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Full Court Press: Northwestern University, A New Challenge To The NCAA

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FULL COURT PRESS: *NORTHWESTERN UNIVERSITY*, A NEW CHALLENGE TO THE NCAA

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In recent years, a host of issues have arisen between the National Collegiate Athletic Association (NCAA) and the college athletes who provide the labor from which the NCAA and its member universities derive their profits. Many of these issues have been heavily publicized and have spurred a heated debate over the status of college athletes and the future of the collegiate athletic system. This Article primarily focuses on the issue of college athletes' status as employees for purposes of federal labor law.

The significant increase in the popularity of college sports in recent years has led to conference realignment, facility building and arms race, governance issues and litigation. The student-athletes, the players in the highly lucrative college football and basketball games have been left behind. They have resorted to challenging the NCAA's system in many different ways.

Recently, football players at Northwestern University successfully petitioned their local Regional Director of the National Labor Relations Board for a union representation election, arguing that they are employees of the University and as such are entitled to collective bargaining rights and other protections under the National Labor Relations Act. Northwestern

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University has rejected this argument and has appealed the Regional Director's decision to the National Labor Relations Board in Washington, D.C. This Article provides a background for the highly contested dispute, refutes some of the common arguments made against the potential unionization of college athletics, and discusses some of the potential implications if players can and do form a union.

I. INTRODUCTION

The NCAA is currently facing historic and unprecedented challenges from outside parties that seek to create vast waves of change to the current model of intercollegiate athletics. The issues at stake are by no means revolutionary, as the battle between the NCAA and student-athletes seeking better treatment and/or a fair share of revenues has been ongoing for nearly 100 years.[1] But in the last five to ten years, the number of cases and legal basis for some of the cases are new. Major antitrust and labor law litigation against the NCAA, its conferences and its institutions has culminated in 2014 with two major trials that aim to significantly alter the current NCAA model. The *O'Bannon v. NCAA* case in federal court and the *Northwestern University* case before the National Labor Relations Board (hereinafter "the Board") are the two cases in litigation, along with several other cases in the pre-trial phase that allege antitrust violations tied to grant-in-aid caps and cost of attendance discrepancies.[2]

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1. *E.g.*, Nicholas Fram & T. Ward Frampton, *A Union of Amateurs: A Legal Blueprint to Reshape Big-Time College Athletics*, 60 BUFF. L. REV. 1003, 1005-1006 (2012) ("In 1936, in a story followed closely by the black and left-wing press, the Howard University football team struck for several games, demanding adequate medical supplies for players, nutritional food, and access to campus jobs. Two years later, the Louisiana State University football team dismissed a player after 'he dared to 'agitate a union' of the players.' But the most high-profile disputes of the New Deal era centered on the University of Pittsburgh's top-ranked football program. After an undefeated 1937 season garnered the squad a Rose Bowl invitation, players demanded $200 in pocket money for their participation. When university officials balked, the players voted 17-16 to boycott the game … The thirty-odd members of the freshman squad threatened to stike again several months later. Their demands included four-year athletic scholarships, shorter working hours, accommodation for class time missed due to football obligations, and collective bargaining rights.").

2. There are currently four major cases against the NCAA involving scholarship cap issues and cost of attendance discrepancies that have been consolidated with the previously-consolidated Jenkins v. NCAA and Alston v. NCAA cases. The four plaintiffs, listed chronologically from the original filing of their suit, are Kendall Gregory-McGhee (former football player at Minnesota & Northern Colorado), Sharrif Floyd et. al. (former football players at Florida), Nick Kindler (former football player at West Virginia), and Alex Lauricella (former football player at Tulane). *See* Jon Solomon, *Judge Draws NCAA Doubleheader With O'Bannon, Scholarship Cases*, CBS SPORTS (June 17, 2014, 1:42 PM),

The attacked status quo is well described by *The London Economist*, paraphrasing Taylor Branch[3]: "[f]or decades . . . the best coaches earn millions of dollars while the best players live hand to mouth . . . for colleges to make millions from the unpaid labour of mostly black athletes carried 'the whiff of the plantation.'"[4]

Similarly accurate of collegiate profligate living, in our view, is the following *New York Times* commentary:

> The head football coach at Alabama makes $6.9 million a year, and his staff is also very well paid. The offensive coordinator makes $680,000 a year, and the defensive coordinator makes $1.35 million. The strength and conditioning coach earns $395,000.
>
> At Ohio State, the football team moved into a $2.5 million, 10,000-square-foot locker room at its training complex, complete with a deluxe lounge outfitted with high-definition televisions. It also has a waterfall.
>
> When Florida State and Auburn qualified for last season's Bowl Championship Series title game, their conferences each received $18 million.
>
> This is a portrait of life in the wealthiest districts of college sports.
>
> The denizens of these rarefied quarters, universities like Alabama and Louisiana State, are still institutions of higher education. But athletics have become ever more central to their missions, and their bottom lines, thanks to

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http://www.cbssports.com/collegefootball/writer/jon-solomon/24590912/judge-draws-ncaa-doubleheader-with-obannon-scholarship-cases.

3. Taylor Branch, *The Shame of College Sports*, THE ATLANTIC, (Sept. 7, 2011, 11:28 AM), http://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/.

4. *Players: 0; Colleges: $10,000,000,000*, THE ECONOMIST, (Aug. 16, 2014), http://www.economist.com/news/united-states/21612160-pressure-grows-let-student-athletes-share-fruits-their-own-labours-players-0.

> the juggernaut programs that generate hundreds of millions of dollars a year.
>
> Recruiters fly on private planes, athletes train on top-of-the-line equipment, and teams compete in mammoth stadiums that are the envy of many professional teams. It is not uncommon for a university's athletic budget to exceed $60 million.
>
> And all of that has taken place under the N.C.A.A.'s old rules.[5]

* * * * *

In the case of *O'Bannon v. NCAA*,[6] lead plaintiff Ed O'Bannon challenged the NCAA's use of players' names, images and likenesses without providing compensation to the players. In May 2014, O'Bannon and the other members of the recognized class reached a $40 million settlement in the case against EA Sports and Collegiate Licensing Company (but continued to pursue the case against the NCAA for antitrust claims), having alleged that the two companies used player likenesses in their products without providing proper compensation to the players.[7] In June 2014, the plaintiffs in *Keller v. NCAA*, a related case, reached a $20 million settlement with the NCAA over the use of player images and likenesses in video games.[8] Recently, in August 2014, Judge Claudia

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5. Steve Eder, *Fears Rise Over Wealth Gap as Top College Conferences Push Overhaul*, N.Y. TIMES, (Aug. 7, 2014), http://www.nytimes.com/2014/08/07/sports/ncaafootball/new-rules-would-further-separate-college-sports-haves-from-have-nots.html?_r=0.

6. Findings of Fact and Conclusions of Law, O'Bannon v. NCAA, No. C-09-3329-CW (N.D. Cal., Aug. 8, 2014).

7. Ed O'Bannon was a former basketball standout at UCLA, where he led the Bruins to an NCAA Championship in 1995. O'Bannon opted to take legal action against the NCAA, EA Sports, and the Collegiate Licensing Company after discovering that his likeness was used in an earlier iteration of an EA Sports College Basketball game. *E.g.*, Steve Eder & Ben Strauss, *Understanding Ed O'Bannon's Suit Against the N.C.A.A.*, N.Y. TIMES, (June 9, 2014), http://www.nytimes.com/2014/06/10/sports/ncaabasketball/understanding-ed-obannons-suit-against-the-ncaa.html?_r=0.

8. Associated Press, *NCAA settles with former athletes*, ESPN (June 9, 2014, 5:12 PM), http://espn.go.com/college-sports/story/_/id/11055977/ncaa-reaches-20m-settlement-video-game-claims.

Wilken decided the *O'Bannon* antitrust claims and held that the NCAA player compensation prohibition was an unreasonable restraint of trade within the meaning of the Sherman Antitrust Act, specifically noting "the association's rules prohibiting student-athletes from receiving any compensation for the use of the names, images, and likenesses restrains price competition among FBS football and Division I basketball schools . . . ."[9]

Since the filing of the O'Bannon case, several other antitrust cases have been brought against the NCAA stemming from issues with grant-in-aid caps and cost-of-attendance discrepancies. Under the current system, an institution's grant-in-aid package only includes tuition, college/university fees, books, and room and board – all of which are defined by the NCAA as necessary "grant-in-aid" costs. However, it has been estimated that the average athletic scholarship still falls several thousand dollars below the actual cost of attendance. This is referred to as the 'cost of attendance gap' in several of the lawsuits brought against the NCAA.[10] In August 2014, the NCAA, reflecting what has been called "Team Reform,"[11] allowed the so-called "Power Five"[12] Conferences to " . . . pay their athletes a few thousand dollars more than what the current scholarship rules allow, loosen restrictions against agents and advisors, and revamp recruiting rules to ease contact with top prospects."[13] The retreat appears to be on, in an attempt to stave off "Team Market,"[14] i.e., the raw

9. O'Bannon, No. C-09-3329-CW at 94; O'Bannon, No. C-09-3329-CW at 80, 87-88, 89 (Judge Claudia Wilken rejected the NCAA's argument that the challenged restrictions on student-athlete compensation are reasonable because 1) they are necessary to preserve the tradition of amateurism, 2) maintain the competitive balance in FBS football and Division I basketball teams, 3) promote the integration of academics and athletics, and 4) increase the total output of its product).

10. Tribune Graphics, *INFOGRAPHIC: When a Full-Ride Isn't*, CHI. TRIB. (June 24, 2014, 6:44 PM), http://www.chicagotribune.com/news/chi-infographic-when-a-fullride-isnt-20140624-htmlstory.html.

11. Joe Nocera, Op-Ed., *This is Reform*, N.Y. TIMES (Aug. 8, 2014), http://www.nytimes.com/2014/08/10/opinion/sunday/joe-nocera-the-ncaas-feeble-reform-impulse.html.

12. *See infra* notes 83-86 and accompanying text.

13. Marc Tracy, *N.C.A.A. May Let Top Conferences Play by Own Rules*, N.Y. TIMES (Aug. 5, 2014), http://www.nytimes.com/2014/08/06/sports/n-c-a-a-s-rich-poised-to-get-richer-with-more-athlete-benefits-.html.

14. Nocera, *supra* note 11.

commercialization of college sports in a manner akin to their professional counterparts.

Two notable cases are *Jenkins v. NCAA*, in which the plaintiff argues that the NCAA's scholarship cap violates antitrust law by instituting an illegal payment cap in an otherwise free market,[15] and *Alston v. NCAA et. al.*, , in which the plaintiff alleges that the NCAA and its Power Five Conferences (ACC, Big Ten, Big 12, PAC-12 and SEC) colluded to cap the amount of scholarship money granted to student-athletes at a value below the actual cost of attendance.[16] These antitrust challenges brought against the NCAA, in addition to the *O'Bannon* case and *Northwestern University*, have shaken the legal ground defining amateurism and the NCAA model, a trend fueled by colleges awash in money as they engage in a competitive arms race for athletic talent. Both are cases of first impression and groundbreaking in their respective challenges to the NCAA model, so it is difficult to use precedent in determining a set of likely outcomes.[17]

The name, image and likeness and grant-in-aid cases seek to alter the current NCAA model through litigation. However, members of the Northwestern University football team took a different approach in January 2014 when they filed a petition to the regional office of the National Labor Relations Board in Chicago asking the Board to allow members of the team to be represented by a union.[18] As explained by Ramogi Huma, a former UCLA football player and president of the National College Players Association,[19] "[t]his is about finally giving college athletes a seat at the

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15. *See* Andy Staples, *O'Bannon Just the Beginning: Jenkins case could unhinge NCAA*, SPORTS ILLUSTRATED (June 19, 2014), http://www.si.com/college-football/2014/06/18/obannon-vs-ncaa-jenkins-mark-emmert-claudia-wilken.

16. *See Lawsuit Alleges NCAA and Conferences Cap Scholarships Illegally*, INSIDEHIGHERED.COM (Mar. 7, 2014), http://www.insidehighered.com/quicktakes/2014/03/07/lawsuit-alleges-ncaa-and-conferences-cap-scholarships-illegally#sthash.tOYjbuOn.dpbs.

17. *Contra* Ronald Katz, *Right Or Wrong, Precedent Will Decide O'Bannon Case In Favor Of NCAA*, FORBES (July 21, 2014, 8:55 AM), http://www.forbes.com/sites/danielfisher/2014/07/21/right-or-wrong-precedent-will-decide-obannon-case-in-favor-of-ncaa/.

18. *See* Teddy Greenstein, *Northwestern Football Players Seek to Join Labor Union*, CHI. TRIB. (Jan. 28, 2014) http://articles.chicagotribune.com/2014-01-28/sports/chi-northwestern-football-players-labor-union-20140128_1_basketball-players-labor-union-national-labor-relations-board.

19. "The National College Players Association (NCPA) is a 501c3 nonprofit advocacy group launched by UCLA football players that serves as the only independent voice for college

table . . . [a]thletes deserve an equal voice when it comes to their physical, academic and financial protections."[20]

This article focuses on one of these major challenges, *Northwestern University*, and the attempt to unionize student-athletes. The first part of the article discusses the NCAA college athletics economic model, since a significant portion of its revenues is based on the current model. It is important to understand the challenge and then also to understand the implications to finances and to college athletics if the plaintiffs are successful in litigation and/or the NCAA settles any of these cases with significant changes to its current model.

The second part of this article focuses on the *Northwestern University* case. The third section of this article deals with financial and other implications if the petitioners in *Northwestern University* are successful. Finally, the fourth section of this article discusses some possible outcomes if the current NCAA model is significantly changed, either through litigation and/or the settlement of litigation, either from *Northwestern University*, *O'Bannon v. NCAA*, *Jenkins v. NCAA*, *Alston v. NCAA*, or any of the antitrust cases.

II. NCAA DIVISION I REVENUES AND EXPENSES

A. Introduction

Division I is the highest level of intercollegiate athletics sanctioned by the NCAA. The NCAA is divided into three separate divisions of athletic competition−Division I, Division II, and Division III.[21] Division I schools generally have the largest student bodies, manage the largest athletic budgets, and grant the most athletic scholarships.[22]

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athletes across the nation." *About NCPA*, NAT'L COLLEGE PLAYERS ASS'N, http://www.ncpanow.org/about (last visited Aug. 23, 2014). The mission of the NCPA is "[t]o provide the means for college athletes to voice their concerns and change NCAA rules." The NCPA has outlined 11 goals ranging from rule changes to governance reform that are designed to improve the well-being of NCAA student-athletes. *Mission & Goals*, NAT'L COLLEGE PLAYERS ASS'N, http://www.ncpanow.org/about/mission-goals (last visited Aug. 23, 2014).

20. Tom Farrey, *Kain Colter Starts Union Movement*, ESPN (Jan. 28, 2014, 9:08 PM), http://espn.go.com/espn/otl/story/_/id/10363430/outside-lines-northwestern-wildcats-football-players-trying-join-labor-union.

21. *Membership*, NCAA, http://www.ncaa.org/about/who-we-are/membership (last visited Aug. 23, 2014).

22. *Division I: About the Division*, NCAA, http://www.ncaa.org/about?division=d1 (last

The money in college athletics is generated by the governing body, the NCAA, college conferences, and individual schools. This section will provide an overview of the finances of college sports. The first part will focus on the NCAA, the second part on college conferences, and the third part on colleges and universities.

> "The National Collegiate Athletic Association (NCAA or the "Association") is an unincorporated not-for-profit educational organization founded in 1906. The NCAA is the organization through which colleges and universities of the nation speak and act on athletic matters at the national level. It is a voluntary association of more than 1,200 institutions, conferences, and organizations devoted to the sound administration of intercollegiate athletics in all its phases. Through the NCAA, its members consider any athletics issue that crosses regional or conference lines and is national in character. The NCAA strives for integrity in intercollegiate athletics and serves as the colleges' national athletics governing agency. A basic purpose of the NCAA is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body."[23]

B. NCAA Finances

From a financial perspective, the NCAA revenues are significant, totaling over $900 million in 2012-13 as shown in Figure 1 below, with revenues coming primarily from television and marketing rights related to the NCAA men's basketball tournament.

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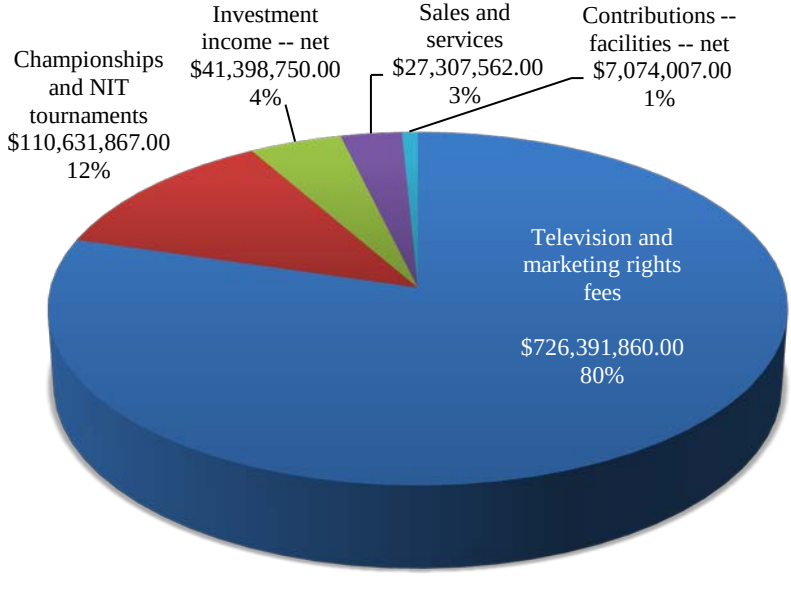
visited Aug. 23, 2014).

23. NCAA, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION AND SUBSIDIARIES: CONSOLIDATED FINANCIAL STATEMENTS AS OF THE YEARS ENDED AUGUST 31, 2013 AND 2012, SUPPLEMENTARY INFORMATION AS OF AND FOR THE YEAR ENDED AUGUST 31, 2013, AND INDEPENDENT AUDITORS' REPORT 7 (2013), *available at* http://www.ncaa.org/sites/default/files/NCAA_FS_2012-13_V1%20DOC1006715.pdf [hereinafter *NCAA 2013 Financial Statements*].

Figure 1
2012-13 NCAA Revenues[24]

Revenues	2013 Total
Television and marketing rights fees	$726,391,860.00
Championships and NIT tournaments	$110,631,867.00
Investment income—net	$41,398,750.00
Sales and services	$27,307,562.00
Contributions—facilities—net	$7,074,007.00
Total revenues	$912,804,046.00

Figure 2
2012-13 NCAA Percentage of Revenue by Category



An examination of NCAA expenses (or distributions) by division illustrates that the vast majority of NCAA expenses are directed towards

24. *Id.* at 4.

Division I conferences and institutions. Not including association-wide programs or management and general expenses, 91% of division-specific NCAA expenses are spent in Division I.[25] 77% of the NCAA's division-specific expenses is distributed to Division I institutions, while an additional 14% is used to fund Division I championships, programs and NIT tournaments.[26] 5% of the NCAA's division-specific expenses is used to fund Division II championships, distributions, and programs, while 4% is allocated to Division III championships and programs.[27]

Figure 3
2012-13 NCAA Expenses[28]

Expenses	2013 Total
Distribution to Division I members	$527,432,377.00
Division I championships, programs, & NIT tournaments	$97,407,498.00
Division II championships, distribution, and programs	$35,650,808.00
Division III championships and programs	$27,531,406.00
Association-wide programs	$122,244,138.00
Management and general	$41,875,827.00
Total expenses	$852,142,054.00

A significant percentage of the money goes to Division I universities. Most of the money is distributed to conferences, with some of the money going directly to institutions.[29] The monies are distributed according to various formulas within each category, and are distributed in a combination of across-the-board directed grants and earned money.[30]

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *NCAA 2013 Financial Statements*, *supra* note 23, at 4.

30. *Id.* at 9.

The remaining non-division-specific NCAA expenses include $122,244,138 (14% of total expenses) for association-wide programs and $41,875,827 (5% of total expenses) for management and general expenses.[31]

The NCAA also maintains a reserve fund to guard and protect the future interests of its membership. In 2013 the NCAA reported a $92.5 million operating reserve in addition to a $326 million quasi-endowment reserve.[32] The quasi-endowment exists specifically to "protect NCAA membership in the event that media revenue dollars are not received due to an interruption in the men's basketball championship."[33] In all, the NCAA claimed over $589 million in unrestricted net assets during the 2013 fiscal year.[34]

As noted above, 77% of NCAA expenses are directed to Division I membership distributions. While revenues are generally distributed to conferences, the mechanism for distribution to individual institutions varies across conferences depending on specific bylaws.[35]

It is important to note that the revenue distribution to Division I institutions does not occur on a pro-rata basis. A large portion of revenue distribution is based on success in the men's basketball championship.[36] This generally means that the Power Five conferences receive greater revenue distributions than smaller conferences based on their relative success in the tournament.[37] The Power Five conferences received between $14.5 and $28.7 million from the NCAA basketball fund in 2012-13, while the distributions to other conferences ranged from $1.4 to $8.1 million.[38] The Atlantic-10 (A-10) Conference and the Metro Atlantic

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31. *Id.* at 4.

32. *Id.* at 19.

33. *The NCAA: Where the Money Goes*, NCAA, http://www.ncaa.org/health-and-safety/ncaa-budget-where-money-goes (last visited Aug. 23, 2014).

34. *NCAA 2013 Financial Statements*, *supra* note 23, at 19.

35. *The NCAA: Where the Money Goes*, *supra* note 33; *NCAA 2013 Financial Statements*, *supra* note 23, at 7.

36. *The NCAA: Where the Money Goes*, *supra* note 33.

37. NCAA, 2012-2013 DIVISION I REVENUE DISTRIBUTION PLAN 7 (2012), *available at* https://www.ncaa.org/sites/default/files/2012-13_Revenue_Distribution_Plan.pdf (last visited Aug. 23 2014) [hereinafter *2012-13 Plan*].

38. NCAA, 2013-2014 DIVISION I REVENUE DISTRIBUTION PLAN 9 (2013), *available at*

Athletic Conference (MAAC) are two of the non-Power Five conferences. In 2012-13 the A-10 received $8,101,952 from the NCAA basketball fund, while the MAAC received $2,209,623.[39] It should also be noted that these revenue distribution figures do not include payouts from college football.

C. Conference Finances

There are currently 31 NCAA Division I conferences.[40] While the historical focus of conferences was to create competition, there was also an academic component to their formation. As stated by the SEC on its website, "[t]he purpose of the Southeastern Conference is to assist its member institutions in the maintenance of programs of intercollegiate athletics which are compatible with the highest standards of education and competitive sports."[41] However, over the years the role of conferences has shifted to where conferences have become more powerful, perhaps more powerful than the NCAA itself.

As the previous section on NCAA finances shows, a large portion of NCAA revenues are distributed to Division I institutions, with the majority of that money flowing to the Power Five conferences.[42] However, this "basketball" money is not the only money on the revenue side of conferences' financial statements. With regard to the SEC's most recent financial statements, "[t]he total amount of the distribution is composed of revenue generated from televised football, bowl games, the SEC football championship, televised basketball, the SEC men's basketball tournament, NCAA championships and a supplemental surplus distribution."[43]

The financial statements of NCAA Division I conferences are generally not publicly available. The information in the following section

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https://www.ncaa.org/sites/default/files/2013-14%20Revenue%20Distribution%20Plan.pdf (last visited Aug. 23, 2014) [hereinafter *2013-14 Plan*].

39. *Id.* at 9.

40. *NCAA Members by Division*, NCAA, http://web1.ncaa.org/onlineDir/exec2/divisionListing (last visited Aug. 23, 2014).

41. *About the SEC*, THE SOUTHEASTERN CONFERENCE (Aug. 9, 2014), http://secsports.go.com/article/11067695/about-the-sec-conference.

42. *2012-13 Plan*, *supra* note 37, at 9.

43. Edward Aschoff, *SEC distributes record $292.8M*, ESPN (May 30, 2014, 4:24 PM), http://espn.go.com/college-sports/story/_/id/11007094/sec-distributes-record-2928-million-revenue.

was compiled from national media reports, not from the actual financial statements. There is even less information available for the mid-major Division I conferences.

As noted in the 2013-2014 NCAA Revenue Distribution Plan, the SEC received over $15.2 million in distributions from the NCAA basketball fund in 2012-13.[44] As the SEC reported $314.5 million in overall revenue for the 2012-13 academic year[45] (a 15% increase from the previous year), nearly $300 million in SEC revenue was derived from sources outside NCAA men's basketball fund distributions.[46]

The SEC derives a large portion of its revenues from television broadcasting contracts.[47] A contract with CBS for the broadcast rights to its top game each week and conference championship game nets the SEC a reported $55 million per year.[48] In 2013, the conference also announced the launch of the SEC Network, a co-venture with ESPN[49] that extended a $2.25 billion, 15-year deal ($150 million per year, annualized) struck with the network in 2008.[50]

In May 2014, the SEC announced a record-distribution of $292.8 million, with each institution set to receive roughly $20.9 million.[51] This figure represents over 90% of the SEC's total revenues, and does not include bowl game payouts ($16.8 million per participant) and NCAA

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44. *2013-14 Plan*, *supra* note 38, at 9.

45. Steve Berkowitz, *Pac-12 zooms past Big Ten, SEC in college sports revenue*, USA TODAY (May 23, 2014, 8:08 PM), http://www.usatoday.com/story/sports/college/2014/05/23/pac-12-conference-tax-return-revenue-record/9497233/.

46. *2013-14 Plan*, *supra* note 38, at 9.

47. *See generally* Jeremy Fowler, *SEC, CBS Rework Long-Term Contract*, CBS SPORTS (May 14, 2013, 4:25 PM), http://www.cbssports.com/collegefootball/writer/jeremy-fowler/22244033/sec-cbs-rework-long-term-contract.

48. *Id.*

49. *SEC Network to broadcast 24/7*, ESPN (May 2, 2013, 4:11 PM), http://espn.go.com/espn/story/_/id/9235260/sec-espn-announce-sec-network-2014.

50. Richard Sandomir, *SEC Will Start TV Network in 2014*, N.Y. TIMES (May 2, 2013), http://www.nytimes.com/2013/05/03/sports/ncaafootball/sec-will-have-own-tv-network-starting-in-2014.html?_r=0.

51. Aschoff, *supra* note 43.

academic enhancement funding ($1 million pool) directed to individual institutions.[52]

Other Power Five conferences employ different television rights models. In 2007, the Big 10 launched the Big 10 Network, a 20-year co-venture with Fox[53] that helped increase revenues to $318.4 million in 2012-13.[54] The Big 10 Network holds rights to most games and contests that are not picked up by its primary rights holders, which are ESPN, CBS for basketball, and FOX for the football conference championship game.[55] Broadcast rights revenues are shared equally by Big 10 schools, with the exception of new member institutions, which must wait six years before receiving a full share of the revenues.[56]

In May 2014, the Big 12 announced a record distribution of $220 million in revenue to member institutions.[57] Similar to the Big 10, member institutions share the distribution equally, except for new members, which receive partial shares during the first years.[58] However, the broadcast rights model is slightly different than those of the SEC and Big 10.[59] In the Big 12, primary broadcast rights are held by ESPN, with Fox owning secondary rights.[60] The tertiary broadcast rights are retained by each

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52. *Id.*

53. Jeff Smith, *Big Ten Network Celebrates Anniversary of Launch*, BIG TEN (Aug. 29, 2008), http://www.bigten.org/genrel/082908aal.html.

54. Berkowitz, *supra* note 45.

55. Kristi Dosh, *College TV Rights Deals Undergo Makeovers*, ESPN (May 10, 2012, 12:56 PM), http://espn.go.com/blog/playbook/dollars/post/_/id/705/college-tv-rights-deals-undergo-makeovers.

56. Tom Fornelli, *Big Ten School Projected to Make $45 Million with New TV Deal*, CBS SPORTS (Apr. 26, 2014, 10:52 AM), http://www.cbssports.com/collegefootball/eye-on-college-football/24540002/big-ten-schools-projected-to-get-45-million-with-new-tv-deal.

57. Chuck Carlton, *Big 12 to Distribute Conference-Record $220 Million to Member Schools*, DALLAS MORNING NEWS (May 31, 2014, 12:05 AM), http://www.dallasnews.com/sports/college-sports/headlines/20140531-big-12-to-distribute-conference-record-220-million-to-member-schools.ece.

58. Blair Kerkhoff, *Record Big 12, SEC Conference Revenue Expected to Keep Climbing*, KANSAS CITY STAR (May 31, 2013, 6:53 PM), http://www.kansascity.com/sports/spt-columns-blogs/campus-corner/article320277/Record-Big-12-SEC-conference-revenue-expected-to-keep-climbing.html.

59. *See* Dosh, *supra* note 55.

60. *Id.*

institution, which allows each school to monetize those rights as the market allows.[61] In 2011 the University of Texas launched the Longhorn Network, a co-venture with ESPN[62] that has allowed the athletic department to receive around $15 million annually in exchange for the third-tier rights to its games.[63]

A look at some of the available information for mid-major conferences shows that the revenues are significantly less than the Power Five conferences. For example, in 2013 the Mid-American Conference received $15.7 million from participating in college football bowls, but $12.9 million of that money came from Northern Illinois' participation in a BCS bowl,[64] which is an uncommon opportunity for a non-Power Five conference institution. By comparison, the SEC earned over $52 million from bowl game payouts in 2013.[65]

D. Revenues Related to FBS Athletic Departments

Division I is subdivided based on football sponsorship.[66] The Football Bowl Subdivision (FBS), formerly known as Division I-A, is collection of 123 NCAA Division I schools[67] with premier varsity football programs that participate in post-season bowl games and play at least 60% of their regular season football games against other FBS institutions.[68]

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61. Kerkhoff, *supra* note 58.

62. Natalie England, *Longhorn Network Launches from UT's South Mall*, TEXASSPORTS.COM (Aug. 27, 2011), http://www.texassports.com/news/2011/8/27/082711aaa_91.aspx.

63. Kerkhoff, *supra* note 58.

64. Jon Solomon, *NCAA Audit: Every Football Conference Made Money on 2012-2013 Bowls*, AL.COM (Dec. 11, 2013, 5:00 AM), http://www.al.com/sports/index.ssf/2013/12/bowl_money_101_ncaa_audit_show.html.

65. *Id.*

66. *Division I: About the Division*, NCAA, http://www.ncaa.org/about?division=d1 (last visited Aug. 23, 2014).

67. *NCAA Sports Sponsorship: Football Bowl Subdivision*, NCAA, http://web1.ncaa.org/onlineDir/exec2/sponsorship?sortOrder=0&division=1A&sport=MFB (last visited Aug. 23, 2014).

68. Division I: About the Division, *supra* note 66; 2013-2014 NCAA Division I Manual art. 20.9.9.2. The Football Championship Subdivision (FCS), formally known as Division I-AA, is the other major Division I subdivision. The FCS consists of schools that participate in a NCAA-run football championship. Additionally, Division I is comprised of a third group that

Total revenue reported in an athletic program's budget consists of both allocated and generated revenues.[69] Allocated revenue includes direct and indirect support from the university, student's fees, and government subsidies.[70] Generated revenue consists of dollars generated directly by the athletic department, such as ticket sales, royalties, broadcast rights, and alumni contributions.[71] Accordingly, athletic expenditures are reported by breaking down operating expenses line by line to illustrate where the money is being spent.

Net revenues (total revenues in excess of total expenses) are a measure of financial health and strength to the extent that total revenues cover total expenses. Additionally, net generated revenues (total generated revenues in excess of total expenses) also measure financial health, but more importantly they may indicate self-sufficiency.[72] Positive net generated revenues imply an athletic department can fund itself with revenue sources independent of institutional entities outside of the department. In 2013, FBS athletic programs generated median revenues of $41,897,000, independent of allocated sources.[73] The largest percentage of these revenues were derived from ticket sales (26 percent), contributions from alumni and others (25 percent), and distributions from the NCAA and each institutions' respective conference (24 percent).[74] See Figure 4 below for an illustration of where generated revenues are derived from.

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does not belong to a subdivision, as those schools do not sponsor intercollegiate football programs. Division I: About the Division, *supra* note 66.

69. *See generally id.*

70. *Id.* at 9.

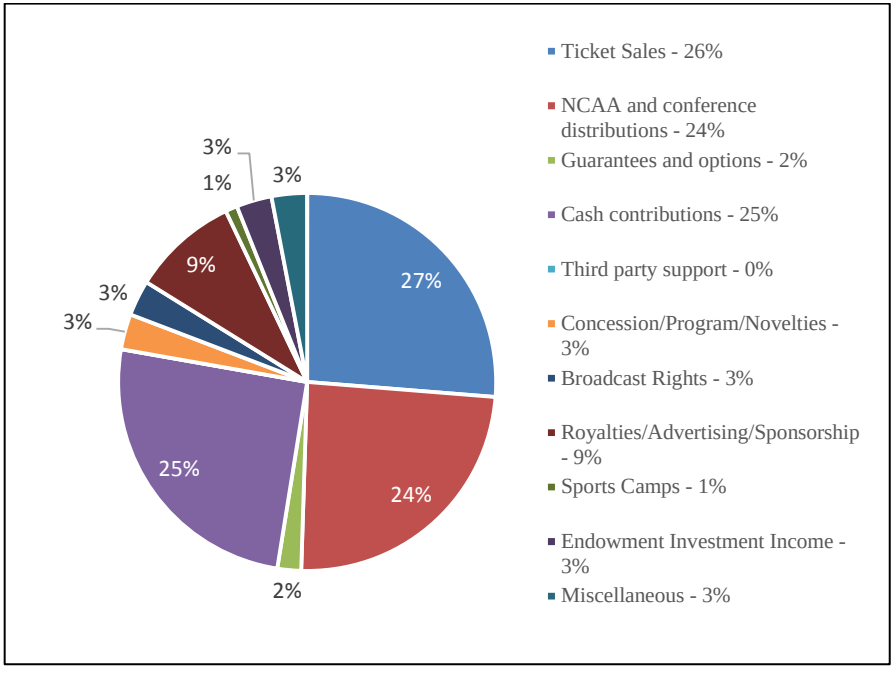
71. *Id*. at 9.

72. Daniel L. Fulks, *Revenues and Expenses: NCAA Division I Intercollegiate Athletics Programs Report 2004*-2013, NCAA 11, 107 (Apr. 2014), *available at* http://www.ncaapublications.com/productdownloads/D1REVEXP2013.pdf.

73. *Id*. at 12.

74. *Id*. at 13.

Figure 4[75]
NCAA FBS Total Generated Revenue Distributions
Mean Values (2013)



E. Expenses Related to FBS Athletic Departments

Despite an influx of substantial generated revenues, athletics programs are expensive to run. The median of total expenses for FBS athletics departments in 2013 was $62,227,000,[76] and total expenses exceeded generated revenues by $11,623,000.[77] Furthermore, the largest athletic expenditures, comprising fifty percent of the median expense budget, are compensation and grants-in-aid to student athletes.[78] Other large expenditures absorbed by athletics programs include direct facilities costs, such as building and grounds maintenance, and costs related to team

75. Percentage values are derived from the mean values, rather than medians. *Id.* at 41.

76. *Id.* at 33.

77. *Id.* at 20.

78. Fulks, *supra* note 72, at 13.

travel and game day expenses. Most athletic departments do not generate enough revenue to cover athletics expenses. In 2013, a total of 103 FBS athletics programs reported negative net generated revenues (expenses exceeded generated revenue).[79] Only 20 programs reported positive net generated revenues (generated revenue exceeded expenses);[80] however, there was a $23,000,000 gap between profitable programs and others, illustrating the larger variation between athletic budgets in the FBS.[81] Figure 5 illustrates the breakdown of expenses incurred by FBS athletics programs and where athletic departments generate revenues to fund such expenses.

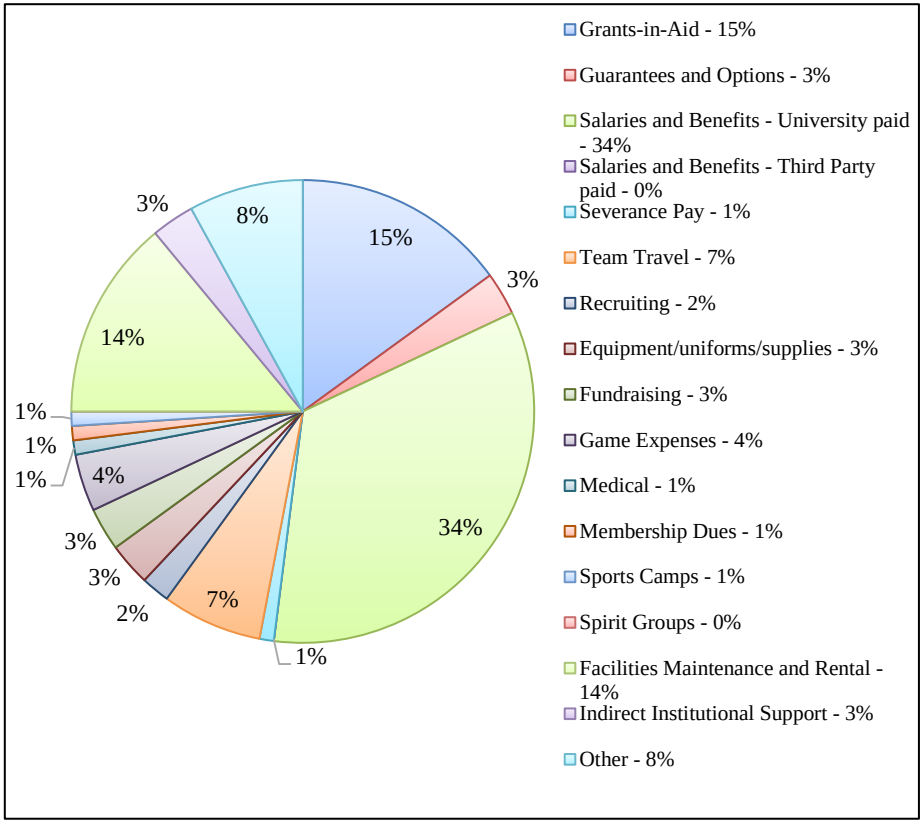
79. *Id.* at 28.

80. *Id.*

81. *Id.* at 13.

Figure 5[82]

NCAA FBS Expense Distributions
(Percentage of Total Operating Expenses)
Mean Values 2013



F. FBS – The Power Five Conferences

The financials vary considerably in the FBS division. There are 65 schools in the Power Five conferences.[83] Here are some of the selected schools in the top part of the FBS:

82. Percentage values are derived from the mean values, rather than medians. *Id.* at 41-42.

83. *See* Dennis Dodd, *NCAA Proposal Would Put Power in Hands of BCS Conferences*, CBS SPORTS (Jan. 10, 2014, 12:42 PM), http://www.cbssports.com/collegefootball/writer/dennis-dodd/24404728/ncaa-proposal-would-put-power-in-hands-of-bcs-conferences.

Figure 6[84]
2013 Revenues and Expenses
Selected Power Five Conference Institutions[85]

Revenues	Texas	Alabama	Michigan	Ohio State
Ticket sales	$60,860,735	$38,904,537	$43,135,543	$54,598,907
Contributions	$37,386,271	$34,233,035	$31,285,461	$22,204,606
Rights/licensing	$58,771,963	$46,032,919	$53,950,086	$45,768,835
Other	$8,672,517	$18,814,859	$14,887,203	$17,066,959
Student fees	$0	$0	$0	$0
School funds	$0	$5,791,200	$255,832	$0
Total Revenue	$165,691,486	$143,776,550	$143,514,125	$139,639,307
Expenses				
Coaching/staff	$55,238,796	$42,215,904	$44,711,328	$52,892,103
Scholarships	$9,956,345	$13,281,263	$18,301,214	$15,537,209
Buildings/grounds	$25,125,236	$22,032,122	$28,972,772	$6,359,999
Other	$56,487,208	$39,535,097	$39,032,997	$41,448,018
Total Expenses	$146,807,585	$116,607,913	$131,018,311	$116,026,329
Total Subsidy	$0	$5,791,200	$255,832	$0
Subsidy Percent	0	4.03	0.18	0

Strong revenues and profitability are the hallmarks of these four selected Power Five institutions. These four institutions earn some of the highest revenues in Division I.[86] It is also important to note that revenues surpass expenses for each of the four athletic departments. By comparison, the median revenue for Division I athletic departments is just under $21 million.[87]

84. *NCAA Finances*, USA TODAY, http://www.usatoday.com/sports/college/schools/finances/ (last visited Aug. 23, 2014).

85. For methodology, see *Methodology for NCAA Athletic Department Revenue Database*, USA TODAY (June 4, 2014, 4:52 PM), http://www.usatoday.com/story/sports/college/2013/05/10/college-athletic-department-revenue-database-methodology/2150123/ [hereinafter *Methodology*].

86. *NCAA Finances*, *supra* note 84.

87. *Id.*

G. FBS – Mid-Majors and Below

"Mid-majors" is a term more closely associated with NCAA basketball. However, it may be an appropriate description of many of the programs outside the Power Five conferences. The contrast is stark and significant when comparing the athletic departments at the University of East Carolina (American Athletic Conference), the University of Ohio (Mid-American Conference) and Troy University (Sun Belt Conference).

Figure 7
2013 Revenues and Expenses
Selected Mid-Major Conference Institutions[88]

Revenues	**East Carolina**	**Ohio**	**Troy**
Ticket sales	$6,859,822	$1,215,671	$622,661
Contributions	$5,744,975	$2,204,293	$2,956,672
Rights/licensing	$6,587,254	$4,146,155	$1,391,685
Student fees	$12,368,781	$15,724,403	$956,988
School funds	$2,600,735	$2,336,950	$11,900,270
Other	$1,643,665	$1,637,589	$1,667,447
Total Revenue	$35,805,232	$27,265,061	$19,505,723
Expenses			
Coaching/staff	$14,941,576	$7,894,851	$5,581,247
Scholarships	$6,931,230	$7,068,691	$4,855,126
Buildings/grounds	$1,911,496	$1,966,678	$3,042,532
Other	$12,855,192	$10,097,330	$6,026,818
Total Expenses	$36,639,494	$27,027,550	$19,505,723
Total Subsidy	$14,969,516	$18,061,353	$12,857,258
Subsidy Percent	41.81	66.24	65.92

The revenues of the Power Five conference schools are on the magnitude of five times greater than the revenues of these mid-major institutions. The differences are especially significant with regard to ticket sales[89] and rights and licensing.[90] The University of Texas athletic

88. *Id.*

89. *See Methodology*, *supra* note 85 (the USA Today database defines each category by using the definition the NCAA provides to its member institution in reporting instructions, for those definitions, see http://fs.ncaa.org/Docs/EADA/2013AgreedUponProcedures.pdf. The NCAA defines a number of categories, but the USA Today database combines some of those

department, for example, earns nearly 100 times the annual ticket revenue of the Troy University athletic department.[91]

Another important aspect is the amount of the institutional subsidy[92] received by each athletic department. The subsidies to the selected Power Five programs range from 0 to 4.03%.[93] For the selected mid-major institutions, institutional subsidies are much higher, between 41.81 and 66.24%.[94] At 66.24%, the institutional subsidy at Ohio University is just below the median figure for institutions for which data was available (66.3%).[95] The two figures also illustrate that while none of the four selected Power Five athletic departments receive money from student fees, all three mid-major athletic departments receive considerable funding from student fees.[96]

One of the most striking differences between the two groups on the expense side of the equation is the amount of coach and staff salaries.[97] While the percentage of the department's budget devoted to coach and staff

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categories (i.e., Broadcast Television, Radio and Internet Rights and Royalties, Licensing Advertisements and Sponsorships are combined into the single category, "Rights/Licensing."). Ticket sales are defined as: "Sales of admissions to athletics events. Include ticket sales to the public, faculty and students, and money received for shipping and handling of tickets. Does not include amounts in excess of face value (such as preferential seating) or sales for conference and national tournaments that are pass-through transactions.").

90. *Id.* ("Rights/Licensing: Includes revenue for athletics from radio and television broadcasts, Internet and ecommerce rights received from institution-negotiated contracts, the NCAA and conference revenue sharing arrangements; and revenue from corporate sponsorships, licensing, sales of advertisements, trademarks and royalties. Includes the value of in-kind products and services provided as part of the sponsorship (e.g., equipment, apparel, soft drinks, water and isotonic products).").

91. *NCAA Finances*, *supra* note 84.

92. *See Methodology*, *supra* note 85 ("Total Subsidy: The sum of students fees, direct and indirect institutional support and state money. The NCAA and others consider such funds "allocated" or everything not generated by the department's athletics functions.").

93. *NCAA Finances*, *supra* note 84.

94. *Id.*

95. *Id.*

96. *Id.*

97. Erik Brady & Jodi Upton, *Mid-Majors Squeezed to Pay Up*, USA TODAY (Mar. 8, 2007, 2:00 AM), http://usatoday30.usatoday.com/sports/college/mensbasketball/2007-03-07-mid-major-coach-salary_N.htm; *Methodology*, *supra* note 85 ("Coaching/staff: All salaries, bonuses and benefits reported on the university's tax forms for coaches and staff, as well as third-party contributions.").

salaries is not dramatically different between the two sets of institutions, the absolute amount of coach and staff compensation is much lower at the mid-major institutions.[98] This is emblematic of a system that rewards successful mid-major coaches and staff members with lucrative opportunities at higher levels of college athletics.[99] In many cases, the mid-major institutions find it difficult to compete with the salaries and prestige offered by many Power Five institutions.[100] In the end, mid-major institutions have trouble meeting many financial challenges brought on by the lack of revenue-generating programs that help to subsidize other sports.[101]

H. Revenue Growth Over the Last Seven Years

There has been significant revenue growth in Division I athletics over the past seven years, especially at the top of FBS football.[102]

98. *Id.*

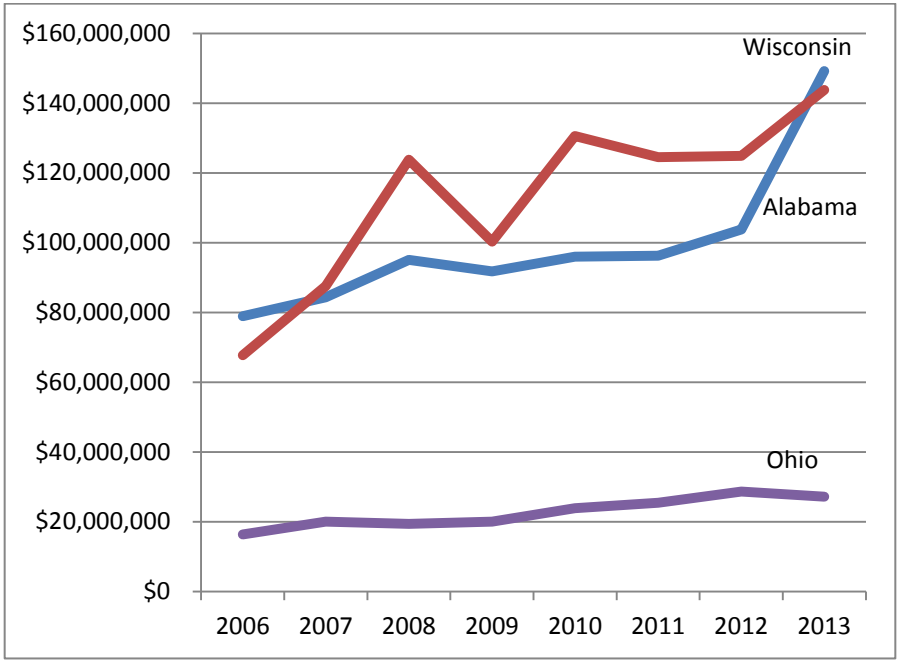
99. *Id.*

100. *Id.*

101. *Id.*

102. *NCAA Finances*, *supra* note 84.

Figure 8[103]
Revenue Growth for Selected FBS Institutions (2006 – 2013)



Alabama and Wisconsin, two Power Five conference institutions have enjoyed very strong revenue growth since 2006.[104] In just seven years, Wisconsin increased its revenues by over 89%. Alabama posted a 112% increase in revenue during the same period.[105] The chart also shows the revenue growth of the athletic department at Ohio University.[106] While Ohio totaled just over $27 million in revenue in 2013, the athletic department posted revenue growth of 66% between 2006 and 2013.[107]

Despite the strong revenue growth shown by the Ohio athletic department, the fact remains that the gap between mid-major institutions

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

and Power Five institutions is widening.[108] This growing disparity is likely to continue and even increase, as the Power Five conferences negotiate (or renegotiate) their conference football and men's basketball media contracts, and/or realize the growth of revenues from regional networks and the acquisition of new and larger markets. The addition of Maryland and Rutgers to the Big 10 is one such example of a conference substantially increasing its television footprint in search of increased broadcast revenues.[109] Additionally, the introduction of the College Football Playoff will result in a new football bowl payout structure, likely one that directs more resources towards the Power Five conferences.[110]

III. NORTHWESTERN UNIVERSITY

A. Introduction

In 2014, the Chicago Regional Director of the National Labor Relations Board held that Northwestern University football players were employees within the meaning of the National Labor Relations Act ("NLRA").[111] This decision, which may not be resolved on appeal for a number of years,[112] has created an enormous number of attacks, coming in the press[113] as well as from Congress,[114] which has responded with a

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108. *NCAA Finances*, *supra* note 84.

109. Ben Straus, *The Big Ten's Bigger Footprint*, N.Y. TIMES (Nov. 30, 2013), http://www.nytimes.com/2013/12/01/business/the-big-tens-bigger-footprint.html?pagewanted=all&r=0.

110. Brett McMurphy, *Power Conferences Likely to Receive Most of Playoff Revenue*, CBS SPORTS (June 18, 2012, 7:57 PM), http://www.cbssports.com/collegefootball/story/19378895/power-conferences-likely-to-receive-most-of-playoff-revenue.

111. Decision and Direction of Election, Northwestern Univ., Case 13-RC-121359 (N.L.R.B. Region 13, Mar. 16, 2014) [hereinafter *Regional Director's Decision*].

112. Ann Killion, *Court Case Could Make or Break Title IX*, SF GATE (Apr. 5, 2014, 11:39 PM), http://www.sfgate.com/collegesports/article/Court-case-could-make-or-break-Title-IX-5379767.php; *see generally* WILLIAM B. GOULD IV, A PRIMER ON AMERICAN LABOR LAW 74-75 (5th ed. 2013); Am. Federation of Labor v. NLRB, 308 U.S. 401 (1940); *cf.* Leedom v. Kyne, 358 U.S. 184 (1958); Boire v. Greyhound Corp., 376 U.S. 473 (1964). Although the Board's election decisions cannot be directly appealed to the federal courts, employers can transform adverse election decisions into unfair labor practice proceedings by refusing to bargain with the union, which can then be appealed.

113. *E.g.*, Patrick T. Harker, *Student Athletes Shouldn't Unionize*, N.Y. TIMES (Apr. 2, 2014), http://www.nytimes.com/2014/04/02/opinion/student-athletes-shouldnt-unionize.html; Douglas Belkin, Melanie Trottman & Rachel Bachman, *College's Football Team Can Unionize*,

condemnation eerily reminiscent of the way in which the organization of professional sports players was greeted.[115] Though Board doctrine relating to employee status is not predicated upon revenues received by the employer—jurisdiction is asserted on the basis of the volume of business conducted across state lines[116]—the trigger for union organizing no doubt finds its roots in the big business that so-called "amateur" sport has become.[117] Players are not sharing in this.[118]

For instance, in *Northwestern* itself, the Regional Director noted: "Players are prohibited from profiting off their image or reputation, including the selling of merchandise and autographs. Players are also required to sign a release permitting the Employer and the Big Ten

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WALL ST. J. (Mar. 27, 2014, 12:05 AM), http://online.wsj.com/news/articles/SB10001424052702303325204579463650558954652; Letter to the Editor, *Student, Athlete and Employee?*, N.Y. TIMES (Apr. 4, 2014), http://www.nytimes.com/2014/04/05/opinion/student-athlete-and-employee.html; *cf.* Killion, *supra* note 114.

114. *See Big Labor on College Campuses: Examining the Consequences of Unionizing Student Athletes, Hearing Before the H. Comm. on Educ. & Labor*, 113th Cong. (2014).

115. *See generally* CHARLES P. KORR, THE END OF BASEBALL AS WE KNEW IT: THE PLAYERS UNION, 1960-1981 (2002); *cf.* WILLIAM B. GOULD IV, BARGAINING WITH BASEBALL: LABOR RELATIONS IN AN AGE OF PROSPEROUS TURMOIL (2011); ROBERT C. BERRY, WILLIAM B. GOULD IV & PAUL D. STAUDOHAR, LABOR RELATIONS IN PROFESSIONAL SPORTS (1986).

116. *E.g.*, 29 C.F.R. § 104.204 (2012); *cf.* Guss v. Utah Labor Relations Bd., 353 U.S. 1 (1957).

117. *See, e.g.*, *Regional Director's Decision*, *supra* note 111 ("The Employer reported to the Department of Education that its football team generated total revenues of $235 million and incurred total expenses of $159 million between 2003 and 2012. For the 2012-2013 academic year, the Employer reported that its football program generated $30.1 million in revenue and $21.7 million in expenses."); *see also* Nicholas Fram & T. Ward Frampton, *A Union of Amateurs: A Legal Blueprint to Reshape Big-Time College Athletics*, 60 BUFF. L. REV. 1003, 1003-1009 (2012); Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71, 73-80 (2006).

118. *E.g.*, Joe Nocera, Opinion, *A Step Toward Justice in College Sports?*, N.Y. TIMES (Mar. 31, 2014), http://www.nytimes.com/2014/04/01/opinion/nocera-a-step-toward-justice-in-college-sports.html; Joe Nocera, Opinion, *Unionized College Athletes?*, N.Y. TIMES (Jan. 31, 2014), http://www.nytimes.com/2014/02/01/opinion/nocera-unionized-college-athletes.html; Joe Nocera, *Let's Start Paying College Athletes*, N.Y. TIMES (Dec. 31, 2012), http://www.nytimes.com/2012/01/01/magazine/lets-start-paying-college-athletes.html?pagewanted=all&_r=0; Taylor Branch, *The Shame of College Sports*, THE ATLANTIC (Sept. 7, 2011, 11:28 AM), http://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/.

Conference to utilize their name, likeness and image for any purpose."[119] As the *New Yorker* recently observed:

> The rationale for the players' demands, which include concussion-testing, extended medical coverage, and more manageable practice schedules, is based on a real inequity. Football makes lots of money for schools—Northwestern says that between 2003 and 2012 it made two hundred and thirty-five million dollars in football revenue, including lucrative TV deals—and the thought is that those who create the value ought to share in it, particularly since a sports scholarship, instead of being a guarantee of four years of free education, often lasts only as long as the player is producing. The union vote is a subset, in turn, of a larger, much talked-of move to pay student players to play sports. This, too, sounds reasonable. Nick Saban, the head coach at the University of Alabama, makes around seven million dollars a season; shouldn't those who do the work share the wealth?[120]

It is no longer a Frank Merriwell-type relationship,[121] where competition was part-time and subordinated to full-time university student commitment. Today, as the Regional Director found with regard to Northwestern University:

> [T]he Employer's scholarship players are identified and recruited in the first instance because of their football prowess and not because of their academic achievement in high school. Only after the Employer's football program becomes interested in a high school player based on the

119. *Regional Director's Decision*, *supra* note 111. *But see* Findings of Fact and Conclusions of Law, O'Bannon v. NCAA, No. C-09-3329-CW (N.D. Cal., Aug. 8, 2014) (holding this conduct to be a violation of antitrust law).

120. Adam Gopnik, *Team Spirit*, THE NEW YORKER (May 12, 2014), http://www.newyorker.com/magazine/2014/05/12/team-spirit-4. *Cf.* Associated Press, *Donovan, Calipari in Bonus Duel at Final Four*, USA TODAY (Apr. 4, 2014, 7:39 PM), http://www.usatoday.com/story/sports/ncaab/2014/04/04/donovan-calipari-in-bonus-duel-at-final-four/7322283 (discussing six-figure bonuses that top college basketball coaches make for tournament success).

121. *See* BURT L. STANDISH, FRANK MERRIWELL'S LIMIT 1-28 (Tip-Top Weekly, Jan. 6, 1900); BURT L. STANDISH, FRANK MERRIWELL AT YALE (Street & Smith 1903); THE ADVENTURES OF FRANK MERRIWELL (Universal Pictures 1936).

> potential benefit he might add to the Employer's football program does the potential candidate get vetted through the Employer's recruiting and admissions process.[122]

A number of the athletic programs, particularly large-revenue producing football and basketball,[123] as well as low-revenue baseball,[124] have morphed into a kind of minor league[125] that historically, even on the professional level, have been without protection.[126] A symbiotic relationship between the professional leagues, such as the National Football League and the National Basketball Association (as well as the leagues in baseball and hockey), is one in which the farm team or training costs are reduced for the small group that advances to major league status.[127] There

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122. *Regional Director's Decision*, *supra* note 111.

123. William B. Gould IV, *Bargaining, Race, and Globalization: How Baseball and Other Sports Mirror Collective Bargaining, Law, and Life*, 48 U.S.F. L. REV. 1, 8 (2013).

124. *Id.* Whereas Division I football teams are allotted eighty-five full-time scholarships, comparable baseball teams are limited to a mere 11.7 scholarships to disperse across the entire team, and individual players rarely receive full scholarships. *See* Bob Nightengale, *MLB Hopes to Invigorate African-American Participation*, USA TODAY (Apr. 10, 2013, 3:24 PM), http://www.usatoday.com/story/sports/mlb/2013/04/10/mlb-bud-selig-creates-diversity-task-force/2071305; Gregory Ruehlmann, *The Incredibly White College World Series*, THE ROOT (June 20, 2008, 12:00 AM), http://www.theroot.com/views/incredibly-white-college-world-series.

125. Gopnik, *supra* note 120 ("The N.F.L. and the N.B.A., which profit indecently from the free development of talent provided by colleges, need to start their own minor leagues, and the colleges should threaten non-participation in events like the draft in order to pressure them to do so."). But the leagues are unlikely to do so at present, because of the enormous revenues that they received in the context of this relationship. Similarly, the colleges will not be likely to alter the status quo given the fact that they profit from the symbiotic connection with the professional leagues and the prospect that their leading players will emerge as outstanding pros.

126. *See* Toolson v. N.Y. Yankees, Inc., 346 U.S. 356 (1953); Triple-A Baseball Club Assocs. v. Ne. Baseball, Inc., 832 F.2d 214 (1st Cir. 1987). *But see* David M. Szuchman, Note, *Step Up to the Bargaining Table: A Call for the Unionization of Minor League Baseball*, 14 HOFSTRA LAB. & EMP. L.J. 265, 299-303 (1996) (discussing the unionization of the professional hockey minor leagues). Recently, former minor league baseball players filed a class action in federal court claiming systematic violations of federal and state wage and hour laws. *See* Complaint for Violations of Federal and State Wage and Hour Laws, Senne v. Office of the Comm'r of Baseball, No. 3:14CV00608 (N.D. Cal. Feb. 7, 2014), 2014 WL 545501.

127. *See e.g.*, David Lariviere, *New Pro Football Launch May Eventually Serve as NFL's D League*, FORBES (May 7, 2014, 10:07 AM) http://www.forbes.com/sites/davidlariviere/2014/05/07/new-pro-football-launch-may-eventually-serve-as-nfls-d-league/; Tom Ziller, *Is the NBA D-League Almost a Real Minor League?*, SB NATION (Aug. 8, 2013, 10:48 AM), http://www.sbnation.com/nba/2013/8/8/4601398/nba-dleague-expansion-minor-league; Lily Rothman, *Emancipation of the Minors*, SLATE (Apr. 3, 2012, 11:08 AM),

has been considerable litigation about controls imposed upon applicants and the timing of their entry to professional status.[128] Deeply intertwined with this process is the issue of race, both football and basketball possessing a disproportionately high percentage of black American players, many or most of whom will not graduate from the university or establish themselves in the major leagues.[129]

The idea of unions in so-called amateur athletics seems revolutionary. Yet only half a century ago, unions did not exist in professional sports. Now, all of the major leagues in all major sports are organized by unions—a phenomenon acquiesced in by professional league owners out of fear of antitrust liability in all sports except baseball.[130]

B. The Legal Framework

Two overriding lines of authority intersect here. The first, from which colleges and universities take some comfort, is the reticence displayed by the Supreme Court in addressing university employment relationships on the same basis as commercial enterprises.[131] Though the Board, reversing itself, has exercised jurisdiction over universities,[132] and though public-employment labor-relations statutes have covered (sometimes explicitly or through separate statute[133]) higher education, the

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http://www.slate.com/articles/sports/sports_nut/2012/04/minor_league_union_thousands_of_pro_baseball_players_make_just_1_100_per_month_where_is_their_c_sar_ch_vez_.html; Adam Fusfeld, *Minor League Hockey Team Thinks NHL Affiliate Is Hurting Its Profits*, BUSINESS INSIDER (Nov. 1, 2010, 2:48 PM) http://www.businessinsider.com/a-minor-league-hockey-team-thinks-its-nhl-affiliate-is-draining-profits-2010-11.

128. *Cf.* Haywood v. Nat'l Basketball Ass'n, 401 U.S. 1204 (1971); Clarett v. Nat'l Football League, 369 F.3d 124 (2d Cir. 2004), *cert. denied*, 544 U.S. 961 (2005); Wood v. Nat'l Basketball Ass'n, 809 F.2d 954 (2d Cir. 1987).

129. *See* Gould, *supra* note 123, at 8-11.

130. *See* Brown v. Pro Football, Inc., 518 U.S. 231 (1996); Radovich v. Nat'l Football League, 352 U.S. 445 (1957); Am. League of Prof'l Baseball Clubs, 180 N.L.R.B. 190 (1969); *cf.* Federal Baseball Club of Balt., Inc. v. Nat'l League of Prof'l Baseball Clubs, 259 U.S. 200 (1922); Toolson v. N.Y. Yankees, Inc., 346 U.S. 356 (1953); Flood v. Kuhn, 407 U.S. 258 (1972). *See generally* William B. Gould IV, *Labor Issues in Professional Sports: Reflections on Baseball, Labor, and Antitrust Law*, 15 STAN. L. & POL'Y REV. 61 (2004).

131. *See e.g.*, Brown, 518 U.S. 231; Flood, 407 U.S. 258; Radovich, 352 U.S. 445; Toolson, 346 U.S. 356; Federal Baseball Club of Balt., Inc., 259 U.S. 200.

132. *See* Cornell Univ., 183 N.L.R.B. 329 (1970).

133. *E.g.*, Higher Education Employer-Employee Relations Act of 1978; CAL. GOV. CODE §§ 3560-3599 (West 2013).

Court's landmark *Yeshiva* decision[134]—where it said that the "principles developed for the industrial setting cannot be 'imposed blindly on the academic world'"[135]—expresses caution. Closely related to this is the line of Board authority that seems to have treated student-employees differently from other employees because they are students.[136] This was illustrated most recently by the Board's decision in *Brown University*,[137] relied upon by the universities in connection with unionization of athletes, holding that graduate teaching assistants are not employees given the fact that their work is so closely connected to the educational mission of the university.[138]

But this has run up against the broad characterization of the word "employee" within the meaning of the NLRA provided by a unanimous Supreme Court in the 1990s.[139] There, the Court endorsed the common law definition of employee, and held that an employee is a person who performs services for another under contract of hire subject to the other's control or right of control in return for benefit or payment.[140] Except for truly volunteer employer-employee relationships,[141] or temporary employees who have a certain date for termination,[142] such individuals are

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134. NLRB v. Yeshiva Univ., 444 U.S. 672 (1980).

135. *Id.* at 681 (quoting Syracuse Univ., 204 N.L.R.B. 641, 643 (1973)).

136. *E.g.*, S.F. Art Inst., 226 N.L.R.B. 1251, 1251 (1976); Leland Stanford Junior Univ., 214 N.L.R.B. 621, 621 (1974); Adelphi Univ., 195 N.L.R.B. 639, 640 (1972).

137. Brown Univ., 342 N.L.R.B. 483, 493 (2004). This decision reversed New York University, 332 N.L.R.B. 1205, 1209 (2000). Subsequently, the Board appeared to express disagreement with *Brown University* by granting a petition for review in *New York University*, 356 N.L.R.B. No. 7 (2010), but the union withdrew its petition and negotiated a collective bargaining agreement with the university subsequent to obtaining majority status through a privately conducted process.

138. Brown Univ., 342 N.L.R.B. at 487 ("It is clear to us that graduate student assistants, including those at Brown, are primarily students and have a primarily educational, not economic, relationship with their university.").

139. NLRB v. Town & Country Elec., Inc., 516 U.S. 85, 86-87 (1995).

140. Town & Country Elec., Inc., 516 U.S. at 90-92 ("The ordinary dictionary definition of 'employee' includes any 'person who works for another in return for financial or other compensation.' . . . The phrasing of the Act seems to reiterate the breadth of the ordinary dictionary definition . . . [and] literal interpretation of the word 'employee' is consistent with several of the Act's purposes.").

141. *E.g.*, WBAI Pacifica Found., 328 N.L.R.B. 1273, 1276 (1999).

142. *E.g.*, MJM Studios of N.Y., Inc., 336 N.L.R.B. 1255, 1257-58 (2001) (discussing "date certain" test for temporary-employee status). *Cf.* Personal Prods. Corp., 114 N.L.R.B. 959, 960-961 (1955).

employees. For instance, the Board has held that medical interns in a three-to seven-year residency program are employees.[143] Thus, the key test is whether there is both benefit and control.

Athletic scholarship players at Northwestern—on the football team there are 85 of 112 who fit within that category and thus are part of the appropriate bargaining unit for the purposes of the NLRA—have received approximately $61,000 per academic year in a grant of aid.[144] Clearly this is a benefit, though when considered against the poverty line, and the fact that revenue sharing at the professional level would at least double this amount, it is relatively small. A recent standout in the NCAA tournament contended that his scholarship left him at times going to bed hungry at night.[145] But it is a benefit nonetheless for the purpose of the common law test adopted by the Supreme Court.

Of course, in addition to benefits, security is also important, and although the scholarships were year-to-year and, under NCAA rules as of two years ago, predicated upon athletic performance and not academics, colleges are now permitted to provide multi-year awards. Though Northwestern provides a four-year scholarship with an option for a fifth year, the *Chronicle of Higher Education* found that relatively few Division I public universities do so for more than a "handful of athletes."[146] At the wealthiest programs, new "entitlements" for young athletes are decried, and the University of Texas at Austin, University of Oregon, Texas A&M, University of Arizona, Georgia Tech, and University of Louisville have a very small number of multi-year awards.[147] Of course, in basketball there is the notorious "one and done," i.e. the advance of players to the NBA after just one year at the university.[148] There was considerable resistance

143. Boston Med. Ctr. Corp., 330 N.L.R.B. 152, 166 (1999).

144. *Regional Director's Decision*, *supra* note 111. In general, qualified scholarships are exempt from taxable gross income. 26 U.S.C. § 117 (2012). There is an exception for scholarships that represent "payment for teaching, research, or other services by the student required as a condition for receiving the qualified scholarship," 26 U.S.C. § 117(c)(1) (2012), yet the IRS has never interpreted athletic scholarships as falling within this category.

145. Soraya Nadia McDonald, *National Champ U-Conn.'s Napier Says He Goes to Bed Starving*, WASH. POST (Apr. 8, 2014), http://www.washingtonpost.com/news/morning-mix/wp/2014/04/08/national-champ-uconns-napier-says-he-goes-to-bed-starving.

146. Brad Wolverton & Jonah Newman, *Few Athletes Benefit from Move to Multiyear Scholarships*, CHRON. OF HIGHER EDUC. (Apr. 19, 2013), http://chronicle.com/article/Few-Athletes-Benefit-From-Move/138643/.

147. *Id.*

148. NBA Collective Bargaining Agreement, December 2011, Art. X, § 1(b)(i) *available at* http://www.nbpa.org/cba/2011; *see* Alex Berg, Opinion, *Viewpoint: One and Done Rule Bad*

and a near repeal of the new rule: "[s]everal Southeastern Conference institutions—including Louisiana State University, the University of Tennessee, and Texas A&M University—are largely opposed to the multiyear approach.[149] But some of the league's teams have used multiyear awards when necessary to land recruits."[150] The multi-year agreement provides the athletes, whom the universities claim are being recruited as student-athletes, to remain in the university even when their skills either decline, do not realize promise, or cannot be utilized because of injury.[151]

Meanwhile, the controls are considerable. In order to obtain outside employment at Northwestern, for instance, permission must be obtained from the athletic department.[152] Only media interviews arranged by the athletic department are allowed.[153] Restrictions are imposed upon online postings.[154] The players are subject to a strict drug and alcohol policy,[155] and a dress code is in effect.[156] During the first two years, players must live in on-campus dormitories, and upperclassmen must submit their lease to the coach for approval.[157]

Beginning the first week in August, there is a month-long training camp[158] and summer workouts conducted by strength and conditioning coaches can take up to twenty-five hours per week.[159] Though the rules only permit four hours of practice per day,[160] other drills are held outside

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for Athletes, USA TODAY (June 27, 2012), http://college.usatoday.com/2012/06/27/opinion-one-and-done-rule-bad-for-athletes/.

149. Wolverton & Newman, *supra* note 146.

150. *Id.*

151. *Cf. Id.*

152. *Regional Director's Decision*, *supra* note 111, at 4.

153. *Id.* 5.

154. *Id.*

155. *Id.*

156. *Id.* at 16.

157. *Id.* at 3.

158. *Regional Director's Decision*, *supra* note 111, at 5.

159. *Id.* at 8-9.

160. *Id.* at 6.

the presence of coaches,[161] and players go to the coaches' offices in the evening for a couple of hours of game-film watching.[162] During the regular football season, the players are involved with the program for at least forty to fifty hours per week.[163]

C. The Education Defense

The principal defense of the universities and colleges is that athletes are not employees within the meaning of the NLRA, since *Brown University* held that teaching assistants are not employees inasmuch as they are "primarily" involved in an educational enterprise.[164] But as the Regional Director found, the same cannot be said of football players who are supervised by non-academic coaches,[165] in contrast to graduate students who are under the tutelage of professors.[166] Moreover, as the Board itself noted, the *Brown University* doctrine is problematic because involvement with the educational enterprise and professors ought not remove individuals from employee status.[167]

Again, *Yeshiva* has noted that universities are different.[168] But to the extent that issues in collective bargaining may involve grades or class hours or academics, the answer is not for the Board to refuse to assert jurisdiction, but rather to hold that such subject matter is non-mandatory

161. *Id.* at 6-7.

162. *Id.* at 7.

163. *Id.* at 6.

164. Brown University, 342 N.L.R.B. at 488.

165. *Regional Director's Decision*, *supra* note 111, at 19.

166. *Id.* at 18.

167. McCormick & McCormick, *supra* note 117, at 121 ("At the outset, it bears remembering that the Board in Brown did not foreclose graduate student assistants from employee status solely because they were students. That is, the Board did not rule in *Brown* that students and employees are two mutually exclusive categories."); *Id.* at 121-28 (distinguishing *Brown* from the student-athlete context on the grounds that athletes play a limited role as students, that athletic participation does not contribute to education, that athletes are supervised by coaching staff instead of faculty, and that athletic scholarships are compensation for athletic services and not merely financial aid).

168. Yeshiva Univ., 444 U.S. at 680-81.

within the meaning of the NLRA under *First National Maintenance*[169] and its progeny.[170]

The Board, for instance, has taken jurisdiction over government contractors even though the contracts that they enter into with the government are beyond the jurisdiction of the NLRA and the Board and may preclude collective bargaining over many issues.[171] Sometimes the Board has stressed the proposition that "most, if not all, matters relating to the employment relationship" are to be controlled by the entity that is in a relationship with the government.[172] In the landmark *Management Training* case, the Board held that the employer must "control some matters relating to the employment relationship" in order to be an employer within the meaning of the NLRA.[173] When disputes arise, again, the fundamental concern ought to be where the duty of bargain parameters lies, rather than jurisdiction itself.[174] Thus, though some issues may be controlled by the NCAA or by public employers beyond the jurisdiction of the statute, the employer may be able to address some subject matter at the bargaining table.

Similarly, even though editorial matters are beyond the collective bargaining process by virtue of the First Amendment, the Board has asserted jurisdiction over newspapers.[175] In education itself, notwithstanding the issues relating to freedom of religion or freedom of speech,[176] the Board nonetheless asserts jurisdiction over education in the

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169. First Nat'l Maint. Corp. v. NLRB, 452 U.S. 666, 674-675 (1981); *see also* William B. Gould, *The Supreme Court's Labor and Employment Docket in the 1980 Term: Justice Brennan's Term*, 53 U. COLO. L. REV. 1, 6-17 (1981).

170. *E.g.*, NLRB v. Pan Am. Grain Co., 432 F.3d 69 (1st Cir. 2005); Dubuque Packing Co., Inc., 303 N.L.R.B. 386 (1991). *cf.* Q-1 Motor Exp., Inc., 323 N.L.R.B. 767, 769 (1997) (Chairman Gould Concurring).

171. The circuit courts have uniformly supported the Board's holdings. *See, e.g.*, Aramark Corp. v. NLRB, 179 F.3d 872 (10th Cir. 1999); Pikeville United Methodist Hosp. of Kentucky v. United Steelworkers of Am., 109 F.3d 1146 (6th Cir. 1997); Teledyne Econ. Dev. v. NLRB, 108 F.3d 56 (4th Cir. 1997); NLRB v. Fed. Sec., Inc., 154 F.3d 751 (7th Cir. 1998).

172. Chicago Mathematics & Sci. Acad. Charter Sch., Inc., 359 N.L.R.B. No. 41 (Dec. 14, 2012); *see also* Recana Solutions, 349 N.L.R.B. 1163 (2007).

173. Mgmt. Training Corp., 317 N.L.R.B. 1355, 1358 (1995).

174. *See id.* at 1357 ("Nor should the Board be deciding as a jurisdictional question which terms and conditions of employment are or are not essential to the bargaining process.").

175. *See, e.g.*, Ampersand Publ'g, LLC v. NLRB, 702 F.3d 51 (2012); Ampersand Publ'g, LLC, 359 N.L.R.B. No. 127 (May 31, 2013).

176. *Cf.* NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979).

private sector.[177] This all illustrates that, regardless of the sincerity of concerns about the integrity of universities' educational missions, the mere assertion of jurisdiction by the Board does not necessitate bargaining between athletes and the university over education-related issues. The Board has the ability to except certain issues from the status of mandatory bargaining subjects—and need not avoid the issue entirely by declining to assert jurisdiction over college athletes as "employees."

D. Implications for Federal and State Taxation of College Athletes

In addition to misplaced cries about the sanctity of education and the need to preserve the student-school relationship discussed above, critics of unionization have also warned of increased taxation of college athlete "employees" if the Regional Director's decision is upheld.[178] However, decisions by the Board have no legal force on the federal or state agencies that administer the separate statutes governing taxation and other employee-benefit issues, and thus there is no clear causal relationship that would lead to new taxation.[179] Contrary to some popular perceptions, the

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177. *E.g.*, Chicago Mathematics & Sci. Acad. Charter Sch., Inc., 359 N.L.R.B. No. 41; Windsor Sch., 200 N.L.R.B. 991 (1972).

178. *E.g.*, Darren Rovell, *Players Could Get Big Tax Bill*, ESPN (Mar. 27, 2014), http://espn.go.com/college-football/story/_/id/10683398/tax-implications-create-hurdle-players-union; Alejandro Cancino, *Northwestern Ruling Could Lead Athletes Paying Taxes on Scholarships*, CHIC. TRIB. (Mar. 28, 2014), http://articles.chicagotribune.com/2014-03-28/business/chi-northwestern-union-taxes-20140327_1_athletic-scholarships-football-players-state-taxes; Paul Caron, *Northwestern Athletes May Face Big Tax Hit From Unionization Victory*, TAXPROF BLOG (Mar. 28, 2014), http://taxprof.typepad.com/taxprof_blog/2014/03/northwestern-athletes.html; Kevin Trahan, *Clarity Sought as Northwestern Football's Labor Effort Evolves*, USA TODAY (Mar. 31, 2014, 2:43 AM), http://www.usatoday.com/story/sports/ncaaf/2014/03/31/college-football-ncpa-capa-nlrb-chicago-northwestern-labor-union/7077455/.

179. *E.g.*, Paseiro v. C.I.R., 36 T.C.M. (CCH) 1432, 1435 (1977) ("Contrary to the contention of the petitioner, a ruling by the National Labor Relations Board that hospital residents are students rather than employees under the National Labor Relations Act does not determine the proper classification of petitioner under [the Internal Revenue Code]."); *see also* Woodling v. C.I.R., 35 T.C.M. (CCH) 1766, 1767-68 (1976) ("Whatever [the *Cedars-Sinai* decision's] effect in other areas, such a determination is in no way binding on us in construing the tax laws."); Bretz v. C.I.R., 37 T.C.M. (CCH) 278 (1978) ("[T]he classification or definition as an employee under the labor laws is not controlling in tax cases . . . ."); Hales v. C.I.R., 37 T.C.M. (CCH) 946 (1978) ("Petitioner's student analogy to the decision of the NLRB that certain hospital interns and residents are not employees for collective bargaining purposes is also inapposite."); Tsou v. C.I.R., 40 T.C.M. (CCH) 56, 59 (1980) ("[T]he findings of the NLRB . . . have no bearing upon the tax issue here involved."); Saber v. C.I.R., 42 T.C.M. (CCH) 945, 948 (1981) ("[P]etitioner's contention that rulings by the National Labor Relations Board that medical residents are students should control our decision is without merit.").

fact that college athletes might possess a federal right to unionize does not mean they will suddenly be receiving taxable wages, or that the Internal Revenue Service will suddenly reverse decades of countervailing precedent in order to tax them.[180]

In the late 1970s, the Board determined that medical-student interns, residents, and clinical fellows were not statutory "employees" within the meaning of the NLRA.[181] As one might expect, this decision fostered a host of challenges by interns and residents who sought to have their earnings from such positions—which primarily came in the form of grants and stipends[182]—excluded from their taxable income inasmuch as they were not "employees." However, both the IRS and the U.S. Tax Court consistently rejected these challenges on the grounds that the definition of "employee" under federal labor law is distinct from the definition of "employee" under federal tax law.[183] In a formal Revenue Ruling, the IRS stated that: "The standards used for determining whether individuals are employees for purposes of labor relations are not the same as those used for purposes of Federal taxation."[184] Indeed, the IRS only felt the need to clarify the issue in the first place "so that the public will not erroneously rely on the Board's decision . . . ."[185]

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180. *E.g.*, Paseiro v. C.I.R., 36 T.C.M. (CCH) at 1435 ; *see also* Woodling v. C.I.R., 35 T.C.M. (CCH) at 1767-68; Bretz v. C.I.R., 37 T.C.M. (CCH) 278; Hales v. C.I.R., 37 T.C.M. (CCH) 946; Tsou v. C.I.R., 40 T.C.M. (CCH) at 59 (1980); Saber v. C.I.R., 42 T.C.M. (CCH) at 948 (1981).

181. Cedars-Sinai Med. Ctr., 223 N.L.R.B. 251 (1976); *see also* St. Clare's Hosp. & Health Ctr., 229 N.L.R.B. 1000 (1977). These decisions were overruled twenty years later by *Boston Med. Ctr. Corp.*, 330 N.L.R.B. 152, and medical-student residents and interns continue to be recognized as statutory employees even after *Brown University*, 342 N.L.R.B. 483. *See* Brown University, 342 N.L.R.B. at 494 n.5 (2004) (declining to overrule *Boston Medical*).

182. In the context of scholarship athletes, two distinct interpretations of the Internal Revenue Code seem relevant: first, whether such athletes are "employees" within the meaning of the statute; and second, whether the athletic scholarships themselves fall within the exception to non-taxable qualified scholarships contained in 26 U.S.C. § 117 (2012). However, the right-to-control inquiry under the common-law test for employee status—*see, e.g.*, Blodgett v. C.I.R., 104 T.C.M. 500 (2012)—and the inquiry into whether the scholarships are "payment for . . . services by the student required as a condition for receiving the qualified scholarships," 26 U.S.C. § 117(c)(1), appear to substantially overlap for purposes of the present analysis.

183. *E.g.*, Paseiro v. C.I.R., 36 T.C.M. (CCH) at 1435 ; *see also* Woodling v. C.I.R., 35 T.C.M. (CCH) at 1767-68; Bretz v. C.I.R., 37 T.C.M. (CCH) 278; Hales v. C.I.R., 37 T.C.M. (CCH) 946; Tsou v. C.I.R., 40 T.C.M. (CCH) at 59 (1980); Saber v. C.I.R., 42 T.C.M. (CCH) at 948 (1981).

184. Rev. Rul. 78-54, 1978-1 C.B. 36.

185. I.R.S. Gen. Couns. Mem. 37,277 (Sept. 29, 1977).

Although these rulings rejecting a direct equivalence between an individual's status for tax purposes and his or her status under other federal statutory regimes have a long historical precedent,[186] one could argue that their continued validity might be questioned to the extent that they relied on older Supreme Court opinions endorsing a functionalist approach to employee status under federal law.[187] In the 1990s, the Court gestured toward a more uniform application of common-law principles in determining employee status.[188] However, as noted previously, in the 1990s the Court also recognized a broad conception of employee status under the NLRA in *NLRB v. Town & Country Electric, Inc.*[189] In that case, the Court distinguished between decisions by *courts* interpreting an ambiguous federal statute—in which case the presumption of common-law agency doctrine prevails—and decisions by *the Board* interpreting the NLRA, in which case the "Board's construction of [the term 'employee'] is entitled to considerable deference," unless the Board departs so far from the common-law doctrine so as to "render[] its interpretation unreasonable."[190]

Thus, there remains substantial latitude between Board decisions regarding employee status for the purposes of federal labor law,[191] and employee status under other statutory regimes—including federal tax

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186. *See, e.g.*, Loo v. C.I.R., 22 T.C. 220, 224-25 (1954) (holding that petitioner's status under federal immigration law as determined by the Immigration and Naturalization Service was irrelevant for the purposes of determining the classification of income for taxation purposes); Guaranty State Bank of Greenville, Tex. v. C.I.R., 12 B.T.A. 543, 547 (1928) (holding that findings of Texas Banking Commissioner were not binding and were "without any probative force").

187. *E.g.*, Rev. Rul. 78-54, 1978-1 C.B. 36 (citing United States v. Silk, 331 U.S. 704 (1947); NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111, 136-37 (1944). *But see* I.R.S. Information Letter 2014-0016, 2014 WL 2958209 (June 27, 2014) (noting that the IRS has reaffirmed the fact that "employee" status for labor law purposes does not control "employee" status for purposes of the Internal Revenue Code in the wake of the *Northwestern* decision).

188. *See* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 324 (1992) (adopting the common-law definition of "employee" under the Employee Retirement Income Security Act, and dismissing *Hearst* and *Silk* as "feeble precedents for unmooring the term from the common law.").

189. Town & Country Elec., Inc., 516 U.S. 85.

190. *Id.* at 94 (citations omitted).

191. *Cf., e.g.*, Nash v. Fla. Indus. Comm'n, 389 U.S. 235 (1967) (discharged employee); Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941) (job applicants). The Board also declines jurisdiction over workers who are likely "employees" for tax purposes, such as certain temporary employees. *Cf.* MJM Studios of N.Y., Inc., 336 N.L.R.B. at 1257-58; Personal Prods. Corp., 114 N.L.R.B. at 960-62.

law.[192] The Board often resorts to the explicit common-law test, but the Board nonetheless retains broader discretion to determine the bounds of the NLRA.[193] Indeed, the very issue before the Board in reviewing Northwestern's appeal of the Regional Director's decision—whether scholarship athletes are excluded as statutory "employees" because they are "primarily students" under the *Brown University* test—arises from a prior Board decision determining employee status beyond the common-law test alone.[194] And since there is still considerable variation between the policies underlying employee status for federal labor law versus federal tax law, there remains no justification for the IRS to base its interpretation of the Internal Revenue Code on the Board's interpretation of the NLRA. The IRS itself has recently reaffirmed this position in response to an inquiry from Senator Richard Burr regarding the *Northwestern* case, and has signaled its intention to adhere to existing IRS precedent regarding the tax treatment of athletic scholarships.[195] According to a June 2014 IRS Information Letter, and consistent with the precedent discussed above, "whether an individual is treated as an employee for labor law purposes is not controlling of whether the individual is an employee for federal tax purposes."[196]

The lack of equivalence regarding employee status extends both ways, and the Board and courts reviewing Board decisions have no greater

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192. *Cf.* Harris v. Quinn, 134 S. Ct. 2618, 2634-36, 2638 (2014) (examining employee status at the state level and recognizing the varying policy considerations that attach to the distinction between "full-fledged state employees" who are treated as covered employees in a wide range of contexts, and workers who are covered "employees" within the meaning of a single statute or statutory provision—such as the definition of homecare personal assistants as "public employees" *solely* for collective bargaining purposes under the Illinois Public Labor Relations Act).

193. *Cf., e.g.*, Nash v. Fla. Indus. Comm'n, 389 U.S. 235 (1967) (discharged employee); Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941) (job applicants). The Board also declines jurisdiction over workers who are likely "employees" for tax purposes, such as certain temporary employees. *Cf.* MJM Studios of N.Y., Inc., 336 N.L.R.B. at 1257-58; Personal Prods. Corp., 114 N.L.R.B. at 960-62.

194. *See, e.g.*, Br. to the Regional Director on Behalf of Northwestern University 51, Mar. 17, 2014, ECF No. 13-RC-121359 ("As the [*Brown University*] Board explained, even assuming *arguendo* that students are employees under a common law definition, 'it does not follow that they are employees within the meaning of the Act.'" (citation omitted)); Br. to the Regional Director on Behalf of Northwestern University 52, Mar. 17, 2014, ECF No. 13-RC-121359 ("[C]ommon law agency principles cannot be forced onto the enrolled student who engages in voluntary co-curricular activities.").

195. I.R.S. Information Letter 2014-0016, 2014 WL 2958209 (June 27, 2014).

196. *Id.*

basis for relying on decisions by the IRS.[197] This is true not only in the context of employee status, but also in the context of classifying employees' compensation—for example, courts have endorsed the Board's inclusion of unreported tips in calculating back pay awards, despite the fact that employees paid no taxes on such income.[198] Similarly, the fact that an employer did not consider individuals to be "employees" for the purposes of tax withholdings and other deductions has no bearing on whether those individuals are "employees" within the meaning of the NLRA.[199] These examples all demonstrate that, at the very least, the IRS certainly has no *obligation* to modify its long-standing policy of excluding college athletes from taxation simply because the Board has granted such athletes the protections of the NLRA.

The more complicated question is whether tax agencies—at least at the state level—*even can* base a change in tax policy on the resolution of the Northwestern players' election petition. In addition to the threat of federal taxation, another main source of worry for college athletes might be taxation at the state level.[200] However, while the above discussion of the relationship between the IRS and Board decisions is not directly applicable in the state context, there may be an even greater obstacle to state reliance on a Board determination that scholarships athletes are "employees" covered by the NLRA: federal preemption.[201] States are generally granted

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197. *See, e.g.*, FedEx Home Delivery v. NLRB, 563 F.3d 492, 511 n.10 (D.C. Cir. 2009) ("It is to the precedents of the Board, and not to those of the Internal Revenue Service, that we owe deference, as only the former is charged with enforcing the provisions of the NLRA."); Truman Med. Ctr., Inc. v. NLRB, 641 F.2d 570, 573 n.2 (8th Cir. 1981) ("[R]ulings of the Internal Revenue Service are not determinative of the meaning of the section 2(2) exemption for purposes of the National Labor Relations Act."); Local 777, Democratic Union Org. Comm. v. NLRB, 603 F.2d 862, 880 (D.C. Cir. 1978).

198. *E.g.*, Atl. Limousine, Inc. v. NLRB, 243 F.3d 711, 717-18, 719 (3d Cir. 2001); NLRB v. Lee Hotel Corp., 13 F.3d 1347, 1347 (9th Cir. 1994).

199. *See* Seattle Opera v. NLRB, 292 F.3d 757, 763-64, n.8 (D.C. Cir. 2002); NLRB v. Amber Delivery Serv., Inc., 651 F.2d 57, 61-62 (1st Cir. 1981); J. Huizinga Cartage Co. v. NLRB, 941 F.2d 616, 620 (7th Cir. 1991); NLRB v. Keystone Floors, Inc., 306 F.2d 560, 561, 563 (3d Cir. 1962). *But see* I.R.S. Chief Couns. Adv. 200948042, 2009 WL 4092540 (Nov. 27, 2009) (suggesting that NLRB Regional Director's conclusion that workers were not common-law employees could constitute a "reasonable basis" for employer to rely on such conclusion in having mistakenly not treated workers as employees for tax purposes).

200. *E.g.*, Rovell, *supra* note 178; Cancino, *supra* note 178; Caron, *supra* note 178; Trahan, *supra* note 178.

201. *See* Bo Newsome, *Are Scholarship Athletes Employees? NLRB Ruling Prompts House Hearing*, NAT'L ASS'N. OF INDEP. COLLS. & UNIVS. (May 19, 2014) http://www.naicu.edu/news_room/news_detail.asp?id=20362.

broad freedom against federal interference in the collection of taxes,[202] but here the hypothetical is that state agencies would base a reconsideration of college athletes' tax status on a determination by the Board made in the context of a union representation petition. In other words, a change in policy on the state level triggered by the Board's decision would make the Northwestern players newly liable for taxation as a direct result of their having petitioned the Board for a representation election and their having pursued a claim of employee status before the Board.[203]

There is a plausible argument that any state decision triggered by the Board's resolution of the *Northwestern* case would be unconstitutional under the Supremacy Clause of the U.S. Constitution,[204] based on the theory that such a decision would constitute interference with a field preempted by federal law. The NLRA and the federal law of labor relations give rise to an expansive doctrine of preemption.[205] This doctrine encompasses the understanding that states must sometimes cede authority in order to preserve the federal scheme for labor relations,[206] as well as the understanding that a state's withholding or granting of certain benefits under state law can unduly interfere with the federal scheme.[207] A state decision to base its reconsideration of individuals' tax status on Board proceedings might constitute just such undue interference.

In *Nash v. Florida Industrial Commission*, the Supreme Court was faced with a similar preemption issue.[208] In that case, a Florida agency had interpreted the state's unemployment compensation statute such that

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202. Allegheny Pittsburgh Coal Co. v. Cnty. Comm'n, 488 U.S. 336, 344 (1989) ("The States . . . have broad powers to impose and collect taxes."). *But see, e.g.*, Davis v. Mich. Dep't of Treasury, 489 U.S. 803, 810-11 (1989) (discussing the holding in *McCulloch v. Maryland*).

203. *See* Newsome, *supra* note 201.

204. U.S. CONST. art. VI, cl. 2.

205. *See* Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wis. Emp't Relations Comm'n, 427 U.S. 132, 136-55 n.3 (1976); San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 236, 244 (1959); *see also* William B. Gould, *The Garmon Case: Decline and Threshold of Litigating Elucidation*, 39 U. DET. MERCY L.J. 539, 539-40 (1962).

206. *E.g.*, NLRB v. Nash-Finch Co., 404 U.S. 138, 144 (1971) (holding that the Board has implied authority to seek federal injunctions against state court orders interfering with the administration of federal labor law).

207. *E.g.*, Wis. Dep't of Indus., Labor & Human Relations v. Gould Inc., 475 U.S. 282, 287 (1986) (holding that state law preventing employers with multiple unfair labor practice violations from receiving government contracts was preempted).

208. Nash v. Fla. Indus. Comm'n 389 U.S. 235, 236--38 (1967).

individuals, like the petitioner, who filed unfair labor practice charges with the Board would be excluded from receiving unemployment benefits while the charges were still pending.[209] The Court held that the state decision was a coercive deterrent to individuals filing charges with the Board, and therefore was preempted by the NLRA.[210] According to the Court: "Florida should not be permitted to defeat or handicap a valid national objective by threatening to withdraw state benefits from persons simply because they cooperate with the Government's constitutional plan."[211]

Much like the state decision at issue in *Nash*, if a state agency bases its reconsideration of whether to tax college athletes on those athletes' successful petition to the Board, the "financial burden . . . impose[d] will impede resort to the [NLRA] and thwart congressional reliance on individual action."[212] Quite simply, if individual workers or classes of workers learn that petitioning the Board for employee status or for a union-representation election might cause them to become newly liable for state taxation, such workers will be faced with an "unappetizing choice"[213] between either federal labor protections or continued tax-free status, and thus will be less willing to enforce their rights under federal law. Furthermore, the intrusion of state tax determinations would disrupt the goal of the NLRA in securing the "'uniform application' of its substantive rules and [in avoiding] the 'diversities and conflicts likely to result from a variety of local procedures and attitudes . . . . '"[214] Decisions by individual states that proceedings before the Board can serve as legitimate grounds for reconsidering individuals' state tax obligations would create a national

209. *Id.* at 236-37 (the agency determined that filing charges with the Board created an ongoing "'labor dispute'" within the definition of the state statute).

210. *Id.* at 239.

211. *Id.*

212. *Id.*; *see also* Livadas v. Bradshaw, 512 U.S. 107, 117-18 (1994) (finding state decision, which waived state wage-payment penalties against employers for employees covered by certain collective-bargaining agreements, to be preempted by the NLRA: "[T]he [state official] has presented Livadas and others like her with the choice of having state-law rights under §§ 201 and 203 enforced or exercising the right to enter into a collective-bargaining agreement with an arbitration clause . . . . This unappetizing choice, we conclude, . . . cannot ultimately be reconciled with a statutory scheme premised on the centrality of the right to bargain collectively . . . .").

213. Livadas, 512 U.S. at 117.

214. NLRB v. Nash-Finch Co., 404 U.S. 138, 144 (1971) (quoting Garner v. Teamsters, Chauffeurs & Helpers Local Union No. 776, 346 U.S. 485, 490 (1953)).

patchwork whereby workers in one state are shackled with greater deterrents to petitioning the Board than workers in an adjacent state.

Of course, as a general matter, a state determination that college athletes are taxable employees does not automatically conflict with federal law.[215] But states have declined to tax college athletes for decades, and it is unclear what the justification for changing course now would be other than the *Northwestern* case and the possible introduction of a union.[216] The question of whether the taxation of college athletes is permissible under state tax statutes, which do not themselves conflict with federal law, is fundamentally irrelevant, since "[p]re-emption analysis, rather, turns on the actual content of [the state's] policy and its real effect on federal rights."[217] If a state agency's determination that college athletes are taxable is ultimately based upon, or is a direct result of, an independent decision by the Board in enforcing the NLRA, then the state's actions would begin to raise serious questions of federal preemption.

IV. POTENTIAL FINANCIAL IMPLICATIONS

A. Introduction

As has been demonstrated, there are numerous questions of law yet to be answered. It remains to be seen whether a Board decision, and/or a possible federal appeals court decision, or a U.S. Supreme Court decision will ultimately decide on and resolve their various issues. Of course, there also remains the possibility of a settlement, which might resolve some of their issues. For example, a Board decision may leave open the state and federal taxation question. However, a decision by the Board, followed by a

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215. Nor, as a general matter, was Florida under any inherent obligation to provide the petitioner in *Nash* with unemployment benefits. The constitutional issue arose from the nexus between the state's decision and the petitioner's proceedings before the Board.

216. State policies explicitly linking differential taxation to union membership might be more clearly preempted by section 7 of the NLRA and by *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959). Such direct interference with employees' section 7 rights might also be grounds for damages actions against state officials in their individual capacities under 42 U.S.C. § 1983 (2012). The Supreme Court has recognized a section 1983 cause of action under the NLRA. *See* Livadas v. Bradshaw, 512 U.S. 107, 132-34 (1994); Golden State Transit Corp. v. Los Angeles, 493 U.S. 103 (1989). However, in general the Court has also strongly undercut plaintiffs' ability to challenge the collection of state taxes, and at a minimum plaintiffs might be required to bring a section 1983 action in state court due to the so-called Tax Anti-Injunction Act, 26 U.S.C. § 7421(a), as well as principles of comity. *See* Fair Assessment in Real Estate v. McNary, 454 U.S. 100 (1981).

217. Livadas, 512 U.S. at 119 (citing Nash v. Fla. Indust. Comm'n, 389 U.S. 235).

vote in unionization and a subsequent collective bargaining agreement between the players and the Northwestern University, may sufficiently change the characterization of the players such that the IRS or a state taxing agency might have the grounds to tax the players.

This section will explore the range of possible ramifications of continued litigation success of the petitioners in *Northwestern University* and/or a possible settlement in the case. This allows us to consider the range of the potential impact, as well as the magnitude. It is important to understand the ramifications, not only on the parties involved (CAPA, Northwestern Football players), but also for similarly situated parties (college football players at private universities and possibly public universities). It is also important to understand that a shift in the dynamics, relationship, legal status, etc. in football, because of its significant dominance on college athletic departments, will potentially have a significant impact on the rest of the athletic department, its sports, student-athletes, coaches and other staff, and administrators.

B. Increasing Athletic Aid to Cost of Attendance

If student-athletes are successful in reform efforts, the amount of financial aid provided to student-athletes will likely increase, particularly those in revenue generating sports like football and men's basketball. One example, especially in a settlement scenario, is increasing athletic scholarships to the full cost of attendance[218] (unionization and subsequent collective bargaining negotiations will likely result in greater amounts). By NCAA mandate, "full-ride" athletic scholarships are limited to the cost of tuition and fees, room and board, and required course-related materials,[219] leaving student athletics to cover personal expenses and travel from their hometown to the university and vice versa. Consequently, full-grant in aid scholarships approved by the NCAA do not cover the full cost to attend a college or university as a full time student. For example, Northwestern University estimates it will cost undergraduate students a total of $65,554 to attend the university for one year as a full time student, yet because athletic scholarships sanctioned by the NCAA do not cover personal

218. Cost of attendance is the full and reasonable estimated cost to complete a full-year at a college or university set by each individual academic institution and includes tuition and fees, room and board, required course material and other personal expenses including travel. For an example, see *Cost of Attendance*, NORTHWESTERN UNIVERSITY, http://undergradaid.northwestern.edu/eligibility-and-policies/financial-eligibility/cost-of-attendance.html (last visited Aug. 23).

219. 2013-2014 NCAA Division I Manual art. 15.02.5

expenses of transportation, student athletes at Northwestern are only eligible to receive a scholarship up to $63,589, creating a financial gap of $1,965.[220] Similarly, the financial gap at the University of Texas is $2,159 (see Figure 9 below).

Figure 9
Cost of Attendance Gap

Northwestern University (Private)[221]			
	Cost of Attendance	**Full Grant in Aid**	
Tuition & Fees	$47,286	$47, 286	
Room & Board	$14,389	$14,389	
Books & Supplies	$1,914	$1,914	
Personal Expenses	$1,965	Not Included	
Transportation	*Varies*	Not Included	
Total	$65,554	$63,589	Δ: $1,965

University of Texas (Austin, TX): In-State Tuition[222]			
	Cost of Attendance	**Full Grant in Aid**	
Tuition & Fees	$5,369	$5,369	
Room & Board	$5,681	$5,681	
Books & Supplies	$375	$375	
Personal Expenses	$1,388	Not Included	
Transportation	$735	Not Included	
Total	$13,584	$11,425	Δ: $2,159

To manage this gap and provide the full cost of attendance to student-athletes, member institutions will need to provide additional funding for travel and personal expenses, and increase the amount of scholarships currently provided to student-athletes. This cost will vary from program to program based on the number of athletic scholarships each athletic program currently offers, the cost of tuition and fees, room and

220. *Cost of Attendance*, *supra* note 218.

221. *Id.*

222. *Cost of Attendance*, THE UNIVERSITY OF TEXAS AT AUSTIN, http://finaid.utexas.edu/costs.html (July 27, 2014).

board, and required course materials at each institution, and the full estimated cost of attendance established to attend those institutions. Additionally, to remain in compliance with Title IX,[223] if an educational institution increases the amount of aid available to male athletes (i.e. football players) up the full cost of attendance, a proportional amount of aid must also be provided to female athletes.[224] Therefore, increasing football or men's basketball scholarships up to or beyond the cost of attendance will increase the cost to sponsor other sports within athletics program as well.

The additional costs of increasing scholarships can be estimated by multiplying the number of athletic scholarships currently provided by the additional cost to increase full grant-in-aids to the full cost of attendance. For example, if an athletics program elected to increase approximately 100 scholarships (eighty-five for football and thirteen for men's basketball),[225] by $1,000 to meet the university's full cost of attendance, the athletic department might incur $100,000 (100 x $1,000) of additional costs. However, to remain in compliance with Title IX, increasing scholarships for male student-athletes may also require a boost in scholarships allocated to female student-athletes.[226] Therefore, the athletic program may need to actually increase almost 200 athletic scholarships up to the cost of attendance as opposed to the initial 100 in order to provide additional aid to both male and female athletes. Thus, the athletic program might more accurately incur $200,000 (200 x $1000) of additional costs, significantly increasing grant-in-aid expenses.

As stated above, the cost to increase athletic aid up to the cost of attendance will vary at each institution depending on the number of scholarships increased and how much value must be added to each. Figure 10 takes both of these factors into account to illustrate the potential costs of providing an actual full-ride athletic scholarship.

223. 20 U.S.C. § 1681-87 (2012); 34 C.F.R. § 106.41(a) (2010).

224. 34 C.F.R. § 106.41(a) (2010).

225. As per NCAA rules, FBS athletics programs may only furnish a maximum of eighty-five scholarships to football, thirteen to men's basketball, and fifteen to women's basketball. 2013-2014 NCAA Division I Manual art. 15.5.5, 15.5.6.

226. 34 C.F.R. § 106.41(a) (2010).

Figure 10
Cost of Increasing Scholarships (Full Grant in Aid)
Up to the Cost of Attendance

	Additional Value Added to Each Scholarship		
# of Scholarships	$1,000	$1,500	$2,000
50	$50,000	$75,000	$100,000
100	$100,000	$150,000	$200,000
150	$150,000	$225,000	$300,000
200	$200,000	$300,000	$400,000
250	$250,000	$375,000	$500,000
300	$300,000	$450,000	$600,000

	Additional Value Added to Each Scholarship		
# of Scholarships	$2,500	$3,000	$3,500
50	$125,000	$150,000	$175,000
100	$250,000	$300,000	$350,000
150	$375,000	$450,000	$525,000
200	$500,000	$600,000	$700,000
250	$625,000	$750,000	$875,000
300	$750,000	$900,000	$1,050,000

C. Increasing Athletic Aid Beyond Cost of Attendance

Increasing financial aid for student athletes up to the cost of attendance is just one of the many possibilities that could arise from efforts to reform college athletics.[227] Some believe that NCAA student athletes in

227. Glenn Wong, Opinion, *College Athletes Should Be Careful What They Wish For*, N.Y. TIMES (Mar. 28, 2014), http://www.nytimes.com/roomfordebate/2014/03/27/scholars-players-and-union-members/college-athletes-should-be-careful-what-they-wish-for.

revenue generating sports should actually be paid much more than the cost of attendance, pointing to the millions of dollars in revenue that athletic departments generate each year.[228] Others have proposed that student athletes should receive a flat stipend to cover personal expenses and other foreseeable costs.[229] Regardless, either outcome will increase costs for athletics programs.[230] If student athletes are one day paid based on which sports generate revenue for the university, football and men's basketball teams are the most likely to receive a pay day as the two highest revenue-generating sports, which likely opens up the door to more gender equity issues under Title IX.[231] Although, theoretically it is unclear whether revenue based compensation would apply to entire teams or individual players. Additionally, a flat stipend could be provided to all student athletes within a program, to specific sports or teams, or to specific athletes.[232] Irrespective of how it happens or why, if athletic aid for student athletes is increased beyond the cost of attendance, the costs of sponsoring intercollegiate athletics will soar.[233] Athletic aid could be increased for specific individuals, teams (i.e. football), sports (i.e men's and women's basketball), or for entire programs (men's and women's).[234] Therefore, as illustrated in Figure 11, the additional cost of increasing athletic aid will depend on the value of the stipend or payment and the number of student athletes receiving it.

228. Joe Nocera, *Let's Start Paying College Athletes*, N.Y. TIMES (Dec. 30, 2011), http://www.nytimes.com/2012/01/01/magazine/lets-start-paying-college-athletes.html?pagewanted=all&_r=0.

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

233. Mechelle Voepel, *Title IX a Pay-for-Play Roadblock*, ESPN (Jul. 15, 2011), http://espn.go.com/college-sports/story/_/id/6769337/title-ix-seen-substantial-roadblock-pay-play-college-athletics.

234. Nocera, *supra* note 228.

Figure 11
Cost of Increasing Athletic Aid (Full Grant in Aid) Beyond the Cost of Attendance

	Additional Value Added to Each Scholarship		
# of Student Athletes	$5,000	$6,000	$7,000
50	$250,000	$300,000	$350,000
100	$500,000	$600,000	$700,000
200	$1,000,000	$1,200,000	$1,400,000
300	$1,500,000	$1,800,000	$2,100,000
400	$2,000,000	$2,400,000	$2,800,000
500	$2,500,000	$3,000,000	$3,500,000
600	$3,000,000	$3,600,000	$4,200,000
650	$3,250,000	$3,900,000	$4,550,000

	Additional Value Added to Each Scholarship		
# of Student Athletes	$8,000	$9,000	$10,000
50	$400,000	$450,000	$500,000
100	$800,000	$900,000	$1,000,000
200	$1,600,000	$1,800,000	$2,000,000
300	$2,400,000	$2,700,000	$3,000,000
400	$3,200,000	$3,600,000	$4,000,000
500	$4,000,000	$4,500,000	$5,000,000
600	$4,800,000	$5,400,000	$6,000,000
650	$5,200,000	$ 5,850,000	$6,500,000

D. Title IX Impact

Title IX also figures to play a large role in the development of new NCAA and athletic department policies following the conclusion of the current litigation. "Perhaps no law has received more attention in the

sports industry, specifically within high school and collegiate sports, than Title IX. Forty years after its enactment, this educational statute has truly reshaped the landscape of American sport."[235] Title IX's impact on NCAA activity is undisputed, and could be furthered depending on the outcome of the *Northwestern* case.

Although Title IX outlaws gender discrimination in any facet of a school that receives public funding, it is most commonly known for its impact on amateur athletics.[236] According to Title IX, "No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis."[237]

In order to prove compliance with Title IX, athletic departments are tasked with three steps. First, they must accommodate the interests and abilities of both male and female student-athletes.[238] To do this, a program must be able to pass one of three tests in place.[239] The most likely test that a school will pass is the level of competitive opportunities available to both genders by comparing proportional opportunities to the student population demographic, while the other tests examine the department's practice of program expansion relative to the underrepresented gender, and determine if the institution fully accommodates the abilities and interests of both genders.[240]

Next, schools are evaluated on the financial assistance they provide to both male and female student athletes.[241] The Office of Civil Rights compares the scholarship dollars being spent on both genders against the

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235. Paul M. Anderson, *Title IX at Forty: An Introduction and Historical Review of Forty Legal Developments that Shaped Gender Equity Law*, 22 MARQ. SPORTS L. REV. 325, 325 (2012).

236. Diane Heckman, *The Glass Sneaker: Thirty Years of Victories and Defeats Involving Title IX and Sex Discrimination in Athletics*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 550, 553 (2003).

237. 34 C.F.R. § 106.41(a) (2010).

238. 34 C.F.R. § 106.41(c)(1) (2010); GLENN M. WONG, ESSENTIALS OF SPORTS LAW 324 (4th ed. 2010).

239. WONG, *supra* note 238, at 324.

240. *Id.*

241. *Id.*

proportion of student athletes of each gender to determine if an institution is treating both genders equally.[242] If the proportion of financial assistance is not equal to those that compete in athletics, then a further review is required.[243] At times, nondiscriminatory factors, including the varying costs of different sports, as well as different values of instate versus out-of-state tuitions can help to explain disparities.[244]

Finally, institutions are assessed on the level to which they provide student athletes of both genders with equivalent benefits, opportunities, and treatment.[245] The OCR has eleven components that are used to determine if equal treatment is being provided, including the athletic facilities for each sport, coaching staff, and equipment provided.[246]

With the potential for significant reforms within both the NCAA and athletic department policies regarding student athletes, Title IX could have significant financial implications for athletic departments.[247] Thus, if Northwestern is forced to recognize football student-athletes as a bargaining unit, then it may only be a matter of time until all other NCAA student-athletes obtain the same status.

If the outcome of the *Northwestern* litigation results in NCAA football players receiving additional compensation of some form, schools will need to act to appropriately compensate their female student-athletes in order to maintain equality across genders.[248] Regardless of whether the additional compensation comes in the form of increasing athletic scholarships to cover the full "cost of attendance" at a university, or other indirect benefits received through participation in an athletic program, athletic departments must take action to fairly compensate athletes from all programs in order to prove Title IX compliance.[249] With very few specific sport programs, men's or women's, being profitable beyond certain high-level football and men's basketball programs, factoring in additional costs

242. *Id.* at 324-325.

243. 34 C.F.R. § 106.41(c) (2010).

244. WONG, *supra* note 238, at 325.

245. *Id.*

246. 34 C.F.R. § 106.41(c); WONG, *supra* note 238, at 325.

247. Wong, *supra* note 227.

248. *Id.*

249. *Id.*

to every athletic department for female student athletes in order to remain compliant with Title IX could prove particularly costly.[250]

Additionally, if athletes in high profile sports like football and men's basketball are granted the rights to profit off their own name, image and likeness, then the issues arise regarding how to deal with other men's sports, as well as women's sports. If each student-athlete is given the rights to his or her own name, image and likeness, then the market will determine how much money they receive. The payment will come from third parties, and as a result, will not fall under the purview of Title IX.[251]

The final legal issue will be whether men's football and basketball players, if they are employees, are subject to Title IX. If not, then this may have the impact of helping men's non-revenue sports.

E. Workers' Compensation Impact

Workers' compensation is a system of insurance that provides benefits to employees that are injured or become ill on the job.[252] Workers' compensation generally provides employees with medical care, compensation (total or partial), disability compensation (total or partial) and death benefits in the case of an injury or illness suffered because of their work.[253]

If student-athletes are determined by a state workers' compensation board to be employees of an educational institution, then the value of their scholarships may also be determined to constitute a salary.[254] In this case, educational institutions, as employers, may be required to provide workers' compensation benefits for student-athletes that are injured while

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250. Voepel, *supra* note 233.

251. James K. Gentry & Raquel M. Alexander, *Pay for Women's Basketball Coaches Lags Far Behind That of Men's Coaches*, N.Y. TIMES (Apr. 2, 2012), http://www.nytimes.com/2012/04/03/sports/ncaabasketball/pay-for-womens-basketball-coaches-lags-far-behind-mens-coaches.html?pagewanted=all.

252. UTAH LABOR COMMISSION: INDUSTRIAL ACCIDENTS DIVISION'S EMPLOYEE'S GUIDE TO WORKER'S COMPENSATION 2012/2013 (2012), *available at* http://laborcommission.utah.gov/media/pdfs/industrialaccidents/pubs/EEGuide.pdf. [hereinafter *Utah Worker's Compensation Guide 2012-13*)

253. *Id.*

254. Workers' compensation programs are administered on a state-by-state basis. New Hampshire Workers Compensation Pamphlet, NHBAR.ORG (Mar. 2011), https://www.nhbar.org/uploads/pdf/WorkersCompensationPamphlet.pdf. Thus, student-athletes in some states may be considered by workers' compensation boards to be employees of their institution, while other student-athletes in different states may not be afforded the same status.

participating in athletic competitions or training, unless the student-athletes are excluded from coverage.[255]

In order to be able to provide these benefits, athletic departments must allocate funds from their operating budgets in order to pay the insurance premiums. Alternatively, some states allow employers to self-insure the cost of workers' compensation.[256] Premiums for workers' compensation are calculated by multiplying the total payroll amount by the applicable workers' compensation classification rate.[257] For example, an employer with a $100,000 payroll facing a .1631 classification rate for classification will pay $16,310 in premiums ($100,000 x .1631 = $16,310).[258]

Workers' compensation is administered on a state-by-state basis; therefore the additional costs of providing workers' compensation for each institution will vary depending on the rate used by each state. Some states, such as Florida, prohibit professional athletes from being covered under workers' compensation laws.[259]

As the value of an athletic scholarship may be considered a student-athlete's salary, the payroll of a particular institution will be the total value of the athletic scholarships it grants. For each institution, the additional cost per athlete to provide workers' compensation can be estimated by multiplying the value of an athletic scholarship by the appropriate workers' compensation rate. To calculate the total cost of workers' compensation insurance at each institution, the previous figure can be multiplied by the number of current athletic scholarships provided, as shown in Figure 12 below.

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255. Wong, *supra* note 227.

256. *Utah Worker's Compensation Guide 2012-13*, *supra* note 252.

257. *Premium Calculation*, WORKERS COMPENSATION FUND, https://www.wcfgroup.com/premium-calculation (last visited Aug. 23, 2014).

258. The .1631 figure is based on an illustrative example used by the Workers Compensation Fund of Utah in demonstrating how workers' compensation premiums are calculated (the actual example figure is .1641). It does not represent the actual classification rate used to calculate workers' compensation premiums for the University of Utah. It is used here to illustrate the potential financial cost to an institution of beginning to pay such premiums. *Id.*

259. Fla. Stat. § 440.02(17)(c)3 (2013).

Figure 12
Additional Cost of Providing
Workers' Compensation Insurance

(Scholarship Value x WC Rate) x Number of Scholarships = Cost					
# of Additional Scholarships	$30,000 x (.1631)	$40,000 x (.1631)	$50,000 x (.1631)	$60,000 x (.1631)	$70,000 x (.1631)
50	$244,650	$326,200	$407,750	$489,300	$570,850
100	$489,300	$652,400	$815,500	$978,600	$1,141,700
150	$733,950	$978,600	$1,223,250	$1,467,900	$1,712,550
200	$978,600	$1,304,800	$1,631,000	$1,957,200	$2,283,400
250	$1,223,250	$1,631,000	$2,038,750	$2,446,500	$2,854,250
300	$1,467,900	$1,957,200	$2,446,500	$2,935,800	$3,425,100

Assume that the University of Utah currently provides fifty athletic scholarships valued at $50,000 each. Each student-athlete receiving a scholarship will effectively have a salary of $50,000. If the Utah workers' compensation rate is .1631, each scholarship will cost the institution an additional $8,155 ($50,000 x .1631) in premiums per year. Therefore, the yearly total cost to the institution for workers' compensation premiums for all fifty scholarships would be $407,750.

In practice, calculating workers' compensation costs will be much more complicated. This is because the value of a scholarship may vary across sports. It will also vary from student-athlete to student-athlete, as the value of an in-state scholarship at a public institution is generally less than the value of an out-of-state scholarship.[260]

F. Unemployment Insurance Impact

Unemployment insurance is designed to provide financial protection for certain employees.[261] As set forth by the state of New York in the preface of the "Employer's Guide to Unemployment Insurance,"

260. Ron Lieber, *Pay for College: Services Emerge to Help Out-of-State Students Pay In-State Tuition*, N.Y. TIMES (July 3, 2014), http://www.nytimes.com/2014/07/05/your-money/paying-for-college/chasing-in-state-tuition-as-colleges-tighten-rules.html?_r=0.

261. *Employer's Guide to Unemployment Insurance, Wage Reporting, and Tax Withholding Tax*, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE (Jan. 2014), *available at* http://www.tax.ny.gov/pdf/publications/withholding/nys50.pdf. [hereinafter *New York Employer's Guide*].

"The New York State Unemployment Insurance Program, administered by the State Labor Department and financed by employers, provides immediate, short-term financial protection for people who are out of work through no fault of their own."[262]

Unemployment insurance is determined on a state-by-state basis.[263] Therefore, the rules, regulations and interpretations will vary. If student-athletes are determined to be employees of an educational institution, the institution may be responsible for the cost of unemployment insurance.

This issue will be handled on a state-by-state basis to determine if student-athletes are employees for purposes of unemployment insurance. In New York, for example, the definition of a covered employee is, "any service, unless specifically excluded, performed for compensation under a contract of hire."[264]

There are a number of exclusions from unemployment insurance coverage in New York[265] and again, these exclusions will vary by state.[266]

If student-athletes found to be employees under the state's unemployment insurance laws are not excluded, then unemployment insurance must be purchased by the employer (university athletic program). Most state programs consider a number of factors in determining the unemployment insurance rate. For example, in New York, factors include the number of employees, their annual wage base, and a rate (which is the percentage amount paid by the employer for the insurance).[267] The rate can/will also be adjusted based on the experience rating (once that is established through time and experience).[268]

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262. *Id.*

263. *State Unemployment Insurance Benefits*, U.S. DEPARTMENT OF LABOR EMPLOYMENT & TRAINING ADMINISTRATION, http://workforcesecurity.doleta.gov/unemploy/uifactsheet.asp (last visited Aug. 23, 2014).

264. *New York Employer's Guide*, *supra* note 261.

265. Employers are not responsible for unemployment insurance contributions for, among others: independent contractors, students, sole proprietors, free-lance reporters, licensed real estate brokers, licensed insurance agents. *Id.*

266. *Id.*

267. *Id.*

268. *Id.*

Figure 13
Additional Cost of Providing Unemployment Insurance

Number of Student-Athletes	**Annual Wages** (assume $70,000 per student-athlete)	**1% rate**	**8% rate**
100	$7,000,000	$70,000	$560,000
150	$10,500,000	$105,000	$840,000
200	$14,000,000	$140,000	$1,120,000
250	$17,500,000	$175,000	$1,400,000
300	$21,000,000	$210,000	$1,680,000

New York's normal range rates are 0 to 8 percent.[269] So in the figure above, if 200 student-athletes are considered employees and covered under state statutes for unemployment benefits, then the cost to the employer will be $140,000 to $1,120,000 based on the rate. It is important to note that the rate can be adjusted by a subsidiary rate and an experience rating.[270]

If student-athletes are determined to be employees and are not excluded from unemployment insurance, as Figure 13 shows, the costs may vary considerably based on the number of student-athletes, their annual wage and the rate. There will be some added cost, and especially with high rates, these costs are not insignificant.

G. Income Tax Impact

As discussed earlier, it is unlikely that unionization would lead to taxable "employee" college athletes. However, in a new world of college athletics, the Internal Revenue Service may change its stance. So for now, while in the "unlikely" category, here are the federal income tax implications if a college athlete's scholarship is considered a wage or salary.

If the value of an athletic scholarship is considered a wage or salary, student-athletes may be required to pay income tax based upon the value of the scholarship[271] If colleges and universities aim to ensure that

269. *Id.*

270. *New York Employer's Guide*, *supra* note 261.

271. Bingler v. Johnson, 394 U.S. 741, 755-58 (1969) (grants given to taxpayers by their employer so that they could research and write their doctoral theses in engineering were taxable 'compensation', rather than excludable 'scholarships', where there was an employer-employee

student-athletes are made whole and that athletic scholarships cover relevant costs, then the cost of income tax will need to be included when determining the value of a scholarship.

For example, X University provides 100 scholarships valued at $50,000 each. For illustrative purposes, assume that the tax on $50,000 of income is $8,000 dollars. Also assume that the tax on $60,000 of income is $10,000. If each student-athlete is required to pay income tax on the value of his or her scholarship, then each scholarship would only be worth $42,000 ($50,000- $8,000(tax)). This additional cost may mean that the scholarship no longer covers the cost of tuition & fees, room & board, and required course materials. Therefore, in order to offset the decrease in scholarship value caused by the introduction of an income tax, X University will need to increase the amount of a scholarship to $60,000. This will ensure that the after-tax value of each scholarship remains at $50,000 ($60,000-$10,000). Adjusting the value of a scholarship to account for income tax paid by student-athletes will cost the university $10,000 per scholarship, which in a department with 100 scholarships, will cost a total of $1,000,000 per year ($10,000 x 100 scholarships).

V. CHANGES TO THE NCAA MODEL

Based on the above analysis, a median-level athletic department will face a financial impact in the $3M to $5M range if student-athletes are treated as employees. Of course, a settlement in the *Northwestern* case means that the financial impact could fall within a much greater range, perhaps anywhere from $0 to $5M. The question then becomes, if the expense side of the athletic department's budget faces an increase, how will this be accounted for? Can FBS athletic departments afford these additional costs, and if so, how will they be covered?

The reality is that a total of twenty (of 123) FBS athletics programs reported *positive* net generated revenues (generated revenues exceed expenses) in 2013.[272] On the contrary, a total of 103 FBS athletics programs reported *negative* net generated revenues (expenses exceeded

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relationship, employee benefits were continued, topics of theses were required to relate at least generally to work of laboratory where taxpayers were employed, and employer required taxpayers not only to hold positions with employer throughout the 'work-study' phase of the program, but taxpayers were also obligated to return to employer for two years after completion of their leave).

272. Daniel L. Fulks, *Revenues and Expenses: NCAA Division I Intercollegiate Athletics Programs Report 2004-2013*, NCAA 13 (Apr. 2014), *available at* http://www.ncaapublications.com/productdownloads/D1REVEXP2013.pdf.

generated revenue) in 2013.[273]

For those institutions that reported positive net generated revenues, the median net generated revenue was $8,449,000.[274] For those institutions where expenses exceeded revenues, the median net deficit was $14,904,000.[275] Thus, the financial gap between successful programs and those with a deficit was just over $23,000,000.[276] However, for those 103 programs that reported negative net generated revenue, losses only increased 2% over 2012,[277] after increasing almost 21% the previous year.[278]

It is important to recognize that the potential additional costs discussed above (Title IX, unemployment insurance, workers' compensation, income taxes) will increase the expense side of the financial statements for each FBS institution.

The budget sizes of FBS athletic departments vary tremendously. For example, in 2013, the University of Texas reported total expenses of $146,807,585, while Arizona State reported total expenses of $65,600,187, and Ohio University with reported total expenses of $27,027,550.[279] Grants-in-aid represent a significant percentage of athletic department expenses.[280] In 2013, the median total grant-in-aid expenses for FBS programs was $8,088,000 for public institutions and $14,014,000 for private schools.[281]

Very few institutions with positive net revenues may be able to afford the additional costs discussed above. This is especially true of universities and athletic departments that are self-sufficient. There are currently seven collegiate athletic programs (Texas, Ohio State, LSU, Penn State, Oklahoma, Nebraska, & Purdue) that are self-sufficient, meaning that

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273. *Id.* at 28.

274. *Id.* at 13.

275. *Id.*

276. *Id.*

277. *Id.* at 12.

278. Fulks, s*upra* note 272, at 28.

279. *NCAA Finances*, USA TODAY, http://www.usatoday.com/sports/college/schools/finances/ (last visited Aug. 23, 2014).

280. Fulks, *supra* note 272 at 32.

281. *Id.*

the departments are not dependent upon institutional entities outside the athletic department but most schools account for allocated expenses. [282]

Beyond the twenty programs in the Power Five conferences that reported a positive net generated revenue in 2013, the remaining 100 or so FBS institutions will face significant financial challenges likely to have a substantial impact on their athletic department revenues. This group of institutions includes most of the forty-five remaining schools from the Power Five conferences.[283] For example, the Rutgers University athletic department received nearly $47 million in institutional funds during the 2012-13 academic year, an increase of 67.9% from the previous year.[284] The University of Tennessee received an institutional subsidy of over $12.4 million in 2012-13.[285] However, it is important to note that the significant increase in revenues is already in place for schools in the Power Five conferences.[286] This includes television contracts and revenues from the College Football playoff system.[287] The schools in the Power Five conferences should clearly be able to afford significant increased benefits to student-athletes (and this is without reducing the expense side of significant coaching salaries for coaches and staff, as well as significant facilities investments).[288]

It is clear that the next category, the non-Power Five conference institutions might face significant and severe challenges. These schools already rely upon a very high percentage of institutional funding (allocated

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282. *NCAA Finances*, *supra* note 278 (indicated as schools that receive zero subsidy).

283. *See* Dennis Dodd, *NCAA Proposal Would Put Power in Hands of BCS Conferences*, CBS SPORTS (Jan. 10, 2014, 12:42 PM), http://www.cbssports.com/collegefootball/writer/dennis-dodd/24404728/ncaa-proposal-would-put-power-in-hands-of-bcs-conferences.

284. Keith Sargeant & Steve Berkoitz, *Subsidy of Rutgers Athletics Jumps 67.9% to $47 Million*, USA TODAY (Feb. 23, 2014, 10:32 PM), http://www.usatoday.com/story/sports/college/2014/02/23/rutgers-university-athletics-subsidy-jumps/5761371/.

285. *NCAA Finances*, *supra* note 279.

286. George Schroeder, *Power Five's College Football Playoff Revenues Will Double What BCS Paid*, USA TODAY (July 16, 2014, 5:57 PM), http://www.usatoday.com/story/sports/ncaaf/2014/07/16/college-football-playoff-financial-revenues-money-distribution-bill-hancock/12734897/; Marc Tracy, *N.C.A.A. May Let Top Conferences Play by Own Rules*, N.Y. TIMES (Aug. 5, 2014), http://www.nytimes.com/2014/08/06/sports/n-c-a-a-s-rich-poised-to-get-richer-with-more-athlete-benefits-.html.

287. *See* Schroeder, *supra* note 286.

288. *See* Dodd, *supra* note 283.

revenues).[289] Institutional funds represent 41.81% of the athletic department revenues at East Carolina University, 66.24% at Ohio University, and 65.92% at Troy University (contrast this with the University of Michigan, an FBS institution that reported positive net generated revenue and a 0.18% institutional subsidy).[290] Schools in this category have already been trying to reduce institutional allocations, so there is very little possibility of increasing revenue streams sufficiently in order to cover increased costs.[291] However, the institutions in this category have the opportunity and ability to reduce coaching salaries or expenditures relating to training facilities. This likely means a request for more institutional funding, which given financial challenges in higher education in general, will be difficult at best and probably unlikely. Some FBS institutions rely very little on allocated revenue. For example, allocated revenue accounts for just 0.18% of Michigan's total athletic department revenue.[292] Other institutions depend more heavily upon allocated revenues in order to compete. Allocated revenue comprises 66.24% of the total athletic department revenues at Ohio University.[293]

VI. CONCLUSION

College athletics may now find itself at a crossroads similar to that faced by professional athletics roughly a half century ago. As the foregoing analysis makes clear, the long-term legal and economic implications for the existing model of college athletics remain hotly contested. There are compelling reasons to believe that the Board's decision regarding the eligibility of scholarship athletes to form a union should and would have little direct impact on the viability of athletic programs—both because certain sensitive issues, such as education, could simply be classified as non-mandatory bargaining subjects; and because the link between a determination of employee status under labor law and under other areas of the law, such as taxation, is tenuous at best. At the same time, the numbers suggests that a worst-case scenario resulting in new

289. *See NCAA Finances*, *supra* note 279.

290. *Id.*

291. *See* Sargeant & Berkoitz, *supra* note 284 (Rutgers President expects the athletics program to be self-sufficient within the next six years once it receives its funding from the Big Ten conference, which would diminish the program's need to rely on institutional support).

292. *NCAA Finances*, *supra* note 279.

293. *Id.*

taxation and increased employment costs for universities could indeed have substantial financial implications for the least-profitable programs—even if the doomsday prophecies put forward by some anti-union commentators would likely not come to pass. Despite this uncertainty, a number of key points are readily discernable.

First, it is apparent that the demarcation line between "professional" and "amateur" athletics has become increasingly synthetic, and that what used to be a true "student-athlete" system in decades past has become a big business with close ties to the professional leagues. Second, as a result of this commercialization of college sports, it is also apparent that there is a great deal of money to go around at the college level—even if the lion's share of the profits now flow to the largest and most successful programs and their coaches. Third, with this backdrop in mind, it is difficult to dispute the fundamental accuracy of the Regional Director's determination in the *Northwestern* case regarding the employee-like control and payment of scholarship athletes.

However, these observations do not resolve the difficult questions surrounding college athletics, but merely open the door to further complexities. As a matter of both labor law and social policy, the Regional Director's decision in *Northwestern* points in the right direction. Athletes have no, or a very small, constituency—even a smaller one than their more nakedly professional counterparts.[294] And it is unclear to what extent political considerations, and the substantial vested interests of policymakers and sports fans alike, will interfere with the necessary reforms in college sports and perhaps with the Board's review of the *Northwestern* decision itself as well as a pushback potential from both the Supreme Court[295] and congress.[296] Furthermore, the entrenched symbiotic relationship between the professional leagues and the "amateur" system suggests that there are

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294. Findings of Fact and Conclusions of Law, O'Bannon v. NCAA, no. 09-cv-03329-CW at 31 (N.D. Cal. Aug. 8, 2014) ("many people felt that the removal of the reserve clause . . . which ultimately enabled players to become free agents, thus leading to higher salaries – would undermine the popularity of professional baseball. However, despite these predictions and fans' stated opposition to rising salaries, Major League Baseball revenues continued to rise after the removal of the reserve clause quote regarding opinion survey . . . would undermine the popularity of professional ball."). *cf.* WILLIAM B. GOULD IV, BARGAINING WITH BASEBALL: LABOR RELATIONS IN AN AGE OF PROSPEROUS TURMOIL (2011).

295. *See* NLRB v. Yeshiva Univ., 444 U.S. 672 (1980). For recent demonstrations of a fundamentally conservative Court, see William B. Gould IV, *The Supreme Court, Job Discrimination, Affirmative Action, Globalization, and Class Actions: Justice Ginsburg's Term*, 36 U. HAW. L. REV. 371 (2014); *cf.* Quinn v. Harris, 134 S. Ct. 2618 (2014).

296. *See Big Labor on College Campuses: Examining the Consequences of Unionizing Student Athletes, Hearing Before the H. Comm. on Educ. & Labor*, 113th Cong. (2014).

few practicable alternatives on the horizon, and little motivation to dramatically restructure the basic framework that currently exists.

Unionization at the college level could have a dramatic impact, although instead of athlete compensation, the true focus of bargaining may turn out to be player concerns that are developing at the professional level as well, such as safety, concussions,[297] and the abuse of painkillers.[298] The election at Northwestern may not be the ultimate catalyst for major changes to the existing collegiate system, but regardless of its ultimate resolution, it demonstrates the increasing pressures that are building to effectuate some type of long-term reform.

297. *See* William B. Gould IV, *Football, Concussions, and Preemption: The Gridiron of National Football League Litigation*, 8 F.I.U. L. REV. 55, 68 (2012).

298. *See* Class Action Complaint, Dent v. Nat'l Football League, No. 3:14-cv-02324, 2014 WL 2058098, at *4 (N.D. Cal. May 20, 2014). .