BALANCING FREEDOM OF CONTRACT AND COMPETING VALUES IN SPORTS

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I. INTRODUCTION

A symposium that examines sports law as a reflection of the values that inure in American society and its legal system brings to mind an expression that has become an axiom: sports represents a microcosm of American society.1 As such, sports not only reflects values fundamental to American society, but contributes to shaping society’s

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values. Similar observations can be made of the body of doctrine that comprises American law: a society’s legal system reflects the values of the society. Like sports, and other institutions, however, the body of rules that comprises our legal system also reinforces values and shapes our perceptions of reality.

Contract law has been described as a system of order. As such, it too invariably reflects social, political, and economic values central to virtually every society. Both sport and contract constitute phenomena that are pervasive rather than trivial aspects of American society. These important institutions share another common feature—the values that underlie mainstream contract ideology are similar to those reflected in sports. The significance of these institutions and their common features present opportunities for interesting areas of inquiry, including the extent to which values residing within contract and sports find expression in legal decisions in the sports context.

2. See Eitzen & Sage, supra note 1, at 55; see also Drew A. Hyland, Philosophy Of Sport 2 (1990) (noting sports also teaches the values reflected in them).

3. See Friedrich Kessler et al., Contracts Cases and Materials 1-2 (3d ed. 1986) (stating that understanding the law of contract and law generally “is to view legal doctrine, rules, principles, and standards as reflecting the value system of the culture in which the legal system is embedded”); KELLY Y. Testy, An Unlikely Resurrection, 90 NW. U. L. Rev. 219, 228 (1995) (“Contract, as does law in general, reflects the value system of the culture in which the legal system is embedded. The tensions and ambivalence of society are played out in law.”).

4. See Blake D. Morant, Contractual Rules and Terms and the Maintenance of Bargains: The Case of the Fledgling Writer, 18 Hastings Comm. & Ent. L.J. 453, 456 (“The law, and in particular contract law . . . , permeate[s] many phases of society.”); Kessler et al., supra note 3, at 1-2 (observing that contract law reflects society’s values); Virginia Held, Non-Contractual Society: A Feminist View, 13 Canadian J. Phil. 111, 111 (Supp. 1987) (“Realities are interpreted in contractual terms, and goals are formulated in terms of rational contracts.”).

Courts have also observed how the legal system reflects and reinforces important societal values. For example, in Redgrave v. Boston Symphony Orchestra, Inc., the court observed:

Protection of freedom is a prime objective of our legal system. Freedom of speech, freedom of artistic expression, freedom of contract, and freedom of choice on political and moral issues are among the protected activities. Implicit in the protection of freedom in these and other contexts is a conception of society in which pluralism may flourish.


5. See Kessler et al., supra note 3, at 1.

6. See id. (“[C]ontract is a principle of order of such universal usefulness that even a socialist society cannot dispense with it.”).

7. See Eitzen & Sage, supra note 1, at 19 (noting that sport is a phenomenon that is pervasive in the United States); Amy H. Kastely et al., Contracting Law 2 (1996) (“[C]ontract and market are the dominant metaphors of the twentieth century.”).

8. See supra notes 1-2 and accompanying text.
This essay's goals are modest inasmuch as the number and variety of cases in which contract issues arise in sports is as "vast, complex, and diverse" as the domain of contract. This essay will first identify the values that contribute to modern notions of contract law and American sports. Despite the prevalence of values such as personal autonomy, individualism, and competition, other values play important roles in defining these institutions. After identifying the competing values that reside within both modern contract law and sports, this essay explores the dichotomies they spawn.

Through a brief survey of cases in the sports context, this essay will demonstrate how the values that shape our images of contract and sports, historically influenced decision-making in disputes that directly or indirectly implicated contract law. This overview provides examples of cases in which freedom of contract rhetoric is a vital component of the reasoning employed to justify a particular result. In addition, however, this essay examines how competing values and goals, often articulated in legislation, circumscribe both the role of private contract and the bargain theory of contract that is its focal point. Thus, as is true of non-sports related matters, contract law's significance in sports has been eroded. Despite limitations on the scope of contract law and its ideology, the essay proposes that traditional views of contractual values are of continued relevance to judicial decision-making in sports matters. This proposition is demonstrated in cases in which antitrust and labor law principles dominate. The continued relevance of contract is also demonstrated through examination of an issue that arises within the context of intercollegiate athletics: assertions by student-athletes that they possess implied contractual rights. With regard to this issue, contractual values subsumed within the notion of freedom of contract impact the allocation of rights and responsibilities between student-athletes and their colleges and universities. The essay concludes by addressing the costs that may be attendant to

9. In fact, my initial excitement to pursue this topic was followed by considerable trepidation once I realized the potential enormity of this undertaking. My anxiety was a product of recognition of the significant number of reported sports law related decisions in which courts have considered matters invoking contract law, either directly or indirectly. In addition, I could not ignore the various perspectives from which contract law can be examined. For example, the body of law known as contract can be divided into at least three categories: contract in fact, contract law, and contract theory. See generally Richard E. Speidel, Afterword: The Shifting Domain of Contract, 90 Nw. U. L. Rev. 254 (1995) (discussing the three parts of contract domain: contract in fact, contract law, and contract theory).

10. See Speidel, supra note 9, at 254.
judicial adherence to and application of rules that promote the bargain theory of contract law.

II. CONTRACT'S UNDERLYING VALUES

A. The Classical Model

The principal function of contract law traditionally has been viewed as providing the framework for the enforcement of promises. In providing this framework, contract as "society's legal mechanism for protecting the expectations that arise from the making of agreements for the future exchange of various types of performance," reflects and affects our cultural values.

Understanding the values that influence modern contract law requires examination of classical contract—the theory of contractual relationships that emerged in the nineteenth century. Mirroring the ideals of classical liberalism, classical contract reflected values of self-determination extant within nineteenth-century western culture.

The dominant current of belief inspiring nineteenth-century industrial society... was the deep-felt conviction that individual and cooperative action should be left unrestrained in family, church, and market, and that such a system of laissez-faire would protect the freedom and dignity of the individual and secure the greatest possible measure of social justice.

As expressed in the foregoing quotation, classical contract emphasized values associated with individual autonomy that were viewed

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Understanding classical contract is important since it provides the source of derivation for most of the rules of modern contract. In addition, "classical concepts and rules remain an essential part of the advocate's arsenal and the judge's toolkit; they are daily employed in the routine disposition of contract disputes." Knapp & Crystal, supra note 12, at 35. Moreover, despite substantial changes to the classical approach to contract by modern courts, the principles of the classical system continue to serve as a point of departure in deciding disputes involving common-law contract. See id. at 36-37; Kastely et al., supra note 7, at 4 (noting that while many of the ideas associated with classical contract have been rejected or reformulated, others have persisted).

14. See Kessler et al., supra note 3, at 5.
15. Id. at 6 (citing S. Fine, Laissez Faire and The General Welfare State, A Study of Conflict in American Thought, 1865-1901 (1982)).
as conducive to the emerging market economy of the period. This conceptualization of contract was captured in the phrase “freedom of contract” which denotes that “rights and duties should come into existence only through promises and express agreements—the power of free men and women to bind themselves legally.” Although the “freedom of contract” concept is somewhat misleading, inasmuch as classical courts denied enforcement of contracts for reasons of public policy, this designation captured the prevailing attitudes toward contractual behavior. The classical vision was one of contract premised on agreements that were the product of discrete transactions voluntarily entered into between consenting parties.

Several implications emanated from a conceptualization of contract premised on free will and personal autonomy. One was the belief that individuals, if left alone, would engage in contracting behavior that best protected their interests. Thus, a dominant tenet of the classical model was that individuals could contract, or refuse to contract, with whomever they desired.

The classical contract model with its deference to individuality and market economy was implemented through the somewhat mechanical application of abstract rules of law. For example, mutual assent was determined pursuant to rigid rules of offer and accept-

18. Kessler et al., supra note 3, at 9 (“[T]here never has been in our law any such freedom [of contract] as they [i.e., the advocates of doctrinaire liberalism] postulate.” (alterations in original)).
19. See id. (noting that courts during the classical period also denied enforcement of contracts in restraint of trade as well as those that contemplated torts or crimes).
20. See Kastely et al., supra note 7, at 4. As discussed below, the classical image also focused on the bargained-for exchange and featured the idea of objectivity. See id.
21. See Linzer, supra note 17, at 188.
22. See Knapp & Crystal, supra note 12, at 131. This view was expressed in Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co., as follows:
We had supposed that it is elementary law that a trader could buy from whom he pleased and sell to whom he pleased, and that his selection of seller and buyer was wholly his own concern. “It is a part of a man’s civil rights that he be at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice, or malice.” 227 F. 46, 48-49 (2d Cir. 1915) (citation omitted).
23. See Williams II, supra note 16, at 1038; see also Ralph J. Mooney, supra note 16, at 1136 (discussing how classical contract “exalt[s] technical, definitional legalisms over common-sense reality”); Knapp & Crystal, supra note 12, at 10 (during the classical period of
ance. Courts, fearful of incorporating terms to which parties had not consented, were reluctant to imply terms into agreements. In this regard, the familiar refrain was the axiom that "courts do not make contracts for the parties."

In addition, the bargain theory of consideration, a primary pillar of classical contract theory, "insisted that only the participants could measure the value of a deal, and that a system of such subjectively assessed values would produce the markets required for a smoothly functioning and efficient economy. Individualism and the predominance of will are seen as natural ideological corollaries of such a system." Since it was considered inappropriate for courts to place a value on the goods or services exchanged, the ordinary rule of contract, as reflected in the phrase "[I]et the bargainer beware," vested contracting parties with the responsibility of protecting their own interests. Consequently, the classical regime of contract reserved a limited role for judicial regulation of contracting behavior. Contract was perceived as merely providing the general rules that sculpted the framework within which parties managed their own affairs. Courts were called upon to police wrongful behavior such as fraud and duress, but beyond that contracting parties were responsible for protecting their interests. Accordingly, it was generally considered inappropriate for courts to police the substantive fairness of the re-

contract, "cases were to be decided by virtually mechanical applications of rules to reach a doctrinally 'correct' result.")


25. See Williams I, supra note 13, at 198; Mooney, supra note 16, at 1171. Or as the New York court stated, "courts cannot aid parties . . . when they are unable or unwilling to agree upon the terms of their own proposed contract." Varney v. Dilmars, 111 N.E. 822, 824 (N.Y. 1916).

26. KESSLER ET AL., supra note 3, at 7. See, e.g., Varney, 111 N.E. at 824.

27. Clare Dalton, An Essay in the Deconstruction of Contract Doctrine, 94 Yale L.J. 997, 1068 (1985) (footnotes omitted); see KASTELY ET AL., supra note 7, at 286 (stating that the rationale for the rule that courts should not examine the adequacy of consideration "rests on freedom of contract: the idea that individuals should be free to set their own values and to engage in the free exchange of goods and services without interference from the government, including the judiciary").

28. See KESSLER ET AL., supra note 3, at 7; see KASTELY ET AL., supra note 7, at 286 (commenting on the impropriety under classical contract for courts to assess the adequacy of consideration and in so doing impose their sense of value on the exchange between contracting parties); see also Swinton v. Whittsville Sav. Bank, 42 N.E.2d 808 (Mass. 1942) (refusing to impose obligation on owner to reveal termite infestation in affirming dismissal of concealment action).

29. See KNAPP & CRYSTAL, supra note 12, at 131 (discussing the state's legal role as a neutral referee of parties competing in the marketplace).
sulting contract. The judiciary’s function was to interpret and enforce contracts entered into between two freely contracting parties.

In summary, the dominant ideology of classical contract was captured in the phrase freedom of contract. This phrase reflected the preeminence of values including those of independence, self-reliance, the rational pursuit of self-interest, equal access of contracting parties to perfect information, and the absence from the marketplace of artificial barriers to entry. These beliefs underlie the notion of consent so critical to the classical model of contract. Thus, the classical model featured principles of individual autonomy and noninterference by the state as the vehicles for fostering the good will of all by giving free rein to individual initiative. The role of the judiciary as an instrument of the state was to mechanically apply abstract formal rules in order to limit judicial intrusion into individual autonomy. "Classical contract law presupposed a world in which all of the actors played on a level playing field and were, therefore, able to fend for themselves without the need for state intervention." Under the classical construct, contract as a system of private ordering allowed parties to create their own law.

B. The Neoclassical Model

Early in the twentieth century, it became apparent that unrestrained freedom of contract and the values that underlie classical contract would not necessarily operate to promote public or individual welfare. Variables internal and external to contract ideology influenced this perspective. Judges and contract theorists recognized the fallacies inherent in the classical belief that the individual’s right voluntarily to assume obligations was protected when abstract doctrine

30. See Kessler et al., supra note 3, at 7–8 (suggesting it was not a proper exercise of judicial authority for courts to either make or invalidate improvident bargains); Williams I, supra note 13, at 192–93 ("[I]t was not proper for courts to delve into the 'adequacy' of consideration, that is, to protect a party from a hard bargain from which she should have protected herself.").
31. See Kastely et al., supra note 7, at 39.
32. See Jay M. Feinman, Critical Approaches to Contract Law, 30 UCLA L. REV. 829, 832 (1983) [hereinafter Feinman I]. Professor Feinman adds that the "notion of consent was grounded in a conception of the social world as composed of independent, freedom-seeking individuals, each of whom avidly pursued his own self-interest." Id.
33. See Knapp & Crystal, supra note 12, at 131.
34. See Feinman I, supra note 32, at 832.
36. See Feinman I, supra note 32, at 831–32.
37. See Mooney, supra note 16, at 1187.
was mechanically applied.\textsuperscript{38} Moreover, the consistency believed to result from the mechanical application of abstract rules of law never became a reality.\textsuperscript{39} Examples of this inconsistency appeared in numerous reported decisions in which contract liability ensued notwithstanding the absence of a bargained-for exchange.\textsuperscript{40}

In addition, increasing awareness of the propriety of state intervention in economic matters undermined "classical contract's individualist premises." Analogous to societal changes that shaped the contours of classical contract ideology, increasing demands for reforming social inequalities eroded the freedom of contract principle at its core.\textsuperscript{42} As a consequence, contractual relationships increasingly became perceived as something other than a matter of individual choice that arose independently of public policy.\textsuperscript{43} Indeed, contract theorists today recognize that governmental intervention into contractual relationships is justified because of the social costs attendant to the unrestrained values of individualism reflected in classical contract.\textsuperscript{44}

The tension that resulted from the desire to incorporate notions of morality, such as the moral duty that one contracting party may have to another,\textsuperscript{45} into contract law is often expressed as creating a fundamental dichotomy between values favoring personal autonomy and those favoring social control.\textsuperscript{46} As discussed above, the classical image was that contract embodied a system of private law pursuant to which individuals regulated their behavior. Such an image contrasts with that of a system of public law where external controls are imposed on individual relationships.\textsuperscript{47} "Within private law, contract law embodied the dichotomy between individual and community by imagining a realm of private agreement in which individual freedom was

\textsuperscript{40} See Feinman II, supra note 38, at 1286–87.
\textsuperscript{41} Id. at 1291.
\textsuperscript{42} See Kessler et al., supra note 3, at 10.
\textsuperscript{43} See Feinman II, supra note 38, at 1287.
\textsuperscript{44} See Linzer, supra note 17, at 188.
\textsuperscript{45} See Knapp & Crystal, supra note 12, at 131.
\textsuperscript{46} See id.; see also Testy, supra note 3, at 228 (noting contract reflects the divide between society's commitment to individual freedom and social control). "For instance, contract is rife with the tension between freedom of contract (individual) and reliance-based liability (other)." Id.
\textsuperscript{47} See Feinman II, supra note 38, at 1286.
protected from state coercion. The image that motivated this realm was the isolated bargain between independent, self-interested individuals."\(^{48}\)

A principal function of neoclassical contract theory—modern contract—has been reconciling the private/public dichotomy so pronounced within classical contract law.\(^{49}\) It therefore attempts to balance society's and contract law's "divided commitment to individual freedom and social control."\(^{50}\) As adroitly articulated by one commentator:

Neoclassical contract accommodates these conflicting values through a method that is flexible and pragmatic. Logic and analytic rigor remain important in contract law because they are a source of legal authority and an important element of professional culture. In contrast to classical law, though, neoclassical law tempers rigid logic by the use of policy analysis, empirical inquiry, and practical reason. Contract doctrine, more often formulated as general standards rather than mechanical rules, guides judges, sometimes quite strongly, but it allows them enough discretion in hard cases to reach just, socially desirable results.\(^{51}\)

Thus, neoclassical contract has attempted to accommodate values of private autonomy and public concerns through a body of principle and decisional methodology that focuses the judiciary's attention on social factors, public policy, and community standards of morality.\(^{52}\) Consequently, the neoclassical model of contract imposes standards of behavior that take into account the nature of the contracting parties'

\(^{48}\) Id.

\(^{49}\) See id. at 1285; see also Dalton, supra note 27, at 1010 (discussing how neoclassical contract attempts to accommodate the duality between contract law as private ordering—a system that promotes personal autonomy and freedom—and public ordering—a system that is controlled by the state and consequently infringes on personal freedom).

\(^{50}\) Testy, supra note 3, at 228.

\(^{51}\) Feinman II, supra note 38, at 1288 (footnotes omitted).

\(^{52}\) See id. at 1288–89. This methodology contrasts sharply with the classical approach in which judges were to avoid considering moral or public policy in decision-making. The role of the judiciary was to apply the abstract rules. See KASTELY ET AL., supra note 7, at 362. In this sense:

Classical [contract] law also embodied a methodological dichotomy between abstract and particularized inquiry. Judges could either take a highly abstract view of a situation and proceed from general principles, or closely scrutinize the individual facts and equities of a case. The first method appeared to serve individual freedom by preventing judges from imposing their own values on parties to litigation, whereas the second method raised the specter of the arbitrary exercise of judicial discretion.

*Id.* at 380.
relationship including the social and business context in which a transaction is consummated.\textsuperscript{53}

The neoclassical view of obligation is illustrated in its approach to determining what constitutes an agreement. Unlike classical contract that assumed that parties generally expressed every important term in their contract, neoclassical contract employs a broader definition of agreement.\textsuperscript{54} The Uniform Commercial Code provides an example of the more expansive conceptualization of agreement. Under the U.C.C., agreement is defined as “the bargain of the parties in fact, as found in their language or by implication from other circumstances including course of dealing or usages of trade or course of performance.”\textsuperscript{55} Modern contract law assumes and often expects parties not to incorporate expressly into the agreement every understanding and expectation.\textsuperscript{56}

The effectiveness of neoclassical contract in balancing values of personal autonomy and individualism with interdependence and communal standards of responsibility\textsuperscript{57} is the subject of intense debate, a detailed discussion of which is beyond the scope of this paper.\textsuperscript{58} I will, however, briefly summarize some of these criticisms.\textsuperscript{59} An overarching theme of critics of the neoclassical contract model is that it, like classical ideology, continues to create a world that is highly fictional.\textsuperscript{60} According to this view, this fictionalized world marginalizes the collective value and fosters the individualistic core of contract which ultimately accentuates inequities in society.

Critics also assert that contract ideology focusing on individualism tends to deny the extent to which the effect of rules of contract law are dependent on the social positions of persons using them.\textsuperscript{61} In

\textsuperscript{53} See Williams II, supra note 16, at 1040.
\textsuperscript{54} See Kastely et al., supra note 7, at 735.
\textsuperscript{55} Id. (quoting U.C.C. § 1-201(3)).
\textsuperscript{56} See id.
\textsuperscript{57} See Feinman II, supra note 38, at 1288.
\textsuperscript{58} See Testy, supra note 3, for a discussion of neoclassical contract’s attempts at balancing individual autonomy and communal responsibility.
\textsuperscript{59} See Amy H. Kastely, Cog or Cyborg?: Blasphemy and Irony in Contract Theories, 90 Nw. U. L. Rev. 132 (1995), for discussions of the criticism of classical and modern contract law. See also Hillman, supra note 39, for further discussion.
\textsuperscript{60} See Hillman, supra note 39, at 110-11.
\textsuperscript{61} See id. at 110-11 (“Contract actors—lawyers, judges, even theorists—become imbued with the logic of the system . . . and legitimize it, thereby masking exploitation of the underclasses.” (footnote omitted) (quotations omitted)); Kastely, supra note 59, at 168 (“In addition to denying or concealing the ways that social position influences the application of rules and consequences of judicial decisions . . . . Contract thinking undermines efforts to improve the condition of those who have been exploited and otherwise oppressed by shifting responsibility from the actor to the victim.”).
this way, contract law "justif[ies] or conceal[s] group-based oppress-
ion." Consequently, contract ideology is condemned as creating or
perpetuating injustice because it does not adequately address ex-
ploration and powerlessness.63

Contract ideology also has been criticized for including mislead-
ing assumptions regarding social arrangements.64 For example, critics
assert that the neoclassical model of contract is premised upon false
assumptions such as competitiveness when the core of modern con-
tracting relationships is cooperation and compromise.65 Accordingly,
they argue that modern contract is not well suited for relational
contracting.66

Finally, critics assert that neoclassical contract's attempt to ac-
commodate conflicting values results in a body of law that is incoher-
ent. As was recently expressed:

Contemporary contract law incorporates the assumptions and
values of neoclassical economics, beginning . . . with its emphasis
on bargained-for exchange. At the same time, contemporary contract
law incorporates assumptions and values that conflict
with those of neo-classical economics, such as concern over un-
just allocations of power and resources and unequal access to
information. As an abstract formulation, contemporary contract
law is incoherent: it embodies irreconcilable ideas and goals.
But that just means courts have to make difficult decisions with-
out conclusive guidance from the doctrine or principles of con-
tract law, and this is true of most areas of law.67

63. See id. at 154–57; see also Mooney, supra note 16, at 1206 ("American contract
[law] decisions today tend to enhance rather than to mitigate the power of economically
dominant parties.").
64. See Speidel, supra note 9, at 263–64.
At least initially, contemporary contract doctrine assumes, as did classical doctr-
ine, that the parties to an agreement had adequate information and choice; it
further assumes that most, if not all, of the terms of the contracts were negotiated
and agreed upon. But the increasing use of standard form contracts and the
growing awareness of the characteristics of relational contracting undercut that
assumption. Some parties to standard form contracts do not have adequate infor-
mation and choice. Relational contracts, by necessity, are incomplete and depend-
ent upon good faith adjustments after the time of formation.
Id. at 264.
67. KASTELY ET AL., supra note 7, at 58; see also Feinman I, supra note 32, at 830
(arguing that neoclassical's attempt to resolve the flaws in the classical construct has re-
sulted in a body of law with underlying theoretical premises that are "inadequate and
inconsistent").
Others believe that the neoclassical regime has effectively balanced the values captured in the freedom of contract notion and competing values. From this perspective, classical contract has undergone a fundamental transformation in which values associated with social responsibility effectively constrain values associated with freedom of contract.\textsuperscript{68} Defenders of modern contract argue that its complex set of rules facilitates the formation of private agreements and ensures some degree of fairness.\textsuperscript{69} The doctrine of promissory estoppel is identified as the "quintessential example of contract law's evolution"\textsuperscript{70} and the mechanism that ameliorates rather than accentuates inequities in society.\textsuperscript{71} Enforcement of promises based on moral obligation and policing doctrines such as good faith and unconscionability are identified as other manifestations of this evolution.\textsuperscript{72} According to one scholar:

Although based in part on the principle of freedom of contract, modern contract law is also tempered both within and without its formal structure by principles, such as reliance and unjust enrichment, that focus on fairness and the interdependence of parties . . . . I assert that . . . freedom of contract and other principles share the spotlight.\textsuperscript{73}

Despite their differing views, I believe defenders and critics of modern contract would agree that although it has been moderated by values of fairness and interdependence, the principle of freedom of contract remains at the core of modern contract.\textsuperscript{74} Therefore,

\textsuperscript{68} See Williams I, supra note 13, at 193–94.

\textsuperscript{69} For example, today courts exhibit greater willingness to inquire into the adequacy of the consideration in order to evaluate the fairness of an exchange. This is particularly true when one party to a transaction is unusually vulnerable or possesses substantially less bargaining power or when the contract or a term thereof conflicts with an important public policy. See Kastely et al., supra note 7, at 286.

\textsuperscript{70} Williams I, supra note 13, at 195.

\textsuperscript{71} See Hillman, supra note 39, at 112–13.

\textsuperscript{72} See Williams I, supra note 13, at 194, 197, 203.

\textsuperscript{73} Hillman, supra note 39, at 104 (footnote omitted).

\textsuperscript{74} See Feinman II, supra note 39, at 1288. "The core remains the principle of freedom of contract . . . 'tempered both within and without [contract's] formal structure by principles, such as reliance and unjust enrichment, that focus on fairness and the interdependence of parties rather than on parties' actual agreements.'" Id. Or as Professor Hillman stated:

Although free-market forces declined as legislative-administrative processes responsive to the 'perceived costs or excesses' of the market came to dominate the twentieth-century welfare state, those forces never were completely submerged. In the limited domain that antitrust, labor, consumer protection, and many other regulatory laws ceded to private bargainers, courts continued in some measure to administer the principle of freedom of contract.

notwithstanding its attempt to incorporate social duties, modern contract continues to focus on the "enforcement of obligations voluntarily undertaken." In fact, a case can be made that the contractual value of individual choice may have regained ground lost as a result of contract's evolution. Accordingly, judicial resort to mechanisms, such as promissory estoppel, aimed at lessening the predominance of the bargain principle, has declined. According to this view, the return to dominance of the freedom of contract conceptualization has been accompanied by "rigid formation categories, the parol evidence rule, the plain meaning rule, hostility to implied terms, and an increased tendency to categorize disputes as 'questions of law' unsuitable for juries."

Various explanations have been offered for the persistence of classical and neoclassical contract. One reason given for modern contract's retention of key elements of classical contract is that ideas such as freedom of contract and individualism create powerful images that are appealing because of tradition and because they are partially descriptive of human behavior. Indeed, even critics recognize the "liberatory and life enhancing" aspects of contract ideology.

[Contract ideology (particularly the individualistic strand featured in classical and neoclassical contract theory) is persistent, and alternative accounts of human connection, including serious versions of reliance, unjust enrichment, unconscionability, and good faith doctrine, are short-lived. Many people in the United States adhere to individualistic contract ideology non-consciously, without considering it to be a distinctive set of thoughts and perceptions, because it corresponds with their learned per-

75. Dalton, supra note 27, at 1014.
76. See Lawrence M. Friedman, The Republic Of Choice: Law, Authority, and Culture 80–82 (1990) (arguing that rather than declining, "values involved in individual freedom of choice' have gotten more robust over the years"); see also Held, supra note 4, at 111 (acknowledging the persistence of contract although critical of contract ideology, and noting that modern society interprets and formulates goals in contractual terms).
77. See Kastely, supra note 59, at 139 (arguing that despite some initial expansion, many courts have "domesticated the doctrines of promissory estoppel and promise for benefit received, making them compatible with classical contract theory, or at least much less of a threat to it"); see also Mooney, supra note 16, at 1135 (arguing that courts increasingly refuse to use doctrines such as promissory estoppel and good faith and have returned to dominance concepts as stalwarts of classical contract such as the parol evidence rule).
78. Mooney, supra note 16, at 1135.
79. See Feinman 1, supra note 32, at 833.
80. Kastely, supra note 59, at 169. "The idea that one may choose one's significant relationships and obligations has given hope to many and has inspired significant social change." Id. See Testy, supra note 3, at 219–20 (noting that lesbian theory recognizes contract's potential to empower and to oppress women).
ceptions of life. Moreover, most do not have reason to question this ideology, because it generally serves their interests, at least as those interests are perceived through the lens of contract ideology. It is unlikely that individualist contract ideology will wither away, and it is predictable that serious challenges to it will be relatively short-lived.\textsuperscript{81}

III. SPORTS UNDERLYING VALUES

Before examining the manifestation of contractual values in reported decisions involving sports, I wish to briefly examine values associated with sports. What becomes apparent is that values of individual responsibility and personal autonomy that remain core elements of modern contract law are not dissimilar to values typically associated with sports. Yet, as is true of contract law, sport as an institution within American society gives residence to conflicting values.\textsuperscript{82}

Like the themes that underlie contract, those most prevalent in sport have not remained constant. For instance, during the late nineteenth and early twentieth centuries, sport emphasized notions of hard work, sacrifice, and occupational success.\textsuperscript{83} These values dominated during a period of rapid growth for the American economy and the belief in “boundless opportunities for [the] ambitious.”\textsuperscript{84} Moving forward in time, the late 1970s and 1980s and the rejuvenation of societal values that emphasized business success and self-fulfillment also focused on the themes of wealth, fame, and individual achievement for athletes.\textsuperscript{85}

Although the dominant themes have varied over time, certain values reside at the core of American sports. Sport “is infused with themes consistent with the American Dream.”\textsuperscript{86} In this regard, sport appropriately has been characterized as reflecting and reinforcing values associated with “the American way of life—competition, individualism, achievement, and fair play.”\textsuperscript{87} According to this perspective, sports instills within its participants values of teamwork, self-discipline, fair play, perseverance, sacrifice, and hard work.\textsuperscript{88} In summary,

\begin{footnotesize}
\begin{enumerate}
\item Kastely, supra note 59, at 159–60 (footnote omitted).
\item See generally Paul C. Weiler & Gary R. Roberts, Sports and the Law VI (1993) (noting that a key feature of sports is its blend of competition and cooperation).
\item See Nixon & Frey, supra note 1, at 45.
\item Id.
\item See id.
\item Id. at 41.
\item See Eitzen & Sage, supra note 1, at 13.
\item See Hyland, supra note 2, at 2; D. Stanley Eitzen, Ethical Dilemmas In American Sport, 62 Vital Speeches Of The Day 182, 182 (1996).
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\end{footnotesize}
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the major themes, of what has been called the American Sports Creed, "assert that sport builds character, teaches discipline, develops competitiveness, prepares participants to compete in life, enhances physical and mental fitness, and contributes to a belief in (Christian) religion and a patriotic belief in America."989

Yet, sports as a microcosm of society also possesses the negative qualities of the society that it reflects.90 The negative values that manifest in sports include "selfishness, envy, conceit, [and] hostility"91 as well as competitiveness which leads to the winning-at-all-costs mentality.92 Notes one scholar, the winning-at-all-costs philosophy "leads to dehumanization of athletes and to their alienation from themselves and from their competitors."93 The over-emphasis on winning also mirrors the drive to achieve the American dream in the larger society.94 Sport, therefore, reproduces one of contract law's fundamental dichotomies: the conflict between values associated with competition, individualism, and the unrelenting pursuit of self-interest and those associated with moral responsibility and interdependence.

Finally, like the values that underlie the classical theory of contracting, ideals often associated with sport are increasingly subject to criticism. For instance, sport is commonly viewed as a social activity in which one will be judged solely on the basis of ability and merit.

[The sanctum of sport is premised on doctrines of "equality of opportunity, sportsmanship, and fair play." This premise is consistent with a liberal jurisprudential approach that "conceives meritocracy as a system in which benefits and burdens are distributed in accord with one's deeds—presumably the products of rational choice—rather than characteristics over which one has no apparent control."95

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89. NIXON & FREY, supra note 1, at 41.
90. See HyLAND, supra note 2, at 2 (urging recognition that sports is a reflection of society's values).
91. EITZEN, supra note 88, at 185 (internal quotation omitted).
92. See HyLAND, supra note 2, at 35 (arguing that the emphasis on winning is a product of our competitive capitalist society); EITZEN, supra note 88, at 182–84 (discussing how the overemphasis of values associated with competition and winning contribute significantly to such ethical problems in sports as drug abuse by athletes, cheating by athletes and coaches, and violence).
93. EITZEN, supra note 88, at 185. See EITZEN & SAGE, supra note 1, at 18 (arguing that sports reflects the negative qualities of American society including materialism, the pervasiveness of racism and domination over individuals by bureaucracies, and the unequal distribution of power).
94. See NIXON & FREY, supra note 1, at 42–43.
Critics assert such idealized views of sport fail to take into account the linkage between power and the persistence of oppression in sport. \(^\text{96}\) Despite these criticisms, however, sport remains enormously popular in American society. \(^\text{97}\)

**IV. SPORTS LAW AND CONTRACT THEORY**

As the above discussion illustrates, values of individualism, competition, and independence reverberate within both sports and contract ideology. The discussion which follows examines contract ideology in the sports context. The reported decisions examined are merely illustrative and, as such, are intended to suggest further areas of inquiry as much as they are intended to reach conclusions. In addition, inferences and generalizations must be made to account for those instances when courts fail explicitly to articulate a particular set of values in reaching decisions. With these words of caution, the following discussion provides a glimpse of the role of contractual values in sports related cases. It reveals that historical and contemporary thinking regarding contract ideology in the sports context parallels developments in other contexts.

As in other areas, historically the bargain principle of contract predominated in sports related matters. However, its preeminence has been moderated by the incursion of competing values and policies. Nevertheless, the bargain principle has not been completely displaced and remains important in the resolution of contractual disputes in sports.

**A. The Bargain Principle Expressed**

Courts have invoked the bargain principle of contract and its accompanying values in deciding contractual disputes in sports. A case at the turn of the century, *American League Baseball Club of Chicago v. Chase*, \(^\text{98}\) is illustrative. Chase, a baseball player, signed a standard player’s contract prescribed by the American League of Professional Baseball. \(^\text{99}\) Chase gave notice of his intent to cancel the contract. \(^\text{100}\)

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\(^{97}\) See NIXON & FREY, *supra* note 1, at 42 (“Criticism of sport is not taken seriously because cultural beliefs about the virtues of sport are so pervasive, so deeply entrenched, and so closely tied to dominant American values.”).

\(^{98}\) 149 N.Y.S. 7 (1914).

\(^{99}\) See *id.*

\(^{100}\) See *id.* at 8.
Thereafter, he entered into a contract to play with another team. The team for which Chase played, sought a negative injunction restraining him from playing for his new employer.101

In setting aside the temporary injunction that the plaintiff had obtained,102 the court first noted that a provision in the agreement allowed a team to terminate a player’s contract on ten days notice, but granted the player no reciprocal right.103 According to the court, the notice provision and other provisions, namely reserve and option clauses that bound the player to the team, resulted in a complete lack of mutuality of obligation.104 The court also invoked antitrust law in denying relief.105

In support of its holding, the court quoted at length from commentators who extolled the virtues of limiting restraints on freedom of contract. “Every man has the right to earn his living... without undue interference, a right of absolute freedom... to make contracts with reference to service,... or to refrain from making them,... and such a right is both a liberty and property right... .”106 In concluding, the court noted that the case was not one that simply involved a breach of contract. Rather, it presented the question of whether the system created by organized baseball improperly restricted players’ “personal freedom, the right to contract for their labor wherever they will.”107

101. See id. at 7.
102. See id. at 20.
103. See id. at 14. The Chase court’s use of the lack of mutuality concept provides a vivid example of the classical contract approach to issues of mutual assent and consideration. The mutuality of obligation notion in its simplest form provides that unless both parties are bound, neither party is bound. See E. Allen Farnsworth, Contracts 113 (2d ed. 1990). Under modern contract, the lack of mutuality concept has fallen into disfavor as a basis for setting aside agreements. See Knapp & Crystal, supra note 12, at 118.
104. See Chase, 149 N.Y.S. at 14.
105. See id. at 17; Weiler & Roberts, supra note 82, at 107–08 (1993) (discussing the antitrust aspects of the Chase decision).
106. Chase, 149 N.Y.S. at 17–18 (citations omitted).
107. Id. at 19. Other courts deciding similar issues relied on lack of mutuality and other classical contract defenses to deny injunctive relief. See generally Metropolitan Exhibition Co. v. Ward, 9 N.Y.S. 779 (1890) (denying injunction which would prevent baseball player from playing for another team on grounds of lack of mutuality and certainty as to terms); Philadelphia Ball Club, Ltd. v. Hallman, 8 Pa. C. 57 (1890) (holding that lack of mutuality, indefiniteness and unfairness justified court’s refusal to grant injunctive relief); Harrisburg Base-Ball Club v. Athletic Assoc., 8 Pa. C. 337 (1890) (holding lack of mutuality as a basis for not granting injunctive relief).

However, in Philadelphia Ball Club, Ltd., v. Lajoie, 51 A. 973 (Pa. 1902), the court relied on freedom of contract principles to reach a different result. The court held that a player’s contract with his team under terms similar to those set forth in the Chase contract did not fail for lack of mutuality of obligation. In reaching this conclusion the court rea-
A recent judicial expression of the freedom of contract principle occurs in *Continental Basketball Ass'n, Inc. v. Ellenstein Enterprises, Inc.* The plaintiff, the owner of a Continental Basketball Association (CBA) franchise, alleged, inter alia, that the CBA's failure to comply with certain registration and disclosure provisions of a state statute governing franchises rendered the parties' contract void and precluded the league from recovering amounts due under the agreement. In refusing to invalidate the agreement, the court first noted the presumption that contracts which are freely bargained for are enforceable unless they contravene a public policy. It next stated that the value of freedom of contract precludes judicial invalidation of a contract unless it violates a statute that clearly provides that contracts in violation thereof are unenforceable. The court concluded its analysis by emphasizing the parties' relatively equal bargaining position and "freedom of contract" as grounds for respecting the bargain struck between them.

**B. Accommodating Conflicting Values**

As is true of contractual matters generally, parties have called on courts to decide contractual disputes in sports that require a balancing of competing values. The cases discussed below illustrate the judiciary's efforts to accommodate conflicts between values of individualism and community, unrestrained freedom of contract and competition, and individual and collective action. While certain of the cases discussed—principally those involving future contracts—are of little precedential value due to subsequent developments, they provide insight into the historical role of contract in sports and of tensions produced by competing values.

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109. See id. at 136.
110. See id. at 139.
111. See id. at 140.
112. See id. at 141. Another recent illustration of the articulation of the freedom of contract notion in the sports context appears in the dissenting opinion in *Johnson v. Rapid City Softball Ass'n*, 514 N.W.2d 693, 703 (S.D. 1994) (Henderson, J., dissenting). In disagreeing with the majority's invalidation of an exculpatory clause, the dissent noted that "[p]ublic policy, as well as our State and Federal Constitutions, strongly favors freedom to contract." *Id.* at 704. The dissent next turned to the question of consent, a major edifice of contract ideology, in arguing that the plaintiff should be bound by the release agreement. See *id.*
C. Future Contract Cases

Contractual disputes involving future contracts followed a similar pattern. A player under contract to one team, entered into a contract to perform for another team following termination of his contract with his current team. The team with which the player was under contract would seek injunctive relief declaring the future contract invalid and seeking to enjoin the player from playing for his prospective employer.

_Cincinnati Bengals, Inc. v. Bergey_, 113 is not only illustrative of these types of cases, but displays the conflict of values that arise in contractual disputes in sports. The Cincinnati Bengals, a professional football team, sought an injunction against Bill Bergey who had signed a contract with the Virginia Ambassadors, a World Football League team. 14 Bergey signed the contract with the Ambassadors while he was under contract with the Bengals.115 He was not, however, obligated to perform under his contract with the Ambassadors until after the expiration of the Bengals’ contract for his services.116

The Bengals argued that allowing players to sign future service contracts undermined its contractual right to players’ full performance while under contract with them.117 They also asserted that the nature of sports, and in particular the teamwork required in order to have a successful football team, justified its request for injunctive relief.118 According to the team, allowing future contracts not only diluted such player’s investment to the team, but also adversely impacted other players and the team’s cohesiveness.119

The court acknowledged that “a football team is a sort of delicate mechanism, the success of whose operation is dependent upon the coordination of various cohesive units” and that a significant number of a team’s players under future contracts would undermine its competitive success.120 Nevertheless, this interest was not such as to warrant limiting either the WFL’s or Bergey’s right to enter into a contract that was not illegal. In balancing the harm to the Bengals against that to the WFL and the players, the court specifically noted the harm that granting the plaintiff’s injunction would cause to the players’ right of

114. _See id._ at 131.
115. _See id._ at 133.
116. _See id._ at 138.
117. _See id._ at 131.
118. _See id._ at 136.
119. _See id._ at 136-37.
120. _Id._ at 137.
contract. Thus *Bergy*, and cases like it, can be interpreted as representing a conflict of values. Values that favor individual autonomy, and consequently freedom of contract, conflict with those that emphasize values of community or team effort. In the future contract cases, courts were unwilling to suppress personal freedom and freedom of contract for values related to community. They concluded that the competing values were not sufficiently important to override the bargain theory of contract.

D. *The Intersection of Contract, Labor and Antitrust*

The propriety of denying individuals their right to contract in order to promote group interests or other values is a fundamental issue in sports cases in which principles of labor and antitrust law figure prominently. Courts and commentators have appropriately analyzed these cases according to antitrust or labor principles or as representative of the conflict between the two areas of substantive law. For instance, the legal doctrine that predominates in addressing questions central to the relationship between players and clubs, such as player mobility, has shifted over time from contract, to antitrust, to labor. Commentators, writing as early as 1971, noted “terms and conditions of employment of professional athletes in baseball, basketball and football are no longer governed solely by individual contracts but have been supplanted in part by collective bargaining between the leagues and player unions.” Therefore, I am mindful that labor and antitrust have eroded the significance of the law of private contract in sports and of the complex interplay between these bodies of substantive law in sports. However, legislation has not totally dis-

121. *See id.* at 147.

122. *See, e.g.*, Washington Capitals Basketball Club, Inc. v. Barry, 419 F.2d 472, 477 (9th Cir. 1969); Munchak Corp. v. Cunningham, 457 F.2d 721, 725 (4th Cir. 1972); World Football League v. Dallas Cowboys Football Club, Inc., 513 S.W.2d 102, 105 (Tex. Civ. App.—Dallas 1974, writ ref’d n.r.e.).

123. *See Weiler & Roberts, supra* note 82, at 65.


125. *See Farnsworth, supra* note 103, at 356 (noting that federal antitrust law and related state legislation, in most instances, has rendered the common law of contract of no consequence with respect to restraints of trade); *Weiler & Roberts, supra* note 82, at 65 (noting the shift in significance from contract to antitrust to labor law).

placed contract or negated the significance of contractual values.\textsuperscript{127} The discussion that follows seeks to show the displacement of contractual values due to the incursion of labor and antitrust law and the principles reflected therein.\textsuperscript{128} The cases discussed below also reflect the tension between contractual and competing values.\textsuperscript{129} In addition, however, the discussion is intended to show that even in cases such as \textit{Wood v. National Basketball Ass'n},\textsuperscript{130} where values and goals related to labor policy overshadow those of common law contract, contractual values nevertheless are relevant in judicial reasoning and decision-making.

1. \textit{Competing Values in Labor Policy}

In \textit{Wood v. National Basketball Ass'n}, a college basketball player alleged that provisions, including the salary cap and college draft, of the collective bargaining agreement between the NBA and the National Basketball Players Association violated the antitrust laws.\textsuperscript{131} In cases such as \textit{Wood}, plaintiffs argue individual teams should be forced to compete for players' services.\textsuperscript{132} Such competition would increase the players' bargaining power.\textsuperscript{133} This argument appeals to notions of individual bargaining and "traditional views about rewarding the talented."\textsuperscript{134}

In \textit{Wood}, the court assumed that the plaintiff would receive more favorable treatment if the draft and salary cap were eliminated so that he could offer his services to the highest bidder.\textsuperscript{135} It went on, however, to emphasize that labor law policy gives greater preeminence to collective rather than individual bargaining power. The court stated:

\begin{quote}
Federal labor policy thus allows employees to seek the best deal for the greatest number by the exercise of collective rather than individual bargaining power. Once an exclusive representative
\end{quote}

\begin{itemize}
\item \textsuperscript{127} See Kessler \textit{et al.}, \textit{supra} note 3, at 16. For instance, although it requires parties to bargain in good faith, labor law does not require them to reach a bargain. See id. Collective bargaining agreements that are subject to labor law standards reserve some latitude for players to shape the contours of their individual contracts.
\item \textsuperscript{128} See Yasser \textit{et al.}, \textit{supra} note 126, at 183 (commenting that even under collective bargaining agreements in sports, parties remain free to individually negotiate elements of the employment).
\item \textsuperscript{129} See Kastely \textit{et al.}, \textit{supra} note 7, at 42 (citing Flood v. Kuhn, 407 U.S. 258 (1972), as illustrative of cases indicating that the law's commitment to neoclassical economics is tempered by values and goals that compete with those of market ideology).
\item \textsuperscript{130} 809 F.2d 954 (2d Cir. 1987).
\item \textsuperscript{131} See id. at 956–57.
\item \textsuperscript{132} See Jacobs & Winter, \textit{supra} note 124, at 7.
\item \textsuperscript{133} See id.
\item \textsuperscript{134} Id.
\item \textsuperscript{135} See Wood, 809 F.2d at 958–59.
\end{itemize}
has been selected, the individual employee is forbidden by federal law from negotiating directly with the employer absent the representative’s consent . . . . 136

In short, labor law provides an illustration of the tempering of freedom of contract in order to promote public values. Specifically, individual bargaining power is sacrificed for the good of the whole.

Wood also illustrates, however, the use of the freedom of contract rhetoric even in a context in which common law contract has for the most part been displaced. In reasoning that applying antitrust law would conflict with important labor policy the court stated:

Freedom of contract is an important cornerstone of national labor policy for two reasons. First, it allows an employer and a union to agree upon those arrangements that best suit their particular interests . . . . Courts cannot hope to fashion contract terms more efficient than those arrived at by the parties who are to be governed by them . . . .

Freedom of contract is particularly important in the context of collective bargaining between professional athletes and their leagues. Such bargaining relationships raise numerous problems with little or no precedent in standard industrial relations. As a result, leagues and player unions may reach seemingly unfamiliar or strange agreements. If courts were to intrude and to outlaw such solutions, leagues and their player unions would have to arrange their affairs in a less efficient way. 137

Similar reasoning has been employed in other cases. In Caldwell v. American Basketball Ass’n, Inc., 138 the Second Circuit, in sustaining the district court’s dismissal of plaintiff’s antitrust claims 139 due to the labor exemption, discussed how labor values, such as collective action, override private contract values, such as individual bargaining. 140 Similarly, in Brown v. Pro Football, Inc., 141 a recent case likely to generate controversy due to the Court’s expansive reading of the scope of

136. Id. at 959.
137. Id. at 961 (citations omitted).
138. 66 F.3d 523 (2d Cir. 1995).
139. See id. at 527. Plaintiff asserted the antitrust laws had been violated in two ways: “first, he asserts a right to seek the best terms for his labor as a professional basketball player; second, he asserts a right not to have teams that might compete for his skills agree collusively upon the terms upon which he will or will not be hired.” Id.
140. See id. at 528. In this regard, the court noted that “[t]he extinguishing of the employee’s right to seek the best bargain begins once a mandatory collective bargaining relationship is established and continues throughout the relationship.” Id.
141. 116 S. Ct. 2116 (1996). In 1990, 235 developmental players filed a class action suit against the NFL and its member clubs asserting that the $1,000 per week salary limitation unilaterally imposed by NFL clubs following an impasse in efforts to agree with the union to a new collective bargaining agreement constituted an illegal price fix in violation of the Sherman Act. See id. at 2119. The NFL in defense asserted that the limitation was
the labor exemption to antitrust liability, the Supreme Court recognized the restraints on competition and individual action that labor law requires. In his dissenting opinion in Brown, Justice Stevens emphasized that the Court should avoid an interpretation of the labor exemption that would undermine a fundamental policy of labor law: the "union's freedom to contract."143

2. Competing Values in Antitrust Policy

The conflict between values and policies other than those associated with freedom of contract and market also appears in antitrust decisions. Athletes have turned to antitrust law to challenge devices that either tie players to particular teams or seek to limit their compensation. Examples of these and other clauses that have been challenged as violating antitrust laws in professional sports include the following: reserve clauses, option clauses, the draft system, and free agent compensation arrangements. Examples of antitrust challenges in college athletics include lawsuits involving NCAA amateurism rules such as the "no draft," "no agent," "limited

shielded from the purview of antitrust laws by virtue of the nonstatutory labor exemption. See id.

In denying the NFL's motion for summary judgment, the district court held that the nonstatutory labor exemption was inapplicable. See id. A jury trial resulted in trebled damages totaling over $30 million. See id. The Court of Appeals reversed holding that the NFL's conduct fell with the scope of the collective bargaining process and therefore the nonstatutory labor exemption precluded liability under the Sherman Act. See id. In reaching this result, the Circuit Court for the District of Columbia rejected the players' argument that the salary limitation was not within the collective bargaining process since it was not a part of the collective bargaining agreement and therefore had never been consented to by the union. See id.

142. See id. at 2120-21.
143. Id. at 2135 (Stevens, J., dissenting). "[O]ne of the fundamental policies of NLRA is freedom of contract." Id. (citation omitted). See Powell v. National Football League, 930 F.2d 1293, 1307 (8th Cir. 1989) (Lay, C.J., dissenting). "[T]he NLRA is aimed at promoting 'actual liberty of contract' by redressing the unequal balance of bargaining power between employers and employees." Id. (citation omitted).
144. See YASSER ET AL., supra note 126, at 187.
145. "The reserve clause gives a club the exclusive right to the players for succeeding seasons." Id. at 187.
146. "The option clause allows a club to renew player contracts at the option of the club, usually providing for exercise of the option at a lesser salary." Id.
147. "Draft systems divide the amateur or free agent supply of players among the clubs of a league, awarding each club the exclusive right to contract with a player drafted." Id.
148. "Free agent compensation schemes require compensation in the form of players or draft choices to a team losing a player to another club." Id.
149. See NATIONAL COLLEGATE ATHLETIC ASS'N, 1996-97 NCAA MANUAL § 12.2.4.2 (1996) [hereinafter NCAA MANUAL]; see also Banks v. NCAA, 977 F.2d 1081, 1093 (7th Cir. 1992) (rejecting student-athlete's antitrust challenge to no-draft and no-
compensation," eligibility rules, and NCAA rules that govern commercial activities such as television rights.

Turning to college athletics, courts on numerous occasions have assessed the anti-competitive effects of NCAA regulations. In most instances, courts have upheld the right of NCAA members to exercise their contractual freedom in promulgating such legislation. In upholding these provisions, however, courts focus not on NCAA member institutions' freedom of contract. Rather, they give primacy to public values associated with amateurism over those of the marketplace. For example, in *Banks v. NCAA*, a student-athlete playing football for Notre Dame registered for the National Football League draft and consulted with an agent. The NCAA declared him ineligible to play football in his remaining year at Notre Dame. Banks, seeking to enjoin the NCAA from enforcing its no-agent and no-draft rules, asserted the rules violated section 1 of the Sherman Act. In refusing to invalidate the rules, the court held that "the regulations of the NCAA are designed to preserve the honesty and integrity of intercollegiate athletics and foster fair competition among participating amateur college students." Thus, the court relied on principles of amateurism in concluding that the pertinent NCAA rules failed to constitute unlawful restraints of trade. Indeed, courts have relied on similar reasoning to shield from antitrust laws NCAA rules that focus on the association's organization, academic eligibility of student-athletes, and amateurism.

agent rules); Gaines v. NCAA, 746 F. Supp. 738, 748 (M.D. Tenn. 1990) (reaching the same result).
152. *See e.g., Hairston v. Pacific 10 Conference, 101 F.3d 1315, 1320 (9th Cir. 1996)* (holding that sanctions imposed on university by athletic conference for rules violation did not violate Sherman Act); Justice v. NCAA, 577 F. Supp. 356, 383 (D. Ariz. 1983) (holding that NCAA sanctions lacked an anticompetitive purpose and did not constitute an unreasonable restraint under the Sherman Act).
153. *See e.g., NCAA v. Board of Regents of the Univ. of Okla., 468 U.S. 85, 113 (1984)* (holding that NCAA plan restricting members' ability to enter into television contracts violated the Sherman Act).
154. 977 F.2d 1081 (7th Cir. 1992).
155. *See id.* at 1083-84.
156. *See id.* at 1084.
157. *Id.* at 1090.
158. *See Gary R. Roberts, The NCAA, Antitrust, and Consumer Welfare, 70 TUL. L. REV. 2631, 2647-48 (1996)* (categorizing various NCAA regulations and analyzing their ability to pass rule of reason scrutiny); *see also* Hairston v. Pacific 10 Conference, 101 F.3d 1315 (9th Cir. 1996) (imposing sanctions for violations of NCAA rules did not violate sec-
In *NCAA v. Board of Regents*, the Supreme Court held that an NCAA plan for televising college football games violated section 1 of the Sherman Act. Notwithstanding this result, the Court suggested that promoting amateurism and preserving competitive balance would justify upholding most NCAA rules. In this regard, the Court stated that "[i]t is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics." Continuing this line of dictum, the Court added that "[t]here can be no question but . . . that the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act."

Scholars and judges have appropriately questioned the assumptions that courts rely on in reaching these decisions. In fact, these assumptions were recently scrutinized in *Law v. NCAA*. There a federal district court examined an NCAA bylaw that required each NCAA member institution to designate one of its coaches, except in football, as a restricted earnings coach. This legislation placed a

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160. See *id* at 120.
161. See Roberts, *supra* note 158, at 2657 (criticizing the Court’s conclusions as presumptuous).
163. *Id* at 120.
166. See *id* at 1398. In 1991, the NCAA enacted a cost reduction measure limiting the number of coaches in all NCAA Division I sports. *Id* at 1400–01. Bylaw 11.02.3 was one
$16,000 cap on a restricted earnings coach's yearly income from athletic related duties.\textsuperscript{167} The federal district court held that the cap on compensation that restricted earnings coaches could earn constituted an illegal price fix in violation of section 1 of the Sherman Antitrust Act.\textsuperscript{168} In so doing, it rejected the NCAA's assertions that the fostering of amateurism and the ability of the NCAA to maintain competitive balance within intercollegiate athletics justified this restraint of trade.\textsuperscript{169}

In asserting these challenges, the plaintiffs in \textit{Law} essentially argue that antitrust laws should limit the freedom of contract between NCAA member institutions to enact provisions regulating various aspects of college athletics. Limiting freedom of contract between NCAA member institutions is deemed appropriate in cases such as \textit{Law} where the provision at issue will have an unjustifiable anticompetitive effect. Although use of antitrust laws to invalidate NCAA regulations limits the freedom of contract of NCAA member institutions, such a limitation is offset by the value of promoting competition.

The plaintiffs in \textit{Law}, however, can also be viewed as asserting their right to individual freedom, including the right to strike the best bargain for their services by requiring competition among their employers, colleges, and universities. Although not a focus of the court's antitrust analysis, the coaches in \textit{Law} essentially argued that the restrictive earnings limitations had the same effect on the prices paid for their services as a monopsony—"market power held by a buyer or buyers over suppliers of an input [that] allows the buyer(s) to force down the price paid or to restrict the quantity/quality of the input being purchased."\textsuperscript{170} In summary, \textit{Law} can be analyzed as involving the

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  \item of several recommendations of the Cost Containment Committee, an NCAA ad hoc committee, charged with formulating recommendations for reducing costs in intercollegiate athletics. \textit{See id.} at 1400.
  \item \textsuperscript{167} \textit{See id.} at 1400.
  \item \textsuperscript{168} \textit{See id.} at 1410. Section 1 of the Act provides in pertinent part as follows: "Every 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." \textit{15 U.S.C.} § 1 (1994).
  \item \textsuperscript{169} \textit{See Law}, 902 F. Supp. at 1406. The NCAA also argued that the compensation limitation was part of an overall effort directed toward containing the escalating costs of operating intercollegiate athletic programs. \textit{See id. See also} Roberts, \textit{supra} note 158, at 2658–69 (evaluating these justifications).
  \item \textsuperscript{170} Roberts, \textit{supra} note 158, at 2643 (arguing that the REC cap is anticompetitive since it seeks cost reductions not from creating efficiency but from "exercising power over suppliers of input"). \textit{See generally} Stephen F. Ross, \textit{Monopoly Sports Leagues}, \textit{73 Minn. L. Rev.} 643, 667 n.107 (1989) (defining monopsony power as "the flip side of monopoly—a single firm buying goods or services from sellers" and discussing its anticompetitive effects in the context of sports).
\end{itemize}
invalidation of an NCAA rule that lacked a sufficient nexus to promoting certain values: "the ideals of amateurism" and the scholar-athlete. The case can also be viewed, however, as a successful attempt by plaintiffs to use antitrust law as a vehicle for protecting their individual freedom to contract. Although questions may be raised concerning whether protecting individual interests in freedom of contract is properly within the goals of antitrust law, this undercurrent is present in other antitrust cases in the intercollegiate context.

The labor and antitrust decisions provide a glimpse of public policies and values that compete with the values of the marketplace including freedom of contract. Even though these cases temper freedom of contract with competing values such as preserving marketplace competition, ideas associated with the bargain principle remain relevant. We now turn to a group of cases which illustrates the predominance of values related to the bargain principle.

E. The Student-Athlete/University Relationship and Judicial Reluctance to Imply Terms

The influence of the bargain theory of contract is quite striking in cases where student-athletes have sought an expansion of the contractual obligations owed to them by their colleges and universities. In these cases, student-athletes urge courts to imply into the express contract between them and their institutions, contract-based obligations that extend beyond their institutions' provision of financial aid. Student-athletes have sought to impose implied contractual obligations on their colleges and universities. These implied obligations include the following: a duty on the part of institutions to provide

171. Roberts, supra note 158, at 2645 (characterizing the court's reasoning in this matter).

172. See id. at 2650 (noting the debate regarding whether wealth transfers are a legitimate concern of antitrust law); Note, The Antitrust Implications of Employee Non compete Agreements: A Labor Market Analysis, 66 Minn. L. Rev. 519, 526–27 (1982) (asserting that a goal of antitrust laws in addition to achieving economic efficiency is protecting individual freedom and opportunity).


student-athletes with an educational opportunity, a right of student-athletes to athletic participation and conversely an obligation on colleges not to interfere, and in some instances to promote such a right; an institutional obligation to provide student-athletes with an opportunity to develop their athletic skills; and an institutional obligation to protect student-athletes from physical harm.

Reading the contract strictly so as only to give rise to obligations expressly set forth in the contract documents, courts have for the most part rejected attempts to imply obligations into the contractual relationship. The methodology employed in rejecting these efforts is strikingly similar. For instance, in Jackson v. Drake University, a student-athlete asserted that rights to an educational opportunity and to athletic participation were implied within the express contract between him and the institution. In rejecting this claim the court focused on the omission from the contract documents of any such obligation. It reasoned that "where the language of a contract is clear and unambiguous, the language controls. The court concluded that

174. See Ross, 957 F.2d at 416 (asserting obligation on university to provide meaningful opportunity to participate in school's academic program); Jackson v. Drake Univ., 778 F. Supp. 1490, 1493 (S.D. Iowa 1991) (asserting implied obligation between student-athlete and institution for latter to provide former with an educational opportunity).


176. See Third Amended Complaint, at 28 ¶ 79, Fortay v. University of Miami, (S.D. Fla. Dec. 9, 1994) (No. 94-0385-CIV. MORENO) [hereinafter Third Amended Complaint] (asserting that the University of Miami owed him an implied contractual right to provide him the guidance necessary to allow him to develop his athletic skills).

177. See Reed v. University of North Dakota, 543 N.W.2d 106, 110 (Minn. Ct. App. 1996) (discussing student-athlete's allegation that his agreement to play hockey was conditioned on university's obligation to provide medical care).


179. See id. at 1493.
the financial aid agreements do not implicitly contain a right to play basketball.\textsuperscript{180}

Similar reasoning was employed a few years earlier in \textit{Hysaw v. Washburn University},\textsuperscript{181} where a federal district court rejected a breach of contract claim premised upon an implied right to play football.\textsuperscript{182} The court stated:

The law in Kansas is well-established that when a written contract exists and its language is clear and unambiguous, the language controls. Plaintiffs argue they were promised that they would be allowed to play football during the 1986–87 season. Yet the written scholarship contracts they signed make no indication of such promises. In fact, the only promises in those written contracts were that the players would receive money. Plaintiffs provide no other evidence, other than “understandings” and “expectations,” that they were promised a position on the 1986 team.\textsuperscript{183}

In \textit{Ross v. Creighton University},\textsuperscript{184} a student-athlete argued his educational malpractice claim was cognizable under tort and contract principles.\textsuperscript{185} The court recognized that the contract between Ross and his college consisted of the contract documents such as the Letter of Intent and terms implied from other university documents such as bulletins and custom.\textsuperscript{186} The Seventh Circuit concluded, however, that Ross possessed a legally cognizable contract claim only to the extent that he could “point to an identifiable contractual promise that the [school] failed to honor.”\textsuperscript{187}

\begin{footnotes}
\footnotetext{180}{\textit{Id.} (citations omitted).}
\footnotetext{181}{690 F. Supp. 940 (D. Kan. 1987).}
\footnotetext{182}{\textit{Id.} at 946–47.}
\footnotetext{183}{\textit{Id.} (emphasis added) (citations omitted). Relying on the reasoning in \textit{Hysaw}, a federal district court in Kansas rejected the plaintiff's claim that the express contract included an implied promise that he would have a position on the school's baseball team. \textit{See} Lesser v. Neosho County Community College, 741 F. Supp. 834, 865 (D. Kan. 1990); Gonyo v. Drake Univ., 837 F. Supp. 989, 994 (S.D. Iowa 1993) (holding that university agreed to no contractual obligations to student-athletes—including right to participate in sport—apart from express contractual obligation to provide financial aid); \textit{see also} Justice v. NCAA, 577 F. Supp. 356, 365–66 (D. Ariz. 1983) (intimating as dicta that no implied right to participate in post-season play arises from express contract between student-athletes and their institutions); Conrad v. University of Wash., 834 P.2d 17, 26 (Wash. 1992) (refusing to find contractual right to renewal of financial aid); Taylor v. Wake Forest Univ., 191 S.E.2d 379, 382 (N.C. App. Ct. 1972) (refusing generally to extend university's contractual obligations beyond provision of financial aid).}
\footnotetext{184}{957 F.2d 410 (7th Cir. 1992).}
\footnotetext{185}{\textit{See id.} at 415–16.}
\footnotetext{186}{\textit{See id.} at 417.}
\footnotetext{187}{\textit{Id.} (alteration in original).}
\end{footnotes}
Similar sentiments were expressed by the federal district court in *Fortay v. University of Miami* in rejecting plaintiff's claim that the express contract between student-athletes and colleges gives rise to implied contractual obligations. The court defined the contract between Fortay and his school as consisting of the Letter of Intent, the Scholarship Agreement, and various recruiting letters. It held that "the written contract is devoid of any express or even implied provision that Fortay would be the starting quarterback." The court also noted that no other implied contractual obligations regarding educational or athletic opportunity arose from the contract documents.

What is striking about these cases is the judicial reluctance to acknowledge the relevance of information beyond the language contained in the contract documents. Such an approach ignores the "contextual and relational dimensions of a contract." Acknowledging these dimensions of contractual relations would allow for consideration of the relative status of the parties and other information which might provide insight into the reasonable expectations of parties and, thus, the true nature of their respective contractual undertakings. This suggests that under the guise of impartial rules of contract interpretation, courts are promoting certain values. These values are those traditionally associated with contract, such as independent parties who are capable of protecting their own affairs.

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189. *Id.*


Pursuant to the Letter of Intent, UND agreed to give Reed financial aid in exchange for his agreement to play hockey. Reed does not allege that UND breached this agreement and the Letter of Intent contains no provisions regarding UND’s responsibilities regarding medical care. We therefore conclude that district court correctly determined that, when viewed in a light most favorable to Reed, the contract claims fail as a matter of law.

192. *See* Davis, *supra* note 95, at 693 (arguing that determining reasonable expectations should be made pursuant to a broad contextual approach). "Such an approach involves consideration of variables ranging from the express terms of the agreement, to the nature of the particular relationship including trade usage, and the circumstances surrounding the making of the contract." *Id.*
Consequently, courts reject the notion of interdependence and communal interests between student-athletes and their institutions.

Moreover, the approach of courts in these cases seems to represent a retreat to the rigid methodology so prevalent in classical contract ideology. Consequently, they are abandoning interventionist, egalitarian contract jurisprudence for a more classical, conceptualist ethic\textsuperscript{193} that impliedly grants preeminence to "freedom of contract and marketplace economics."\textsuperscript{194} Judicial unwillingness to imply terms beyond those that are set forth in the contract documents is reminiscent of the classical mantra that courts will not make contracts for the parties. It also focuses on the contractual value of consent between two independent parties.

By emphasizing the bargain principle, courts deny the relational nature of the student-athlete university relationship. In addition, giving primacy to the bargain principle fails to accept the reality that student-athlete/university contracts are not negotiated but constitute standard form agreements. They also ignore that it may be appropriate to apply special rules to non-negotiated contracts.\textsuperscript{195} Finally, critics of contract would argue that such a refusal uses contract as a means of maintaining the powerlessness of student-athletes.\textsuperscript{196}

V. Conclusion

Historically, courts in sports related cases adopted and adhered to the bargain principle and what it implies: individualism, consent, and independence. The preeminence of private contract has been substantially lessened, however, as a result of values that compete with those captured in the bargain principle. These values and policies, such as collective bargaining which overrides individual bargaining and restricts freedom of contract, typically find expression in legislation that limits the scope of private lawmaking that results from

\textsuperscript{193} See Mooney, supra note 16, at 1134. Conceptualism is "legal thought and that emphasizes definitions, categories and syllogistic logic . . . .[C]onceptualist theorists and judges generally prefer rules over standards, certainty over flexibility, questions of law over questions of fact, and, at a deeper level, individualism over community." Id.

\textsuperscript{194} Mooney, supra note 16, at 1135.

\textsuperscript{195} See Speidel, supra note 9, at 264 (proposing that although the bargain principle should apply to negotiated contracts, special rules should apply to standard form and relational contracts).

\textsuperscript{196} See Kastely, supra note 59, at 165 (arguing that some courts appearing to apply simple rules of contract interpretation, actually justify and conceal the exploitation and powerlessness of the oppressed); Mooney, supra note 16, at 1172 (arguing that "the principal beneficiaries of these conceptualist attacks [on implying terms into parties' agreements] are economically privileged parties like landowners, employers, and banks").
contracting. Notwithstanding such limitations, contract ideology remains prevalent in sports. As such, contract in the sports context presents the same dichotomies created by competing values that are present in other contexts.