

Concussion Crisis: Regulating the NFL's Concussion Policy Under the Commerce Clause

by MARGARET GREER*

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-Representative Linda Sanchez (D), California

Introduction

The United States government's interest in regulating and monitoring football head injuries dates back to the early twentieth century. In 1905, eighteen collegiate athletes died from football related injuries.¹ With university presidents calling for the abolition of the game, President Theodore Roosevelt intervened in order to save the sport and to encourage the implementation of rules meant to reduce the risk of injury and death.² At the emergency White House summit, representatives of the country's top collegiate programs legalized the forward pass and increased the yardage required for a first down to ten yards in an attempt to deemphasize repeated tackling.³ The health and injury risks associated with football decreased even more when the National Football League ("NFL" or "League"), founded in 1920, made helmets mandatory in 1943.⁴ The introduction of high-strength thermoplastic helmets in the mid-1950s

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1. MARK FAINARU-WADA & STEVE FAINARU, LEAGUE OF DENIAL: THE NFL, CONCUSSIONS, AND THE BATTLE FOR TRUTH 135 (2013).

2. *Id.*

3. *Id.*

4. William B. Gould IV, *Football, Concussions, and Preemption: The Gridiron of National Football League Litigation*, 8 FIU L. Rev. 55, 55-56 (2012).

further reduced football induced skull fractures and hemorrhages.⁵ No helmet, however, could or can prevent the onset of the silent, yet deadly damage caused by chronic traumatic encephalopathy (“CTE”), the long term brain trauma sustained by an unknown number of professional, collegiate, and youth football players.⁶

This Note will examine both the need for federal regulation of the NFL’s concussion policy, as well as the feasibility of such regulation under Article I, Section 8, Clause 3 of the United States Constitution (“Commerce Clause”).⁷ In *United States v. Lopez*,⁸ the United States Supreme Court found that Congress may regulate activities which have a substantial impact on interstate commerce.⁹ *Lopez* and its progeny, however, indicate that the concussions and traumatic brain injuries sustained by professional football players do not meet the substantial impact requirement. The Court’s decision in *Gonzales v. Raich*,¹⁰ which established the principle that Congress may regulate individual actors if the regulation is part of a larger federal regulatory scheme, provides guidance for federally regulating the NFL’s concussion policy.¹¹ It is important to note, however, that even if Congress is able to utilize its Commerce Clause power to establish a federal traumatic brain injury regulatory scheme, political opposition to federal intervention, as well as a general apathy toward the neurological and mental diseases that the injured football players develop, may ultimately inhibit passage of the much needed federal regulation.

Part II of this Note explores both the history of the NFL’s refusal to acknowledge a correlation between concussions and long-term neurological damage, as well as Congress’ role in prompting the NFL to admit publicly that concussions and sub-concussive blows do result in traumatic brain injuries. Part III describes how the NFL’s decision to alter both rules of play and its concussion policy has provided little protection or guarantee against head injuries for the League’s players. An analysis of the ineffectuality of the League’s changes substantiates this Note’s argument that federal regulation of the NFL’s concussion policy is imperative. Part IV of this Note traces the history of the

5. WADA & FAINRU, *supra* note 1, at 135.

6. *Id.* at 163.

7. U.S. CONST. art. I, § 8, cl. 3.

8. *United States v. Lopez*, 514 U.S. 549, 559 (1995).

9. *Id.*

10. *Gonzales v. Raich*, 545 U.S. 1 (2005).

11. *Id.*

concussion litigation between former NFL players and the League. This portion of the Note explores the constitutionality of class action settlements through the lens of the proposed \$760 million settlement negotiated by the League and former NFL players.¹² A review of the proposed settlement emphasizes both the costly consequences of traumatic football related head injuries and why the settlement is an insufficient solution to the NFL's concussion problem.¹³ Finally, Part V analyzes the congressional legislation that has been proposed to regulate concussion polices in educational institutions and in youth athletics as a means of explaining how Congress may and should rely on its Commerce Clause power to regulate the NFL's concussion policy.

I. A History Of The NFL's Denial And Eventual Acceptance

For decades, countless former NFL players suffered in silence and behind closed doors from Alzheimer's disease, Parkinson's disease, dementia, severe depression, and the then undiagnosed CTE. In 2002, forensic neuropathologist Bennet Omalu discovered CTE and brought into the open the deadly consequences of playing professional football.¹⁴ Omalu first identified the presence of CTE in the brain of Mike Webster, the seventeen-year Hall of Fame NFL veteran, who most notably played center for the Pittsburgh Steelers.¹⁵ Before dying at the age of fifty from a massive heart attack, Webster had spent most of the last decade of his life in an utter state of confusion.¹⁶ Broke, alone, and disheveled, Webster often slept in his truck or in the local bus station, struggled with memory loss, insomnia, depression, and signs of Parkinson disease.¹⁷ During the last few years of his life, Webster's two teenage sons served as his full time caretakers.¹⁸ Upon a posthumous examination of Webster's brain, Omalu did not find the traditional hallmarks of either Alzheimer's or Parkinson's disease.¹⁹ Instead, Omalu discovered an alarming number of tau protein tangles scattered throughout

12. *In re Nat'l Football League Players' Concussion Injury Litig.*, 961 F. Supp. 2d 708 (2013).

13. *Id.*

14. WADA & FAINRU, *supra* note 1, at 148.

15. *Id.* at 47.

16. *Id.* at 104.

17. *Id.* at 83–100.

18. *Id.*

19. *Id.* at 158.

Webster's brain.²⁰ Omalu named the condition chronic traumatic encephalopathy, or CTE.²¹ Omalu's finding provided an answer for the former NFL players who suffered for years from inexplicable bouts of dementia, memory loss, depression, advanced aging, and suicide.²² As of fall 2012, Ann McKee, the nation's leading CTE expert, had identified the disease in thirty-three brains of former NFL players.²³

Numerous scientists, doctors, and experts in the field of neuroscience and neuropathology soon confirmed Omalu's discovery.²⁴ By 2007, medical experts concluded that the repeated head trauma experienced by football players, in the form of both concussions and sub-concussive impacts, caused CTE.²⁵ A concussion is a traumatic "injury to the brain that results in temporary loss of normal brain function."²⁶ A concussion occurs "when the head hits or is hit by an object, or when the brain is jarred against the skull, with sufficient force to cause temporary loss of function in the higher centers of the brain."²⁷ Sub-concussive impacts are small blows that "have a cumulative effect and can lead to damage in the brain similar to that caused by diagnosed concussions."²⁸ Despite the overwhelming evidence, NFL leadership categorically refused to acknowledge the existence of CTE, to admit to any correlation between the disease and football induced head trauma, or to even concede that football related concussions or head trauma can produce devastating long-term damage.²⁹

In the early 1990s, the NFL formed the Mild Traumatic Brain Injury ("MTBI") Committee in order to research the long-term

20. *Id.*

21. *Id.*

22. *Frequently Asked Questions*, B.U. CTE Ctr., <http://www.bu.edu/cte/about/frequently-asked-questions/> (last visited Mar. 29, 2014).

23. WADA & FAINRU, *supra* note 1, at 343.

24. *Id.*

25. *Id.* at 224.

26. *Concussion*, American Association of Neurological Sciences, <https://www.aans.org/Patient%20Information/Conditions%20and%20Treatments/Concussion.aspx> (last visited Mar. 29, 2014).

27. *Concussion*, Encyclopedia of Children's Health, <http://www.healthofchildren.com/C/Concussion.html> (last visited Mar. 29, 2014).

28. Jeff Klein, *Study Shows Possible Brain Damage Caused by Subconcussive Blows*, N.Y. TIMES (Nov. 30, 2012, 7:02 PM), <http://slapshot.blogs.nytimes.com/2012/11/30/study-shows-possible-brain-damage-caused-by-subconcussive-blows/?php=true&type=blogs&r=0>.

29. See WADA & FAINRU, *supra* note 1, at 166–228.

health effects from repeated football related head trauma. The NFL continued to deny any relationship between on-field head trauma and long-term damage in spite of the fact that in 2001, sixty percent of retired NFL players reported sustaining at least one concussion during their careers, twenty-five percent reported sustaining at least three concussions, and more than half said that they had lost consciousness on the field or experienced memory loss at least once.³⁰ The MTBI Committee even issued a report in which it concluded that “[p]rofessional football players do not sustain frequent repetitive blows to the brain on a regular basis.”³¹ At the 2007 Concussion Summit, William Barr, Ph.D, of the New York University Medical Center alleged that over the course of a nineteen-year period, the MTBI Committee only relied on fifteen percent of available data in concluding that there were no long-term effects from concussions in NFL athletes.³² At the same time that the MTBI Committee continued to deny the existence of any damaging long-term effects from football head injuries, the Committee’s top members provided data analysis to Riddell, the nation’s top football helmet manufacturer.³³ The Committee’s members asserted that Riddell’s helmets reduced the “relative risk” of concussion by thirty-one percent, an absolute falsehood which demonstrated the NFL’s biased, limited, and unrealistic outlook.³⁴ Most troubling of all, when the NFL’s researchers made findings that negated the League’s position, the League attacked and undermined the research.³⁵

On October 29, 2009, the House Judiciary Committee held a hearing on football and brain damage.³⁶ The hearing changed the course of the NFL’s public opinion regarding the correlation between concussions and sub-concussive injuries and long-term damage. Despite Chairmen Roger Goodell’s equivocation and evasiveness when asked directly for the NFL’s opinion on concussion damage, California Representative Linda Sanchez completely deflated the NFL’s confidence in its ability to publicly deny the truth about football head injuries.³⁷ In an exchange with Goodell, Sanchez noted:

30. *Id.* at 116, 170.

31. *Id.* at 170.

32. *Id.* at 221, 227.

33. *Id.* at 185, 187.

34. *Id.*

35. *Id.* at 227.

36. *Id.* at 275.

37. *Id.* at 270.

“[t]he NFL sort of reminds me of the tobacco companies, pre-’90s, when they kept saying, ‘no, there is no link between smoking and damage to your health.’”³⁸ Less than three weeks after Sanchez compared the League’s denial of the correlation between football head injuries and permanent brain damage, CTE, Alzheimer’s disease, Lou Gehrig’s disease, Parkinson’s disease, dementia, and depression, to the tobacco industry’s decades long refusal to admit any relationship between tobacco and lung cancer, the NFL disbanded the MTBI Committee and donated \$1 million to the Boston University Center for the Study of Traumatic Encephalopathy.³⁹ Most notably, after the hearing, NFL Director of Communications, Greg Aiello, admitted to journalist Alan Schwartz: “[i]t’s quite obvious from the medical research that’s been done that concussions can lead to long term problems.”⁴⁰ Congress’ hearing marked a turning point in the history of the League’s public opinion regarding football head injuries. The changes that the hearing precipitated in the NFL’s concussion policy, while significant, have ultimately proved to be an insufficient solution for reducing the rate and the effects of football head injuries.

II. The NFL’s Faulty Concussion Policy

In the years since the 2009 House Judiciary Hearing, the NFL has made noticeable alterations to its concussion policy. For example, teams are now required to have injured and concussed players evaluated by an independent neurologist, independent neurologists are to be present on the sidelines during games, and same day returns to games and practices after players experience concussion symptoms are prohibited.⁴¹ The requirements of a neutral physician on the sidelines, a symptom checklist, and a baseline neurological and cognitive test for players have been introduced to “standardize and enforce the objectivity with which team physicians and trainers handle sideline concussion evaluations in the face of the pressure a team physician may feel to return a player to the game.”⁴²

38. *Id.* at 280.

39. *Id.* at 283–84.

40. Alan Schwarz, *N.F.L. Acknowledges Long-Term Concussion Effects*, N.Y. TIMES (Dec. 20, 2009), <http://www.nytimes.com/2009/12/21/sports/football/21concussions.html?pagewanted=all>.

41. WADA & FAINRU, *supra* note 1, at 283.

42. Cailyn M. Reilly, *The NCAA Needs Smelling Salts When it Comes to Concussion Regulation in Major College Athletics*, 19 UCLA ENT. L. REV. 245, 263 (2012).

The League has also made efforts to penalize dangerous plays. In March 2013, for example, the NFL owners approved a new rule, which prohibits “runners and defenders from lowering their heads and hitting with their helmets when outside of the tackle box—the area of the field between the two offensive tackles.”⁴³ The rule marks an attempt by the League to decrease the risk of serious head injuries. Although the NFL has implemented a number of changes to its method for handling concussed players, the modifications fail to provide a sufficient means of reducing the incidence of head trauma.

An important component of minimizing the long-term effects of head injuries is ensuring that the injuries sustained by players are accurately reported to the NFL’s injured players list. Preventing long-term brain damage is partly dependent upon ensuring that injured players do not return to play until they are healed. Since 2009, when the NFL began to reform its concussion policy, the number of players reported to the injured players list has increased by sixty-eight percent.⁴⁴ The NFL’s reporting process, however, is not accurate or effective. Not only do the reports fail to include head injuries sustained during the preseason, but they also lack a uniform system for describing and reporting head injuries.⁴⁵ For example, while some teams report the head injury sustained by a player as a concussion, other teams write simply “head” as the injury description.⁴⁶ As a result, during the 2013 preseason, even though forty instances of player concussions or head injuries were reported on team websites, only ten of those concussions were included in the official Week 1 NFL Injured Players List.⁴⁷ With only two-thirds of known concussions reported during the 2013 season and numerous players, such as Jets receiver Jeremy Kerley and Broncos receiver Wes Welker continuing to play while suffering from concussion symptoms, it is clear that the NFL’s concussion plan is insufficient.⁴⁸

43. Jason Breslow, *With Eye on Concussions, NFL Adopts New Rule on Helmet Hits*, Frontline (Mar. 22, 2013, 4:12 PM), <http://www.pbs.org/wgbh/pages/frontline/sports/concussion-watch/with-eye-on-concussions-nfl-adopts-new-rule-on-helmet-hits/>.

44. Steve Fainaru & Mark Fainaru-Wada, *Inside the Numbers: Counting Concussions in the NFL*, Frontline (Dec. 13, 2013, 8:57 PM), <http://www.pbs.org/wgbh/pages/frontline/sports/concussion-watch/inside-the-numbers-counting-concussions-in-the-nfl/>.

45. *Id.*

46. *Id.*

47. James Breslow, *NFL Concussions: The 2013-14 Season in Review*, Frontline (Jan. 30, 2014, 4:31 PM), <http://www.pbs.org/wgbh/pages/frontline/sports/concussion-watch/nfl-concussions-the-2013-14-season-in-review/>.

48. *Id.*

The lack of objectivity in the NFL's study, screening, and treatment of traumatic brain and head injuries emphasizes the inadequacy of the NFL's concussion policy. The NFL is currently the main sponsor of independent scientific and medical research on football head trauma, which raises serious issues regarding the research's accuracy and impartiality.⁴⁹ In addition to the serious concerns surrounding the research which the NFL funds, there is evidence that internally, the League continues to deny the seriousness of head injuries. At the beginning of the 2013 season, new players attended a three-day lecture on the dangers of concussions where they were informed that while concussions are "never an insignificant injury," no "direct cause and effect has been established yet," between concussions and long-term brain damage.⁵⁰ The fact that the NFL continues to inform athletes that concussions do not produce long-term effects, underreports instances of head injuries, and controls almost all CTE research provides little reassurance that the safety of the League's players is being properly protected. Federal regulation of the League's concussion policy is needed and the ability of one congressional representative to compel the League to completely change its public position on football head trauma indicates that Congress can play a powerful role in transforming the NFL's concussion policy.

III. The NFL Cases and the Proposed Settlement

The need for congressional regulation of the NFL's concussion policy is also made evident by the current litigation between the NFL and more than 4,500 retired NFL players and their families. In July 2011, former NFL players filed a suit against the NFL, in which they alleged that the League breached its duty to the players by failing to protect them from the neurological trauma caused by concussions and other serious head injuries.⁵¹ The players also asserted that the NFL hid the damaging risks, which such head injuries could cause. The suits filed by more than 4,500 former players were combined as a multidistrict litigation ("MDL").⁵² Following consolidation, the

49. WADA & FAINARU, *supra* note 1, at 346.

50. Sally Jenkins & Rick Maese, *Do no harm: NFL tries to improve player safety without admitting to any liability for past*, WASH. POST (July 21, 2013), http://www.washingtonpost.com/sports/redskins/nfl-tries-to-improve-player-safety-without-admitting-to-any-liability-for-past/2013/07/21/08fb66b8-e8d8-11e2-818e-aa29e855f3ab_story.html.

51. *In re Nat'l Football League*, 961 F. Supp. 2d at 710.

52. *Id.*

players and the NFL began mediation where “[t]he Settling Parties met with multiple medical, actuarial, and economic experts to determine, develop and test an appropriate settlement framework to meet the needs of Retired NFL Football Players suffering from, or at risk for, the claimed injuries.”⁵³ On January 14, 2014, District Judge Anita Brody rejected the proposed \$760 million settlement.⁵⁴

The settlement which Judge Brody rejected included a nationwide settlement class, which was to cover three categories of claimants: retired NFL players, authorized representatives of legally incapacitated, incompetent, or deceased retired NFL players, and close family members of retired NFL players or other people who could legally assert the right to sue on the basis of their relationship with the retired NFL players.⁵⁵ The settlement included more than 20,000 class members.⁵⁶ The class had two different subclasses. The first class included players who have not been diagnosed with a “qualifying diagnosis,” and the second class covered players who have been diagnosed with a qualifying diagnosis “prior to the date of the Preliminary Approval and Class Certification Order and their Representative Claimants and Derivative Claimants, and the Representative Claimants of deceased Retired NFL Football Players who were diagnosed with a Qualifying Diagnosis prior to death or who died prior to the date of the Preliminary Approval and Class Certification Order and who received a post-mortem diagnosis of [CTE].”⁵⁷ The different levels of qualifying diagnosis were defined as follows: “A Qualifying Diagnosis is defined as Level 1.5 Neurocognitive Impairment (early Dementia), Level 2 Neurocognitive Impairment (moderate Dementia), Alzheimer’s Disease, Parkinson’s Disease, amyotrophic lateral sclerosis (“ALS”), and/or Death with CTE.”⁵⁸

The settlement the parties reached stipulated that the NFL would pay a total of \$760 million over a twenty-year period.⁵⁹ The payments would provide a benefit resource for the class members. The settlement also set aside \$75 million for the Baseline Assessment Program, which would provide players with baseline

53. *Id.* at 711.

54. *Id.* at 711, 715.

55. *Id.* at 711.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

neuropsychological and neurological evaluations to determine the presence of and degree of neurological and cognitive defects.⁶⁰ Players with evidence of moderate cognitive impairment would receive certain medical treatments, medications, counseling, and further evaluations. The settlement also included a “Monetary Award Fund” in the amount of \$675 million.⁶¹ This money was meant for players who have already been diagnosed with a “qualifying diagnosis,” or for players who are ultimately diagnosed with a “qualifying diagnosis.”⁶² “Representative Claimants and Derivative Claimants related to such players” would “also be eligible for cash awards.”⁶³ Former players with Level 1.5 Neurocognitive Impairment would receive a maximum of \$1.5 million, those with Level 2 Neurocognitive Impairment would receive at most \$3 million, players with Alzheimer’s Disease a \$3.5 million maximum, those diagnosed with Parkinson’s Disease a \$3.5 million maximum, players suffering from ALS at most \$5 million, and deceased players or players diagnosed with CTE \$4 million.⁶⁴ The settlement stated that these awards could be altered or reduced according to the age of the player at the point of diagnosis and the number of years the player was in the NFL.⁶⁵

The settlement established a \$10 million Education Fund to pay for education programs meant to promote safety and head injury prevention both at the professional level, and in youth football programs.⁶⁶ The education fund would also provide eligible players with information on the NFL’s medical and disability programs. The class members agreed that as part of the settlement, they would “release all claims and dismiss with prejudice all actions against, and covenant not to sue, the NFL Parties and others in this litigation and all Related Lawsuits in this Court and other courts.”⁶⁷ Furthermore, under the settlement, all class members receiving “Monetary Awards” would “also be required to dismiss pending and/or forebear from bringing litigation relating to cognitive injuries against the

60. *Id.* at 711–12.

61. *Id.* at 712.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

National Collegiate Athletic Association (“NCAA”) and any other collegiate, amateur, or youth football organizations and entities.”⁶⁸

A. Problems with the NFL Class Action Settlement

Before examining how and why Judge Brody’s rejection of the settlement is indicative of the need for congressional regulation of the NFL’s concussion policy, it is important to note that scholars such as Martin Redish view class action settlements as unconstitutional violations of the case and controversy requirement of Article III of the United States Constitution.⁶⁹ The constitutional problem with class action settlements is that because there is no live dispute between the parties which a federal judge is being asked to resolve through litigation and because the parties are responsible for determining how the claims should be disposed of, the required adverseness element which is integral to Article III’s case and controversy requirement is missing.⁷⁰ Here, for example, the parties agreed that the League officials would not have to answer questions under oath about their knowledge of the link between football and traumatic brain injury. As explained by the case’s court-appointed mediator: the agreement “doesn’t mean that the NFL hid information or did what the plaintiffs claimed;”⁷¹ nor does it mean “that the plaintiffs’ injuries were caused by football or that the plaintiffs would have been able to prove that their injuries were caused by football.”⁷² Without the element of adverseness, Article III judges like Judge Brody must perform the quasi-administrative executive task of distributing “private resources outside the context of an adversarial case-or-controversy.”⁷³ As a result, the judiciary is not only forced to violate the constitutional separation of powers, but it also must do so in a manner which jeopardizes the judiciary’s integrity because it forces the judges to violate their constitutional obligation to hear only adversarial cases or controversies.⁷⁴

68. *Id.*

69. MARTIN H. REDISH, *WHOLESALE JUSTICE CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT* 178 (2009); *see* U.S. CONST. art. I, § 2, cl. 1.

70. *Id.* at 178.

71. Wada & Fainru, *supra* note 44.

72. *Id.*

73. REDISH, *supra* note 69, at 227.

74. *Id.* at 210–11.

Class action settlements not only pose a constitutional threat, but they often provide insufficient protection to those in the class. “[W]here settlement negotiations precede class certification, and approval for settlement and certification are sought simultaneously, we require district courts to be even ‘more scrupulous than usual’ when examining the fairness of the proposed settlement.”⁷⁵ Nevertheless, “[b]ecause the issue of certification is never actively contested, the judge never receives the benefit of the adversarial process that provides the information needed to review the propriety of the class and the adequacy of settlement.”⁷⁶ The lack of a fully developed evidentiary record means that the court cannot make an “independent assessment of the facts and law” which is needed for determining whether the settlement “fairly reflects the value of class claims.”⁷⁷ Judge Brody’s reasoning for refusing to accept the proposed settlement highlights many of the inadequacies of class action settlement. In rejecting the proposed settlement without prejudice, Judge Brody noted:

I am primarily concerned that not all Retired NFL Football Players who ultimately receive a Qualifying Diagnosis or their related claimants will be paid. The Settlement fixes the size of the Monetary Award Fund. It also fixes the Monetary Award level for each Qualifying Diagnosis, subject to a variety of offsets. In various hypothetical scenarios, the Monetary Award Fund may lack the necessary funds to pay Monetary Awards for Qualifying Diagnoses. More specifically, the Settlement contemplates a \$675 million Monetary Award Fund with a 65-year lifespan for a Settlement Class of approximately 20,000 people. Retired NFL Football Players with a Qualifying Diagnosis of Parkinson’s Disease, for example, are eligible for a maximum award of \$3.5 million; those with a Qualifying Diagnosis of ALS may receive up to \$5 million. Even if only 10 percent of Retired NFL

75. *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 534 (3d Cir. 2004) (citing *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liability Litig.*, 55 F.3d 768, 805 (3d Cir. 1995). *See also* Fed. R. Civ. P. 23(e).

76. *In re General Motors Corp.*, 55 F.3d at 789–90.

77. *Pettway v. Am. Cast Iron Pipe Co.*, 576 F. 2d 1157, 1169 (5th Cir. 1978); REDISH, *supra* note 69, at 213.

Football Players eventually receive a Qualifying Diagnosis, it is difficult to see how the Monetary Award Fund would have the funds available over its lifespan to pay all claimants at these significant award levels.⁷⁸

Even without a full evidentiary record, it is clear to Judge Brody that the settlement reached by the League and the former players will not fairly and adequately cover all class members. The reality is that almost every single class member could eventually receive a qualifying diagnosis, but as the settlement currently stands, it is impossible for all qualifying class members to receive coverage. In order to determine the amount needed to ensure the protection of all class members, a full hearing in which experts could testify to the cost of future care and treatment, to the percentage of claimants who will likely receive a qualifying diagnosis, and to the extent the League obscured the reality of the game's long term neurological damage to players, would be required. Without a full record, it is doubtful that a settlement which accurately provides for all of the members in the class will ever be reached.

Many class members understand the deficits of the settlement proposed by the League. After a settlement is approved, class members are prohibited from re-litigating their claims against the defendant, and the defendant may use the class action judgment as an affirmative defense to any such suit.⁷⁹ Recognizing the lack of protection provided by the settlement, attorney Thomas Girardi, who represents 1,200 of the claimants, has recommend that a "substantial number" of his clients opt out of the settlement because while the agreement benefits severely impaired players, it leaves many others with barely "a handshake."⁸⁰ It is clear that even if Judge Brody accepts a proposed settlement in the future, the NFL will continue to face litigation regarding the concussion issue. On December 10, 2013, "thirty-nine players filed a lawsuit in Manhattan Federal Court against the League and companies associated with helmet maker Riddell, seeking damages of more than \$75,000 each and a medical

78. *In re Nat'l Football League*, 961 F. Supp. 2d at 715.

79. WILLIAM B. RUBENSTEIN, *NEWBERG ON CLASS ACTIONS*, § 1:6 (5th ed. 2013).

80. Mark Fainaru-Wada & Steve Fainaru, *Lawyer blasts concussion agreement*, ESPN.com (Jan. 14, 2014, 11:45 PM), http://espn.go.com/espn/otl/story/_id/10295307/attorney-blasts-concussion-deal-recommend-clients-continue-sue-nfl.

monitoring program paid for by the NFL.”⁸¹ Furthermore, while the estate of Mike Webster, which was excluded from the League’s settlement, intends to sue the NFL in California Superior Court, the children of Junior Seau, the legendary San Diego Charger linebacker who while suffering from CTE committed suicide, are suing the NFL for their own pain and suffering.⁸² The class action settlement reached by the NFL and the former NFL players not only raises issues of constitutionality and fairness, but it also fails to provide a definite and satisfying solution for the current players and former players who will and do suffer from long term neurological damage.

Judge Brody’s rejection of the initial settlement highlights the need for congressional regulation of the NFL’s concussion policy. The NFL is a \$10 billion industry that earns annual rights fees of \$5 billion.⁸³ As indicated by Judge Brody’s rejection of the \$760 million proposed settlement, the amount of money needed to compensate injured players and to pay for the care and treatment of players who suffer from the devastating results of football related traumatic head injuries is an astronomical unknown. As long as the sport continues to be played, athletes will sustain traumatic head injuries in the form of concussions and sub-concussive hits which will lead to long term debilitating, neurological damage. The first step in mitigating the damage caused by football head injuries is instituting a federally regulated, uniform concussion policy.

IV. Concussion Regulation At The Federal Level

Although neither state nor federal legislators have attempted to regulate the NFL’s concussion policy, state and federal legislative efforts have been made to monitor and to manage the concussion policies of the nation’s youth athletic programs. As of January 30, 2014, “all 50 states and Washington, D.C., have passed laws protecting student-athletes from returning to play too soon after

81. Daniel Beekman, *NFL facing another concussion lawsuit as former NY Giants, NY Jets get involved*, NEW YORK DAILY NEWS (Dec. 10, 2013, 11:39 PM), <http://www.nydailynews.com/sports/football/nfl-faces-concussion-lawsuit-article-1.1544139#ixzz2vhIQwC5H>.

82. Jason M. Breslow, *Report: Concussion Settlement Could Shut Many Out*, Frontline (Sept. 20, 2013, 3:46 PM), <http://www.pbs.org/wgbh/pages/frontline/sports/League-of-denial/report-nfl-concussion-settlement-could-shut-out-many/>.

83. WADA & FAINRU, *supra* note 1, at 5.

suffering the effects of a concussion.”⁸⁴ Most of the legislation focuses on establishing a standard of protocol for testing and monitoring students and youth athletes who have sustained a concussion or serious sub-concussive blow and on educating coaches, trainers, student-athletes, and parents about the symptoms and risks of concussions.⁸⁵ Recognizing the national interest and concern for improving the safety and health of the nation’s youth football players, Congress in 2010, first attempted to pass legislation to regulate concussion policies in youth athletics.⁸⁶

Congress has recognized that integral to establishing a uniform concussion treatment policy is the need to formulate a baseline assessment program for detecting concussions. In September 2013, a new version of the Concussion Treatment and Care Tools Act of 2013’ (“ConTACT Act of 2013”)⁸⁷ was introduced in the Senate and House of Representatives.⁸⁸ The ConTACT Act of 2013 is based off of the ConTACT Act of 2010, which proposed the setting aside of federal funds for “computerized preseason baseline and post injury neurocognitive testing for student athletes.”⁸⁹ Although it was never passed, ConTACT Act of 2010 would have required the federal government “to convene a conference of medical, athletic, and education experts to come up with guidelines that address the prevention, identification, treatment, and management of concussions in school-aged children.”⁹⁰ Building off of the failed ConTACT Act of 2010,⁹¹ the ConTACT Act of 2013 is aimed at amending “title III of the Public Health Service Act to provide for the establishment and implementation of guidelines on best practices for diagnosis, treatment, and management of mild traumatic brain injuries (MTBIs) in school-aged children.”⁹² Congress understands that “each year United States emergency departments treat an estimated 173,285 sports- and recreation-related mild traumatic brain injuries (MTBIs), including concussions, among children and adolescents, from birth to

84. Joe Frolo Sun, *See where your state stands on concussion law*, US FOOTBALL (Sept. 28, 2014 9:42 PM), <http://usafootball.com/blog/health-and-safety/see-where-your-state-stands-concussion-law>.

85. Reilly, *supra* note 42, at 267.

86. *Id.* at 268.

87. H.R. 3113, 113th Cong. (2013); S. 1516, 113th Cong. (2013).

88. *Id.*

89. Reilly, *supra* note 42, at 269.

90. *Id.*

91. H.R. 1347, 111th Cong. (2010).

92. H.R. 3113.

19 years of age,” and that most schools do not have funding to implement adequate concussion diagnostic and management programs.⁹³ Congress, through the bill, intends to establish a set of guidelines, no later than March 15, 2015, on the “best practices for diagnosis, treatment, and management of MTBIs in school-aged children.”⁹⁴ Under the ConTACT Act of 2013, Congress will provide states with grants for implementation and compliance with the guidelines.⁹⁵ Congress will require states to provide periodic reports of data on MTBI incidents and “to utilize, to the extent practicable, applicable expertise and services offered by high school sports associations and local chapters of national brain injury organizations in such States.”⁹⁶ A version of the ConTACT Act has also been introduced in the Senate and both versions of the resolutions have been referred to the Senate Committee on Health, Education, Labor, and Pensions and to the House of Representatives Committee on Energy and Commerce respectively.⁹⁷

The 113th Congress, building upon the ConTACT resolutions, has made extensive efforts to regulate concussion policies at the primary and secondary education levels. In September 2013, Senator Richard Durbin introduced the Protecting Student Athletes from Concussions Act of 2013.⁹⁸ The purpose of the act is to “promote minimum State requirements for the prevention and treatment of concussions caused by participation in school sports, and for other purposes.”⁹⁹ Tying compliance to the receipt of funding under the Elementary and Secondary Education Act of 1965,¹⁰⁰ the bill requires the adoption of a Local Educational Agency Concussion Safety and Management Plan.¹⁰¹ The management plan emphasizes the education of students, parents, and school personnel about concussions through the use of training, release forms, treatment plans, and monitoring protocols. The proposed bill requires a uniform method of treating concussions and that peer review scientific approved information on concussions be posted in visible

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. H.R. 3113; S. 1516.

98. S. 1546, 113th Cong. (2013).

99. *Id.*

100. 20 U.S.C. § 6301 (2014).

101. *Id.*

areas of all primary and secondary schools.¹⁰² Central to the treatment protocols is the notion that if any school personnel suspects that a student has sustained a concussion, even if the injury is sustained outside of school or a school related activity, the student is to be immediately removed from the school related athletic activity.¹⁰³ The student is prohibited from returning on the day of removal and must receive clearance from a health care professional before he or she can return.¹⁰⁴

Sponsored by Representative Timothy Bishop and seven co-sponsors, Protecting Student Athletes From Concussions Act of 2013 was introduced in the House of Representatives on November 19, 2013, and has been referred to the House Committee on Education and Workforce.¹⁰⁵ Like the bill introduced in the Senate, the purpose of the House bill is to “promote State requirements for local educational agencies and public elementary and secondary schools relating to the prevention and treatment of concussions suffered by students.”¹⁰⁶ According to the House of Representative’s Constitutional Authority Statement, “Congress has the power to enact this legislation pursuant to the following: Article I, Section 8, Clauses 1, 3, and 18.”¹⁰⁷

Congress has also attempted to regulate concussion policies at the collegiate level. The National Collegiate Athletics Accountability Act (“NCAA Act”),¹⁰⁸ which Representative Charles Dent introduced into the House of Representatives on August 1, 2013, aims to “amend section 487(a) of the Higher Education Act of 1965 to provide increased accountability of nonprofit athletic associations.”¹⁰⁹ Around the country, “institutions of higher education receive approximately \$150,000,000,000 to \$200,000,000,000 in funding under title IV of the Higher Education Act of 1965.”¹¹⁰ The NCAA Act amendment stipulates that to be a member of a nonprofit athletic association, the institutions would have to provide “annual baseline concussion testing of each student athlete on the active roster of each

102. *Id.*

103. *Id.*

104. *Id.*

105. H.R. 3532, 113th Cong. (2013).

106. *Id.*

107. *Id.*

108. H.R. 2903, 113th Cong. (2013).

109. *Id.*

110. *Id.*

team participating in a contact/collision sport or a limited-contact/impact sport . . . before such student athlete may participate in any contact drills or activities.”¹¹¹ Again, Congress has tied enforcement to the schools’ reliance upon federal education grants. The bill has been referred to the Subcommittee on Higher Education and Workforce Training.¹¹² By introducing the legislation, Congress has taken another step toward acknowledging the fact that head injuries sustained during contact sports can have detrimental effects on an individual’s future, and therefore, efforts must be made to ensure that uniform protection measures are put into place for student athletes.

Congress’ introduction of both the Protecting Student Athletes from Concussions Act of 2013 and the NCAA Act, is based in part, on its belief that youths who sustain sports related head injuries may experience long term damaging effects which may impact their ability to learn, to work, and to contribute to the economy. Congress’ ability to regulate concussion policies in primary, secondary, and collegiate institutions, is not only doubtful, but the proposed legislation provides little guidance for federal regulation of the NFL’s concussion policy. In *Lopez*, the United States Supreme Court held that Congress can regulate channels of commerce, instrumentalities of commerce, and activities which have a substantial impact on commerce.¹¹³ The Court concluded that Congress lacked authority under the Commerce Clause to pass legislation that criminalized the possession of a gun within a school zone, because gun possession near schools does not have a substantial impact on commerce.¹¹⁴ The government contended that Congress had the power to regulate guns near schools because when guns are found in close proximity to schools, it tends to have a negative impact on the economy.¹¹⁵ High rates of gun possession near schools, coincides with drug trafficking, gang related activity, a disruption in school attendance, and a decline in education performance, all of which are factors that ultimately have an adverse effect on economic productivity and interstate movement of goods.¹¹⁶ The Court rejected the government’s reasoning, noting that the link between school violence and

111. *Id.*

112. *Id.*

113. *Lopez*, 514 U.S. at 556.

114. *Id.* at 560.

115. *Id.* at 563–64.

116. *Id.*

commerce was too attenuated and that the eventual aggregate impact on interstate commerce, as a result of a decline in education performance and attendance, was insubstantial.¹¹⁷

The Court, in *United States v. Morrison*,¹¹⁸ reiterated its belief that the eventual harm which an activity may have on interstate commerce does not provide a substantial enough basis for Commerce Clause based regulation.¹¹⁹ The Court concluded that the Violence Against Women Act of 1994,¹²⁰ which provided a damage remedy for women who were abused on the basis of gender, was an unconstitutional extension of Congress' regulatory power under the Commerce Clause.¹²¹ The Court found that the impact which large numbers of abused women have on economic productivity, and on the maintenance of an active and healthy workforce was insubstantial.¹²²

Congress' proposed concussion policy legislation for education institutions seems to fail the Court's *Lopez* and *Morrison* analysis. Congress' promulgation of both the Protecting Student Athletes from Concussions Act of 2013 and the NCAA Act, is based in part, on its belief that youths who sustain sports related head injuries may experience long term damaging effects that may impact their ability to learn, to work, and to ultimately contribute to the economy. But, just as the Court refused to accept the arguments that gun possession near schools and battered women constitute activities which negatively impact the strength of the United States' economy, the Court would also likely reject Congress' current contention that it needs to regulate scholastic concussion policies in order to ensure the ability of students to become healthy, active contributors to the nation's workforce. Even if the economic impact of the head injuries on interstate commerce were framed in terms of the substantial cost of diagnosing, treating, and caring for individuals with head injuries, and not in terms of the negative impact which head injuries have on the vitality of the nation's workforce, it is unlikely that the Court would accept this analysis under *Lopez* and *Morrison*. The fact that the proposed concussion legislation for educational institutions seems to not meet the substantial economic impact test indicates that NFL

117. *Id.* at 565–66.

118. *United States v. Morrison*, 529 U.S. 598, 625–27 (2000).

119. *Id.*

120. *Id.* at 605–06.

121. *Id.* at 627.

122. *Id.* at 612, 627.

concussion policy legislation would also likely fail to meet the *Lopez* substantial economic impact requirement. The mere fact that former players are impeded from being active members of the economy's workforce as a result of their NFL head injuries would not meet the substantial economic impact requirement.

Prior to the Supreme Court's decision in *National Federation of Independent Business v. Sebelius*,¹²³ Congress could have easily enforced a uniform concussion policy on education institutions via its ability to condition federal grants. For over thirty years, Congress freely conditioned federal grants as a means of compelling compliance with congressional regulations. The Court notably addressed Congress' ability to regulate by conditioning federal funds in *South Dakota v. Dole*.¹²⁴ In *Dole*, the Court upheld congressional regulation that aimed to set a national legal drinking age of twenty-one years by docking five percent of a state's highway funding if the state did not comply with the national legal drinking age.¹²⁵ The Court concluded that Congress could implement regulation by conditioning federal grants as long as the condition requires lawful behavior, the state is informed of the condition, the condition is related to Congress' reason for granting funds to the state, and the condition is not coercive.¹²⁶ From 1987 to 2012, the Court failed to find any piece of conditioned legislation to be coercive. Under the Court's analysis in *Dole*, Congress' education concussion regulation is related directly to its reason for granting funds to schools. Congress grants funds to schools via the Elementary and Secondary Education Act of 1965 and the Higher Education Act of 1965¹²⁷ in order to create equal access to education and to establish high standards and accountability.¹²⁸ A uniform concussion management, treatment, and education policy for scholastic athletics works to ensure the health of students so that they can receive a full and complete education as prescribed by the Elementary and Secondary Education Act of 1965 and the Higher Education Act of 1965.¹²⁹ Therefore, it would seem that Congress could and should be able to implement its concussion legislation by conditioning school funding.

123. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

124. See *South Dakota v. Dole*, 483 U.S. 203 (1987).

125. *Id.*

126. *Id.* at 211.

127. Higher Education Act of 1965, Pub. L. No. 89-329 (2013).

128. *Id.*

129. *Id.*

Sebelius, however, places into doubt Congress' ability to regulate by conditioning funding. The Court in *Sebelius* found that the Affordable Care Act¹³⁰ provision, which required states to forfeit all federal Medicaid funds if the states did not expand their Medicaid programs, was too coercive.¹³¹ Chief Justice Roberts stated that to "threaten to withhold . . . existing funds" would amount to impermissible coercion.¹³² Because federal Medicaid funds amount to up to ten percent of states' total budgets, to withhold the funds would be "a gun to the head."¹³³ Based on the Court's analysis in *Sebelius*, it seems that Congress could face difficulty conditioning the existing funds which schools receive under Elementary and Secondary Education Act of 1965 and the Higher Education Act of 1965. However, the conditioning of funds under the Elementary and Secondary Education Act of 1965 and the Higher Education Act of 1965 is distinguishable from the government's attempt to condition Medicaid federal funds in *Sebelius*. Whereas as in *Sebelius* the Government sought to withhold all funds if a state failed to comply with the Medicaid expansion provision of the act, here, Congress only seeks to withhold additional, new funds which would go toward implementing the concussion regulatory program. Because Congress is not threatening to withhold all federal education funding, it seems that the condition is not coercive, and is therefore, an acceptable means of regulating concussion policies in educational institutions.

Unfortunately, Congress' attempt to regulate concussion policies at education institutions by conditioning the schools' federal education funding provides little guidance for federal regulation the NFL's concussion policy. In 1966, Congress passed Public Law 89-800,¹³⁴ which granted the NFL a monopoly regarding broadcasting rights.¹³⁵ Public Law 89-800 also amended Internal Revenue Service Code, Section 501(c)(6) "to include 'professional football leagues' in its definition of not-for-profit organizations."¹³⁶ As a result, the NFL is exempt from having to pay federal taxes.¹³⁷ Although the NFL is a

130. *Sebelius*, 132 S. Ct. 2581–82.

131. *See Sebelius*, 132 S. Ct. 2566.

132. *Id.* at 2603.

133. *Id.* at 2604.

134. Pub. L. No. 89-800, 80 Stat. 1515 (1966).

135. Dallas Steele, *How Much Money Does Your State Spend on NFL Football? Check This Chart*, PolicyMic (Oct. 2, 2013), <http://www.policymic.com/articles/66077/how-much-public-money-does-your-state-spend-on-nfl-football-check-this-chart>.

136. *Id.*

137. *Id.*

tax-exempt non-profit organization, the League, unlike the nation's schools, does not receive federal funding. Therefore, even if the *Sebelius* decision has not impeded Congress' ability to regulate via conditioning federal funds, because Congress does not grant the NFL federal funds, Congress would have nothing to condition as a means of enforcing a uniform League concussion policy.

The two pieces of congressional legislation which provide the most guidance for federal regulation of the NFL's concussion policy are the Concussion Awareness and Education Act of 2014,¹³⁸ and the National Brain Injury Research and Treatment Improvement Act of 2014.¹³⁹ Both pieces of legislation aim to establish a federal regulatory agency system for monitoring, treating, and preventing traumatic brain injuries. Congress has recognized that integral to establishing a uniform treatment policy is the need to formulate a baseline assessment program for detecting concussions. The Concussion Awareness and Education Act of 2014 calls for the Secretary of Health and Human Services, acting through the Director of the Centers for Disease Control and Prevention, to "establish and oversee a national system to determine the incidence of sports-related concussions," in individuals aged five to twenty-one years of age.¹⁴⁰ The Act also calls for the Director of the National Institutes of Health and the Secretary of Defense to "establish objective, sensitive, and specific metrics and markers of concussion diagnosis, prognosis, and recovery in youth" and to create "evidence-based guidelines for the management of short-and long-term sequelae of concussion in youth."¹⁴¹ Based on its findings, the National Institutes of Health Director and the Secretary of Defense are to "develop standards, best practices, and guidelines for the rules of play and training, respectively for sports, athletic, and military training."¹⁴² The Act represents a clear effort by Congress to create, through the Human Health and Services Department, the Centers for Disease Control and Prevention, and the National Institutes of Health, an overarching federal system for researching sports related head injuries in youths under the age of twenty-two and to establish regulations for treating and preventing such head injuries.¹⁴³

138. H.R. 3954, 113th Cong. (2014).

139. H.R. 4251, 113th Cong. (2014).

140. H.R. 3954.

141. *Id.*

142. *Id.*

143. *Id.*

The Concussion Awareness and Education Act of 2014, is indicative of Congress' understanding that in order to regulate individual concussion policies, it must do so under a broader federal head injury prevention and treatment program. In *Raich*, the Court ruled that the regulation of home grown marijuana was an appropriate exercise of congressional authority under the Commerce Clause.¹⁴⁴ The Court reasoned that even if the marijuana was not considered economic, it could still be regulated under the Controlled Substances Act because the legislation was part of a larger federal drug regulatory scheme.¹⁴⁵ Even though concussions and head injuries may not be considered an economic activity in and of themselves, Congress could conceivably regulate the concussion policies of individual actors, sports teams, and schools if there were a larger federal head injury scheme in place, headed by the Department of Health and Human Services, the National Institutes of Health, and the Centers for Disease Control and Prevention.

Introduced in the House of Representatives on March 14, 2014, the National Traumatic Brain Injury Research and Treatment Improvement Act of 2014, provides the necessary framework for forming a national traumatic brain injury prevention and treatment scheme.¹⁴⁶ The proposed resolution demonstrates Congress' recognition that traumatic brain injuries impact a substantial portion of the United States population.¹⁴⁷ The resolution also reveals Congress' belief that before a treatment and prevention program can be put in place, Congress must first establish a "statistically sound, scientifically credible, integrated surveillance system regarding traumatic brain injury" known as the "National Traumatic Brain Injury Surveillance System."¹⁴⁸ With the system, the government will be able to keep a record of the incidence and prevalence of concussions and traumatic brain injuries in the entire United States population.¹⁴⁹ The National Traumatic Brain Injury Research and Treatment Improvement Act of 2014 requires collection of the injured individuals' demographic information, including the "assessment tool used to make the diagnosis," the "sport or activity and the level of competition" being played when the injury was

144. *See Gonzales*, 545 U.S. 1.

145. *Id.*

146. H.R. 4251.

147. *Id.*

148. *Id.*

149. *Id.*

sustained and any “protective equipment and impact monitoring devices” which the injured individual used.¹⁵⁰ To ensure an objective collection and reporting system, the Health and Human Services Secretary may “award grants to, or enter into contracts or cooperative agreements with, public or private nonprofit entities to carry out” the act’s orders.¹⁵¹

If passed, the National Traumatic Brain Injury Research and Treatment Improvement Act of 2014 will provide Congress with the data it needs to support the implementation of an overarching regulatory system for monitoring concussion policies and treatment. Congress’ interest in investigating the prevalence and health consequences of traumatic brain injuries is analogous to the federal government’s continual study of the results of tobacco consumption and smoking.¹⁵² The government’s study of the negative impacts of tobacco consumption provides Congress with a continued basis for regulating the tobacco industry.¹⁵³ Although the National Traumatic Brain Injury Research and Treatment Improvement Act does not specifically mention the NFL, the fact that Congress is interested in recording instances of brain injuries sustained in all age groups and in all professions, indicates that the injuries sustained by professional football players will be included in the analysis. The organization of a congressional scientific investigation into traumatic brain injuries will provide Congress with the basis for establishing an objective traumatic brain injury treatment and prevention scheme.

Conclusion

The need for congressional regulation of the NFL’s concussion policy is imperative. The NFL’s endorsement of the ConTACT Act of 2013 serves as a promising recognition by the League that Congress must play a prominent role in preventing and in regulating the treatment of traumatic brain injuries sustained by football players.¹⁵⁴ Unfortunately, in the last five years, not one of the ten

150. *Id.*

151. *Id.*

152. *Informing Tobacco Regulation through Research*, U.S. FOOD AND DRUG ADMINISTRATION, <http://www.fda.gov/AboutFDA/CentersOffices/OfficeofMedicalProductsandTobacco/AbouttheCenterforTobaccoProducts/ucm383161.htm> (last visited Apr. 4, 2014).

153. *Id.*

154. Molly Hooper, *Lawmakers, Obama butt heads on football*, THE HILL (Feb. 2, 2014, 4:00 PM), <http://thehill.com/homenews/197198-lawmakers-differ-with-obama-on-kids-playing-football>.

concussion bills or resolutions introduced by lawmakers in the House or Senate has made it out of the committee to which it was referred.¹⁵⁵ Despite the fact that Congress could use its Commerce Clause power to establish a national traumatic brain injury regulatory scheme to enforce a uniform concussion policy on parties such as the NFL, the implementation of such a scheme seems unlikely. The underlying causes of congressional opposition to a federal traumatic brain injury regulatory scheme are not entirely clear. Perhaps, it is simple congressional inertia, perhaps, our representatives and senators believe that there are more pressing issues requiring regulation than ensuring the safety of football players, or perhaps, the opposition arises out of the general apathy which our nation's leaders display toward the neurological and mental diseases which the injured football players eventually develop.¹⁵⁶ Before the NFL's concussion policy can be regulated federally under the Commerce Clause, Congress must first realize that regulating traumatic brain injuries and developing methods for treating the neurological diseases that the players experience are matters of paramount concern. Enacting legislation to regulate concussion and traumatic brain injury detection and treatment will help not only former NFL players, but also the millions of Americans who suffer from the same neurological conditions that the players do.

155. *Id.*

156. Hooper, *supra* note 154; Ken Lombardi, *Seth Rogen pleads with Congress over Alzheimer's, slams low senator turnout*, CBS News (Feb. 27, 2014, 5:02 PM), <http://www.cbsnews.com/news/seth-rogen-pleads-congress-over-alzheimers-slams-low-senator-turnout/>.