. Supp. 1049 (C.D. Cal. 1971); *Linseman v. World Hockey Ass'n*, 439 F. Supp. 1315 (D. Conn. 1977); *L.A. Mem'l Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197 (9th Cir. 1980); *Neeld v. Nat'l Hockey League*, 594 F.2d 1297 (9th Cir. 1979); *Smith v. Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978)).
23. *In re NCAA Student–Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268 (9th Cir. 2013) (citing *C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818 (8th Cir. 2007); *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959 (10th Cir. 1996); *Gionfriddo v. Major League Baseball*, 114 Cal. Rptr. 2d 307 (Cal. Ct. App. 2001)); *Keller v. Elec. Arts, Inc. (Keller I)*, No. C09-1967CW, 2010 WL 530108 (N.D. Cal. Feb. 8, 2010) (citing *C.B.C. Distrib. & Mktg.*, 505 F.3d at 818); *Keller v. Elec. Arts, Inc. (Keller II)*, Nos. C09-1967CW, C09-3329CW, 2014 WL 2191464 (N.D. Cal. May 23, 2014).
24. *Karmanos v. Baker*, 617 F. Supp. 809 (E.D. Mich. 1985); *Karmanos v. Baker*, 816 F.2d 258 (6th Cir. 1987).
25. *McCormack v. Nat'l Collegiate Athletics Ass'n*, 845 F.2d 1338 (5th Cir. 1988) (citing *Radovich v. Nat'l Football League*, 352 U.S. 445 (1957); *Smith v. Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978)).
26. *McDonald v. Nat'l Collegiate Athletic Ass'n*, 370 F. Supp. 625 (C.D. Cal. 1974).
27. *McHale v. Cornell Univ.*, 620 F. Supp. 67 (N.D.N.Y. 1985).
28. *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955 (N.D. Cal. 2014).
29. *O'Halloran v. Univ. of Wash. (O'Halloran I)*, 672 F. Supp. 1380 (W.D. Wash. 1987); *O'Halloran v. Univ. of Wash. (O'Halloran II)*, 856 F.2d 1375 (9th Cir. 1988).

30. *Parish v. Nat'l Collegiate Athletics Ass'n (Parish I)*, 361 F. Supp. 1220 (W.D. La. 1973); *Parish v. Nat'l Collegiate Athletics Ass'n (Parish II)*, 506 F.2d 1028 (5th Cir. 1975).
31. *Phillip v. Nat'l Collegiate Athletics Ass'n (Phillip I)*, 960 F. Supp. 552 (D. Conn. 1997); *Phillip v. Fairfield Univ. (Phillip II)*, 118 F.3d 131 (2d Cir. 1997).
32. *Regents of Univ. of Minn. v. Nat'l Collegiate Athletics Ass'n (Minnesota I)*, 422 F. Supp. 1158 (D. Minn. 1976); *Regents of Univ. of Minn. v. Nat'l Collegiate Athletics Ass'n (Minnesota II)*, 560 F.2d 352 (8th Cir. 1977).
33. *Rock v. Nat'l Collegiate Athletics Ass'n*, No. 1:12-CV-1019-JMS-DKL, 2013 WL 4479815 (S.D. Ind. Aug. 16, 2013) (citing *Clarett v. Nat'l Football League*, 306 F. Supp. 2d 379 (S.D.N.Y. 2004)).
34. *Shelton v. Nat'l Collegiate Athletic Ass'n*, 539 F.2d 1197 (9th Cir. 1976).
35. *Smith v. Nat'l Collegiate Athletics Ass'n (Smith I)*, 978 F. Supp. 213 (W.D. Pa. 1997); *Smith v. Nat'l Collegiate Athletics Ass'n (Smith II)*, 139 F.3d 180 (3d Cir. 1998); *Nat'l Collegiate Athletics Ass'n v. Smith (Smith III)*, 525 U.S. 459 (1999); *Smith v. Nat'l Collegiate Athletics Ass'n (Smith IV)*, 266 F.3d 152 (3d Cir. 2001).
36. *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059 (9th Cir. 2001) (citing *Mackey v. Nat'l Football League*, 543 F.2d 606 (8th Cir. 1976)).
37. *Wiley v. Nat'l Collegiate Athletics Ass'n*, 612 F.2d 473 (10th Cir. 1979).

State Decisions Organized by "Case" in the Database

38. *Bloom v. Nat'l Collegiate Athletics Ass'n*, 93 P.3d 621 (Colo. App. 2004).
39. *English v. Nat'l Collegiate Athletics Ass'n*, 439 So. 2d 1218 (La. Ct. App. 1983).
40. *Hart v. Nat'l Collegiate Athletics Ass'n*, 550 S.E.2d 79 (W.Va. 2001).
41. *Hill v. Nat'l Collegiate Athletics Ass'n (Hill I)*, 1 Cal. App. 4th 1398 (Cal. Ct. App. 1990); *Hill v. Nat'l Collegiate Athletics Ass'n (Hill II)*, 801 P.2d 1070 (Cal. 1990); *Hill v. Nat'l Collegiate Athletics Ass'n (Hill III)*, 865 P.2d 633 (Cal. 1994).
42. *Nat'l Collegiate Athletics Ass'n v. Lasege*, 53 S.W.3d 77 (Ky. 2001).
43. *Nat'l Collegiate Athletics Ass'n v. Yeo (Yeo I)*, 114 S.W.3d 584 (Tex. Ct. App. 2003); *Nat'l Collegiate Athletics Ass'n v. Yeo (Yeo II)*, 171 S.W.3d 863 (Tex. 2005).
44. *Oliver v. Nat'l Collegiate Athletics Ass'n (Oliver I)*, 920 N.E.2d 196 (Ohio Ct. Cm. Pls. 2008) (citing *Marinero v. Major Indoor Soccer League*, 610 N.E.2d 450 (Ohio Ct. App. 1991)); *Oliver v. Nat'l Collegiate Athletics Ass'n (Oliver II)*, 920 N.E.2d 203 (Ohio Ct. Cm. Pls. 2009).
45. *Nat'l Collegiate Athletics Ass'n v. Gillard*, 352 So. 2d 1072 (Miss. 1977).
46. *McAdoo v. Univ. of N.C. at Chapel Hill (McAdoo I)*, No. 11 CVS 3903, 2011 WL 8363728 (N.C. Super. Ct. July 20, 2011); *McAdoo v. Univ. of N.C. at Chapel Hill (McAdoo II)*, 736 S.E.2d 811 (N.C. Ct. App. 2013).