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# "Show Me the Money!"-Analyzing the Potential State Tax Implications of Paying Student-Athletes

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&

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## I. Introduction

At the beginning of the 2013 college football season, former college athlete Chris Beck blogged on the issue of whether student-athletes should be paid.[1] Analyzing the issue from the financial perspective of two college quarterbacks – Tahj Boyd, the Clemson University signal-caller who led the Tigers to a 2011 ACC Championship Title winning the 2012 Atlantic Coast Conference (ACC) Player of the Year award, and Johnny Manziel who won the 2012 Heisman Trophy as a freshman and was subsequently benched for the first half of the Texas A&M University Aggies season opener in 2013 as punishment for allegedly taking money from brokers to autograph items sold over the Internet – Beck, like many others, urged that college athletes should be compensated as employees based on the fact that universities enhance their national prominence and receiving lucrative financial benefits from having certain student-athletes on their rosters.[2]

Less than six months later, on March 26, 2014, in a potential game-changer for college athletics, the Chicago district (Region 13) of the National Labor Relations Board (NLRB) ruled that Northwestern University football players qualify as employees of the institution and can unionize and bargain collectively.[3] Historically, college sports have functioned under the National

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[1] *See* Darren Heitner, *Should College Athletes be Paid*, SPORTS MARKETING MEDIA (Oct. 1, 2013), http://www.sportsagentblog.com/2013/10/01/should-college-athletes-be-paid/.

[2] *Id.* Heitner, in his analysis, recommended that generally only revenue-generating sports team members (i.e., men's college football and basketball programs) receive compensation; that a 10% tax be imposed on all television contracts, licensing deals for apparel and memorabilia and radio agreements to help fund NCAA institutions and the programs they support; provided options for distributing the funds to the various schools and players; and offered a penalty system for schools found in violation of rules regarding benefits from sources outside the NCAA; *see also* Paul Doyle, *Paying College Athletes: A Movement Grows*, INSURANCENEWSNET.COM (May 31, 2014), http://insurancenewsnet.com/oarticle/2014/05/31/paying-college-athletes-a-movement-grows-a-512019.html#.U40VbvldWsg (offering that Allen Sack, a University of New Haven professor of management and a member of the Notre Dame football team in the 1960s, has for many years been an outspoken advocate of reforming college athletics and that he has been claiming for decades that the NCAA created an employer-employee relationship between schools and athletes in 1973.).

[3] Brian Bennett, *Northwestern Players Get Union Vote*, ESPN COLLEGE FOOTBALL (Mar. 27, 2014, 9:23 AM ET), http://espn.go.com/college-football/story/_/id/10677763/northwestern-wildcats-football-players-win-bid-unionize; *see also* Ben Strauss & Steve Elder, *College Players Granted Right to Form Union*, N.Y. TIMES (Mar. 26, 2014),

Collegiate Athletic Association's (NCAA) core principle of the *amateur* student-athlete, in which players receive athletic scholarships to pay for their higher education while simultaneously engaging in competitive athletics for their universities.[4] The NLRB's ruling found that Northwestern University scholarship football players should be entitled to form a union based on numerous factors, to include the magnitude of time dedicated to their sport, the amount of control exerted by coaches, and the scholarship agreements which are akin to contracts for compensation.[5]

Two weeks after this milestone decision, Northwestern University filed an appeal with the NLRB in Washington, D.C. in an effort to quash the prior Region 13 decision.[6] This case added fuel to the fire of the debate whether student-athletes should be paid, an issue recently spearheaded by Manziel.[7] However, the inquiry into whether student-athletes should be considered *employees* arose more than sixty years ago when a University of Denver (DU) football player named Ernest Nemeth filed a worker's compensation claim against DU after injuring his back during spring football practice.[8]

The debate over whether student-athletes should be paid for their services by colleges and universities garners both avid supporters and significant adversaries.[9] While state court cases have not been supportive of the *pay-for-play* model, several scholarly publications have expressed interest in moving towards the employee classification of student-athletes in college sports.[10] Moreover, in recent years numerous cases were filed against the NCAA which are on-

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http://www.nytimes.com/2014/03/27/sports/ncaafootball/national-labor-relations-board-rules-northwestern-players-are-employees-and-can-unionize.html?_r=0.

[4] *See* Strauss & Elder, *supra* note 3.

[5] *Id.*

[6] *See* Amanda Becker, *Northwestern University Appeals Decision Granting Football Team Union Vote*, REUTERS (Apr. 9, 2014, 4:31 PM EDT), http://www.reuters.com/article/2014/04/09/us-college-football-unions-idUSBREA381VT20140409.

[7] *See* Sean Gregory, *It's Time to Pay College Athletes*, TIME (Sept. 16, 2013), http://time.com/568/its-time-to-pay-college-athletes/.

[8] EVENING INDEP. (Oct, 4, 1951), *available at* http://www.newspapers.com/newspage/3608625/ (last visited June 16, 2014).

[9] *See, e.g.*, State Comp. Ins. Fund v. Indus. Accident Comm'n, 314 P. 2d 288 (Colo. 1957) (denying benefits to the widow of a scholarship athlete killed during a football game); Rensing v. Indiana State Univ. Bd. of Trs., 444 N.E. 2d 1170 (Ind. 1983) (denying recovery to a football player who was rendered a quadriplegic during a collegiate sporting event); Coleman v. W. Michigan University, 336 N.W. 2d 224 (Mich. Ct. App. 1983) (holding that a scholarship agreement between an athlete and institution does not entitle the athlete to workers' compensation); Taylor v. Wake Forest Univ., 191 S.E. 2d 379 (N.C. Ct. App.), *cert denied*, 192 S.E. 2d 197 (N.C. 1972) (excusing a university's obligation to provide financial assistance to a student-athlete who refused to play football as a result of his poor academic showing).

[10] *See, e.g.*, Christian Dennie, *Changing the Game: The Litigation That May be the Catalyst for Change in Intercollegiate Athletics*, 62 SYRACUSE L. REV. 15, 18 (2012) (arguing that NCAA student-athletes are neither professionals nor amateurs, and courts should adopt a new standard of review to determine whether student-athletes have cognizable claims against the NCAA); Michael A. Corgan, *Permitting Student-Athletes to Accept Endorsement*

going and could change the face of college sports and its own definition and use of the term *amateurism*.[11] Still, amidst arguments that student-athletes should be compensated for injuries

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*Deals: A Solution to the Financial Corruption of College Athletics Created by Unethical Sports Agents and the NCAA's Revenue-Generating Scheme*, 19 VILL. SPORTS & ENT. L.J. 371, 374 (2012) (contending that allowing student-athletes to accept endorsement deals would significantly diminish those athletes from seeking secret compensation from sports agents); Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71 (2006) (demonstrating that student-athletes' daily burdens and obligations meet the legal standard of the term "employee" and arguing that because the relationship between athletes and their universities is commercial instead of primarily academic, student-athletes are entitled to form and participate in labor organizations.); Jason Gurdus, *Protection Off Of the Playing Field: Student-Athletes Should be Considered University Employees For Purposes of Workers' Compensation*, 29 HOFSTRA L. REV. 907 (2001) (prompting that courts should hold that scholarship athletes are employees of their institutions and should be eligible to receive workers' compensation); Frank P. Tiscione, *College Athletics and Workers' Compensation: Why the Courts Get It Wrong in Denying Student-Athletes Workers' Compensation Benefits When They Get Injured*, 14 SPORTS LAW. J. 137 (2007) (analyzing why courts are incorrect in disallowing student-athletes coverage under workers' compensation statutes); Brian C. Root, *Note: How The Promises of Riches in Collegiate Athletics Lead to the Compromised Long-Term Health of Student-Athletes: Why and How the NCAA Should Protect Its Student-Athletes' Health*, 19 HEALTH MATRIX 279, 281 (2009) (raising the concern that universities owe their student-athletes a heightened duty of care, and presenting recommendations on steps the NCAA should take to protect the health of student-athletes).

[11] *See, e.g.* Patrick Hruby, *Court of Illusion*, SPORTS ON EARTH (Oct. 10, 2013), http://www.sportsonearth.com/article/62747894/#!ZsW9P (offering that the NCAA's claim that the popularity of college sports is based upon amateurism is "bogus."). Currently, there are several high-profile and potentially high-impact cases facing the NCAA at various stages of litigation or settlements which severely challenge the unpaid, non-employee amateur principle maintained by the NCAA for its student-athletes. *See, e.g.*, Robert Litan, *Legal Briefs*, SPORTS ILLUSTRATED (June 2, 2014) (noting that the most prominent cases against the organization include the College Athletes Players Association v. Northwestern Univ., O'Bannon v. Nat'l Collegiate Athletic Ass'n, Keller v. Nat'l Collegiate Athletic Ass'n, Alston v. Nat'l Collegiate Athletic Ass'n, and Jenkins v. Nat'l Collegiate Athletic Ass'n); *see also* Tim Dahlberg, *Proposed $40 million Settlement Set for Players*, Seattle Times (June 1, 2014), http://seattletimes.com/html/collegesports/2023741717_apxlawsuit.html?syndication=rss (noting that the payments could range from as little as $48 for each year an athlete was on a roster to $951 for each year the image of an athlete was used in a videogame dating back to 2003); *see also* Marc Edelman, *O'Bannon v. NCAA Trial Begins Today: Is the College Sports Cartel about To Fall*, FORBES (June 9, 2014), http://www.forbes.com/sites/marcedelman/2014/06/09/obannon-v-ncaa-trial-begins-today-is-the-college-sports-cartel-about-to-fall/ (noting that the O'Bannon antitrust case was actually renamed *NCAA Student-Athlete Name & Likeness Licensing Litigation* and that "Three specific issues are likely to be addressed in this week's trial: (1) whether the NCAA member schools collectively have the power within any relevant market to control the licensing of college athletes' names and likenesses ("market power"); (2) whether the NCAA's licensing restraints do more to promote or suppress competition within these markets; and (3) whether the NCAA can achieve its stated objectives in any less restrictive manner.");We recognize that the concept of "amateurism" is a major theme that is found throughout the NCAA Manual. Our paper references and utilizes the 2013- 2014 NCAA DIVISION I MANUAL, [hereinafter "NCAA Manual"], *available at* http://grfx.cstv.com/photos/schools/usc/genrel/auto_pdf/2013-14/misc_non_event/ncaa-manual.pdf ); *see, e.g.*, NCAA Manual art. 2.9The Principle of Amateurism. ("Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises."; *see generally* Adam Epstein & Paul Anderson, *Utilization of the NCAA Manual as a Teaching Tool*, 26 J. LEGAL STUD. EDUC.. 109 (2009) (highlighting that the word "amateurism" is mentioned almost 40 times in the 2012-13 NCAA Manual); T. Matthew Lockhart, *Oliver v. NCAA: Throwing a Contractual Curveball at the NCAA's "Veil of Amateurism"*, 35 U. DAYTON L. REV.. 175, 186 (2010) (noting the deference that courts have given to the manner in which the NCAA defines and regulates amateurism according to its rules, more formally known as bylaws); *see also* NCAA Manual art. 12.1.2 Amateur Status. ("An individual loses amateur status and thus shall not be eligible for intercollegiate competition in a particular sport if the individual: (a) Uses his or her athletics skill

sustained while participating in college athletics and for their ability to generate lucrative, commercialized income to their institutions and the NCAA, academic publications have thus far not directly focused on the realistic implications of paying these student-athletes primarily from an income tax perspective.[12]

The purpose of this article, then, is to analyze the potential state income tax implications of paying student-athletes, and to address the impact that such taxes could have on the world of college athletics.[13] To meet this objective, this article will explore the history of the *pay-for-play* model and its relationship to the NCAA, analyze the potential impact which state income taxes may have on college athletics should student-athletes be paid, and conclude that from a state

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(directly or indirectly) for pay in any form in that sport; (b) Accepts a promise of pay even if such pay is to be received following completion of intercollegiate athletics participation; (c) Signs a contract or commitment of any kind to play professional athletics, regardless of its legal enforceability or any consideration received, except as permitted in Bylaw 12.2.5.1; … (d) Receives, directly or indirectly, a salary, reimbursement of expenses or any other form of financial assistance from a professional sports organization based on athletics skill or participation, except as permitted by NCAA rules and regulations; (e) Competes on any professional athletics team per Bylaw 12.02.8, even if no pay or remuneration for expenses was received, except as permitted in Bylaw 12.2.3.2.1; (f ) After initial full-time collegiate enrollment, enters into a professional draft (see Bylaw 12.2.4); (g) Enters into an agreement with an agent."). The NCAA's position on amateurism also extends to what it calls "extra benefits" and the use of sports agents. *See* NCAA Manual art. 16.02.3 Extra Benefit. ("An extra benefit is any special arrangement by an institutional employee or a representative of the institution's athletics interests to provide a student-athlete or the student-athlete's relative or friend a benefit not expressly authorized by NCAA legislation. Receipt of a benefit by student-athletes or their relatives or friends is not a violation of NCAA legislation if it is demonstrated that the same benefit is generally available to the institution's students or their relatives or friends or to a particular segment of the student body."); NCAA Manual art. 12.3.1 General Rule. ("An individual shall be ineligible for participation in an intercollegiate sport if he or she ever has agreed (orally or in writing) to be represented by an agent for the purpose of marketing his or her athletics ability or reputation in that sport. Further, an agency contract not specifically limited in writing to a sport or particular sports shall be deemed applicable to all sports, and the individual shall be ineligible to participate in any sport.").

[12] Although to the date of this research no academic papers have focused exclusively on the tax implications of paying student-athletes, many scholarly works address various tax issues within their analyses of student-athletes and the NCAA. *See, e.g.*, J. Winston Busby, *Playing For Love: Why the NCAA Rules Must Require A Knowledge-Intent Element to Affect the Eligibility of Student-Athletes*, 42 CUMB. L. REV. 135, 169 (2011/2012) (noting that tax laws are among the few of many legal concerns that face the NCAA); Michael A. Corgan, *supra* note 10, at 387 – 388 (addressing the tax exempt status of the NCAA); Matthew J. Mitten, James L. Musselman & Bruce W. Burton, *Targeted Reform of Commercialized Intercollegiate Athletics*, 47 SAN DIEGO L. REV. 779, 809 (2010) (analyzing the relevance of whether a college or university operating an athletic program qualifies for tax-exempt status); Adam Hoeflich, *The Taxation of Athletic Scholarships: A Problem of Consistency*, 1991 U. ILL. L. REV. 581, 581 (1991) (presenting the argument that the Internal Revenue Service should tax student-athletes on their scholarships and fellowships); Kathryn Kisska-Schulze & Adam Epstein, *Taxing Missy: Operation Gold and the 2012 Proposed Olympic Tax Elimination Act*, 14 TEX. REV. ENT. & SPORTS L. 95 (2013) (proposing various tax models to reduce federal income taxes imposed on Olympic medal-winning athletes, to include a discussion of Operation Gold earnings of student-athletes and the effects of such on NCAA eligibility); Nancy McCoy & Kerry Knox, *Comment: Flexing Union Muscle – Is It the Right Game Plan For Revenue Generating Student-Athletes In Their Contest For Benefits Reform With the NCAA?*, 69 TENN. L. REV. 1051, 1061 (2002) (discussing the "laundry money" idea the help offset the inequity existing in Division I-A athletics and the tax-exempt benefit which universities would maintain should they bundle extra money into athletes' scholarship packages).

[13] The purpose of this article is to specifically address the state income tax implications on the pay-for-play model of college sports. Although the authors acknowledge that both federal and various state local taxes could likewise have an impact on this model, the analysis of their impacts on paying college athletes is outside the scope of this article.

income tax perspective, paying student-athletes will have a significant effect on the evolution of college sports.

## II. The Pay-for-Play Model and the NCAA

The exploration of whether student-athletes should be paid for their services to the universities they sign a contract with is not a recent inquiry; however, it is again at the forefront of national discussion.[14] The legal analysis of this query began with whether a student-athlete should be considered an *employee*, specifically focusing on whether or not an injured student-athlete could receive worker's compensation under state law.[15] A series of cases across the country sparked this debate, beginning with two Colorado state cases decided in the 1950s.[16]

In general, courts have consistently held that student-athletes are not entitled to workers compensation because no employer-employee relationship exists.[17] On March 26, 2014 the NLRB ruled that student-athletes at Northwestern University are distinct from graduate-student assistants and therefore should be characterized as employees.[18] As such, an exploration of the evolution of cases pertaining to the employment of student-athletes is vital to the understanding of the debate as to whether student-athletes should be paid to play college sports.[19]

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[14] *See* Dennis A. Johnson & John Acquaviva, *Point/Counterpoint: Paying College Athletes*, SPORT J. (June 15, 2012), http://thesportjournal.org/article/pointcounterpoint-paying-college-athletes/ (Exploring the history and evolution of the discussion of whether or not student-athletes should be paid); *see also* Michael Rosenberg, *Worker's Comp*, SPORTS ILLUSTRATED (Apr. 7, 2014), (discussing, in reference to the NCAA's March Madness basketball tournament, how much class time student-athletes miss "…so the NCAA can hype its multi-billion dollar educational event.").

[15] Univ. of Denver v. Nemeth, 257 P.2d 423 (Colo. 1953).

[16] *Id*; *see also* Univ. of Denver v. Indus. Comm'n of Colorado, 335 P.2d 292 (Colo. 1959).

[17] *See, e.g*., State Comp. Ins. Fund v. Indust Accident Comm'n, 314 P. 2d 288 (Colo. 1957) (denying benefits to the widow of a scholarship athlete killed during a football game); Rensing v. Indiana State Univ. Bd. of Trs., 444 N.E. 2d 1170 (Ind. 1983) (denying recovery to a football player who was rendered a quadriplegic during a collegiate sporting event); Coleman v. W. Michigan University, 336 N.W. 2d 224 (Mich. Ct. App. 1983) (holding that a scholarship agreement between an athlete and institution does not entitle the athlete to workers' compensation); Taylor v. Wake Forest Univ., 191 S.E. 2d 379 (N.C. Ct. App.), *cert denied*, 192 S.E. 2d 197 (N.C. 1972) (excusing a university's obligation to provide financial assistance to a student-athlete who refused to play football as a result of his poor academic showing).

[18] *See* Sara Hebel, *Employees or Not? Graduate-Student Assistants Versus Scholarship Athletes*, CHRON. OF HIGHER ED. (Mar. 27, 2014), https://chronicle.com/article/Employees-or-Not-/145573/ (comparing the 2014 NLRB decision to the significant ten-year old 2004 case at Brown University in which the NLRB ruled that "students serving as graduate-student assistants spend only a limited number of hours performing their duties, and it is beyond dispute that their principal time commitment at Brown is focused on obtaining a degree and, thus, being a student.").

[19] *See* Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71 (2006) (offering that "Grant-in-aid athletes in revenue-generating sports at Division I National Collegiate Athletic Association (NCAA) institutions are not "student-athletes" as the NCAA asserts, but are, instead, "employees" under the National Labor Relations Act (NLRA)."); *see also* Marc Edelman, *21 Reasons Why Student-Athletes Are Employees And Should Be Allowed To Unionize*, FORBES (Jan. 30, 2014), http://www.forbes.com/sites/marcedelman/2014/01/30/21-reasons-why-student-athletes-are-employees-and-should-be-allowed-to-unionize/.

## A. Worker's Compensation and the Employer-Employee Relationship: Classic Cases

In April 1950, the University of Denver (DU) had an injured scholarship athlete file a workers' compensation claim.[20] In *Univ. of Denver v. Nemeth*, football player Ernest Nemeth played for the school and also worked for the college, receiving fifty dollars a month, meal deductions, and housing accommodations in exchange for cleaning sidewalks, caring for the campus tennis court, and maintaining the campus furnace.[21] These jobs were contingent upon his participation on the school's football team.[22] Put differently, Nemeth had to play football as part of the overall deal agreement.[23]

Unfortunately, Nemeth sustained various neck and back injuries while engaged in spring football practice.[24] He subsequently filed a claim for worker's compensation alleging that he was employed by DU to play football and that the injury arose out of and in the course of his employment.[25] The Supreme Court of Colorado ruled in Nemeth's favor, declaring that he was an employee for worker's compensation purposes.[26] Although this case was a game-changer at the time, sending shock waves among the NCAA brass, the decision was short-lived.[27]

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[20] *Nemeth*, 257 P.2d 423; *see also Univ. of Denver*, 335 P.2d 292, 294 (holding that even though Nemeth accepted a lump sum payment for his 15% permanent disability, when he subsequently asked for more compensation due to a change in his condition, the Supreme Court of Colorado declared that private agreements may neither violate public policy nor abrogate statutory requirements such as under the through private agreements under the workers' compensation system established at that time, and the decision to reopen Nemeth's case was affirmed).

[21] *Nemeth* at 424.

[22] Today, this arrangement would not be allowed as one might characterize it in today's intercollegiate environment as an "extra-benefit" in accordance with NCAA Manual art. 16.02.3 Extra Benefit, *supra* note 11.

[23] *Nemeth*, 257 P.2d 423 at 425-26. The court also noted "Higher education this day is a business, and a big one... A student employed by the University to discharge certain duties, not a part of his education program, is no different than the employee who is taking no course of instruction so far as the Workmen's Compensation Act is concerned." *Id*. at 426.

[24] *Id*. at 424.

[25] *Id*. at 425.

[26] *Id*.

[27] *Id*. at 430; *see also* Ellen J. Staurowsky, *"A Radical Proposal": Title IX has No Role in College Sport Pay-for-Play Discussions*, 22 MARQ. SPORTS L. REV. 575 (2012) (quoting from the memoirs of Walter Byers, the first full-time executive director of the NCAA, that after the *Nemeth* decision that the NCAA intentionally crafted the term "student-athlete" to differentiate college athletes from those in the professional ranks and made a concerted effort to include the expression in all NCAA rules and interpretations); *see also* Matt Emeterio, *Why Cam Newton Proves College Players Should Be Paid*, PBH NETWORK (Jan. 10, 2011), http://www.prosebeforehos.com/sports-editor/01/10/why-cam-newton-proves-college-players-should-be-paid/ (offering that after losing the *Nemeth* case, the NCAA created the "student-athlete" designation specifically to ensure that college athletes would not be deemed, at least linguistically, as employees of NCAA members universities and therefore not covered by state workers compensation laws).

In 1957 the Supreme Court of Colorado again addressed the issue of whether a scholarship football player could be entitled to workers' compensation in *State Comp. Ins. Fund v. Indus. Accident Comm'n*.[28] In this case, Fort Lewis College player Ray Dennison died two days after suffering a head injury he sustained on the opening play.[29] In reviewing the lower court's decision, the Supreme Court of Colorado reasoned that the "college did not receive a direct benefit from the activities, since the college was not in the football business and received no benefit from this field of recreation."[30] The Court held that the injury was not an incident of or caused by his employment by the college, and emphasized that without a contractual obligation to play football, there was no employer-employee relationship to which workers' compensation was applicable.[31] The Court further distinguished its holding from that of *Nemeth* by finding that Nemeth's employment "depended wholly on his playing football and it is clear that if he failed to perform as a football player he would lose the job provided for him by the University."[32]

In direct response to the concern over the *Dennison* decision, the NCAA embedded the term "student-athlete" into its rules and regulations known today as its *bylaws*.[33] Subsequent to the

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[28] 314 P.2d 288 (Colo. 1957).

[29] *Id*. at 289; *see also* Ray Hogler, *Soapbox: Paying for College Athletics under Scrutiny*, COLORADOAN.COM (Mar. 1, 2014), http://www.coloradoan.com/article/20140301/OPINION04/303010089/Soapbox-Paying-college-athletics-under-scrutiny (stating, "the Colorado Supreme Court reversed and held that her husband's injury did not occur in the course of and arise out of his employment because Dennison was not an employee of Fort Lewis. In the court's words, "Since the evidence does not disclose any contractual obligation to play football, then the employer-employee relationship does not exist and there is no contract which would support a claim for compensation under the Act." Dennison was a "student-athlete" attending college on a full-time basis and only secondarily a football player.").

[30] *State Comp. Ins. Fund*. at 290 (referring to Fort Lewis A&M College, now known just as Fort Lewis College (in Durango, Colorado), and the game against Trinidad State Junior College).

[31] *Id*. at 289 – 90 (offering that "…his tuition and expenses were paid from various sources. He was the beneficiary of an athletic scholarship known as a "Grant-in-Aid" to students; he was hired by the college to manage the student lounge; he also was hired to do work on the college farm; and received assistance from the G. I. Bill for ex-servicemen. As a regularly enrolled student, he was privileged to share in the student activities of the school, and was employed by the school as a part time employee and paid on an hourly basis of seventy cents per hour. The benefit of the athletic scholarship was a waiver by the college of all tuition. At the time of his enrollment as a student he had a part time job at a filling station and the director of student affairs and football coach asked him, that if he could get a job that would make him as much as he was making at the filling station, at different hours, would he play football? Being agreeable to such an arrangement, deceased [Dennison] was then employed by the college to do certain work, which he did, and for which he was paid the regular student rate. He worked about twenty hours a week and was not paid for playing football."). The Court also stated that it did not believe that the legislature intended the workers' compensation fund to be a "pension fund for all student athletes attending our state educational institutions." *Id.* at 290.

[32] *Id*. (quoting *Nemeth*, 257 P.2d 423 at 426-27, "The football coach testified that meals and the job ceased when the student was 'cut from the football squad.'" Further, "* * * the employment at the University * * * was dependent on his playing football, and he could not retain his job without playing football.").

[33] *See* Jared Wade, *How the NCAA Has Used the Term "Student-Athlete" to Avoid Paying Workers Comp Liabilities*, RISK MGMT. MONITOR (Sept. 13, 2011), http://www.riskmanagementmonitor.com/how-the-ncaa-has-used-the-term-student-athlete-to-avoid-paying-workers-comp/ (referencing Taylor Branch, *The Shame of College Sports*, ATLANTIC (Oct. 2011), http://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/?single_page=true (quoting Branch's research, "We crafted the term student-athlete," Walter Byers

*Nemeth* and *Dennison* decisions, many other state courts, especially in the 1970s and 1980s, dealt with similar workers compensation claims; however, these later decisions upheld the principle that student-athletes were not considered *employees* of their universities.[34] Of note, football player Kent Waldrep, who injured his spinal cord and suffered permanent paralysis in a 1974 game between Texas Christian University (TCU) and the University of Alabama, sued for worker's compensation and ultimately lost his lengthy legal battle.[35] Waldrep's unsuccessful challenge was not unique, however, and prominent cases from the states of Indiana and Michigan demonstrated that courts were unwilling to move on the issue of declaring that student-athletes are employees, thus refusing to grant worker's compensation benefits.[36] Today, the NCAA provides a program which provides insurance in the event a student-athlete is injured, but such aid is not deemed a state-sponsored worker's compensation program.[37] In sum, despite the

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[the NCAA's first Executive Director] himself wrote, "and soon it was embedded in all NCAA rules and interpretations." The term came into play in the 1950s, when the widow of Ray Dennison, who had died from a head injury received while playing football in Colorado for the Fort Lewis A&M Aggies, filed for workmen's-compensation death benefits. Did his football scholarship make the fatal collision a "work-related" accident? Was he a school employee, like his peers who worked part-time as teaching assistants and bookstore cashiers? Or was he a fluke victim of extracurricular pursuits? Given the hundreds of incapacitating injuries to college athletes each year, the answers to these questions had enormous consequences. The Colorado Supreme Court ultimately agreed with the school's contention that he was not eligible for benefits, since the college was "not in the football business." The term student-athlete was deliberately ambiguous. College players were not students at play (which might understate their athletic obligations), nor were they just athletes in college (which might imply they were professionals). That they were high-performance athletes meant they could be forgiven for not meeting the academic standards of their peers; that they were students meant they did not have to be compensated, ever, for anything more than the cost of their studies. Student-athlete became the NCAA's signature term, repeated constantly in and out of courtrooms.").

[34] *See*, *e.g.*, Rensing v. Ind. State Univ. Bd. of Trs., 444 N.E.2d 1170 (Ind. 1983) (reversing and holding that the resulting disability to the scholarship athlete nevertheless did not establish that either party had the intent to enter into an employer-employee relationship); Coleman v. W. Mich. Univ., 336 N.W.2d 224 (Mich. Ct. App. 1983) (holding that WMU had little control over Coleman and even if it did, Coleman's football skills were not an integral part of WMU's school business); Waldrep v. Texas Emp'rs Ins. Ass'n, S.W.3d 692 (Tex. Ct. App. 2000) (holding that TCU did not direct or control all of Waldrep's activities as a football player before suffering his spinal cord injury which led to paralysis); *but see* Van Horn v. Indus. Accident Comm'n, 33 Cal. Rptr. 169 (Dist. Ct. App. 1963) (holding in favor of the wife of California State Polytechnic football team who successfully brought a workers' compensation claim to recover for the death of her husband as a result of a plane crash while returning from a game).

[35] *Waldrep*, 21 S.W.3d 692 at 700 (emphasizing that there that there was no intent on the part of TCU or Waldrep that his scholarship should constitute payment for his football services and that "NCAA rules provided that student-athletes would be ineligible if they used their skill for pay in any form;…").

[36] *See*, *e.g.*, *Rensing*, 444 N.E. 2d 1170 at 1175 (ruling that no employment relationship was created, and absent such a relationship, the injured party could not be eligible to collect workman's compensation); *Coleman*, 336 N.W.2d 224 at 226-7 (decision centering on whether the task performed by the purported employee "is an integral part of the proposed employer's business" and thereby court rejected the assertion that intercollegiate football is integral to the university's primary businesses of education and research); *see also* Jeff Kessler, *Dollar Signs on the Muscle... and the Ligament, Tendon, and Ulnar Nerve: Institutional Liability Arising from Injuries to Student-Athletes*, 3 VA. J. SPORTS & L. 80 (2001) (exploring various sports torts cases including *Rensing*, *Coleman*, and *Waldrep*).

[37] *See* ADAM EPSTEIN, SPORTS LAW 132-134 (2013) (offering that the NCAA has established an insurance plan covering every student who participates in college sports, including managers, trainers, and cheerleaders. One can learn more about this plan by visiting the NCAA website (www.ncaa.org). In 1990, the NCAA also started the Exceptional Student-Athlete Disability Insurance program (ESDI) program. The ESDI program protects student-

*Nemeth* decision, the NCAA and its member institutions have successfully defended their characterization of student-athletes as unpaid amateurs for decades.

### B. Commercial Misappropriation and Antitrust Claims: NCAA on Defense

In the 1980s and 1990s, as television rights provided massive financial benefits to the NCAA and its member institutions, the organization faced much heated criticism and debate over whether or not it should share such wealth with its primary labor source, the student-athletes themselves.[38] To date, the NCAA has adamantly refused to amend its stance on the *pay-for-play* model despite the reality that television contracts and coaching salaries continue to skyrocket while student-athletes receiving athletic scholarships receive no more benefits than tuition-waivers and meals.[39]

For the most part, the NCAA has successfully defended its bylaws over the years in the courts in which it demonstrated no violation of federal antitrust laws.[40] Examples of the NCAA's restrictions include bylaws that limit the number of coaches per member institution for football,[41] limiting the number of official (i.e. paid-for) visits by a prospective student-athlete,[42] mandating that attendance at home football games average at least 15,000,[43] capping the number of pages that a football press guide can have to two hundred and eight pages with no color on the inside pages,[44] and requiring the minimum academic standards necessary for student-athletes to participate in college sports[45].[46] Although the NCAA has won the vast majority of antitrust

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athletes in football, men's and women's basketball, baseball, and ice hockey who, based upon their athletic talents, are projected by the professional leagues to be potential first-round draftees).

[38] *See* 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 (stating, "And what does the labor force that makes it possible for coaches to earn millions, and causes marketers to spend billions, get? Nothing. The workers are supposed to be content with a scholarship that does not even cover the full cost of attending college. Any student athlete who accepts an unapproved, free hamburger from a coach, or even a fan, is in violation of N.C.A.A. rules.").

[39] *See, e.g.*, NPR Staff, *Should The NCAA Change Its Rules To Pay-for-play?*, NPR.ORG (Apr. 3, 2014), http://www.npr.org/2014/04/03/298763594/should-the-ncaa-change-its-rules-to-pay-for-play (offering audio as well).

[40] EPSTEIN, *supra* note 37, at 359-365.

[41] NCAA Manual, *supra* note 11, art. 11.7.2 ("Bowl Subdivision Football") & art. 11.7.3 ("Championship Subdivision Football").

[42] *Id.* art. 13.6.2.2 ("Number of Official Visits-Prospective Student-Athlete Limitation").

[43] *Id.* art. 20.9.7.3 ("Football-Attendance Requirements").

[44] *Id.* art. 13.4.1.(g) ("Athletic Publications").

[45] *Id.* art. 14 ("Eligibility: Academic and General Requirements").

claims filed against it, two cases, *NCAA v. Bd. of Regents of Univ. of Oklahoma*[47] and *Law v. NCAA*,[48] both validate that the NCAA is vulnerable to antitrust claims, sacking the organization.[49]

Recently, legal attacks against the NCAA have centered on the issue of whether student-athletes' likenesses are being used illegally in commercial video games and, therefore, whether the current and former student-athletes should be compensated.[50] Notably, in 2009 two separate lawsuits initiated by Sam Keller, a former Division I college quarterback, and Ed O'Bannon, a former basketball star for UCLA who was named Most Outstanding Player of the 1995 Final Four, merged into a single suit against the NCAA and was coined *NCAA v. Student-Athlete Name & Likeness Licensing Litigation*.[51]

Keller, O'Bannon and other student-athletes alleged that the NCAA was in violation of federal antitrust law by preventing the student-athletes from capitalizing on their names and likenesses in any way, specifically with regard to the use of their likenesses in Electronic Arts (EA) sports video games.[52] The NCAA remained steadfast that student-athletes had granted the NCAA the right to use their likeness,[53] and if student-athletes could receive money in this manner then the

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[46] There are various cases that have involved the NCAA and its bylaws with regard to antitrust challenges. *See* Law v. NCAA, 902 F. Supp. 1394 (D. Kan. 1995), *aff'd*, 134 F.3d 1010 (10th Cir. 1998) (finding NCAA's Cost Reduction Committee's decision to establish Restricted Earnings Coach (REC) for basketball assistant coaches violated federal antitrust laws); NCAA v. Bd. of Regents of Univ. of Oklahoma, 468 U.S. 85 (1984) (finding restricted television broadcast plan violated antitrust laws). *Consider also* Jones v. NCAA, 392 F. Supp. 295 (D. Mass. 1975) (NCAA declaring student-athlete ineligible and the district court noted that he was a student, not a businessman); Hennessey v. NCAA, 564 F.2d 1136 (5th Cir. 1977) (limiting the maximum number of assistant football and basketball coaches Division I institutions could employ did not violate antitrust laws); Justice v. NCAA, 577 F. Supp. 356 (D. Ariz. 1983) (accepting NCAA sanctions because the sanctions were reasonably related to NCAA goals of preserving amateurism and promoting fair competition); NCAA v. Tarkanian, 488 U.S. 179 (1988) (finding the NCAA not a state actor); Smith v. NCAA, 139 F.3d 180 (3d Cir. 1998) (finding the Sherman Act did not apply to NCAA eligibility rules); Metro. Intercollegiate Basketball Ass'n v. NCAA, 339 F. Supp. 2d 545 (S.D.N.Y. 2004) (settling out of court when the NCAA purchased National Invitation Tournament); NCAA v. Yeo, 171 S.W.2d 863 (Tex. 2005) (finding swimmer's reputation of "the most decorated athlete in the history of the Republic of Singapore" did not enjoy a special protection under the Texas Constitution).

[47] 468 U.S. 85 (1984).

[48] 134 F.3d 1010 (10th Cir. 1998).

[49] *See, e.g.*, Doug Lederman, *College Sports Antitrust Vulnerability*, INSIDE HIGHER ED. (Apr. 16, 2014), http://www.insidehighered.com/news/2014/04/16/sports-antitrust-lawyers-latest-target-ncaa-scholarship-limits#sthash.WWX1Vdmt.dpbs.

[50] *See* John Wolohan, *Update on O'Bannon v. NCAA*, LAWINSPORT (Mar. 31, 2014), http://www.lawinsport.com/articles/intellectual-property-law/item/update-on-o-bannon-v-ncaa.

[51] *Id*.; *see also* FRONTLINE, *The Lawsuit: An Introduction*, http://www.pbs.org/wgbh/pages/frontline/money-and-march-madness/ncaa-lawsuit/ (last visited Apr. 7, 2014) (noting the consolidation with similar suits and renaming in 2010).

[52] Thereby violating Section 1 of the Sherman Antitrust Act.

[53] In the Keller case, the plaintiff claimed that the NCAA, its licensing agent the Collegiate Licensing Company (CLC), and Electronic Arts conspired to violate student-athletes' right of publicity; *but see* Associated Press, *NCAA*

current model for college sports would be destroyed.[54] At the time of this writing, the EA Sports case appears to have settled though the NCAA continues to face challenges related to its rules related to *amateurism*.[55]

The attention over the pay-for-play issue resurfaced when Johnny Manziel was featured on the September 16, 2013 cover of *Time Magazine* with the headline, "It's Time to Pay College Athletes."[56] During the 2013 football season, Manziel made "show me the money" hand gestures after big plays, further prompting the national pay-for-play discussion.[57] Without question, the fact that the NCAA's *March Madness* basketball tournament generates almost $800 million per year in television rights for this non-profit organization has raised legal and ethical issues with regard to the appropriateness of the NCAA model.[58] In a period of heated debate over whether student-athletes should be paid, the NLRB's recent decision could be the keystone to NCAA reform.

C. The 2014 NLRB and Northwestern University Ruling: Momentum for Reform?

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*Settles with Former Athletes*, ESPN (June 9, 2014), http://espn.go.com/college-sports/story/_/id/11055977/ncaa-reaches-20m-settlement-video-game-claims (announcing that the NCAA will pay $20 million to former football and basketball players who had their images and likenesses used in video games, hoping the settlement will help keep amateurism rules intact for college sports and just hours before the O'Bannon trial began in California challenging the NCAA's the authority to restrict or prohibit payments to athletes. Sam Keller, the former quarterback at Arizona State and Nebraska, filed the class-action suit in May 2009 and contended the NCAA unfairly deprived college players of revenue. The case was supposed to go to trial in March, 2015); *see also* Michael McCann, *NCAA Reaches Settlement with Keller Plaintiffs: What Does it Mean?*, SPORTS ILLUSTRATED (June 9, 2014), http://sportsillustrated.cnn.com/college-football/news/20140609/ncaa-keller-lawsuit-settlement/#ixzz34jU2Cw5K (noting that "the sports trial of the century," *O'Bannon v. NCAA*, began with a bang after the NCAA announced it reached two proposed settlements: one with Electronic Arts and the Collegiate Licensing Company to resolve a lawsuit the NCAA filed against them last November, and a second with former Arizona State quarterback Sam Keller, who sued the NCAA over avatars of college athletes appearing in video games, though offering that these settlements are subject to approval by U.S. District Judge Claudia Wilken).

[54] *Id*.; *see also* Tom Farrey, *Jeffrey Kessler Files against NCAA*, ESPN (Mar. 18, 2014), http://espn.go.com/college-sports/story/_/id/10620388/anti-trust-claim-filed-jeffrey-kessler-challenges-ncaa-amateur-model (stating, with regard to the NCAA, "that the agreed-upon financial constraint is necessary to preserve its notion of amateurism, which the officials argue is significantly tied to the educational mission of universities and the commercial success of college sports.").

[55] *See* Michael McCann, *O'Bannon Settles with EA and CLC in Class Action, NCAA Still Remaining*, SI.COM (Sept. 26, 2013), http://sportsillustrated.cnn.com/college-football/news/20130926/mccann-obannon-ea-clc-settlement/.

[56] *See* Sean Gregory, *supra* note 7.

[57] *See* Dan Carson, *Texas A&M President Flashes Johnny Manziel's 'Show Me the Money' Gesture*, BLEACHER REPORT (Sept. 6, 2013), http://bleacherreport.com/articles/1763834-texas-am-president-throws-up-johnny-manziels-show-me-the-money-gesture.

[58] *See, e.g.*, John Jeansonne, *NCAA's Failure to Address Athlete Issues Lead to Union Movement*, NEWSDAY (Mar. 29, 2014), http://www.newsday.com/sports/college/college-football/ncaa-s-failure-to-address-athlete-issues-lead-to-union-movement-1.7545822 (referring to "NCAA tyranny..." and that the failure by the NCAA to address real issues for many years has led to a "revolution.").

Around the same time as Manziel's public displays of support for the pay-for-play model, the National College Players Association (NCPA), an advocacy group whose mission is, "To provide the means for college athletes to voice their concerns and change NCAA rules" generated considerable attention to the plight of the student-athlete in a very different way.[59] The NCPA utilized the "All Players United" slogan in 2013 to call attention to various issues in college sports, including eliminating the "restrictions on legitimate employment and players' ability to directly benefit from commercial opportunities."[60] In January 2014 the organization filed a petition in Chicago on behalf of football players at Northwestern, including former quarterback Kain Colter.[61] The March 26, 2014 NLRB ruling in favor of the student-athletes has generated mixed public reaction, with some impressing that this decision has the potential to permanently end decades of exploitation by the NCAA and its member institutions.[62] Certainly,

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[59] *See* Patrick Vint, *All Players United: How College Football Players are Following Baseball's Model*, SBNATION (Oct. 5, 2013), http://www.sbnation.com/college-football/2013/10/5/4772140/apu-college-football-players-ncaa.

[60] *See* Chip Patterson, *Northwestern Players Start Union Movement in College Athletics*, CBS SPORTS.COM (Jan. 28, 2014), http://www.cbssports.com/collegefootball/eye-on-college-football/24422752/northwestern-players-start-union-movement-in-college-athletics.

[61] *See* Tom Farrey, *Kain Colter Starts Union Movement*, ESPN.COM (Jan. 28, 2014), http://espn.go.com/espn/otl/story/_/id/10363430/outside-lines-northwestern-wildcats-football-players-trying-join-labor-union (offering that Ramogi Huma, president of the National College Players Association (NCPA), filed a petition in Chicago on behalf of football players at Northwestern University, submitting the form at the regional office of the National Labor Relations Board and backed by the United Steelworkers union. The article notes that Northwestern quarterback Kain Colter reached out to the NCPA in the spring of 2013to improve the conditions under which they play NCAA sports.).

[62] *See* Rosenberg, *supra* note 14 (offering that the ruling only applies to private universities and could be subject to many appeals. Rosenberg also offers that radical changes might be in store for the NCAA and that someday the organization might have to admit that student-athletes are indeed employees); *see also* Patrick Hruby, *The Death of College Amateurism*, SPORTSONEARTH.COM (Mar. 31, 2014), http://www.sportsonearth.com/article/70479484/national-labor-relations-board-rules-northwestern-football-players-are-employees-can-unionize (discussing, analyzing and supporting Region 13 director Peter Sung Ohr's decision in favor of the Northwestern players that they should be characterized as employees and emphasizing the amount of control that the university had over its student-athletes. Hruby quotes Ohr, "...the record makes clear that the 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 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..."). For a copy of the decision, see http://www.insidehighered.com/sites/default/server_files/files/NU%20Decision%20and%20Direction%20of%20Election.pdf (last visited Apr. 6, 2014); *see also* Nick DeSantis, *Reactions to the Ruling on College Athletes' Bid to Form a Labor Union*, CHRON. OF HIGHER ED. (Apr. 7, 2014), http://chronicle.com/blogs/ticker/reactions-to-the-ruling-on-college-athletes-bid-to-form-a-labor-union/74937 (providing internet links to various other articles on the subject with mixed reactions); *see also* Peter Morici, *Stop the NCAA Insanity: Separate University Athletics from Academic Requirements*, FOXNEWS.COM (Mar. 31, 2014), http://www.foxnews.com/opinion/2014/03/31/stop-ncaa-insanity-separate-university-athletics-from-academic-requirements/ (offering that obtaining a quality education is why young people should go to college and that universities have monopolized the market through the NCAA and mandating that as amateurs, student-athletes may not be paid for their labor or unique talents even though their daily activities are "very tightly controlled." Morici also offers that if the NLRB decision survives through appeals, that the top 30 or 40 programs in the country could pay the most money to attract the best athletes. Morici, in fact, states "Pay the athletes…" and opines that these 30 or 40 programs should instead form football and basketball teams that

the decision has the potential of overruling a 2004 case involving graduate-student assistants at Brown University which found that such student assistants were not employees, and therefore they did not have the right to form unions.[63] In fact, an analysis of the differences and similarities between graduate-student assistants and scholarship student-athletes could eventually be revisited by the courts.[64]

Scores of collegiate coaches and administrators have become millionaires over the years, yet student-athletes have never been authorized to be paid for their services and still keep their eligibility.[65] Subsequent to the NLRB decision, this mantra may soon change, especially in light of the discussion at the 2014 NCAA convention in which the highest-profile Division I schools in the Football Bowl Subdivision (FBS) (i.e., those in ACC, Big Ten, Big 12, Pac-12 and SEC) sought autonomy to break away from lesser schools and conferences in Division I in order to provide more benefits to student-athletes, including stipends which could cover the entire cost of school attendance, rather than mere tuition and meals.[66] Thus, a new intercollegiate athletic environment could eventually be established, though paying student-athletes outright is still not supported by the NCAA.[67]

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are "affiliated" with schools and a major pro-franchise); *see also* John Jeansonne, *supra* note 58 (quoting lawyer Eric Broutman that the NCAA "has gotten incredibly greedy.")

[63] *See Brown Univ*., 342 N.L.R.B. 483 (2004); *see also* Vimal Patel, *'The Days of the Brown U. Ruling are Numbered,'* CHRON. HIGHER ED. (Mar. 27, 2014), http://chronicle.com/article/The-Days-of-the-Brown-U/145575/ (noting that the regional office of the NLRB drew distinctions between the scholarship football players at Northwestern and the graduate-student assistants in the Brown University case because the Brown assistants were "primarily students" while the players at Northwestern had more of an economic relationship than an academic one with the university. Patel quotes William A. Herbert, executive director of the National Center for the Study of Collective Bargaining in Higher Education and the Professions at Hunter College, "This decision is important for both universities and graduate students because it has the potential to clarify and re-examine the Brown University decision,..."); *see also* Hogler, *supra* note 29 ("In cases involving graduate students at New York University and Brown University, it held first that they were employees and then that they were not.").

[64] *Id*.

[65] *See, e.g*., Emilio Degrazia, *College Sports as a Private Enterprise-Just Do It*, STAR TRIB. (Apr. 4, 2014), http://www.startribune.com/opinion/commentaries/253971241.html (offering that student-athletes are really part of an "entertainment industry" and providing that "Jerry Kill, the University of Minnesota football coach, had his $1.2 million salary increased to $2.1 million, plus perks, for guiding the Gophers to eight wins and five losses during the 2013 season.").

[66] *See* Eddie Pells, *Emmert: Unionization "Grossly Inappropriate,"* YAHOO SPORTS (Apr. 6, 2014), http://sports.yahoo.com/news/emmert-unionization-grossly-inappropriate-174827350--ncaab.html (discussing how the NCAA supposedly plans on changing its existing structure to adapt to changing times particularly the larger, more revenue-generating conferences and schools by offering more "autonomy" to its membership.); *see also* George Schroeder, *SEC Officials Keep 'Division IV' on Edge of NCAA Table*, USA TODAY (May 30, 2014), http://www.usatoday.com/story/sports/college/2014/05/30/sec-meetings-mike-slive-ncaa-governance-reform-autonomy/9780933/.

[67] *See* Dan Wetzel, *NCAA Still Refusing to See Big Picture; All College Sports are not Equal*, YAHOO SPORTS (Apr. 6, 2014), http://sports.yahoo.com/news/ncaa-still-refusing-to-see-big-picture--all-college-sports-are-not-equal-215042288-ncaab.html (stating, "…it's clear that the leaders of college athletics are determined to make concessions

While the NCAA argues that it would be "grossly inappropriate" to promote the notion that student-athletes should unionize and be considered employees, the ideal that student-athletes may eventually be paid remains plausible.[68] Should the movement toward paying student-athletes continue to generate support, a significant yet relatively neglected inquiry deserving exploration entails the issue of how state income taxes could play a role in collegiate athletics should student-athletes be paid. Specifically, to what degree could the imposition of state income taxes on the pay-for-play model further change the face of college athletic sports?[69]

The examination of the application of tax-related issues in sports is not novel.[70] These tax issues cover a broad range of subjects, including the preferential tax breaks to lure professional teams away from their home city, or, instead, to keep professional teams where they are in an effort to prevent them from relocating elsewhere, the tax implications of raising revenue to build sports facilities, and the manner in which professional sports leagues might "tax" themselves by instituting their own cap on spending.[71] Tax issues have also worked their way into contract

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toward their athletes. Additional monetary stipends, a voice for the players, scholarship adjustments, stricter practice time limits are all on the table and some are inevitably going to be passed, at least at the biggest schools.").

[68] *See* Pells, *supra* note 66 (offering that Mark Emmert, NCAA President, insisting the association has plans to change the school-athlete relationship and that the organization wants to allow the big conferences with moneymaking teams to write their own rules to so solve student-athletes' complaints rather than through unionization); *see also* Adam Rittenberg, *Pat Fitzgerald Urges against Union*, ESPN.COM (Apr. 5, 2014), http://espn.go.com/chicago/college-football/story/_/id/10734087/pat-fitzgerald-urges-northwestern-wildcats-players-vote-union (discussing Northwestern University Head Football Coach Pat Fitzgerald's opinion that student-athletes should not form a union and quoting Fitzgerald, "I believe it's in their best interests to vote no,…" and "With the research that I've done, I'm going to stick to the facts and I'm going to do everything in my power to educate our guys. Our university is going to do that. We'll give them all the resources they need to get the facts.").

[69] *See* Michael Sanserino, *College Athletes Union Raises Tax, Discrimination Questions*, PITTSBURGH POST GAZETTE (Apr. 6, 2014, 12:07AM), http://www.post-gazette.com/business/employment/2014/04/06/College-athletes-union-raises-tax-discrimination-questions/stories/201404030298; *see also* Ken Berry, *College Athletes Could Be Sacked with High Taxes on Scholarships*, CPA PRACTICE ADVISOR (Apr. 13, 2014), http://www.cpapracticeadvisor.com/news/11393197/college-athletes-could-be-sacked-with-high-taxes-on-scholarships.

[70] *See* Sarah K. Fields & Sarah J. Young, *Learning from the Past: An Analysis of Case Law Impacting Campus Recreational Sport Programs*, 20 J. LEGAL ASPECTS OF SPORT 75 (2010) (analyzing cases over the last 30 years that have had an effect on campus recreation programs, including at least four cases whose primary focus was tax related); *see also* Rodney L. Caughron & Justin Fargher, *Independent Contractor and Employee Status: What Every Employer in Sport and Recreation Should Know*, 14 J. LEGAL ASPECTS OF SPORT 47 (2004) (discussing a variety of tax subjects including, but not limited to, Federal Insurance Contributions Act (FICA) taxes, Federal Unemployment Tax Act (FUTA) taxes, and federal income tax withholding with particular emphasis on the difference between an employee, contractor and independent contractor); Laura Misener, *Safeguarding the Olympic Insignia: Protecting the Commercial Integrity of the Canadian Olympic Association* , 13 J. LEGAL ASPECTS OF SPORT 79, 86-7 (2003) (noting that The Canada Corporations Act allows public organizations that meet the criteria as charitable organizations to be issued specific tax benefits); *see also generally* Lori K. Miller & Paul M. Anderson, *The Internship Agreement: Recommendations and Realities*, 12 J. LEGAL ASPECTS OF SPORT 37 (2002).

[71] See Kisska-Schulze & Epstein, *supra* note 12, at 97; *see also* Paul M. Anderson & W.S. Miller, *Sonic Bust: Trying to Retain Major League Franchises in Challenging Financial Times*, 21 J. LEGAL ASPECTS OF SPORT 117 (2011) (discussing the legal and economic issues, including various tax concerns, involving various NBA franchises including the Seattle SuperSonics); *see also* W.S. Miller & Chad LeBlanc, *Bingo?: An Overview of the Potential Legal Issues Arising From the Use of Indian Gaming Revenues To Fund Professional Sports Facilities*, 19 J. LEGAL

considerations.[72] Major League Baseball's *luxury tax* system emerges for discussion on an annual basis, for example.[73]

Other notable issues arising within the sphere of tax and the sports world include the tax-free status of private and exclusive country clubs, issues involving unrelated business income tax (UBIT) and planned giving to college and university athletic departments, and whether homeschooled student-athletes may participate in public school sports without actually attending those schools since public schools receive tax revenue from taxpayers, including homeschooled families' contributions.[74] With little question, tax issues in sports present various challenges.

Comprehending the evolution of the pay-for-play model to from *Nemeth* to current, and considering the emerging prospect that student-athletes may be paid in the future, the following analysis depicts the foreseeable state income tax effects of paying student-athletes.

## III. Analyzing the State Tax Implications of the Pay-for-Play Model of College Athletics

The term *gross income*, within the Internal Revenue Code (I.R.C.), means all income from whatever source derived.[75] Items included in the definition of gross income are compensation and fees for services rendered.[76] Because professional athletes not only tend to earn lucrative income but are also high profile public figures, they are easy targets for state tax collectors.[77] As such, garnering an understanding of the potential tax implications of paying

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ASPECTS OF SPORT 121 (2009); *see also* Richard A. Kaplan, *The NBA Luxury Tax Model: A Misguided Regulatory Regime*, 104 COLUM. L. REV. 1615, 1631-35 (2004) (discussing history of the NBA luxury tax); *see also generally* Adam Epstein, *An Exploration of Interesting Clauses in Sports*, 21 J. LEGAL ASPECTS OF SPORT 5 (2011).

[72] Kisska-Schulze & Epstein, *supra* note 12, at 97; *see also* Anderson & Miller, *supra* note 71, at 135-138 (exploring the lease provision of the NBA's Minnesota Timberwolves); *see also* Kaplan, *supra* note 71, at 1621-22 (noting that the NFL has a player *franchise tag* which can only be used once per season and requires teams to make an offer equal to the average of the top five salaries in the player's position); *see also* Corgan, *supra* note 10, at 421.

[73] *Id.; see also* Ronald Blum, *Yanks' Luxury Tax Increases $400k to $19.3 Million*, YAHOO! SPORTS (Dec. 18, 2012), http://sports.yahoo.com/news/yanks-luxury-tax-increases-400k-151952634--mlb.html.

[74] Kisska-Schulze & Epstein, *supra* note 12, at 9; *see also* Barbara Osborne, *Gender, Employment, and Sexual Harassment Issues in the Golf Industry* 16 J. LEGAL ASPECTS OF SPORT 25, 50-2 (2006) (discussing the tax benefits of private country clubs that are classified as non-profit organizations, including property tax exemptions. Osborne also notes that a bona fide private membership club is defined as one that has tax exempt status under Section 501(c) of the Internal Revenue Code (I.R.C.); *see also* Anna S. Tharrington & Barbara Osborne, *An Analysis of the Presence and Perception of the Juris Doctorate Degree in Division I College Athletics Administration*, 18 J. LEGAL ASPECTS OF SPORT 309 (2008); *see also* Paul J. Batista & Lance C. Hatfield, *Learn at Home, Play at School: A State-by-State Examination of Legislation, Litigation and Athletic Association Rules Governing Public School Athletic Participation by Homeschool Students*, 15 J. LEGAL ASPECTS OF SPORT 213 (2005); *see also* Kathryn Gardner & Allison J. McFarland, *Legal Precedents and Strategies Shaping Home Schooled Students' Participation in Public School Sports*, 11 J. LEGAL ASPECTS OF SPORT 25 (2001); Joshua Roberts, *Chalk Talk: Dispelling the Rational Basis for Homeschooler Exclusion from High School Interscholastic Athletics*, 38 J.L. & EDUC. 195 (2009).

[75] I.R.C. § 61(a) (2012).

[76] *Id.*

[77] *See* Alan Pogroszewski, *When Is a CPA As Important As Your ERA? A Comprehensive Evaluation And Examination of State Tax Issues on Professional Athletes*, 19 MARQ. SPORTS L. REV. 395, 395 (2009).

student-athletes is a fundamental step in understanding the impact which state taxes could have on college athletics as a whole.

Although the current economic problems afflicting the U.S. economy are not entirely ensuing from the events of September 11, 2001 (9/11), after 9/11 the U.S. not only descended into a recession, but more recently regressed into what is referred to as the *Great Recession*.[78] Since the recession began, state and local governments have proposed and often implemented innovative ways to satisfy revenue needs.[79] In recent decades, modern society has felt the impact of increased state taxation in the form of sin taxes on alcohol, tobacco, strip club operations and soft drinks.[80] In the aftermath of the 2013 *Amazon.com* ruling by the New York Court of Appeals, a number of states have implemented legislation allowing for the collection of sales tax on Internet retail purchases.[81] And as recently as January 2014, Colorado became the first state to legalize recreational marijuana with the anticipation of generating state revenue upwards of $67 million per year.[82]

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[78] *See* Kathryn Kisska-Schulze, *The Future of E-mail Taxation in the Wake of the Expiration of the Internet Tax Freedom Act*, 51, AM. BUS. L. J. 315, 326 (2014); *see also* John Miley, *The U.S. Economy Since 9/11*, KIPLINGER (Sep. 2011), http://www.kiplinger.com/slideshow/business/T019-S001-the-u-s-economy-since-9-11/index.html; *see also* Matthew Parlow, *The Great Recession and Its Implications for Community Policing*, 28 GA. ST. U. L. REV. 1193, 1207 (2012) (analyzing the financial effects of the Great Recession in the U.S.).

[79] *Id.*

[80] *Id.* at 327; *see also* Andrew J. Haile, *Sin Taxes: When the State Becomes the Sinner*, 82 TEMP. L. REV. 1041, 1042 (2009) (citing to William F. Shughart II, *The Economics of the Nanny State, in Taxing Choice: The Predatory Politics of Fiscal Discrimination* 13, 20-24 (WILLIAM F. SHUGHART II ED. 1997)); Rachel E. Morse, *Resisting the Path of Least Resistance: Why the Texas "Pole Tax" and the New Class of Modern Sin Taxes Are Bad Policy*, 29 B.C. THIRD WORLD L.J. 189, 189-91 (2009) (analyzing the 2007 implementation of the Texas "pole tax" on strip clubs in a state legislative effort targeting undesirable social activities); Dr. Merav W. Efrat & Dr. Rafael Efrat, *Tax Policy and the Obesity Epidemic*, 25 J.L. & HEALTH 233, 253, 253 n.158 (2012) (referencing the fact that numerous states have begun imposing a tax on soft drinks and candy, beginning with West Virginia which enacted the first excise tax on soft drinks in 1951) (citing S.B. 1520, 2001-02 Leg. Reg. Sess. (Cal. 2002) (codified as amended in CAL. EDUC. CODE § 49431 (West 2002)).

[81] *See* Kisska-Schulze, *supra* note 78, at 331; *see*; see also Amazon.com, LLC, et al. v. New York State Dep't of Taxation and Fin., et al., 20 N.Y.3d 586, 595 (2013) (affirming the New York Supreme Court's decision that Amazon.com satisfied the substantial nexus requirement of the Commerce Clause in New York); *see also* AMAZON.COM, ABOUT SALES TAX ON ITEMS SOLD BY AMAZON.COM, http://www.amazon.com/gp/help/customer/display.html?nodeId=468512. Items sold by Amazon.com LLC, or its subsidiaries, and shipped to destinations in Arizona, California, Connecticut, Georgia, Kansas, Kentucky, Massachusetts, New Jersey, New York, North Dakota, Pennsylvania, Texas, Virginia, Washington, West Virginia and Wisconsin are subject to tax). *Id.; see also* Adam Liptak, *Justices Pass on Tax Case from Online Merchants*, N.Y. TIMES (Dec. 2, 2013), http://www.nytimes.com/2013/12/03/business/new-york-ruling-on-sales-tax-collection-by-online-retailers-will-stand.html (stating that Amazon collects taxes in sixteen states).

[82] *See* Kisska-Schulze, *supra* note 78, at 329; *see also* COLO. CONST. ART. XVIII, Sec. 16 (2013) (also referred to as "Amendment 64"); *see also* John Ingold, *A Colorado Marijuana Guide: 64 Answers to Commonly Asked Questions*, DENVER POST (Dec. 31, 2013, 12:30:10 PM MST), http://www.denverpost.com/marijuana/ci_24823785/colorado-marijuana-guide-64-answers-commonly-asked-questions; *see also* Keith Coffman, *First State Licensed Marijuana Retailers To Open January 1 In Colorado*, REUTERS (Dec. 28, 2013 8:19 am EST), http://www.reuters.com/article/2013/12/28/us-usa-marijuana-colorado-idUSBRE9BR04J20131228 (noting the state revenue expectations); *see also* Keith Coffman, *Colorado Voters Approve 25 Percent Taxes on Recreational*

Due to their escalating salaries and income, professional athletes have emerged as a focus point for increased scrutiny among state taxing jurisdictions since the early 1990s.[83] The concentrated attention on athletes, including U.S. Olympic medal winners, by taxing jurisdictions is not surprising considering that they are easy targets due to their popularity and often relentless media interest.[84] Progressively, academic scholars have analyzed the multitude of state tax issues surrounding athletes and professional sports teams, to include examining the fairness of the taxing of professional athletes (via the *jock tax*), addressing the constitutional challenges that states must overcome before taxing nonresident professional athletes, dissecting the apportionment options used by states to tax visiting athletes, and assessing the practical effects of state tax laws on individual athletes.[85] However, because the realistic possibility of paying student-athletes has only recently captured heavy media attention, virtually no scholarly publications have focused directly on the plausible tax consequences facing paid student-athletes and college sports.[86]

To address the potential implications of paying student athletes from a state income tax perspective, the following hypothetical provides a theoretical foundation to analyzing the ripple effect which state taxes could have should college athletics eventually move towards the pay-for-play model.[87]

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*Marijuana*, REUTERS (Nov. 6, 2013 1:20 am EST), http://www.reuters.com/article/2013/11/06/us-usa-colorado-taxes-idUSBRE9A504Y20131106 (discussing the voter-approved 25 percent combined excise and sales taxes on recreational marijuana sales).

[83] *See* Kara Fratto, *The Taxation of Professional U.S. Athletes in Both the United States and Canada*, 14 SPORTS LAW J. 29 (2007) (noting that increased athlete salaries, higher ticket prices, soaring franchise price tags and the building of newer facilities have helped launch the big business of professional sports); *see also* Jeffrey L. Krasney, *State Income Taxation of NonResident Professional Athletes*, 2 SPORTS LAW. J. 127, 127 (1995) (directing that professional team athletics has become the focus of increased attention from taxing jurisdictions); *see also* Pogroszewski, *supra* note 77, at 395 (indicating that nonresident taxation on professional athletes began gaining national attention in the early 1990's).

[84] *See* John DiMascio, *The "Jock Tax": Fair Play or Unsportsmanlike Conduct*, 68 U. PITT. L. REV. 953, 957 (2007) (discussing that professional athletes have great difficulty in avoiding state taxing jurisdictions due to their public popularity); *see also* Kisska-Schulze & Epstein, *supra* note 12 (analyzing Operation Gold and the income tax implications facing U.S. Olympic medal-winning athletes).

[85] *See* Alan Pogroszewski and Kari A. Smoker, *Is Tennessee's Version of the "Jock Tax" Unconstitutional?*, 23 MARQ. SPORTS L. REV. 415 (2013) (indicating that the Tennessee Jock Tax is unconstitutional); *see also* Krasney, *supra* note 83, at 142 – 159 (analyzing the constitutional challenges which states face in taxing nonresident professional athletes); *see also* Fratto, *supra* note 83, at 42 – 44 (describing the various methods which states use to apportion nonresident athletes' income); *see also* Pogroszewski, *supra* note 77 (offering a comprehensive overview of the state tax issues pertaining to professional athletes).

[86] A Lexis-Nexis search of the terms "tax and paid student-athlete" at the time of the drafting of this article produced only eight papers. Of those published papers, only one paper from 2000 addresses the practical obstacles of payment of monthly stipends to student-athletes. *See* Thomas R. Hurst and J. Grier Pressly III, Symposium Article: *Payment of Student-Athletes: Legal & Practical Obstacles*, 7 VILL. SPORTS & ENT. L.J. 55 (2000).

[87] The athletes named in this hypothetical are fictional, and any resemblance or likeness to actual persons or events is completely coincidental unless specifically noted.

A. School Shopping: From Hypothetical to the Playing Field to the Jock Tax

Following the recent decision by the NRLB, suppose that in the near future certain college athletes become eligible for compensation as employees of their institutions, to include Chuck Adler, a rising senior and star quarterback for Florida State, and Ryan McDonald, an equally talented sophomore quarterback for the Oregon Ducks.[88] Assuming the compensatory salaries for both Adler and McDonald are based on their formulated value to the team,[89] notwithstanding their individual salary determinations, Adler will automatically benefit over McDonald because he is employed in Florida, a state with no individual income tax; while McDonald's salary will be subject to the 9.90% Oregon income tax rate.[90]

As Florida and Oregon are both public institutions, Adler and McDonald's salaries will be accessible to the public. The Freedom of Information Act of 1966 (FOIA) created a judicially enforceable public right of access to information compiled by the executive branch agencies.[91] Further, new technology has also spawned unprecedented invasions of privacy.[92] Assuming both athletes are comparably gifted and valued to their teams, if publically obtained information unveils that Adler's salary is higher than McDonald's salary, McDonald may be in a position to demand a higher salary from Oregon, or begin shopping around for a transfer to an institution willing to pay more money.[93] The public awareness of paid student-athletes' salaries could likewise lead to McDonald and other college athletes forming labor unions to help further

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[88] For the 2014-2015 collegiate football season, the Florida State Seminoles are ranked 1st and the Oregon Ducks are ranked 8th in the nation. *See* CBSSPORTS.COM, *College Football Rankings*, http://www.cbssports.com/collegefootball/rankings/cbs (updated Feb. 5, 2014).

[89] *See* Robert E. Wagner, *Mission Impossible: A Legislative Solution for Excessive Executive Compensation*, 45 CONN. L. REV. 549, 561 (2012) (noting that professional athletes are akin to corporate executives in the salary potentials these professionals can earn).

[90] *See* OR. REV. STAT. §316.037 (2014). Note, paid collegiate athletes living in Alaska, Florida, Nevada, South Dakota, Texas, Washington and Wyoming will not be subject to state individual income tax as none of these states impose such tax. Further, athletes earning income in New Hampshire and Tennessee will garner similar financial benefits as these two states impose individual income tax only on interest and dividend income. *See* N.H. REV. STAT. ANN. 77:1 (2014); *see also* TENN. CODE. ANN. §67-2-102 (2014).

[91] Martin E. Halstuk and Bill F. Chamberlin, *The Freedom of Information Act 1966 – 2006: A Retrospective on the Rise of Privacy Protection Over the Public Interest in Knowing What the Government's Up To*, 11 COMM. L. & POL'Y 511, 512 (2006); *see also* 5 U.S.C. § 552 (2005).

[92] *Id*. at 538.

[93] For example, would a school like the University of Alabama, whose athletic department generated $143 million during the 2012-2013 football season, share a portion of this revenue with its collegiate football players… or would deep-pocketed boosters help defray employment costs by paying players under the table to ensure that the Crimson Tide stays competitive in the marketplace? *See* Greg Wallace, *Making the Case Against A College Football Players' Union*, BLEACHER REPORT (Apr. 7, 2014) http://bleacherreport.com/articles/2020286-making-the-case-against-a-college-football-players-union; *see also* Erick S. See, *A Perception of Impropriety: The Use of Package Deals in College Basketball Recruiting*, 17 VILL. SPORTS & ENT. L.J. 59 (2010) (addressing that the history of college sports abounds with educational institutions recruiting high profile, elite athletes and the parallel infractions involving university booster clubs, coaches and agents showering the recruits with cash, vehicles and other illegal benefits to sway the recruit's college selection to the providing institution).

negotiate their salaries.[94] Some of these players, depending on the institutions they attend and the various wage-substitute subsidies afforded them, could be eligible for non-cash benefits to include personal vehicles, participation in their employers' health insurance programs, workers' compensation and benefits plans, pension coverage, unemployment compensation, workers' compensation, disability insurance and paid family leave (should they marry and have children while employees of their institutions).[95] Thus, while Oregon may be limited in the amount of additional cash salary it can offer McDonald in an effort to keep him on the roster, it may be in a position to offer its star quarterback superior perquisites such as paid vacation leave, access to a brand new vehicle, and exceptional health insurance.

Because of the overall financial savings which paid student-athletes may entertain if playing for programs located in no-income tax states, college athletics could see an increase in transfer requests of student-athletes residing in higher income tax states.[96] Should Oregon not provide McDonald with the higher salary and/or stronger benefits package which this quarterback demands, McDonald, aware that he still has two years of eligibility and recognizing that he is

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[94] *See* Michael H. LeRoy, *An Invisible Union for an Invisible Labor Market: College Football and the Union Substitution Effect*, 2012 WIS. L. REV. 1077, 1084 (2012) (addressing that a plausible threat to unionize college football players could produce a "union substitution" effect suggesting that employers often provide more voice and benefits to employees when there is a possibility of unionization); *see also* Nicholas Fram and T. Ward Frampton, *A Union of Amateurs: A Legal Blueprint to Reshape Big-Time College Athletics*, 60 BUFFALO L. REV. 1003, 1006 (2012) (Noting that recently college athletics have changed dramatically, to include talk of strikes and players unions to negotiate with the NCAA); *see also* M. Alexander Russell, *Leveling the Playing Field: Identifying a Quasi-Fiduciary Relationship Between Coaches and Student-Athletes*, 43 J.L. & EDUC. 289, 291 (2014) (identifying the recent Northwestern University college football players' attempt to create the first labor union for college athletes); *see also* Jim Litke, *Pat Fitzgerald, Northwester Football Coach, Urges Players to Vote Against Union*, HUFFINGTON POST (Apr. 5, 2014, 5:05 PM EDT), http://www.huffingtonpost.com/2014/04/05/pat-fitzgerald-union_n_5097986.html; *see also* Zac Ellis, *Northwestern Football Players Seek to Unionize; What Does the Development Mean?*, SPORTS ILLUSTRATED CAMPUS UNION (Jan. 28, 2014), http://college-football.si.com/2014/01/28/northwestern-football-kain-colter-labor-union/ (Following the NLRB decision allowing Northwestern University football players to be recognized as employees, the football players requested representation from a labor union. Such request was met with negative feedback from the University, Northwestern football coach Pat Fitzgerald, and the NCAA).

[95] *See* Mary E. O-Connell, *On the Fringe: Rethinking the Link Between Wages and Benefits*, 67 TUL. L. REV. 1422, 1425 (1993) (describing the various noncash benefits received by some participants in the paid labor force); *see also* Brendan S. Maher and Peter K. Stris, 88 WASH. U. L. REV. 433, 435 (2010) (noting that employee benefits come in many forms, including monthly pensions, 401(k) contributions, and the payment of health insurance premiums); *see also* Anne Wells, Note: *Paid Family Leave: Striking a Balance Between the Needs of Employees and Employers*, 77 S. CAL. L. REV. 1067 (2004) (analyzing the various aspects of the Family Medical Leave Act (FMLA)).

[96] The transfer of a professional athlete from a team located in a high income tax states to one in a no-income tax state is not unusual. In 2013, basketball player Dwight Howard left the Los Angeles Lakers to sign with the Houston Rockets, a move which could allow Howard to pocket more money since Texas does not impose an income tax. *See* Travis Waldron, *Dwight Howard's Move to Houston, Taxes, And Why Athletes Choose To Play Where They Do*, THINK PROGRESS (July 190, 2013, 1:06PM), http://thinkprogress.org/sports/2013/07/10/2278261/dwight-howards-move-to-houston-taxes-and-why-athletes-choose-to-play-where-they-do/; *see also* Joshua Rhett Miller, *Millionaire Athletes Flee States With High Income Taxes*, FOX NEWS (Jan. 30, 2013), http://www.foxnews.com/sports/2013/01/30/federal-state-tax-hikes-could-send-athletes-migrating-to-tax-friendlier-states/ (noting that former Los Angeles Angels outfielder Torri Hunter signed with the Detroit Tigers, a team located in a state with a significantly lower tax rate than California, and later moved his family to Texas, a state with no income tax, in order to save taxes on certain income including endorsements and autograph signing).

paying high individual income taxes in Oregon amidst a lower salary range than Florida State can offer, may have an interest in making a transfer request to Florida State to capitalize on his earnings potential while continuing to play for a Top-10 program. While top collegiate athletic programs in Florida and Texas would likely not have an interest in considering the transfer options of every student-athlete making such request, those same programs would certainly benefit from having greater national interest from elite student-athletes due to the tax savings which the schools can offer based solely on their locations and the tax structure within the states. Thus, Florida State, which will graduate Adler at the close of the college athletic season, may have a formidable interest in offering McDonald a spot on its roster.

Although this hypothetical presents select concerns arising from paying current NCAA student-athletes, the plausible tax predicaments of paying student-athletes does not end here. Assume that the number one ranked high school football recruit for the upcoming college football season is Mark Donner, a fictional defensive end from Wichita, Kansas.[97] As of the winter/spring of his senior year, thirty one universities have presented Donner with offers to sign.[98] Of those programs offering Donner a spot on their rosters, this young defensive end might consider signing with a stellar football program located in a state with no income tax like Florida State or Texas, in order to "pocket" the highest percentage of his income – an immediate benefit which only few elite programs in the country can offer.[99] If Ohio State, a top ranked football program located in a state with a 5.39 percent income tax rate wants to entice Donner to sign a letter of intent, it may have to offer him a higher salary than the University of Florida, Florida State, Miami (Florida), University of Central or South Florida – football programs which have all presented offers to Donner – in order to make its offer as financially attractive as those programs located in a state with no income tax.[100]

For USC, UCLA or Stanford - other top programs which have presented Donner offers - to have a competitive advantage in signing him they may have to tender upwards of twelve percent higher salaries than the Florida programs in order to offset California's highest 12.3% individual income tax rate.[101] If none of these California institutions are in a financial position to

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[97] The data with respect to this hypothetical character is derived from information published pertaining to the 2014 - 2015 number one ranked high school football recruit, Jashon Cornell. *See* ESPN, *Recruiting Database 2015 ESPN Junior 300*, http://espn.go.com/college-sports/football/recruiting/playerrankings/_/view/rn300jr/sort/rank/class/2015 (last visited March 28, 2014).

[98] *Id.* The programs which have offered Cornell a spot on their 2015 scholarship rosters include: Arizona State, Arkansas, California, Florida, Florida State, Illinois, Indiana, Iowa, Kansas, Kentucky, Miami (FL), Michigan, Michigan State, Minnesota, Mississippi State, Missouri, Nebraska, Northwestern, Notre Dame, Ohio State, Oklahoma, Ole Miss, Penn State, Pittsburgh, Rutgers, South Florida, Stanford, UCLA, USC, Vanderbilt and Wisconsin.

[99] The following seven states currently do not impose an individual income tax: Alaska, Florida, Nevada, South Dakota, Texas, Washington and Wyoming. Further, Tennessee and New Hampshire only tax individual income derived from interest and dividends.

[100] *See* ESPN, *Recruiting Database 2015 ESPN Junior 300*, http://espn.go.com/college-sports/football/recruiting/playerrankings/_/view/rn300jr/sort/rank/class/2015 (last visited March 28, 2014); *see also* OHIO REV. CODE ANN. § 5747.02 (2014).

[101] *See* CAL. REV. & TAX CODE §17041, CAL. REV. & TAX CODE §17043 (2014).

monetarily compete against programs located in Florida or Texas in order to sign Donner, they might resort to negotiating impressive employee compensation packages to include health insurance coverage, paid holidays, vacation pay, sick leave, flexible spending accounts, life insurance and 401(k) retirement plan contributions.[102]

Ultimately, whether Adler, McDonald or Donner plays for a team in Florida, Oregon, Texas or California, each will be required to periodically travel outside his institution's home state to play in regular season and championship games. No matter the income that each of these athletes earns or the income tax rate imposed by their states of residency, in compliance with the various *jock tax* requirements Adler, McDonald and Donner will have to surrender a portion of their income to certain states where they travel to for competitions, requiring additional individual state income tax filing obligations.[103] Depending on which of two apportionment methods the states hosting away games utilize, non-resident paid college athletes will be liable not only for the tax imposed on their income earned in their states of residency, but also for tax imposed on an apportionable amount of their income earned while playing games outside of their resident state.[104] Thus, Adler, McDonald and Donner will be required to file multiple state income tax forms depending on which states their respective college teams travelled to for away games and championship tournaments. As such, the imposition of the jock tax could eventually have an impact on the future of collegiate out-of-state competitive travel schedules and off-season training locations.[105] Because states like Florida, Texas and Washington do not impose income taxes on either residents or nonresidents, these states could become strategic locations for college away games and Bowl championship locations.[106]

The purpose of the above hypothetical is to expound on the potential impacts of moving towards a college pay-for-play model from a state income tax perspective. To fully grasp its depiction of the possible state income tax implications of paying student-athletes, an understanding of states'

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[102] *See* Maher et. al, *supra* note 95, at 435 (opining that employee benefits come in many forms, including monthly pensions, 401(k) contributions, and the payment of health insurance premiums).

[103] *See* DiMascio, *supra* note 84, at 953. Note, the "jock tax" is an expression referring to the trend among taxing authorities toward levying state and local income taxes on traveling business professionals, particularly visiting professional athletes. This tax requires that travelling professionals pay income taxes in every state where they earn income or have "economic nexus'. *See* TAX FOUNDATION, *Jock Taxes*, http://taxfoundation.org/tax-topics/jock-taxes (last visited May 29, 2014).

[104] *See* Krasney, *supra* note 83, at 125 – 138; *see also* Pogroszewski, *supra* note 77, at 398. Note that states generally offer tax credits to their residents for taxes paid to another state; however, such credits to not necessarily entirely eliminate the potential of double-taxation on a non-resident's earned income. *Id*. at 408.

[105] *See* Chris Stephens, *Both Teams Lose at Super Bowl Because of Jock Taxes*, TAX FOUNDATION (Jan. 31, 2014), http://taxfoundation.org/blog/both-teams-lose-super-bowl-because-jock-taxes (discussing the fact that because the 2014 Super Bowl was located in New Jersey, every employee of both the Seattle Seahawks and the Denver Broncos was subject to the jock tax. It is therefore inferred by the authors of this article that the selection of the location of professional championship games and tournaments has little to do with the implication of the jock tax); *see also* DiMascio, *supra* note 84, at 961 (noting that because Florida does not impose a jock tax, many Major League Baseball franchises hold spring training there).

[106] *See* Pogroszewski, *supra* note 77, at 407 (noting that Florida, Texas and Washington do not tax resident or nonresident income, and are therefore favorable locations for out of state Major League Baseball games).

rights to impose such taxes is critical. As the states' constitutional powers to impose income taxes is the keystone to comprehending the overall impact which state income taxes can have on the pay-for-play model of college athletics, the following analysis ensues.

### B. States' Constitutional Right to Tax Paid Student-Athletes

The term *nexus,* or *substantial nexus,* refers to the minimum connection between a taxing jurisdiction and an out-of state person or entity that is sufficient to constitutionally impose a tax.[107] Within the context of the U.S. Constitution's Due Process Clause, a minimum connection, alerting taxpayers that they could be subject to a state's taxing jurisdiction, is required in order to establish nexus.[108] Specifically, due process requires a "definite link, [or] minimum connection, between a state and the person, property, or transaction it seeks to tax."[109] In combination with due process, the Commerce Clause of the U.S. Constitution requires that the taxpayer also have a physical presence within a taxing jurisdiction.[110] For a state to successfully impose an income tax on an individual, the U.S. Supreme Court has established that the individual have some minimum connection or presence within the state wanting to successfully impose the tax.[111] The significance of the nexus standard on professional athletes is important in

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[107] *See* National Bellas Hess, Inc. v. Dep't. of Revenue of Illinois, 386 U.S. 753, 762 (1967) (citing Miller Bros. Co. v. Maryland, 347 U.S. 340, 344-45 (1954)); Scripto, Inc. v. Carson, 362 U.S. 207, 210-11 (1960); American Oil Co. v. Neill, 380 U.S. 451, 458 (1965)), *overruled in part by* Patterson v. Shumate, 504 U.S. 753 (1992); *see also* Kathryn Kisska-Schulze, *Taxation of Internet Sales – Where in the Cyberspace is Nexus?*, 1 ROCKY MOUNTAIN L.J. 8, 14 (2012).

[108] *See* Pogroszewski et al., *supra* note 85, at 422.

[109] Miller Brothers Co. v. Maryland, 347 U.S. 340, 344-345; 74 S. Ct. 535; 98 L. Ed. 744 (1954).

[110] *See* Pogroszewski et al., *supra* note 85, at 422; *see also* Quill Corp. v. North Dakota, 504 U.S. 298, 308 and 317 (1992). Note, however, that because the U.S. Supreme Court has only addressed the physical presence requirement as applies to sales and use tax imposition, the question still remains whether state taxing jurisdictions can impose an income tax obligation on taxpayers with mere economic presence in lieu of actual physical presence. To date, state courts are divided on this issue; *see id.* at 422; *see e.g.*, Geoffrey, Inc. v. South Carolina Tax Commission, 437 S.E. 2d 13, 15 (S.C. 1993), *cert. denied* 510 U.S. 992 (1993), (finding that for income tax purposes "the nexus requirement of the Due Process Clause can be satisfied even where the corporation has no physical presence in the taxing state if the corporation has purposefully directed its activity at the state's economic forum.").

[111] *See National Bellas Hess*, 386 U.S. 753; *see also Quill*, 504 U.S. 298. In *Bellas Hess*, a Delaware company with its principal place of business in Missouri mailed sales catalogues to Illinois residences twice a year, resulting in purchases made by Illinois residents. The Illinois Department of Revenue brought suit against Bellas Hess to recover use tax arising from these sales. Bellas Hess defended that a tax collection obligation would infringe on its due process rights and unconstitutionally burden interstate commerce. The U.S. Supreme Court decided in favor of the Department of Revenue, determining that notwithstanding the actual presence in Illinois of catalogs and millions of dollars in sales to Illinois customers, the state lacked sufficient nexus with Bellas Hess to impose a use tax collection obligation. The Court noted that the minimum connection necessitated by due process is the taxpayer's presence within in the state. In *Quill,* Quill Corporation was a Delaware company with physical locations in Illinois, California and Georgia. Although none of Quill's employees worked or lived in North Dakota, the company sold office supplies and equipment via mail-order solicitation to North Dakota residents. North Dakota filed suit against Quill to require it to collect use tax from its North Dakota customers. Quill defended that it lacked the substantial nexus required by the Commerce Clause. The U.S. Supreme Court found in favor of Quill, affirming the notion that a taxpayer may have a minimum connection with a taxing jurisdiction but lack the requisite substantial nexus necessary under the Commerce Clause.

understanding the impact that state taxes, the jock tax and apportionment factors could have on college athletics should they be paid.

The concurrent power shared by the federal and state governments under Article I, Section 8 of the U.S. Constitution gives each state the authority to impose taxes on their own residents.[112] While most states in the U.S. levy a tax on personal income, seven states – Alaska, Florida, Nevada, South Dakota, Texas, Washington and Wyoming – do not.[113] Of the remaining forty-three states which impose and collect income taxes, Tennessee and New Hampshire employ the tax only on dividend and interest income.[114]

i. Pro-Athletes Take Advantage of No-Income Tax States

In the realm of professional sports, it is simpler for individual athletes to take advantage of opportunities to reduce their personal income tax obligations than for athletes tied to professional teams.[115] Pro-golfer Tiger Woods, for example, admitted that his relocating from California to Florida was due in part to the tax advantages Florida afforded him on his winnings, endorsement revenue and investment income.[116] Aside from living and training in Florida's year-round favorable weather, Woods maintains an elevated advantage of residing in a no-income-tax state.[117] Specifically, athletes employed in states like Florida, Texas and Washington are taxed significantly less overall than athletes whose home states do impose personal income tax.[118] On the contrary, athletes who are exposed to the highest state tax rates, such as California, Hawaii and Oregon, are subject to the highest overall income tax burden.[119]

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[112] U.S. CONST. art. 1, § 8.

[113] *See* Jeffrey Adams, *Why Come to Training Camp Out of Shape When You Can Work Out in the Off-Season and Lower Your Taxes: The Taxation of Professional Athletes*, 10 IND. INT'L & COMP. L. REV. 79, 92 (1999).

[114] *See* TENN. CODE. ANN. §67-2-102 (2014); *see also* N.H. REV. STAT. ANN. 77:1 (2014).

[115] See William H. Baker, *Home & Away: A Tax Definition For Athletes*, 2 VA. J. SPORTS & L. 104, 127 (2000).

[116] Mitchell L. Engler, *The Untaxed King of South Beach: LeBron James and the NBA Salary Cap*, 48 SAN DIEGO L. REV. 601, 618 (2011); *see also* Robert W. Wood, *Tiger Woods Moved Too, Says Mickelson Was Right About Taxes*, FORBES (Jan. 23, 2013, 11:38PM), http://www.forbes.com/sites/robertwood/2013/01/23/tiger-woods-moved-too-says-mickelson-was-right-about-taxes/.

[117] *See id*. at 607.

[118] *See* Pogroszewski, *supra* note 77, at 413 (analyzing the various tax consequences of individual professional athletes performing services in Major League Baseball, the author found that athletes living in no-income tax states take home on average $107,694.50, or 6.1% more than those athletes residing in states which impose a tax on personal income).

[119] *Id.* at 413 – 414 (In analyzing the various tax consequences of individual professional athletes performing services in Major League Baseball , the author found that professional athletes performing services in California, New York, Ohio, Minnesota and Wisconsin take home only $1,732,063.55, or 57.74% of their total income as compared to the 58.82% of all individuals or the 62.41% of those athletes who played in states with no income); *see also* CAL. REV. & TAX CODE §17041 (noting California's highest income tax rate of 12.30%); HAW. REV. STAT. §235-51 (2014) (noting Hawaii's highest state income tax rate of 11%); and OR. REV. STAT. §316.037 (2014) (noting Oregon's highest state income tax rate of 9.90%).

At a complicated disadvantage, athletes employed by professional sports teams must move, even for a temporary period, to the location where their team is based while commonly maintaining a separate residence in a different locale during the off-season.[120] Due to numerous athletes' dual-location status, state tax complexities arise when determining which state these players are deemed "residents." Such issue is critical when deciphering the states' constitutional power to tax individuals, as states have the authority to tax any individual who resides within their boundaries.[121] While many states classify a *resident* as an individual who is either domiciled in the state or who is in the state with some degree of permanency, the reality of determining the state of residency of a professional athlete can be problematic.[122]

Consider, for example, a professional athlete who resides in North Carolina but plays football for the New York Giants, which is actually based in East Rutherford, New Jersey.[123] Would he be deemed a resident of New Jersey where the team is located and where he chooses to live during the competitive season, or a resident of North Carolina where he owns a home, licenses his car, and is registered to vote?[124] The answer lies in each state's statutory requirements for residency.[125] In New Jersey, a person is considered a resident if they are domiciled in New Jersey, unless they have no permanent home in the state, maintain a home in another state and spend no more than thirty days in New Jersey; or a person who is not domiciled in the state but maintains a permanent place of abode in New Jersey and spends more than 183 days in the state.[126] North Carolina's tax law defines a resident as a person who is either domiciled in the

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[120] *See* Ian Dobson, *The Wrong Gameplan: Why the Minnesota Vikings' Failure to Understand Minnesota's Values Dooms Their Proposal For a New Stadium and How the Team Can Improve Its Future Changes*, 33 WM. MITCHELL L. REV. 485, 495 (2006) (indicating that professional athletes are traded and move cities more frequently than individuals employed in other areas); *see also* Garrett Johnson, *The Economic Impact of New Stadiums and Arenas on Cities*, 2011 U. DENV. SPORTS & ENT. LAW J. 3, 4 (2011) (discussing the reality that the days of a professional player staying with one team his entire career are long gone); *see also* Krasney, *supra* note 83, at 128 (documenting that professional teams and athletes constantly move from one state to the next; and further noting that although professional team-member athletes generally live in the area where the team is located, they also tend to maintain a permanent residence distant from the team's location).

[121] *See* David Schultz, *State Taxation of Interstate Commuters: Constitutional Doctrine in Search of Empirical Analysis*, 16 TOURO L. REV. 435, 440 (2000) (addressing the constitutional rights of states to tax individuals who take up residence within their state borders).

[122] *See* Krasney, *supra* note 83, at 129; *see also* CAL. REV. & TAX. CODE § 17014 (Deering 1998) which defines the term "resident" as including, "(1) every individual who is in this state for other than a temporary or transitory purpose; (2) every individual domiciled in this state who is outside the state for a temporary or transitory purposes.".

[123] Note, for tax year 2014 North Carolina imposes a highest individual income tax rate of 7.75% on income greater than $60,000 while the state of New Jersey imposes a highest individual income tax rate of 8.97% on income over $500,000. *See* N.C. GEN. STAT. §105-134.2 (2014); *see also* N.J. STAT. ANN. §54A:2-1 (2014).

[124] Example derived from Howard J. Wiener, *Tax Considerations For Athletes and Entertainers*, AM.BAR ASS'N FORUM ON THE ENTM'T AND SPORTS INDUS. (2010) at 13.

[125] *Id.*

[126] N.J. STAT. ANN. § 54A: 102(m)(1)(2).

state, or who is present in the state for more than 183 days during the taxable year.[127] However, North Carolina further establishes that "the absence of an individual from the state for more than 183 days raises no presumption that the individual is not a resident."[128] The additional statutory language in North Carolina could result in dual residency status for this particular professional athlete, tax filing requirements in multiple states, an increased possibility of double taxation, and the heightened potential for state tax audits.[129]

The impact which state and local income taxes may have on professional athletes has been analyzed throughout academic literature.[130] However, as previously mentioned, to date there are virtually no academic articles specifically addressing the state tax implications of paying student-athletes, likely due to the NCAA's current ban on the pay-for-play model.[131] Thus, the effect of state and local taxes on student-athletes and the world of college athletics is theoretical at this juncture. Still, because of the recent newsworthiness of the Northwestern University unionization decision, speculation abounds as to the potential state tax implications should student-athletes be paid.[132]

ii. Team Shopping: Key Programs Garner the Competitive Advantage

One intriguing query in assessing the tax implications of paying student-athletes is whether certain collegiate programs would have an immediate competitive advantage over other

[127] N.C. TAX CODE. §105-134.1(12).

[128] *Id.*

[129] *See* Wiener, *supra* note 124, at 13; *see also* Krasney, *supra* note 83, at 130 – 131 (documenting the various issues which professional athletes must contend with due to differing state income tax rules and allocation formulas).

[130] *See, e.g.*, Krasney, *supra* note 83, at 127 (analyzing the various methods by which state and local governments tax nonresident professional athletes); *see also* Adams, *supra* note 113 (scrutinizing the allocations used to determine the tax liability of professional athletes); *see also* Richard E. Green, *The Taxing Profession of Major League Baseball: A Competitive Analysis of Nonresident Taxation*, 5 SPORTS LAW. J. 273 (1998) (depicting the impact of nonresident tax in Major League Baseball); *see also* Elizabeth C. Ekmekjian, *The Jock Tax: State and Local Income Taxation of Professional Athletes*, 4 SETON HALL J. SPORTS L. 223 (1994) (providing a description of the various tax methods employed by state and local taxing authorities to tax nonresident professional athletes); *see also* Mitchell L. Engler, *supra* note 116 (explaining the problems with the NBA salary cap and proposing appropriate responses); *see also* Pogroszewski, *supra* note 77 (examining the history of state taxation on professional athletes and reviewing the state tax implications affecting resident and nonresident athletes in the U.S.).

[131] At the date of drafting this article, a LexisNexis search of the terms "student athletes and state income tax" results in only ten publications, none of which specifically address the state income tax consequences of taxing student-athletes.

[132] *See e.g.*, Michael Bargo Jr., *College Athletes May Regret Unionization*, AM. THINKER (Mar. 29, 2014) http://www.americanthinker.com/2014/03/college_athletes_may_regret_unionization.html (reporting on the potential tax implications of paying Northwestern University athletes); *see also* 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 (documenting the potential tax implications of paying Northwestern football players); *see also* Alejandra Cancino, *Labor Experts Debate NU Football Ruling*, CHICAGO TRIB. (Mar. 28, 2914) http://articles.chicagotribune.com/2014-03-28/business/ct-nu-athletes-nlrb-0328-biz-20140328_1_athletic-scholarships-national-labor-relations-board-nlrb (discussing the tax consequences of paying student-athletes).

university programs strictly from a tax perspective. Specifically, if student-athletes are paid college athletic programs located in states like Florida, Washington, and Texas will have an instantaneous advantage in recruiting talented athletes by the mere fact that there is no state income tax. The concept of *team shopping* from a tax perspective has been readily witnessed in the domain of professional sports.[133] As professional athletes are courted by teams from across the country, the determination of which program to sign with encompasses numerous variables including team chemistry, coaching staff, the team's reputation, the geography and climate of the program, and where the athlete's family is located.[134] Further, athletes frequently consider the state tax implications before signing with an interested team.[135] Such state tax discretion was noted when free agent pro football player Mike Wallace left the Pittsburgh Steelers for the Miami Dolphins in 2013 where his state tax savings was estimated to exceed one million dollars.[136]

At present, there are dramatic differences between choosing to play a sport for a college or university as an amateur as opposed to playing as a professional athlete for one of the *Big Four* sports leagues.[137] For example, when student-athletes from the high school ranks choose a school to attend, they may either walk-on as a non-scholarship player[138] at any school of their choice in any state, or they may commit themselves to a one-year contract in which they receive an athletic scholarship, also known as a grant-in-aid.[139] If the student-athlete decides later to transfer to a different school in another state, they are free to do so under certain conditions established by the

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[133] *See* Teresa Ambord, *Free Agency Brings Back Pivotal State Income Tax Issue*, ACCOUNTINGWEB (July 2, 2013), http://www.accountingweb.com/article/free-agency-brings-back-pivotal-state-income-tax-issue/222030.

[134] *Id.*

[135] *Id.*

[136] *Id; see also* Terri Eyden, *Which Sports Team is Less "Taxing" for Free Agents*, ACCOUNTINGWEB (Apr. 26, 2013), http://www.accountingweb.com/article/which-sports-team-less-taxing-free-agents/221367; Teresa Abord, *Darelle Revis Trade: Become a Buc, Save Big Tax Bucks*, ACCOUNTINGWEB, *available at* http://www.accountingweb.com/article/which-sports-team-less-taxing-free-agents/221367 (noting the state tax savings emanating from the 2013 trade of pro football cornerback Darrelle Revis from the New York Jets to the Tampa Bay Buccaneers ).

[137] *See* Adam Epstein, *supra* note 71 (noting that the *Big Four* is a phrase commonly used to describe the four major North American professional sports leagues: the National Basketball Association (NBA), the National Football League (NFL), Major League Baseball (MLB) and the National Hockey League (NHL).

[138] *See, e.g.,* Michael Felder, *Examining the Process of Being a College Football Walk-On*, BLEACHER REPORT (Apr. 3, 2013), http://bleacherreport.com/articles/1591099-examining-the-process-of-being-a-college-football-walk-on.

[139] NCAA Manual, art. 12.01.4 Permissible Grant-in-Aid. ("A grant-in-aid administered by an educational institution is not considered to be pay or the promise of pay for athletics skill, provided it does not exceed the financial aid limitations set by the Association's membership."); 15.02.5 Full Grant-in-Aid. ("A full grant-in-aid is financial aid that consists of tuition and fees, room and board, and required course-related books."); 15.02.7 Period of Award. ("The period of award begins when the student-athlete receives any benefits as a part of the student's grant-in-aid on the first day of classes for a particular academic term, or the first day of practice, whichever is earlier, until the conclusion of the period set forth in the financial aid agreement. An athletics grant-in-aid shall not be awarded in excess of the student-athlete's five-year period of eligibility."); *see also*, Rick Allen, *National Letter of Intent Reminders*, INFORMED ATHLETE, http://www.informedathlete.com/national-letter-of-intent-reminders .

NCAA.[140] Still, the athletic scholarship would likely only be valid for one year and they could possibly then transfer to another school in another state.[141] All things being equal, then, the student-athlete may choose whatever school he or she wishes to attend before signing any scholarship offer. This gives the student-athlete some freedom of choice.

Alternatively, in the Big Four sports the choice of where to play generally starts with what team drafts the player out of college (for the National Football League (NFL) or the National Basketball Association (NBA))[142] or high school (Major League Baseball (MLB)) or in some instances the National Hockey League (NHL).[143] In this sense, players do not have freedom of choice as to what team they wish to play for because the team drafted them and maintains their rights.[144] Thus, unless a player becomes a *free agent*, their services are bound to a team for a particular number of years.[145] Player mobility from team-to-team is restricted today, though it is much freer now than it used to be.[146] Following legal challenges by Curt Flood[147] in MLB, John Mackey,[148] Freeman McNeil[149] and Reggie White[150] in the NFL, Spencer Haywood[151] in the

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[140] *E.g.*, 13.6.2.3.2 Transfer Student. ("If a student-athlete attending a four-year institution desires to transfer and that institution provides the permission required (per Bylaw 13.1.1.3), it is permissible for a second institution to provide the student-athlete one official visit to that institution's campus."). However, note that the major portion of transfer regulations in the NCAA Manual begins at 14.5 Transfer Regulations, et seq.

[141] *Id*.

[142] *See* Lisa Horne, *Will We Ever See a High School Football Star Jump Straight to NFL?*, BLEACHER REPORT (Mar. 21, 2013), http://bleacherreport.com/articles/1576431-will-we-ever-see-a-high-school-football-star-jump-straight-to-nfl.

[143] *See, e.g.*, MLB.COM, *First Year Player Draft*, http://mlb.mlb.com/mlb/draftday/rules.jsp (last visited June 3, 2014); Mike G. Morreale, *NHL Teams Grab 20 High-Schoolers in Draft*, NHL.COM (June 23, 2012), http://www.nhl.com/ice/news.htm?id=635956; Marc Normandin, *MLB Draft 2013: How the MLB Draft Works*, SBNATION (June 6, 2013), http://www.sbnation.com/mlb/2013/6/6/4401640/mlb-draft-2013-draft-basics-jonathan-gray-mark-appel-colin-moran

[144] *See, e.g.*, Mike Florio, *Sam May Have Been Better Off Going Undrafted*, PRO FOOTBALL TALK (May 13, 2014), http://profootballtalk.nbcsports.com/2014/05/13/sam-may-have-been-better-off-going-undrafted/.

[145] *See, e.g.*, Christopher R. Deubert, Glenn M. Wong & and Daniel Hatman, *National Football League General Managers: An Analysis of the Responsibilities, Qualifications, and Characteristics*, 20 JEFFREY S. MOORAD SPORTS L..J. 427, 451-462 (discussing restricted free agency, unrestricted free agency, and undrafted free agents).

[146] *See generally* Adam Epstein, *Missouri Sports Law*, 20 JEFFREY S. MOORAD SPORTS L.J. 495 (2013) (discussing efforts by prominent individuals in professional sports to gain more rights to negotiate contracts with teams of their choice by seeking free agent status).

[147] Flood v. Kuhn, 407 U.S. 258, 282 (1972).

[148] Mackey v. NFL, 543 F.2d 606 (8th Cir. 1976).

[149] McNeil v. NFL, 790 F. Supp. 871 (D. Minn. 1992).

[150] White v. Nat'l Football League, 822 F. Supp. 1389, 1394 (D. Minn. 1993), motion for final approval of settlement granted, 836 F. Supp. 1458 (D. Minn. 1993), aff'd, 41 F.3d 402 (8th Cir. 1994);

NBA, and Dale McCourt[152] in the NHL, today's free agent landscape is proscribed by the respective collective bargaining agreements (CBAs) and two terms: *restricted free agency*,[153] in which the player may shop his services around to other teams after a number of years in the league, though the team has the right to match the best offer (also known as a *right of first refusal*), and *unrestricted free agency*[154] in which the player may shop around to the highest bidder.[155] Often, the list of teams the player seeks to offer his services depends upon the tax burden related to the city or state in which the team is located and plays.[156]

Due to the significant differences in recruiting in college sports and drafting in professional leagues, specifically focusing on a student-athlete's power of choice, it is reasonable to suggest that state tax rates could play an important role in college athletic programs' recruitment and retention of paid student-athletes.[157] Athletic programs located in no or low income tax states will have an immediate advantage in enlisting and signing top-caliber athletes from a purely income tax perspective.[158] For paid student-athletes, who would have a finite period of time to earn money at the collegiate level and who could suffer a career-ending injury or scandal involvement while attending college, tax policy issues may play a critical role in determining which team to sign with.[159] Similar to free agents, paid student-athletes will undoubtedly

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[151] Haywood v. Nat'l Basketball Ass'n., 401 U.S. 1204 (1971); *see also*, Denver Rockets v. All-Pro Mgmt., Inc., 325 F. Supp. 1049, 1057 (C.D. Cal. 1971) (rule stating that an individual "shall not be eligible to be drafted or to be a Player [in the NBA] until four years after . . . his original high school class has been graduated").

[152] McCourt v. Cal. Sports, Inc., 600 F.2d 1193 (6th Cir. 1979).

[153] *See, e.g.*, Josh Kirkendall, *2014 NFL Free Agency: Rules Regarding Restricted Free Agents*, SBNATION (Mar. 1, 2014), http://www.cincyjungle.com/2014/3/1/5459682/2014-nfl-free-agency-rules-regarding-restricted-free-agents.

[154] *See, e.g.*, Jon Oliver, *2014 NFL Free Agency Q&A: Part II - Restricted and Unrestricted Free Agents*, SBNATION (Mar. 9, 2014), http://www.canalstreetchronicles.com/2014/3/9/5480188/2014-franchise-tag-nfl-free-agency-questions-answers-restricted.

[155] Interestingly, in the NHL a player becomes eligible for unrestricted free agency at age 27 or 7 accrued seasons in the NHL. *See, e.g.*, J.J. from Kansas, *Getting to Know the CBA - Episode 3: Free Agency*, SBNATION (June 21, 2013), http://www.wingingitinmotown.com/2013/6/21/4436012/getting-to-know-the-cba-episode-3-free-agency .(

[156] *See, e.g.*, Jeremy Pelzer, *Ex-NFL Player's Suit against Cleveland's 'Jock Tax' Sent to Mediation by Ohio Supreme Court*, Cleveland.com (Mar. 11, 2014), http://www.cleveland.com/open/index.ssf/2014/03/ex-nfl_players_suit_against_cl.html.

[157] *See* Richard Rider, *Could California's Sky-High State Income Tax Adversely Impact Our Pro Sports Teams?*, RICHARD RIDER RANTS (Feb. 18, 2014), http://riderrants.blogspot.com/2014/02/could-californias-sky-high-state-income.html (noting that for professional athletes, tax policies are more important than in any other occupation).

[158] *See* Henry J. Cordes, *Texas Sets Bar High for State Axing Income Taxes*, OMAHA.COM (Feb. 24, 2013, 12:30AM) (articulating the understanding that states with no income taxes enjoy markedly higher growth than similar neighboring states that levy the tax); *see also* Dick Nelson, *Let's Put A State Income Tax Back on the Table*, CROSSCUT.COM (July 13, 2012) (quoting the CEP of biotech Dendreon that "having no state income tax is an attractive (recruiting) tool…").

[159] NCAA Manual, art. 14.2 Seasons of Competition: Five-Year Rule. ("A student-athlete shall not engage in more than four seasons of intercollegiate competition in any one sport (see Bylaws 14.02.9 and 14.3.3). An institution shall not permit a student-athlete to represent it in intercollegiate competition unless the individual completes all of

attempt to maximize their college salaries to the extent possible, knowing the paucity of their potential to move into the hefty-salary arena of professional team sports.[160]

### iii. Will State Income Taxes Actually Affect School Choice?

The candid question resonating from the recruitment and retention standpoint of college athletic programs should student-athletes be paid is: Just how much more would a team located in a high income tax state like California have to pay in order to make their offer as attractive as a team located in low or no income tax state like Florida? Consider that at the finish of the 2013 college football season, of the Associated Press (AP) Top 25 Rankings, five teams are located in states that do not impose any income tax, three are situated in states which impose individual income tax rates lower than five percent, and three are positioned in California.[161] In order to attract star high school recruits, teams like Stanford, UCLA and USC may have to offer significantly higher salary and benefit options than Florida State, Notre Dame, Michigan State and Arizona State – all of which at situated in the AP Top 25 NCAA Football Rankings.[162]

A 2009 study of state and federal tax consequences for individual professional athletes performing services in MLB found that athletes performing services in California, New York, Ohio, Minnesota and Wisconsin on average took home only 57.74% of their total income as compared to the 58.82% take-home pay of all MLB athletes (wherever located) or the 62.41% take-home pay of those athletes playing in states that do not impose an individual income tax.[163] Further, the study concluded that on average MLB athletes playing for teams in the previously-

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his or her seasons of participation in all sports within the time periods specified below: 14.2.1 Five-Year Rule. A student-athlete shall complete his or her seasons of participation within five calendar years from the beginning of the semester or quarter in which the student-athlete first registered for a minimum full-time program of studies in a collegiate institution, with time spent in the armed services, on official religious missions or with recognized foreign aid services of the U.S. government being excepted. For international students, service in the armed forces or on an official religious mission of the student's home country is considered equivalent to such service in the United States.").

[160] *See* Richard Rider, *supra* note 157; *see also* Glenn M. Wong, Warren Zola and Chris Deubert, *Going Pro In Sports: Providing Guidance to Student-Athletes In A Complicated Legal & Regulatory Environment*, 28 CARDOZO ARTS AND ENT. L.J. 553, 554 (2011) (providing that the 2008 NCAA national advertising campaign entitled "Going Pro in Something Other Than Sports" affirmed to viewers that of the more than 380,000 student-athletes, most will go professional in something other than sports.).

[161] *See* ESPN, *2013 NCAA Football Rankings – Postseason*, *available at* http://espn.go.com/college-football/rankings (The above referenced teams are: Florida State (#1), University of Central Florida (#10), Baylor University (#13), Texas A&M (#18), Washington (#25), Notre Dame (#20), Michigan State (#3), Arizona State (#21), Stanford (#11), UCLA (#16) and USC (#19); *see also* IND. CODE §6-3-2-1(a) (dictating a 3.4% individual income tax rate); MICH. COMP. LAWS §206.51(1)(g), (h) (offering a 4.25% individual income tax rate); AZ. CODE SEC. 43-1011 (allowing for a 4.54% individual income tax rate); *see also*, O'Connor Davies, *Top State Income Tax Rates*, https://twitter.com/SportsTaxMan/status/461903200518279168/photo/1 (last visited June 3, 2014) (demonstrating a map with the highest statutory marginal income tax rates by states for 2014, tweeted by Robert Raiola, CPA, @SportsTaxMan, May 1, 2014).

[162] *See* ESPN, *2013 NCAA Football Rankings – Postseason*, *available at* http://espn.go.com/college-football/rankings

[163] Pogroszewski, *supra* note 77, at 413 – 414.

listed high-tax bracket states pocketed $140,216.25 less than those athletes who play on teams in Florida, Texas or Washington.[164]

As already noted, a colossal difference between drafting players in the Big Four sports versus recruiting high caliber athletes in collegiate sports is the element of *choice*.[165] Professional athletes, akin to chief executives, musicians and actors, are well-paid for the sole reason that the market determines the price they are worth.[166] However, unlike persons engaged in virtually any other occupation, the market value of professional athletes is severely time bound, resulting in most players having a narrow window of opportunity to capitalize on their value.[167] For college athletes, this window is limited to an eligibility period of four out of five total years.[168] Given the short window of earning potential at the college level, coupled with the exceedingly small number of student-athletes who move on to have professional sports careers, it may be reasonable to assume that given the choice, student-athletes may sign with athletic programs that can offer them the opportunity to pocket the greatest amount of take-home pay.[169] It is thus arguable that highly-ranked collegiate athletic programs located in states with no or low income tax rates will automatically benefit in their recruitment endeavors over programs located in high tax rate states, merely because of their location.

If our hypothetical top high school recruit Mark Donner is offered a salary to play for a college team, he will be in a secure position to shop around for the program which can offer him the most take-home pay. If Florida State offers Donner the equivalent salary that Stanford does, from a state income tax perspective Donner would - all things being considered equal - earn more income by signing with Florida State than he would by signing with Stanford.[170] For Stanford to attract Donner to its program, it will likely have to significantly increase its salary offering to offset the high individual income tax rates in California, or consider presenting Donner with an extraordinarily strong employee benefits package to counter the financial opportunity awaiting Donner at Florida State.

iv. Other State Income Tax Considerations

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[164] *Id*. at 414.

[165] *See supra* notes 122 – 130.

[166] Michael B. Dorff, *Does One Had Wash the Other? Testing the Managerial Power and Optimal Contracting Theories of Executive Compensation*, 30 IOWA K. CORP. L. 255, 262 (2005).

[167] Michael H. LeRoy, *Federal Jurisdiction in Sports Labor Disputes*, UTAH L. REV. 815, 854 (2012).

[168] NCAA Manual arts. 14.2 and 14.2.1 ("A student-athlete shall compete his or her seasons of participation within five calendar years from the beginning of the semester or quarter in which the student-athlete first registered for a minimum full-time program…")

[169] *See* Frank LoMonte, *Fouling the First Amendment: Why Colleges Can't, and Shouldn't, Control Student Athletes' Speech on Social Media*, 9 J. BUS. & TECH. L. 1, 29 (2014) (noting the extremely low number of student-athletes that eventually go pro).

[170] Due to the fact that Florida imposes no individual income tax rate, while California impose the highest personal income tax rate of 12.30%.

Should college athletics adopt a pay-for-play model in the future, top college athletic programs located in a no income tax states may see a significant swell of transfer requests from student-athletes residing in higher income tax states.[171] While student-athletes can transfer schools for multiple reasons, to include lack of playing time, poor performance, head coaching changes, and reduced scholarships, the NCAA has complex rules documenting the protocol which a student-athlete must follow in order to transfer.[172] Currently, due to the controversial "permission to contact" rule, a student-athlete must receive permission from his original school before contacting the school where he wishes to transfer.[173] Still, should student-athletes eventually be paid, new NCAA transfer rules could lead to the creation of free agency in college sports without restrictions from their original schools.[174] While top college athletic programs located in no-income-tax states would realistically not be interested in every student-athlete seeking a transfer, those programs would certainly benefit from the interest of quality student-athletes attempting to maximize their take-home pay. Already, the college hoops transfer market has exploded in Division I due to student-athletes vying for a last-chance shot at the Final Four before they lose eligibility.[175] Tack on a salary and extra income opportunities, and Division I athletics could see a surge of transfer interest in programs that can offer maximum take home pay based solely on the tax laws of their states.

If is also foreseeable that student-athlete transfer requests could intensify if college athletes' salaries are made public. It is well understood that public employees do not enjoy an expectation of privacy regarding their salaries.[176] Laws require mandatory wage disclosure by employers at public sector jobs.[177] Alternatively, there is limited federal wage disclosure legislation pertaining to private sector employees.[178] Thus, at the public university sector, institutions would be required to publicize the salaries paid to employed student-athletes, while private

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[171] *See* Baker, *supra* note 115.

[172] *See* Matthew R. Cali, Comment: *The NCAA's Transfer of Power: An Analysis of the Future Implications The Proposed NCAA Transfer Rules Will Have on the Landscape of College Sports*, 21 JEFFREY S. MOORAD SPORTS LAW JOURNAL 217, 217 (2014).

[173] *Id.* at 218.

[174] *Id.* at 220; *see also* Matt Norlander, *Why/ When a New Transfer Rule Could Have Big Effects on College Hoops*, CBS SPORTS (Jan. 4, 2013, 2:29PM), http://www.cbssports.com/collegebasketball/eye-on-college-basketball/21494783/whywhen-a-new-transfer- (emphasizing the possibility of NCAA transfer rule changes and the significant impact it will have in all NCAA sports).

[175] Luke Meredith, *College Hoops Free Agency? Transfer Numbers Are Up*, ASSOCIATED PRESS (Apr. 19, 2014), http://bigstory.ap.org/article/college-hoops-free-agency-transfer-numbers-are (further noting that the number of college basketball players that have appeared in a game for more than one Division I school has nearly tripled in the last decade).

[176] Dieter C. Dammeier, Symposium: *Privacy and Accountability in the 21st Century: Fading Privacy Rights of Public Employees*, 6 HARV. L. & POL'Y REV. 297, 297 (2012).

[177] Marianne DelPo Kulow, *Beyond the Paycheck Fairness Act: Mandatory Wage Disclosure Laws – A Necessary Tool for Closing the Residual Gender Wage Gap*, 50 HARV. J. ON LEGIS. 385, 420 (2013).

[178] *Id.*

universities would not be required to do so.[179] Such mandated broadcasting at the public university sector could result in student-athletes shopping around for transfer opportunities to institutions boasting higher salaries. Further, lower-paid athletes may be in a position to demand that their own universities dig deep into their coffers to match higher-paid student-athletes in an attempt to maintain their own quality rosters, or negotiate non-cash benefits including personal vehicles, participation in their employers' health insurance programs, workers' compensation and benefits plans, pension coverage, unemployment compensation, workers' compensation, disability insurance and paid family leave.[180] The public knowledge of paid student-athletes'

[179] *Id; see also* Kulow, *supra* note 177, at 420 n. 214 which states, "Examples of laws that require disclosure of public sector job salaries include: COLO. REV. STAT. ANN. § 30-25-111(1.5) (West 2013) ("Salary information for all county employees and officials shall be published twice annually ... ."); IOWA CODE ANN. § 331.907(2) (West 2013) ("A copy of the final compensation schedule shall be filed with the county budget at the office of the director of the department of management."); N.H. REV. STAT. ANN. § 9-F:1(II) (2013) ("The state transparency website shall include the following: ... Annual salaries of all full-time state employees, listed by pay type category and in a searchable format ... ."); N.D. CENT. CODE ANN. § 40-01-09.1 (West 2011) (with respect to city government employees, "salary checks need not be published if the governing body elects to publish an annual salary schedule for each employee"); OR. REV. STAT. ANN. § 294.250(3) (West 2012) ("Once each year the county shall publish the actual individual gross monthly salary of all regular officers and employees occupying budgeted positions."); S.D. CODIFIED LAWS § 6-1-10 (2013) ("The boards of county commissioners, the governing board of each municipal corporation, and school boards shall publish ... a complete list of all the salaries of all officers and employees ... ."); TEX. GOV'T CODE ANN. § 25.0172(j) (West 2011) ("Before raising a salary [of a county judge] the commissioners court must publish notice containing information of the salaries affected and the amount of the proposed raise in a newspaper of general circulation in the county."); and WIS. STAT. ANN. § 13.695 (West 2013) ("Each agency shall file with the board ... a statement which identifies the officers and employees of the agency who are paid a salary and whose regular duties include attempting to influence legislative action ... ."); *see also* Government in the Sunshine Act, 5 U.S.C. § 552b (2006); Freedom of Information Act, 5 U.S.C. § 552 (2006 & Supp. III 2009); Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.). But note that while the Sunshine Act requires "open meetings" of government agencies, internal matters--presumably including discussion or disclosure of individual low-level wages--are excluded by subsection (c)(2) (matters that "relate solely to the internal personnel rules and practices of an agency"). Section (b)(2) of the Freedom of Information Act uses the same language to exclude internal matters. The Administrative Procedure Act provides a framework within which government agencies may take action, but does not directly pertain to compensation disclosure."

[180] For example, would a school like the University of Alabama, whose athletic department generated $143 million during the 2012-2013 football season, share a portion of this revenue with its collegiate football players… or would deep-pocketed boosters help defray employment costs by paying players under the table to ensure that the Crimson Tide stays competitive in the marketplace? *See* Greg Wallace, *Making the Case Against A College Football Players' Union*, BLEACHER REPORT (Apr. 7, 2014) http://bleacherreport.com/articles/2020286-making-the-case-against-a-college-football-players-union; *see also* Erick S. See, *A Perception of Impropriety: The Use of Package Deals in College Basketball Recruiting*, 17 VILL. SPORTS & ENT. L.J. 59 (2010) (addressing that the history of college sports abounds with educational institutions recruiting high profile, elite athletes and the parallel infractions involving university booster clubs, coaches and agents showering the recruits with cash, vehicles and other illegal benefits to sway the recruit's college selection to the providing institution); *see also* Mary E. O-Connell, *On the Fringe: Rethinking the Link Between Wages and Benefits*, 67 TUL. L. REV. 1422, 1425 (1993) (describing the various noncash benefits received by some participants in the paid labor force); *see also* Maher et. al, *supra* note 95, at 435 (2010) (noting that employee benefits come in many forms, including monthly pensions, 401(k) contributions, and the payment of health insurance premiums); *see also* Anne Wells, Note: *Paid Family Leave: Striking a Balance Between the Needs of Employees and Employers*, 77 S. CAL. L. REV. 1067 (2004) (analyzing the various aspects of the Family Medical Leave Act (FMLA)).

salaries could likewise lead college athletes to form labor unions to help further negotiate their salaries and benefits.[181]

As presented, state tax rates could play a significant role in allowing certain collegiate programs to have an immediate competitive advantage over other university programs in the event student-athletes are eventually paid. However, the impact which constitutionally-imposed state income taxes could have on college athletes does not end here – the imposition of the *jock tax* could likewise also play a role in the futuristic era of paying student-athletes.[182]

### C. The Impact of the Jock Tax on Paid Student-Athletes

Income tax rates encompass only a part of the overall impression that state tax issues could have on college athletics. The influence of the *jock tax* could also impact the entirety of college athletics should student-athletes be paid.[183] It is a well settled principal that states not only have the power to tax their own residents on income from all sources wherever derived, but also nonresidents on income earned from sources within the state.[184] Professional athletes make up the most visible instance of a class of persons who occasionally cross state lines for work; and due to their publicized travel schedules are relatively effortless targets for states to impose taxes on.[185] While historically athletes filed returns in just two states - the state of their residence or domicile and the state where they play their home games – many states now require nonresident athletes playing for out-of-state teams to file income tax returns and pay tax on the portion of their income earned while playing in that state.[186]

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[181] *See* Michael H. LeRoy, *An Invisible Union for an Invisible Labor Market: College Football and the Union Substitution Effect*, 2012 WIS. L. REV. 1077, 1084 (2012) (Addressing that a plausible threat to unionize college football players could produce a "union substitution" effect suggesting that employers often provide more voice and benefits to employees when there is a possibility of unionization); *see also* Nicholas Fram and T. Ward Frampton, *A Union of Amateurs: A Legal Blueprint to Reshape Big-Time College Athletics*, 60 BUFFALO L. REV. 1003, 1006 (2012) (Noting that recently college athletics have changed dramatically, to include talk of strikes and players unions to negotiate with the NCAA); *see also* M. Alexander Russell, *Leveling the Playing Field: Identifying a Quasi-Fiduciary Relationship Between Coaches and Student-Athletes*, 43 J.L. & EDUC. 289, 291 (2014) (identifying the recent Northwestern University college football players' attempt to create the first labor union for college athletes); *see also* Jim Litke, Pat Fitzgerald, *Northwestern Football Coach, Urges Players to Vote Against Union*, Huffington Post (Apr. 5, 2014, 5:05 PM EDT), http://www.huffingtonpost.com/2014/04/05/pat-fitzgerald-union_n_5097986.html; *see also* Zac Ellis, *Northwestern Football Players Seek to Unionize; What Does the Development Mean?* (Jan. 28, 2014), http://college-football.si.com/2014/01/28/northwestern-football-kain-colter-labor-union/ (Following the NLRB decision allowing Northwestern University football players to be recognized as employees, the football players requested representation from a labor union. Such request was met with negative feedback from the University, Northwestern football coach Pat Fitzgerald, and the NCAA).

[182] The "jock tax" refers to a popular measure among taxing jurisdictions to impose income taxes to the salaries of visiting professional baseball, basketball, hockey and football players. *See* Adams, *supra* note 113, at 79.

[183] The authors' assumption is based on the notion that states have the constitutional right to not only tax their residents, but also nonresidents on their source income earned within the state. *See* Krasney, *supra* note 83, at 132.

[184] Krasney, *supra* note 83, at 132.

[185] *See* Schultz, *supra* note 121, at 458-460.

[186] Krasney, *supra* note 83, at 130.

Taxing nonresident professional athletes gained momentum in the early 1990s when professional athletes' salaries began to sky rocket.[187] Philadelphia was the pioneer city to enforce a tax on athletes earning income within city limits; and almost simultaneously the state of Illinois enacted a bill informally labeled *Michael Jordon's Revenge* which imposed a tax only on athletes who are from states that tax athletes residing in Illinois.[188] Illinois' bill was ratified in 1992 in retaliation against California's nonresident tax on Michael Jordan and the Chicago Bulls following the team's 1991 NBA Championship versus the Los Angeles Lakers.[189] The bill's purpose was to recover tax revenue which Illinois lost to other states and to put pressure on those states which taxed nonresident professional athletes in the hopes of eliminating the tax.[190] More than twenty years later, the consequence of Philadelphia's implementation of a tax on non-resident athletes is that all professional athletes, coaches and certain staff members, regardless of their income level, must consider the jock tax.[191]

Should student-athletes be paid in the future, they will be subject to the jock tax in the same fashion that professional athletes currently are. With regard to nonresidents, states have adopted two competing approaches to taxing professional athletes – (1) residence or domicile and (2) source taxation.[192] Specifically, states have the constitutional power to tax their own residents on all sources of income no matter where derived, and nonresidents on their income earned from sources within the state.[193] Professional athletes who travel and compete in games across state lines are thus subject to the income tax obligations of the various states in which they play their sports.[194]

Referencing the previously discussed 2009 study analyzing the tax consequences of individual professional athletes playing in MLB, the author concluded that taxing nonresident athletes increases the athlete-taxpayer's overall tax burden.[195] The results of the study further established that athletes employed in states with no individual income tax pay the greatest share of nonresident tax; however, those athletes are taxed the least overall as compared to MLB athletes

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[187] *See* Fratto, *supra* note 83, at 40.

[188] *Id.*

[189] *See* Pogroszewski, *supra* note 77, at 395 (describing the increase in national attention of taxing nonresident athletes in the early 1990's); *see also* Fratto, *supra* note 83, at 40 (briefly discussing the passage of "Michael Jordan's Revenge").

[190] Fratto, *supra* note 83, at 40; *see also* Ekmekjian, supra note 130, at 235.

[191] David Martinez, *The "Jock Tax"*, BAKER, NEWMAN, NOYES (Oct. 2013), http://www.bnncpa.com/resources/library/the_jock_tax.

[192] Krasney, *supra* note 83, at 132. "Source taxation" refers to taxing income based on the origin or place where services are actually performed.

[193] *Id.* at 133, *citing* II JEROME R. HELLERSTEIN & WALTER HELLERSTEIN, STATE TAXATION P. 20.01 (1992).

[194] *Id.* at 129.

[195] Pogroszewski, *supra* note 77, at 413; *see also supra* text accompanying notes 163-164.

located in states which tax personal income.[196] The increased amount of nonresident taxes paid by athletes in no-income tax states flows from the fact that these states do not offer a tax credit against their individual state income taxes since they do not impose such taxes on their own residents.[197] Such findings concluded that despite that fact that all professional athletes pay some percentage of income tax on their personal earnings either as a resident or nonresident taxpayer, those athletes who reside in states with no income tax retain the largest percentage of their overall salary.[198] With regard to paid student-athletes, this study further strengthens the perception that collegiate athletic programs located in states with no income tax will automatically benefit in their recruitment and retention strategies by offering elite athletes immediate tax-saving opportunities based purely on their physical locations.

Certainly, no matter the location of a player's domicile the exposure to the jock tax results in increased tax compliance and complexity for all professional athletes.[199] While outside the scope of this article, it is important to note that the jock tax increases the exposure of professional athletes to double taxation on income earned outside their states of residence.[200] Such exposure has been explored in numerous academic publications, most of which focus on the effects of the two generally accepted methods used in allocating professional athletes' earned income – the duty days[201] and the games played[202] formulas.[203] Paid student-athletes, no matter

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[196] *Id.* at 413. The author of this study noted, "Nonresident taxation increases the tax burden for each individual athlete by $27,644.32 or .92%... [O]f the $774,041 in additional nonresident tax paid by athletes, a disproportioned 37.05% is paid by Florida, Texas and Washington resident athletes."

[197] *Id*.

[198] *Id.* at 414.

[199] *See* Krasney, *supra* note 83, at 135 (noting the difficulties and potential conflicts of states taxing nonresident professional athletes); *see also* DiMascio, *supra* note 84, at 955 (discussing the tax complexities facing nonresident professional athletes).

[200] *See* DiMascio, *supra* note 84, at 955.

[201] In simplistic form, the duty days formula is the ratio of the total number of days an athlete works in a state as compared to the total number of days on duty (including training camp days, preseason games, and postseason games). The ratio is then multiplied by the athlete's total taxable income, and the tax liability is calculated by multiplying the state's tax rate by the apportioned taxable income. *See* Fratto, *supra* note 83, at 42.

[202] The games played formula, which yields a higher tax liability than the duty days formula, is calculated by the taxing jurisdiction taking the number of games played in its jurisdiction and dividing that number by the total number of games played. *See* Fratto, *supra* note 83, at 43.

[203] *See e.g.*, Green, *supra* note 130 (discussing the application of the duty days formula among various states and its impact on MLB nonresident athletes); Adams, *supra* note 113, at 100 - 105 (comparing the effects of the duty days and games played formulas on professional athletes); Kevin Koresky, *Tax Considerations for U.S. Athletes Performing in Multinational Team Sport Leagues or "You Mean I Don't Get All of My Contract Money?!"*, 8 SPORTS LAW J. 101, 108 – 109 (2001) (presenting the two most common methods of allocating nonresident professional athletes' income); Fratto, *supra* note 83, at 42 – 44 (comparing and contrasting the duty days formula and the games played formula), Krasney, *supra* note 83, at 135 – 139 (analyzing the two most common allocation methods applicable to nonresident professional athletes); Pogroszewski, *supra* note 77, at 404 (presenting the uniform approach to implementing the duty-day formula to professional sports).

where they choose to play college sports, will be subject to the various complexities associated with the jock tax.

## IV. Conclusion

In 2014, the NLRB ruled in favor of the unionization of Northwestern University football players, taking the debate of whether or not student-athletes should be paid to another level. Just two months later, the Board of Governors for the State Employees Association of North Carolina voted to allow college athletes at public universities to join the union, officially recognizing them as state employees rather than as student-athletes.[204] With little question, these movements emerged from profound encouragement from the likes of quarterback Johnny Manziel flashing his "Show me the money" hand signals to the 2013 Time Magazine headline, "It's Time to Pay College Athletes."[205] Still, paying student-athletes could have remarkable implications from a state income tax perspective.[206] This article explored the potential state income tax implications of classifying paid student-athletes as employees.

From a state income tax perspective, a critical question with respect to paying student-athletes is whether certain collegiate programs located in no or low income tax states will have an immediate competitive advantage over other university programs located in high income tax states. Based on the significant differences in recruitment between college and professional athletics, specifically focusing on a student-athlete's power of *choice*, it is arguable that state tax rates could play a significant role in college athletic programs' recruitment and retention of paid student-athletes.[207] Further, should student-athletes be paid, new NCAA transfer rules could lead to the creation of free agency in college sports without restrictions from their original schools, and the published salaries of student-athletes could result in a potential surge of transfer interest in athletic programs offering maximum take home pay based solely on state tax laws.[208] The public's knowledge of student-athletes' salaries could also lead to the formation of labor unions to negotiate salaries and benefits.[209]

Finally, the imposition of the professional athlete *jock tax* could impact the world of collegiate athletics should student-athletes be paid. Athletes employed in states with no individual income tax may pay the greatest share of nonresident taxes, but are taxed the least overall as compared to

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[204] Adam Peck, *North Carolina Union Opens Its Doors for College Athletes*, THINK PROGRESS (May 21, 2014, 9:19AM), http://thinkprogress.org/sports/2014/05/21/3439515/north-carolina-union-opens-its-doors-for-college-athletes/

[205] *See* Roger Sherman, *Explaining the Johnny Manziel Had Sign Texas A&M President Used*, SB NATION (Sept. 6, 2013, 9:00AM), http://www.sbnation.com/college-football/2013/9/6/4700258/johnny-manziel-texas-am-president-drake-ovo-hand-signal; *see also* Sean Gregory, *supra* note 7.

[206] *See supra* note 12 and accompanying text.

[207] *See* Rider, *supra* note 157.

[208] *See supra* note 174 and accompanying text; *see also* Dammeier, *supra* note 176, at 297.

[209] *See supra* notes 94 and 181 and accompanying text.

athletes located in states which impose a tax on personal income.[210] Such notion allows athletes residing in states with no income tax to retain the largest portion of their overall salary, thus reinforcing the ideal that collegiate athletic programs located in states with no income tax will automatically benefit in their recruitment and retention strategies by offering athletes immediate tax-saving opportunities based solely on their physical locations.[211]

The concept of the student-athlete as a non-paid, non-employee amateur has evolved little over time, though the national discussion remains active. From the *Nemeth* worker's compensation decision and its progeny to today, consideration as to whether student-athletes should be paid for their services and considered employees has never garnered more intensity. The model of pay-for-play and student-athletes as employees has gained momentum in recent years, culminating with the NLRB's 2014 ruling. At present, the NCAA is engulfed in lawsuits, the major college conferences are considering forming a new Division, the NLRB decision has given the first official proclamation that student-athletes may unionize and should be considered employees, and *Time* Magazine has given the issue its cover story.

With impending possibility, paying student-athletes may be the future of college athletics. For student-athletes maintaining a vested interest in seeking compensation for their services given to the universities they play for, and for athletic programs entertaining the idea of eventually paying student-athletes, it is vital to consider the potential state income tax implications of implementing the pay-for-play model into college athletics.

[210] *See supra* note 196 and accompanying text.

[211] *See supra* notes 195 - 198 and accompanying text.