



RECENT DEVELOPMENTS

PAYMENT FOR COLLEGE FOOTBALL PLAYERS IN NEBRASKA

The National Collegiate Athletic Association (“NCAA”) describes its mission as striving “to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body.”¹ As college athletics, and in particular programs in Division I-A,² have become more of a business,³ however, the emphasis within the term “student-athlete” appears to have shifted away from “student” and toward “athlete.” This shift appears most dramatically in the context of the two “revenue-producing” sports, football and men’s basketball.⁴ In the past twelve years, the amount of money generated by these two sports has increased nearly 300%, such that they now fund almost all other sports programs.⁵ Despite this exponential increase, the maximum official compensation for student-athletes has remained largely unchanged: a full grant-in-aid, which includes tuition and fees, room, and required course-related books.⁶ As a result of this stagnation, many col-

¹ Nat’l Collegiate Athletic Ass’n, *NCAA Mission, Values and Goals*, at <http://www1.ncaa.org/eprise/main/Public/hr/mission.html> (last visited Nov. 8, 2003).

² The NCAA is divided into three primary divisions (I, II, and III), generally broken down by the size of the school. The largest schools tend to be in Division I because of its more demanding requirements for event attendance and the number of different sports in which a school must field teams. See Nat’l Collegiate Athletic Ass’n, *What’s the Difference Between Divisions I, II, and III?*, at http://www.ncaa.org/about/div_criteria.html (last visited Nov. 6, 2003). In addition, while athletes in Divisions I and II may receive athletically related financial aid, Division III offers no athletic scholarships. *Id.* In football, Division I schools are further divided into Division I-A schools (the top 117 programs) and Division I-AA (the “non-major” scholarship football programs). *Id.*

³ See generally ANDREW ZIMBALIST, *UNPAID PROFESSIONALS: COMMERCIALISM AND CONFLICT IN BIG-TIME COLLEGE SPORTS* (1999).

⁴ See Daniel L. Fulks, *Revenues and Expenses of Division I and II Intercollegiate Athletic Programs 2001*, at 22 tbl. 3.2, available at http://www.ncaa.org/library/research/i_ii_rev_exp/2002/d1_d2_revenues_expenses.pdf. In 2001, NCAA Division I-A schools averaged \$17.25 million in revenue. *Id.* Combined, football and men’s basketball averaged to contribute more than \$14.5 million, which represents 84% of all revenues. *Id.* Football alone generates 63% of all revenues at Division I-A schools. *Id.* Some studies have pointed out that while, on average, Division I schools may generate a profit, a number of programs—including highly competitive schools such as the University of Michigan and Ohio State University—are unprofitable or barely break even. See Michael Sokolove, *Football is a Sucker’s Game*, N.Y. TIMES, Dec. 22, 2002, § 6 (Magazine), at 36 (citing ZIMBALIST, *supra* note 3).

⁵ See Fulks, *supra* note 4.

⁶ 2003-2004 NCAA DIVISION I MANUAL §§ 15.02.5, 15.1.1, available at http://www.ncaa.org/library/membership/division_i_manual/2003-04/2003-04_d1_manual.pdf [hereinafter NCAA BYLAWS]. At certain schools, this amount can be as high as \$40,000 per year. See, e.g., Duke University Financial Aid Office, *Duke University—Facts & Figures, 2003-2004 Cost of Attendance*, at <http://dukefinancialaid.duke.edu/facts.asp> (last visited Nov. 8, 2003).

legiate athletic teams have turned to extra “unofficial” compensation to gain an advantage on the competition, acting in direct violation of NCAA bylaws.⁷ Reports of athletic scandals, ranging from illegal gifts during recruiting to altering an athlete’s grades to preserve his or her eligibility, have become an annual occurrence, with the offending schools including well-known institutions like the University of Michigan, Florida State University, and the University of Alabama.⁸ This past spring, in response to these scandals, the Nebraska legislature passed Nebraska Legislative Bill 688,⁹ which calls for additional compensation of football players at the University of Nebraska-Lincoln (hereinafter “Nebraska-Lincoln” or “the University”).¹⁰

The bill’s intent is to legitimize and regulate any payments made to Nebraska football players, in an attempt to prevent “under the table” payments made in violation of NCAA rules.¹¹ By creating a system of official, aboveboard compensation, the bill aims to allow the players to share in the vast revenues they help create.¹² Implementation of the bill, however, remains problematic. While the legislation purports to be economically fair by providing “big-time” college athletes with a portion of the revenue they generate, were the bill implemented it would be unlikely to withstand legal challenges, most notably under Title IX of the Education Amendments of 1972 (“Title IX”).¹³

The Nebraska legislation comes at a time of increasing displeasure with what are often perceived as arbitrary NCAA policies that do not allow student-athletes many of the same opportunities as ordinary students. While the NCAA has emphasized the importance of the amateur aspect of college athletics,¹⁴ it has responded to the changing environ-

⁷ See, e.g., NCAA BYLAWS § 15.01.2 (“Any student-athlete who received financial aid other than that permitted by the [NCAA] shall not be eligible for intercollegiate athletics.”).

⁸ For example, the University of Michigan men’s basketball team was sanctioned by the NCAA in May 2003 for numerous violations committed in the 1990s, including players’ acceptance of regular payments and gifts from a prominent Michigan booster. See Avani Patel, *NCAA Adds to Michigan Penalty; Wolverines Lose 4 Scholarships*, CHI. TRIB., May 9, 2003, at C1. The punishment includes a two-year ban from postseason play, the loss of one scholarship (out of thirteen) for four years and three and a half years of probation. *Id.* See also Sokolove, *supra* note 4, at 36 (describing sanctions against Florida State University and the University of Alabama, as well as Gardner-Webb University).

⁹ NEB. REV. STAT. §§ 85-1, 131-37 (2003).

¹⁰ *Id.* § 85-1, 134. The Nebraska Cornhuskers have consistently been one of the Top 25 football teams in the nation. The team has won forty-seven conference championships and five national championships, including three in the 1990s. See MICHAEL BABCOCK, *GO BIG RED: THE COMPLETE FAN’S GUIDE TO NEBRASKA FOOTBALL* 24 (1998).

¹¹ Nebraska Senate Committee on Business and Labor, *Committee Statement—LB 688*, at 2, available at http://www.unicam.state.ne.us/PDF/CommitteeStatement_LB688.pdf (Nov. 7, 2003).

¹² NEB. REV. STAT. §§ 85-1, 132 (1), (10) (2003).

¹³ Title IX, Education Amendments of 1972, 20 U.S.C. §§ 1681-1688 (2000).

¹⁴ See, e.g., Nat’l Collegiate Athletic Ass’n, *Purpose and Goals*, at <http://www.ncaa.com/about/purposes.html> (last visited Nov. 19, 2003); Nat’l Collegiate Athletic Ass’n,

ment with a number of measures designed to increase the money available to student-athletes. Perhaps most importantly, the NCAA now allows student-athletes, even those receiving full scholarships, to hold paying jobs during the academic year.¹⁵ The NCAA passed this bylaw in response to numerous complaints by student-athletes, which ranged from an inability to afford a McDonald's hamburger¹⁶ to the need to gain professional experience for a non-athletic career.¹⁷ Students demonstrating financial need may also receive money from certain federal grants and the NCAA Special Assistance Fund.¹⁸ While these funds have limits on who may receive them and on what they may be used,¹⁹ the NCAA has also proposed a more general fund to assist other athletes in paying for expenses such as emergency travel and medical costs.²⁰ The money given from these funds does not count against the maximum allowable financial aid package.²¹ Finally, beginning in 2003, students may accrue frequent-flyer miles for all athletics-related travel, which for some players could be worth more than \$1,000 per year.²²

Amateurism, at <http://www1.ncaa.org/membership/enforcement/amateurism/index.html> (last visited Nov. 19, 2003).

¹⁵ NCAA BYLAWS § 15.2.6. Prior to August, 1998, scholarship athletes could not have paying part-time jobs during the academic year. See "DI Proposal: 199-15 Financial Aid—Division I Employment Earnings," at https://goomer.ncaa.org/wdbctx/LSDBi/LSDBi.LSDBi_LP_Search.D1_DisplayProposal?p_ID=90&p_HeadFoot=1&p_CallCount=1&p_BylawTerms=ThisIsADummyPhraseThatWillNotBeDuplicated&p_IntentTerms=ThisIsADummyPhraseThatWillNotBeDuplicated&p_RationaleTerms=ThisIsADummyPhraseThatWillNotBeDuplicated (last visited Nov. 6, 2003). Starting in 1998, a full-scholarship student could earn up to \$2,000 per year through employment. 2002-2003 NCAA DIVISION I MANUAL §§ 15.2.6.1, 15.02.4.1(a)(6)-(8), available at http://www.ncaa.org/library/membership/division_i_manual/2002-03/2002-03_ncaa_d1_manual.pdf. In 2003, however, the NCAA revised this rule and removed the earnings limit. NCAA BYLAWS § 15.2.6.

¹⁶ Dan Wetzel, *Arrogant Michigan Must Accept Truth to Move Beyond It* (Mar. 21, 2002), at <http://cbs.sportsline.com/b/page/pressbox/0,1328,5157352,00.html>.

¹⁷ See Lisa Dillman, *NCAA Decides Athletes May Go to Work*, L.A. TIMES, Jan. 14, 1997, at C1; Larry Keech, *NCAA Jobs Bill Raises Questions*, GREENSBORO NEWS & REC., July 14, 1998, at C1.

¹⁸ NCAA BYLAWS § 15.2.4.1(e). In 2000-2001, the average award per recipient from the Special Assistance Fund (including Pell Grants) was \$421.91. Nat'l Collegiate Athletic Ass'n, *NCAA Membership Report 2001*, at 12-13, available at http://www.ncaa.org/library/membership/membership_report/2001/12-13.pdf (last visited Nov. 8, 2003).

¹⁹ The Special Assistance Fund covers four types of expenditures: (1) clothing or other essential expenditures up to \$500, (2) expendable academic course supplies, (3) medical/dental costs not covered by other insurance, and (4) costs associated with student-athlete or family emergencies. See Nat'l Collegiate Athletic Ass'n, *Guidelines for Use of Fund Clarified*, NCAA NEWS (Sept. 24, 2001), available at <http://www.ncaa.org/news/2001/20010924/div1/3820n16.html>.

²⁰ See Mark Alesia, *New NCAA Assistance Fund Will Benefit Larger User Group*, INDIANAPOLIS STAR, Apr. 16, 2003, at 1D.

²¹ NCAA BYLAWS § 15.01.7.1.

²² NCAA BYLAWS § 16.12.1.11(b). Members of the University of Hawaii men's basketball team and men's and women's swimming teams each accrued about 57,400 miles in the 2002-03 season; *Consumer Reports* magazine values those miles at about \$.02 each, for a total value of \$1,148. Jack Carey, *College Athletes Can Collect Frequent-Flier Miles*, USA TODAY, June 2, 2003, at 3C.

Despite these recent changes, the NCAA has faced increasing criticism, both in the media and in state legislatures. In July 2003, the University of Utah basketball team was placed on probation for a series of minor violations by its coach. These violations included the coach's paying for a pizza he shared with a player at a restaurant, when there would have been no violation had he brought the pizza back and served it in his home.²³ In response to the media outcry,²⁴ the NCAA recently amended its bylaws to remove the seemingly trivial distinction of where a meal was consumed, so long as the school makes appropriate documentation.²⁵

The case of University of Colorado football player and world champion freestyle skier Jeremy Bloom has also gained the attention of NCAA critics.²⁶ In 2002, the NCAA informed Bloom that he could not receive any endorsement money based on his Olympic skiing success or he would be ruled ineligible to compete in college football.²⁷ Bloom has since filed suit, claiming the restriction is unenforceable under state law.²⁸ In response, NCAA President Myles Brand has defended the NCAA's treatment of student-athletes, outlining the many funds available for financially needy students and the \$1 billion in scholarships spent on student-athletes each year.²⁹

Nonetheless, the publicity surrounding the Bloom case has caused legislators in at least one other state to take action. Last year, two California state senators introduced a bill that would prohibit universities in the state from adhering to NCAA rules that limit the rights of athletes, including prohibitions on earning income from their name, hiring an agent, and transferring schools.³⁰ This proposal, along with Nebraska Legislative Bill 688, represents perhaps the strongest challenge to the NCAA in its history.

The Nebraska bill focuses on football for a number of reasons. With few exceptions, only football and men's basketball generate significant revenues for college athletic departments,³¹ making these sports logical

²³ See Robyn Norwood, *Utah is Penalized for Rules Violations*, L.A. TIMES, July 31, 2003, § 4, at 5. See also NCAA BYLAWS § 16.12.1.5.

²⁴ See, e.g., Rick Reilly, *Corrupting Our Utes*, SPORTS ILLUSTRATED, Aug. 11, 2003, at 154.

²⁵ See Norwood, *supra* note 23, at 5.

²⁶ See, e.g., *Let Jeremy Bloom Play C.U. Football; NCAA Rules Needlessly Punish Skier*, ROCKY MTN. NEWS (Denver), July 31, 2002, at 42A; Irvin Muchnick, *Welcome to Plantation Football*, L.A. TIMES, Aug. 31, 2003, at I-14.

²⁷ See *Bloom Hopes to Make Choice by June 1*, ROCKY MTN. NEWS (Denver), May 14, 2003, at 13C. Skiers rely on endorsement deals to finance their careers, because there is little money elsewhere in the sport. *Id.*

²⁸ See Adam Thompson, *Bloom's Lawyers File Brief*, DENV. POST, July 3, 2003, at D-10.

²⁹ Adam Thompson, *Bloom Receives Response from Brand*, DEN. POST, Aug. 17, 2003, at C-12.

³⁰ S.B. 193, 2003-2004 Reg. Sess. (Cal. 2003).

³¹ See Fulks, *supra* note 4, at 22 tbl.3.2. At Nebraska-Lincoln, the football team ac-

choices for athlete compensation. In Nebraska, however, while the men's basketball team is modestly successful,³² few things can rival Husker football for importance in the state. The team has sold out 73,918-seat Memorial Stadium more than 250 consecutive times, which makes the stadium the third-largest "city" in the state on game days.³³ Fans routinely drive three hours or more to attend each game and are willing to trek thousands of miles to watch the Huskers in action.³⁴ Senator Ernie Chambers, the bill's sponsor, estimates that Nebraska-Lincoln football generated \$155 million in revenue from 1994 to 2003.³⁵ As Chambers notes, however, the University distributed only \$14 million in scholarships and aid to the players during this same period.³⁶

As a result, Chambers proposed Legislative Bill 688, which the Legislature approved and Governor Mike Johanns signed into law on April 16, 2003.³⁷ The text of the bill describes the problems inherent in the college athletic recruiting and competition process, including "rampant" scandals, players from "impoverished families" who are "vulnerable to inducements, benefits, and other types of [illicit] compensation," and the "unduly restrictive and unreasonable" rules of the NCAA.³⁸ The bill goes on to assert that the University's interest in maintaining a successful football team, due to the income generated, the publicity gained, and the overall benefit to the University's image, often places substantial burdens on student-athletes, who are recruited solely for their athletic ability and not because of any academic achievements.³⁹

counted for more than \$32.6 million of the more than \$47.2 million in revenues generated by the athletic department between July 1, 2001 and June 30, 2002. Office of Postsecondary Educ., U.S. Dep't of Educ., *Equity in Athletics Disclosure Website*, at <http://www.ope.ed.gov/athletics/index.asp> (last visited Nov. 8, 2003) [hereinafter *Equity in Athletics*].

³² The Husker men's basketball team won the NIT Championship in 1996 and reached the NCAA Tournament numerous times in the past two decades, but has never been in serious contention for the National Championship, as the football team is nearly every year. See Univ. of Neb. Athletic Dep't, NEBRASKA BASKETBALL RECRUITING AND MEDIA GUIDE (2003); Babcock, *supra* note 10, at 24.

³³ See Univ. of Neb. Athletic Dep't, OFFICIAL NEBRASKA [FOOTBALL] MEDIA AND RECRUITING GUIDE 324 (2003); Ctr. for Pub. Affairs Research, Univ. of Nebraska-Omaha, *Nebraska Cities and Towns Ranked by 2000 Population*, at http://www.unomaha.edu/~cpar/table_2b1.pdf (noting that the third-largest city in the state, Bellevue, has a population of 44,382).

³⁴ See Terry Douglass, *Husker Fans Flock to Desert for Fiesta Bowl* (Jan. 2, 2000), HUSKERS HQ, at http://www.theindependent.com/stories/010200/Hus_huskernews0102.html (last visited Aug. 10, 2003).

³⁵ See Milan Simonich, *Pay for Play?*, PITTSBURGH POST-GAZETTE, Mar. 30, 2003, at D1.

³⁶ *Id.* The remainder of the money was used primarily to finance other sports at the University. See Fulks, *supra* note 4.

³⁷ Bill Status, L.B. 688, available at <http://www.unicam.state.ne.us/scripts/dbBSInfo.asp?Prefix=L.B.&BillNumber=688&Suffix=&Session=> (last visited Nov. 8, 2003).

³⁸ NEB. REV. STAT. §§ 85-1, 131(1)-(2), (4) (2003).

³⁹ *Id.* §§ 85-1, 132.

The bill establishes two methods for protecting the rights of these athletes against potential abuse by universities. The first alternative provides compensation “in the same manner that non-athlete students are compensated for performing various tasks while a student,”⁴⁰ most likely in the form of a stipend.⁴¹ The bill states that the amount of the stipend should be set by the University,⁴² with most state officials supporting an amount of \$200–\$400 per month.⁴³ The legislation also contains the option of granting similar stipends to other athletes competing in inter-conference athletics.⁴⁴

While the bill does not provide examples of the “various tasks” non-athletes perform or of the compensation received by students who perform them,⁴⁵ students at schools across the nation do indeed receive benefits for serving in certain roles, such as student government.⁴⁶ Compensation varies, but often includes stipends, free cell phones, money for clothing, and even salaries in some cases.⁴⁷ Two key differences exist, however, between the payment of student government officials and student-athletes. First, all of these forms of compensation, if offered to athletes, would violate NCAA rules and lead to penalties, both for the student-athlete and for the college.⁴⁸ Second, as opponents of the bill note, student-athletes already receive a great deal of benefits, both financial and otherwise.⁴⁹ Full athletic scholarships include tuition, fees, books, and room and board.⁵⁰ In addition, athletes often receive team-related clothing and equipment and have access to medical facilities and aca-

⁴⁰ *Id.* §§ 85-1, 133.

⁴¹ *Id.* §§ 85-1, 134.

⁴² *Id.*

⁴³ *See, e.g.,* Simonich, *supra* note 35.

⁴⁴ NEB. REV. STAT. §§ 85-1, 134 (2003).

⁴⁵ Nebraska Revised Statute Section 85-1, 137 refers to part-time work “of at least twelve hours a week;” however, this section is labeled as a “preferable alternative” to Section 85-1, 134, and not an addendum or definition of the terms in Section 85-1, 133. *Id.* § 85-1, 137. In addition, as noted *supra* note 15, in 1998, the NCAA changed its bylaws, allowing full-scholarship athletes to hold part-time jobs. Thus, it does not follow that the intent of the bill is to secure the ability of athletes to gain employment.

⁴⁶ *See, e.g.,* Am. Student Gov’t Ass’n, *The Student Government Salary Survey*, available at http://www.studentleader.com/sl_16.htm (last visited Nov. 8, 2003). The survey reports that 71% of undergraduate institutions nationwide, including 85% of public schools and 87% of schools with enrollments greater than 30,000, provide some sort of compensation for elected student leaders. *Id.*

⁴⁷ The most common type of compensation offered is an hourly wage (often near minimum wage) based on a forty-hour work week or a stipend of \$200 to \$400 per month. *Id.* Nebraska Governor Mike Johanns reportedly favors a pay structure for football players similar to the stipend and for approximately the same amount. *See* Simonich, *supra* note 35.

⁴⁸ *See* NCAA BYLAWS §§ 12.1.1 (defining penalties against students), 19 (defining the enforcement procedures and penalties against institutions).

⁴⁹ *See, e.g.,* John Markon, *Cornhuskers’ Payment Plan is a Bad Idea*, RICH. TIMES DISPATCH, Feb. 21, 2003, at D1.

⁵⁰ NCAA BYLAWS § 15.02.5.

demic resources on campus for no charge.⁵¹ The value of these items far exceeds the highest amount paid to a student government official.⁵²

Perhaps in an attempt to avoid these conflicts, the bill also provides an alternative to athlete compensation. Section 7 of the bill proposes a limitation on the number of hours in which an athlete can participate in a sport, including practices, games, and preparation sessions.⁵³ The bill is silent on the exact number of hours, but it dictates that the number should be low enough so that student-athletes can have a normal academic schedule, graduate in four years, participate in campus activities, and work an average of twelve hours per week.⁵⁴ It should be noted that limitations already exist on the amount of time a Division I athlete can participate in official practices, training sessions, and games. The NCAA bylaws limit an athlete to four hours a day and twenty hours a week of “athletically-related activities”⁵⁵ during the “playing season.”⁵⁶ Collegiate coaches, however, routinely avoid this limitation through “optional” sessions and captain-led practices, with no coaches present.⁵⁷ As a result of these “voluntary”⁵⁸ sessions, some student-athletes spend up to sixty hours per week focusing on their sport.⁵⁹ There is no indication that Legislative Bill 688’s provisions would in any way prevent this manipulation.

Senator Chambers proposed the bill “to let the NCAA know that legislators are concerned about the treatment of athletes and that the rules relative to financial assistance must be modified”⁶⁰ This “Declaration of Independence” from NCAA regulations aims to bring about fairness and “equity of the marketplace” in the relationship between athletes and the governing institutions.⁶¹ While the law cannot take effect until four

⁵¹ See NCAA BYLAWS §§ 16.4 (academic resources), 16.4 (medical expenses), 16.8 (practice and competition expenses).

⁵² The highest documented benefits package for a student leader is \$25,000, paid to the student council president of Northeastern University in Boston (in housing, tuition, stipend, parking, and other costs). See Am. Student Gov’t Ass’n, *supra* note 46.

⁵³ NEB. REV. STAT. §§ 85-1, 137 (2003).

⁵⁴ *Id.*

⁵⁵ NCAA BYLAWS § 17.02.1. This includes all required activity completed under the supervision of a coach, including practice, strength and conditioning, film sessions, and competition. *Id.*

⁵⁶ NCAA BYLAWS §§ 17.1.5.1, 17.11 (defining the football playing season).

⁵⁷ See Liz McCaslin & Kenan Smith, *How Long Do We Practice Anyway?*, IN THE SAAC, Fall 2003, at 1, available at <http://www.atlantic10.org/saac/newsletter/VolIIIssue11.pdf>. The Student-Athlete Advisory Committee has begun to focus on this issue and has made several recommendations to the NCAA. See NCAA Student-Athlete Advisory Comm., *Current Issues and Accomplishments*, at http://www1.ncaa.org/membership/membership_svcs/saac/d1/SAACAccomplishments (last visited Nov. 8, 2003).

⁵⁸ Muchnick, *supra* note 26.

⁵⁹ See *id.* (“Coaches book every hour of [a student-athlete’s] non-classroom time.”).

⁶⁰ Ernie Chambers, *Introducer’s Statement of Intent for LB 688*, 98th Leg., 1st Sess. (Neb. 2003), available at http://www.unicam.state.ne.us/PDF/StatementOfIntent_LB688.pdf (last visited Nov. 7, 2003).

⁶¹ *Id.*

other states home to Big 12 schools⁶² pass similar laws,⁶³ the legislature provided this only as a protection for the University's NCAA eligibility.⁶⁴ Although the law's main purpose may be only to encourage the NCAA to provide greater protections for student-athletes, the fact remains that the current law in Nebraska is designed to pay a stipend to college football players. Indeed, the philosophy animating the law rejects amateur athletics and holds that University of Nebraska football players are entitled to legitimate, aboveboard monetary compensation for their athletic services.

Attempts to enforce this bill, or any law similar in scope, will most likely prove exceedingly difficult. Most obviously, the law contradicts a number of NCAA regulations, and in many ways, the spirit of college amateur athletics. NCAA bylaws clearly prohibit any compensation to student-athletes beyond the amount necessary for their education and student expenses.⁶⁵ The NCAA prohibits several forms of payment to student-athletes, including "[a]ny direct or indirect salary, gratuity or comparable compensation."⁶⁶ In an apparent attempt to avoid this prohibition, the Nebraska legislature changed the original wording of the bill. As introduced, the bill called for players to be paid "compensation" no less than the federal minimum wage, making them employees of the University.⁶⁷ The legislators revised the bill before passage, calling instead for a "stipend" and stating that "[n]othing in this act shall be construed to make a person a professional athlete."⁶⁸

The NCAA bylaws, however, appear to prohibit even the revised bill. Section 12 of the bylaws defines a professional athlete as "one who receives any kind of payment, directly or indirectly, for athletics participation *except as permitted* by the [NCAA]."⁶⁹ The bylaws further state that an athlete loses his or her amateur status, and thus the ability to compete in the NCAA in a certain sport, if the athlete "[u]ses his or her athletics skill (directly or indirectly) for pay in any form in that sport."⁷⁰ The Bloom case showcases that even an athlete attempting to achieve financial gain on the basis of success in a different sport will not be permitted to play in the NCAA. Thus, an attempted payment plan based on skill in the intercollegiate sport has little chance for survival, and the bill's mandate that "football players shall be entitled to fair financial compensation

⁶² Besides Nebraska, the states with schools in the Big 12 are Colorado, Iowa, Kansas, Missouri, Oklahoma, and Texas.

⁶³ NEB. REV. STAT. §§ 85-1, 136 (2003).

⁶⁴ See Chambers, *supra* note 60 ("This is a 'fail-safe' provision that protects the university from risking its eligibility when LB 688 becomes law.").

⁶⁵ See NCAA BYLAWS §§ 15, 15.1, 15.02.5.

⁶⁶ *Id.* § 12.1.1.1.1.

⁶⁷ L.B. 688, 98th Leg., 1st Sess. (Neb. 2003), Initial Reading, § 4, available at http://www.unicam.state.ne.us/pdf/INTRO_LB688.pdf.

⁶⁸ NEB. REV. STAT. §§ 85-1, 134-35 (2003).

⁶⁹ NCAA BYLAWS § 12.02.3 (emphasis added).

⁷⁰ *Id.* § 12.1.1(a).

for playing football”⁷¹ would most likely result in all of the Nebraska football players’ losing their amateur status and ability to compete in the NCAA.

If, however, a number of schools grow tired of the NCAA’s seemingly arbitrary rules and inconsistent enforcement procedures, nothing would prevent them from leaving the organization and forming a new governing body. Since the recent expansion of the Atlantic Coast Conference,⁷² some analysts believe that the five biggest conferences could separate from the NCAA,⁷³ taking with them large television contracts for football and men’s basketball.⁷⁴ The approximately sixty schools that would comprise a new organization represent the most prolific revenue-producing athletic departments in the nation.⁷⁵ Already, the biggest conferences have formed the Bowl Championship Series for football, which is the only college championship not conducted by the NCAA.⁷⁶ If these schools severed all ties with the NCAA, they would be able to keep a larger portion of television and advertising revenues⁷⁷ and would be able to compensate their players in any manner, including the stipends proposed by the Nebraska legislature. If the California Senate succeeds in preventing its schools from following NCAA mandates,⁷⁸ other states could follow suit, thereby increasing the chance that a rival organization to the NCAA could form.

Although the formation of a new governing body is a necessary step in implementing Legislative Bill 688, it is not enough to protect the law from its largest obstacle, Title IX.⁷⁹ The University of Nebraska can leave the NCAA, receive the unanimous support of the state legislature, and be granted funds by the Governor; however, barring the repeal of Title IX, a law compensating only football players, all of whom are male, likely will not withstand legal challenges.

⁷¹ NEB. REV. STAT. §§ 85-1, 133 (2003).

⁷² See *Conference Call; Miami Joins Virginia Tech in Making an 11-Team ACC*, CHI. TRIB., July 1, 2003, at 15.

⁷³ See, e.g., Gregg Doyel, *Divide and Conquer; ‘Superconferences’ Threaten NCAA’s Power*, RICH. TIMES-DISPATCH, June 2, 2003, at C-2.

⁷⁴ See *id.* ABC is paying \$930 million over seven seasons for the rights to the Bowl Championship Series. See STREET & SMITH’S SPORTS BUSINESS JOURNAL BY THE NUMBERS (2002) 87. CBS will pay the NCAA \$6 billion over eleven years for the right to the Division I Men’s Basketball Tournament. *Id.*

⁷⁵ See *Equity in Athletics*, *supra* note 31.

⁷⁶ The BCS is a collaboration of the six major conferences (Big 12, Big 10, Pacific-10, Atlantic Coast Conference, Southeastern Conference, and Big East) and Notre Dame, an independent school. See *Bowl Championship Series*, at <http://www.bcsfootball.org>. The NCAA plays no role in the BCS, other than sanctioning the games. *Id.*

⁷⁷ Currently, the NCAA spends approximately \$30 million per year on Division II and III athletics. See NCAA 2001-2002 Approved Budget, available at http://www.ncaa.org/financial/2001-02_budget.pdf (last visited Aug. 10, 2003). If the top sixty schools separated from the NCAA, they would each receive, therefore, approximately \$500,000 in additional revenue per year.

⁷⁸ See *supra* note 30 and accompanying text.

⁷⁹ 20 U.S.C. §§ 1681–1688 (2003).

Title IX states that “no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”⁸⁰ Congress passed Title IX in 1972, after a House of Representatives investigation revealed extensive discrimination against women with respect to educational opportunities.⁸¹ In an attempt to remedy this discrimination, Congress used its most powerful weapon: federal funding. By withholding financial assistance from educational institutions that continued favoring men, lawmakers hoped “to provide individual citizens effective protection against [discriminatory] practices.”⁸²

The original text of Title IX made no reference to athletics or athletic programs,⁸³ but a 1975 regulation implementing Title IX⁸⁴ included specific requirements for both intercollegiate athletics⁸⁵ and athletic scholarships.⁸⁶ As a result, the late 1970s witnessed an incredible growth in athletic opportunities for women, with the number of female intercollegiate athletes doubling.⁸⁷

In the original Act, Congress did not provide universities with guidelines for what actions constituted progress in ending discriminatory practices. In 1979, the Department of Health, Education, and Welfare developed a three-prong test for “effective accommodation” under the statute.⁸⁸ Under the test, a school is in compliance with Title IX if:

- (1) intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
- (2) if the members of one sex have been and are underrepresented among intercollegiate athletes, the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or
- (3) if the members of one sex are underrepresented among intercollegiate athletics, and the institution cannot show a con-

⁸⁰ *Id.* § 1681.

⁸¹ 118 CONG. REC. 5804 (1972); *see also* N. Haven Bd. of Educ. v. Bell, 456 U.S. 512, 523 n.13 (1982).

⁸² Cannon v. Univ. of Chi., 441 U.S. 677, 704 (1979); Cohen v. Brown Univ., 101 F.3d 155, 165 (1st Cir. 1996) [hereinafter *Cohen II*].

⁸³ 20 U.S.C. § 1681 (1972), *available at* <http://www.dol.gov/oasam/regs/statutes/titleix.htm>.

⁸⁴ 34 C.F.R. § 106.41 (2003).

⁸⁵ *Id.*

⁸⁶ *Id.* § 106.37(c).

⁸⁷ *See* Bart Barnes, *More Women Than Ever in Sports, but Report Says Bias Still Exists*, WASH. POST, July 27, 1980, at E11.

⁸⁸ 44 Fed. Reg. 71,413 (1979) [hereinafter *Policy Interpretation*].

tinuing practice of program expansion under the second prong, the school can show that its current program nevertheless fully and effectively accommodates the interests and abilities of the members of the underrepresented sex.⁸⁹

This three-part test has remained the official policy of the federal government since 1979, and the Office for Civil Rights [hereinafter "OCR"] of the Department of Education has twice reconfirmed its commitment to it.⁹⁰

Over the past twenty-five years, the test has been the subject of much legal criticism. Scholars have decried it for being impractical and limited,⁹¹ producing gender quotas,⁹² and placing too great an emphasis on substantial proportionality at the expense of the other factors.⁹³ Despite this criticism, and the fact that the Policy Interpretation alone does not have the force of law, courts have continued to use this test as the standard for judging Title IX claims.

Title IX jurisprudence has consistently favored women's programs, even at the expense of opportunities for men.⁹⁴ In 1984, the Supreme Court attempted to limit the reach of Title IX, holding in *Grove City College v. Bell*⁹⁵ that Title IX applied only to programs that directly benefited from federal funds. As most collegiate athletic departments do not receive money directly from the federal government,⁹⁶ colleges were no longer compelled to comply with Title IX in regard to athletics, and the athletic balance once again favored male athletes and teams.⁹⁷ The change in Title IX policy proved short-lived, however, as Congress

⁸⁹ *Id.* In 1984, Title IX fell under the authority of the Department of Education, which adopted this language rather than formulating a new policy. *Kelley v. Bd. of Trs., Univ. of Ill.*, 35 F.3d 265, 269 (7th Cir. 1994); *Cohen v. Brown Univ.*, 991 F.2d 888, 895–96, n.10 (1st Cir. 1993) [hereinafter *Cohen I*].

⁹⁰ OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., CLARIFICATION OF INTERCOLLEGIATE ATHLETICS POLICY GUIDANCE: THE THREE-PART TEST, in Letter from Norma V. Cantú, Assistant Secretary for Civil Rights, to Colleague (Jan. 16, 1996) at <http://www.ed.gov/about/offices/list/ocr/docs/clarific.html> [hereinafter 1996 CLARIFICATION]; OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., FURTHER CLARIFICATION OF INTERCOLLEGIATE ATHLETICS POLICY GUIDANCE REGARDING TITLE IX COMPLIANCE, in Letter from Reynolds, Assistant Secretary for Civil Rights, to Colleague (July 11, 2003) at <http://www.ed.gov/about/offices/list/ocr/title9guidanceFinal.html> [hereinafter 2003 CLARIFICATION].

⁹¹ See, e.g., David Klinker, *Why Conforming with Title IX Hurts Men's Collegiate Sports*, 13 SETON HALL J. SPORT L. 73, 83 (2003).

⁹² See, e.g., Sara A. Elliot & Daniel S. Mason, *Gender Equity in Intercollegiate Athletics: An Alternative Model to Achieving Title IX Compliance*, 11 J. LEGAL ASPECTS SPORT 1, 10 (2001).

⁹³ See, e.g., Mary W. Gray, *Setting a Course for College Athletics: The Concept of Substantial Proportionality in Title IX Athletics Cases*, 3 DUKE J. GENDER L. & POL'Y 165, 167–68 (1996).

⁹⁴ See David Hancock Moon, *Gender Inequity? An Analysis of Title IX Lawsuits in Intercollegiate Athletics*, 6 DEPAUL-LCA J. ART & ENT. L. 87 (1995).

⁹⁵ 465 U.S. 555, 563 (1984).

⁹⁶ *Cohen I*, 991 F.2d at 894.

⁹⁷ *Id.*

passed the Civil Rights Restoration Act of 1987, reinstating Title IX protection for intercollegiate athletes.⁹⁸ This Act, passed over President Reagan's veto,⁹⁹ applied Title IX's regulations to all operations of a program receiving federal funding.¹⁰⁰ Thus, a university that receives any federal assistance¹⁰¹ must comply with Title IX in all of its programs, including athletics.

After *Grove City*, Title IX jurisprudence has consistently protected female athletic programs. In *Cohen v. Brown University*, the First Circuit held that a university's decision to downgrade two women's varsity teams constituted a *prima facie* violation of the second and third prongs of the 1979 test.¹⁰² Because Brown also failed the first prong of the test,¹⁰³ the University's action was ruled a violation of Title IX.¹⁰⁴ Brown argued that because the plan also eliminated two men's teams, it provided equal, albeit incomplete, opportunities for both male and female student-athletes, thereby satisfying the third prong.¹⁰⁵ For the court, however, anything less than full accommodation of women's interests would result in a violation of prong three, even if men's interests were not fully accommodated.¹⁰⁶ According to the majority, an institution must bring itself into compliance, if necessary, by "subtraction and downgrading, that is, by reducing opportunities for the overrepresented gender while keeping opportunities stable for the underrepresented gender (or reducing them to a much lesser extent)."¹⁰⁷

In 1996, the First Circuit again considered the case and again held against Brown. In this decision, the court held that even if Brown could prove that women had less interest in sports than men, "such evidence, standing alone, cannot justify providing fewer athletic opportunities for women than for men."¹⁰⁸ The Supreme Court denied *certiorari*,¹⁰⁹ and these cases remain the primary legal precedent for interpreting the three-prong test.

Few cases exist that deal with the specific question of athletically related financial assistance. In fact, no court has ever allowed recovery for the disproportionate allocation of financial assistance to athletes.¹¹⁰

⁹⁸ Pub. L. No. 100-259, §§ 908(2)(a), (3)(a), 908, 102 Stat. 28-29 (1988).

⁹⁹ See George E. Curry, *Civil Rights Veto Overridden*, CHI. TRIB., Mar. 23, 1988, at C1.

¹⁰⁰ Pub. L. No. 100-259, §§ 908(2)(a), (3)(a), 908, 102 Stat. 28-29 (1988).

¹⁰¹ More than 2000 colleges and universities across the nation receive federal financial assistance. See *Equity in Athletics*, *supra* note 31.

¹⁰² *Cohen I*, 991 F.2d at 896-99.

¹⁰³ At the time of the lawsuit, roughly 52% of Brown's student population was male, but men constituted approximately 63% of the school's student-athletes. *Id.* at 898.

¹⁰⁴ *Id.* at 900.

¹⁰⁵ *Id.* at 899.

¹⁰⁶ *Id.* at 898.

¹⁰⁷ *Id.* at 898 n.15.

¹⁰⁸ *Cohen II*, 101 F.3d at 180.

¹⁰⁹ *Brown Univ. v. Cohen*, 520 U.S. 1186 (1997).

¹¹⁰ Judith Jurin Semo et al., *A Guide to Recent Developments in Title IX Litigation—February 15, 2000*, in NCAA, *ACHIEVING GENDER EQUITY*, III, 2, available at

This fact, however, can be attributed in large part to certain evidentiary and procedural barriers plaintiffs must overcome to prove such a case. In *Beasley v. Alabama State University*, the court found that the institution failed to allocate scholarships in a proportionate amount for one year, including denying the plaintiff a scholarship; however, the court found no other year in which such discriminatory behavior had taken place, and thus, no continuing violation as required under Title IX.¹¹¹ Likewise, in *Boucher v. Syracuse University*, while the court found evidence of disproportionate allocation of scholarship funds, the plaintiffs had graduated by the time the case reached trial, destroying their standing to sue.¹¹²

Similar barriers likely would not exist in a suit concerning Legislative Bill 688. A continuing violation could be easily proven if Nebraska-Lincoln followed the law and provided only football players (all males) with additional compensation. Even in the first year of implementation, most courts would likely view the law as *prima facie* evidence of an intent to commit a continuing violation. Furthermore, the finding of such a continuing violation would remove the problem of standing, as any female student-athlete could bring a claim that would likely be successful prior to her graduation.

A school complies with Title IX in its financial assistance policies by allocating total scholarship dollars in an amount proportionate to each gender's level of participation in the intercollegiate sports program.¹¹³ Thus, if 60% of all athletes are male and 40% of all athletes are female, then men should receive 60% of the scholarship money and women 40%. A school can award as many or as few scholarships as it wishes, so long as the total amount of money awarded to men and women remains in proportion.¹¹⁴ While the calculation does not include expenses for when classes are not in session, all dollars awarded during the academic year count against the total.¹¹⁵ The stipend proposed by Legislative Bill 688 would increase the percentage of financial aid awarded to men and trigger a violation of Title IX.

The case law appears to indicate, moreover, that if the courts were to allow an institution to allocate funds disproportionately, it would most likely do so only to assist the underrepresented sex.¹¹⁶ Since Congress

bruary 15, 2000, in NCAA, ACHIEVING GENDER EQUITY, III, 2, available at http://www.ncaa.org/library/general/achieving_gender_equity/current_case_law.pdf (last visited Nov. 8, 2003).

¹¹¹ 3 F. Supp. 2d 1325, 1329, 1336-37 (M.D. Ala. 1998).

¹¹² 164 F.3d 113, 115 (2d Cir. 1999).

¹¹³ See *Policy Interpretation*, supra note 88, at 71,413. See also Valeria M. Bonnette, *Title IX Basics*, in NCAA, ACHIEVING GENDER EQUITY, II, 8, available at http://www.ncaa.org/library/general/achieving_gender_equity/title_ix_basics.pdf (last visited Nov. 8, 2003).

¹¹⁴ See *Policy Interpretation*, supra note 88, at 71,415.

¹¹⁵ *Id.*

¹¹⁶ I was unable to find any cases in which males were claimed to be the underrepresented sex, although this issue may arise in the future.

overruled the Supreme Court decision in *Grove City*, every major court decision has favored the underrepresented gender.¹¹⁷ In *Gonyo v. Drake University*,¹¹⁸ the court held that the over-allocation of funds to the underrepresented sex, women, did not violate Title IX. The rulings in both *Cohen* cases also seem to favor advantages to women, even if they must come at the expense of male programs.¹¹⁹ Thus, it seems unlikely that a court following a similar line of reasoning would permit “extra” compensation for male athletes. In order to avoid cutting other men’s sports expenses, supporters of Legislative Bill 688 would need to lobby for the stipend not to be included in Title IX calculations, perhaps by exempting football altogether from the statute.

Such a rule could perhaps be justified by the much larger size of football rosters in comparison with other sports,¹²⁰ as well as the incredible amount of revenue generated by most football teams.¹²¹ At many schools, the money raised by the football program helps finance almost the entire athletic department.¹²² Thus, proponents of Legislative Bill 688 might argue, these football players deserve increased compensation without upsetting the balance of Title IX.

Unfortunately for the advocates of the bill, these rationales have been proposed and rejected numerous times throughout the history of Title IX. On two different occasions, Congress has declined an opportunity to exempt revenue-producing sports from Title IX calculations.¹²³ Thus far, Congress has enacted only one exception for football. The Javits Amendment, passed in 1974,¹²⁴ excludes legitimate, non-gender related differences in sports, such as equipment costs and event management. Therefore, a university can still spend much more in aggregate on football, a program with higher facility and equipment costs, than on women’s sports teams.¹²⁵ Proponents of Title IX, however, have ada-

¹¹⁷ See Semo, *supra* note 110, at 2–12.

¹¹⁸ 837 F. Supp. 989, 995–96 (S.D. Iowa 1993).

¹¹⁹ *Cohen I*, 991 F.2d at 906; *Cohen II*, 101 F.3d at 176.

¹²⁰ The NCAA permits Division I-A football teams eighty-five scholarships and does not place limits on roster sizes. NCAA BYLAWS § 17.11. In 2001, Nebraska-Lincoln’s football team had 183 members. See Markon, *supra* note 49. In comparison, most basketball teams have eleven to thirteen players, soccer teams usually maintains a roster of twenty-five, and baseball teams frequently field fewer than thirty players. See, e.g., Duke University Athletics Rosters, available at <http://www.goduke.com> (last visited Nov. 8, 2003).

¹²¹ See *supra* note 4.

¹²² See *Equity in Athletics*, *supra* note 31.

¹²³ In 1974, the Senate rejected the Tower Amendment, which would have provided the exemption in the Title IX legislation. 120 Cong. Rec. 15, 322 (1974). See generally “History of Title IX Legislation, Regulation and Policy Interpretation,” available at <http://bailiwick.lib.uiowa.edu/ge/documents/history.pdf> (last visited Nov. 10, 2003). In 1977, Senator Tower again proposed the exemption, this time in a separate bill, but once again it was rejected. S. 2106, 94th Cong. (1977).

¹²⁴ Education Amendments of 1974 (Title VIII), Pub. L.

No. 93-380, § 844, 88 Stat. 484 (1974).

¹²⁵ See *Q & A with Donna Lopiano: What Title IX Means*, AUSTIN AMERICAN-

mantly stated that this represents enough of, if not too much of, a concession.¹²⁶ Thus, Congress seems unlikely, at least at this time, to grant football any further exemptions.

Without an exemption, providing additional compensation to football players would only widen the gap between male and female student-athletes. In order to comply with Title IX, the Nebraska-Lincoln Athletic Department would have two options, both of which would necessitate further cutbacks in other men's sports. The first option would be to pay female athletes in a fashion equal to their male counterparts. Thus, if football players received a total of \$500,000 in stipends, universities could provide female athletes with a similar amount. The text of the bill provides for such a plan, leaving the payment of other athletes to the discretion of the University.¹²⁷ This option presents a fiscal problem: a number of athletic departments currently run deficits and are looking to cut spending.¹²⁸ Adding a stipend would increase the athletic budget by anywhere from \$300,000 to \$1.3 million,¹²⁹ which most schools simply cannot afford.

Thus, the most likely course of action to ensure Title IX compliance would be the second option: cutting spending on men's sports by an amount equal to the stipend, which would result in no change to the overall men's sports budget. Cutting men's expenses means eliminating non-football male sports opportunities. Since the inception of Title IX thirty years ago, more than 400 men's programs have been discontinued; most, if not all, were eliminated to comply with the statute.¹³⁰ Just recently, the Nebraska-Lincoln Athletic Department eliminated its male swimming and diving team because the school could not afford its estimated \$500,000 budget.¹³¹ Thus, a stipend of several hundred thousand

STATESMAN, June 24, 2002, at A10; Donna Lopiano, *Football Doesn't Need Title IX Protection*, (June 5, 2002), at <http://www.womensportsfoundation.org/cgi-bin/iowa/issues/rights/article.html?record=131>.

¹²⁶ Lopiano, *supra* note 125.

¹²⁷ NEB. REV. STAT. §§ 85-1, 134 (2003).

¹²⁸ In 2001–2002, sixty-five percent of Division I schools, including programs such as Duke, the University of Connecticut, and Marquette University, all had budget deficits. See Ted Hutton, *Playing the Price; Higher Costs, Lower Profit Have Many D-1 Programs Seeing Red*, SUN-SENTINEL (Ft. Lauderdale), Apr. 10, 2003, at 1C. In most cases, a successful football program marked the difference between a profitable and non-profitable department; however, the University of Miami (Fla.) lost \$1.5 million in 2002, despite winning the national championship. *Id.*

¹²⁹ Nebraska's Governor reportedly favors a stipend of \$200–\$400 per month. See Simonich, *supra* note 35. Paying 85 scholarship football players (the maximum allowed by the NCAA) \$200 each per month over a nine-month academic year would cost a school \$153,000. Matching those funds for female student-athletes would result in a total expenditure of \$306,000. If all 183 Nebraska football players (including non-scholarship athletes) were paid \$400 per month, the amount would be \$658,800, with matching funds for women bringing the total to \$1,317,600.

¹³⁰ See Terri Cotten, *Title IX Hearings Review Equality: Men's Sports Suffer from Changes, Some Say*, DENV. POST, Oct. 23, 2002, at D-02.

¹³¹ See *Nebraska Cutting Men's Swimming and Diving*, <http://www.theindependent>.

dollars paid to football players could in fact equal an entire sport. While a number of people have blamed these cuts on Title IX, the law's supporters argue that the true culprit is football, with its excess of expenses.¹³² It would become difficult, if not impossible, to counter such an argument if Legislative Bill 688 took effect.

Male participants in non-revenue sports appear to have little legal recourse against the elimination of their sports. Recently, in *Miami University Wrestling Club v. Miami University*,¹³³ the Sixth Circuit held that Miami (Ohio) University's decision to eliminate its wrestling team to comply with Title IX did not constitute gender discrimination. Referencing the 1996 OCR Clarification, the Court conceded that "universities and other recipients of federal funds do not have infinite money supplies."¹³⁴ Therefore, the court continued, "[i]f a university cannot afford to add sports teams in order to provide equal athletic opportunity for men and women, it may be forced to subtract in order to equalize."¹³⁵ Despite OCR's most recent clarification, which called the elimination of teams a "disfavored practice" that is "contrary to the spirit of Title IX,"¹³⁶ the economic reality discussed by the *Miami University* court remains. A bill such as Legislative Bill 688 would place further strains on finite athletic budgets and undoubtedly result in the loss of more men's sports programs, with the affected athletes having little or no legal recourse.

States also seem unlikely to rescue athletic departments by increasing their budgets or providing financial assistance. Governments across the nation are facing budget deficits, with many programs being drastically scaled back or eliminated completely.¹³⁷ While a state legislature may be willing to pass a bill such as Legislative Bill 688 that will require years to be implemented, it seems likely that many state officials would balk at the immediate distribution of more funds to student-athletes already receiving full scholarships. Immediately following the introduction of the bill, the *Omaha World-Herald* ran an editorial sharply criticizing such a proposal in a time of budget cutbacks across the state:

How's this for irony: While the state is considering cutting its need-based scholarship programs to help Nebraska's poorest students attend college—while students are borrowing record amounts of money to cover steeply rising tuition costs—the Ne-

com/stories/032601/Hus_menswim26.html. (last modified Mar. 26, 2001).

¹³² See, e.g., Lopiano, *supra* note 125.

¹³³ 302 F.3d 608, 613 (6th Cir. 2002).

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ 2003 CLARIFICATION, *supra* note 90.

¹³⁷ The Web site of one political organization claims that forty-three states and the District of Columbia will have budget shortfalls in FY 2003 totaling \$27 billion. It is projected that Nebraska alone will lose \$220 million between 2001 and 2003. *The State Fiscal Crisis in Nebraska*, at <http://www.nebraskansforpeace.org/2002/ja02/budget.html>.

braska Legislature and the governor are worried about football players (more than half of them on full-ride scholarships) and whether they've got spending money.¹³⁸

While people across the nation took note of the bill's passage,¹³⁹ one can surmise that their responses were muted because of the apparently slim chance that the act would be implemented. The bill has become law, however, and could be implemented, in theory, as soon as next year. Should this happen, a more vocal and hostile reaction against giving full-scholarship athletes additional money could surely be expected, no matter the revenue these athletes help generate for the school.

If approached from a purely economic perspective, Nebraska Legislative Bill 688 appears completely justified in a free-market economy. If football players are largely responsible for generating millions of dollars in revenue, why should they not receive greater compensation than athletes in sports that produce no revenue? The fact remains, though, that student-athletes are students and not professional athletes.¹⁴⁰ The constraints of Title IX will likely keep such a law from ever being implemented, at least to the degree desired by the bill's supporters. Perhaps, then, the bill will succeed in its other purpose: alerting the public, and in particular the NCAA, to the ever-increasing burdens of the student-athlete in "big time" college athletics. Universities must allow student-athletes to be students, by enforcing hourly limitations on athletic participation and devoting larger portions of athletic revenues to student and academic programs. By doing this, universities will eliminate the need for laws such as Legislative Bill 688, which the schools cannot afford and which could possibly turn "first-class amateur programs" into "third-rate professional sports franchises."¹⁴¹

— Greg Skidmore

¹³⁸ *Those Poor Football Players Fight NCAA Rules on their Court; Leave Legislative Arena for State Scholarship Programs*, OMAHA WORLD-HERALD, Feb. 17, 2003, at 6B.

¹³⁹ See, e.g., *Nebraska Proposal to Pay College Athletes Stirs Issue*, USA TODAY, Feb. 21, 2003, at 6C.

¹⁴⁰ In the past twenty years, the Olympic Games has wrestled with a similar dilemma, balancing preserving amateurism against the compensating athletes for their unique skills. See, e.g., *Changing the Rules*, N.Y. TIMES, Feb. 21, 1986, at A22. While the International Olympic Committee's decision to allow professional athletes to participate created initial excitement (e.g., the Dream Team of NBA basketball players), a movement has developed to reinstate the amateur rule in order to decrease the commercialism of the Games. See, e.g., Glenn Dickey, *Put the Amateurs Back in the Games*, S.F. CHRON., Aug. 16, 2000, at E3.

¹⁴¹ Myles Brand, *Welfare of Student-Athletes NCAA's Top Priority*, DEN. POST, Aug. 17, 2003 (on file with author).