

# Targeted Reform of Commercialized Intercollegiate Athletics

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### I. INTRODUCTION

This Article initially explores our society's powerful, naturally evolved passion for sports competition, the history of this cultural phenomenon as applied to intercollegiate athletics, and the role of big-time, commercialized intercollegiate athletics within the twenty-first century American university. The United States marketplace responds to cultural forces and strong public demand for popular products; the commercialization of college sports directly reflects the marketplace realities of our society.

There is substantial public interest in interscholastic sports. Although men's basketball and football are generally popular with the public, there is a heightened level of interest in the Division I Football Bowl

Subdivision (FBS), formerly known as “Division I-A.” In response, colleges and universities invest substantial resources in their athletic departments as a means to achieve a wide range of legitimate objectives that further their missions. Among these objectives are providing a lens through which the nature, scope, and quality of their higher educational services is discovered by the public; attracting high quality faculty, students, and student-athletes; diversifying their student bodies; forging a continuing bond with alumni, the local community, and other constituents that provides both tangible and intangible benefits; and enhancing their institutional reputations.

This Article will then explain why university athletic department revenues should continue to be exempt from federal taxation, specifically the Federal Unrelated Business Income Tax (UBIT), despite the increasingly commercialized nature of intercollegiate sports such as Division I FBS football and men’s basketball. Moreover, proposed revision of federal tax law is not an effective means of preventing marketplace forces from pushing intercollegiate athletics out of its proper role as an integral part of nonprofit higher education and into a primarily commercial endeavor nearly identical to for-profit professional sports.

Recognizing that the commercialization of intercollegiate athletics creates economic incentives for conduct that may conflict with a university’s academic mission and may potentially exploit student-athletes, this Article proposes that Congress provide the National Collegiate Athletic Association (NCAA) and its member universities with a conditional exemption from the federal antitrust laws. This limited antitrust immunity would enable the NCAA to enact legislation to ensure that intercollegiate athletics are primarily educational endeavors, prevent the excessive allocation of university financial resources to sports, and better enable student-athletes in revenue-generating sports to obtain the educational benefits of their bargain. In addition, this proposal has the potential to protect and maintain the opportunity for student-athletes to participate in sports that do not generate net revenue.

## II. PRIMAL AND CULTURAL FORCES UNDERLYING AMERICAN SPORTS COMPETITION

Persuasive evidence shows that youthful sports competition reflects an inherent, survival-based, and pleasure-producing dynamic that has evolved within human nature. In turn, human culture—including our educational

systems—is profoundly influenced by this dynamic. Culture, in turn, creates consumer demands that are reflected in the economic workings of a free marketplace. The entire history of intercollegiate sports demonstrates this interrelationship. In short, the structure of America’s intercollegiate athletics derives from evolved human nature and is powerfully influenced by the resulting cultural manifestations and their impact on the marketplace. These interlocked forces will be briefly examined.

Current neurology and psychology research indicate that human play is an inherent, joy-producing essential of our species. Play is seen as an imperative, evolved, natural survival element inherent in humans and certain other mammals.<sup>1</sup> Researchers conclude that play is an essential natural selection step that equips people for survival as members of human society.<sup>2</sup> As summarized by one leading psychiatrist-neurologist researcher: “[R]esearch suggests that play is a biological necessity . . . . [T]he forces that initiate play lie in the ancient survival centers of the brain . . . where other anciently preserved survival capacities also reside.”<sup>3</sup>

The survival tools produced by play include human empathy, trust in others, complex problem solving, knowledge of both personal and interpersonal boundaries, and humor.<sup>4</sup>

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1. Interview with Dr. Stuart Brown, M.D., Founder, Nat’l Inst. for Play, [http://www.amazon.com/Play-Shapes-Brain-Imagination-Invigorates/dp/1583333339/ref=sr\\_1\\_1?ie=UTF8&qid=1311111111&sr=8-1](http://www.amazon.com/Play-Shapes-Brain-Imagination-Invigorates/dp/1583333339/ref=sr_1_1?ie=UTF8&qid=1311111111&sr=8-1) (reviewing Dr. Brown’s latest publication); *see also* STUART BROWN WITH CHRISTOPHER VAUGHN, *PLAY: HOW IT SHAPES THE BRAIN, OPENS THE IMAGINATION, AND INVIGORATES THE SOUL* 5–7, 15–50 (2009). Brown, former Chief of Psychiatry at Mercy Hospital, left clinical practice to found the National Institute for Play. *About Us*, NAT’L INST. FOR PLAY, [http://www.nifplay.org/about\\_us.html](http://www.nifplay.org/about_us.html) (last visited July 29, 2010) (chronicling the career of Dr. Stuart Brown, founder of the National Institute for Play); Interview by Krista Tippett with Dr. Stuart Brown, Founder, Nat’l Inst. for Play (July 2, 2009), <http://speakingoffaith.publicradio.org/programs/play/> (discussing Dr. Brown’s neurological and psychological studies). The underlying dynamic of Dr. Brown’s findings may be partially explained by the “collective unconscious” theories of C.G. Jung and his theories of archetypes. Jung speculated that repeated human experiences throughout the course of history create a sort of psychological inheritance of our species. *See generally* Anthony Stevens, *The Archetypes*, in *THE HANDBOOK OF JUNGIAN PSYCHOLOGY: THEORY, PRACTICE AND APPLICATIONS*, 74, 74–93 (Renos K. Papadopoulos ed., 2006). Whatever the root theoretical explanation for Dr. Brown’s observations of human play, ordinary human experience confirms them vividly among youth.

2. Interview by Krista Tippett with Dr. Stuart Brown, *supra* note 1.

3. *Id.*

4. *Id.* Researcher/psychologist Dr. Stuart Brown, studying large numbers of convicted male murderers, found this startling commonality: one hundred percent of the murderers he studied had never learned to play in their youth. *Id.* This discovery launched Dr. Brown into a decades-long study of play. *See About Us*, *supra* note 1. Dr. Brown’s conclusions are significant to understanding the deep grip that sports competition has on our species. Interview by Krista Tippett with Dr. Stuart Brown, *supra* note 1; *see also* JAMES E. JOHNSON ET AL., *PLAY AND EARLY CHILDHOOD DEVELOPMENT* 7, 11, 16–17 (2d ed. 1999) (asserting that the motivation for play and play

Researchers of human behavior confirm that “[c]ompetitiveness is a product of the cumulative experience of the human race.”<sup>5</sup> American athletics history demonstrates that humanity’s youthful energy and the need to compete gave rise to public athletic competitions and was part of the robustness of America’s settlers. For instance, a youthful Abraham Lincoln first became noted for his strength and athletic ability in frontier Indiana wrestling contests.<sup>6</sup> This same grassroots energy seemingly led to America’s original interscholastic competitions, as when Harvard and Yale students created 1852’s first rowing competition,<sup>7</sup> followed by Princeton and Rutgers students’ introducing intercampus college football games.<sup>8</sup> Full-time coaches, formal institutional recognition, big stadiums, widespread sports merchandising, megamedia, and all the rest of today’s sports culture evolved in later decades until we found urban and suburban America bursting with youthful competition and sports.<sup>9</sup>

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activities, such as sports, “comes from within the individual” and that these activities are “pursued for their own sake”).

5. Walter Bonime, *Competitiveness and Human Potential*, 14 J. AM. ACAD. PSYCHOANALYSIS 149, 153 (1986); see also Kingsley R. Browne, *Women in Science: Biological Factors Should Not Be Ignored*, 11 CARDOZO WOMEN’S L.J. 509, 514–15 (2005); Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337, 1368–69 (1997); Craig Holt, *Competitive Fishing Really Serves Purpose*, HERALD-SUN (Durham, N.C.), Aug. 13, 1995, at D9.

6. Ira Berkow, *Honest, Abe Had Athletic Ability*, N.Y. TIMES, Feb. 12, 1987, at B29; see also RONALD C. WHITE, JR., A. LINCOLN: A BIOGRAPHY 47 (2009); *Hastert, Wellstone Named to Wrestling Hall of Fame*, CHI. TRIB., Feb. 25, 2000, at C2 (“[The National Wrestling Hall of Fame] recognizes former wrestlers who have achieved national or international acclaim in their careers. Among the other 32 inductees are former U.S. Presidents George Washington, Abraham Lincoln, William H. Taft and Teddy Roosevelt . . .”).

7. Joanna Davenport, *From Crew to Commercialism—The Paradox of Sport in Higher Education*, in SPORTS AND THE LAW: A MODERN ANTHOLOGY 218, 218 (Timothy Davis et al. eds., 1999).

8. *Id.*

9. It does not take the decades of Dr. Stuart Brown’s studies of play to confirm this. Anyone observing youthful athletic competitions can confirm the premise that competition in youthful sports is not an activity imposed on us by our culture but arises within our species as an inherent natural drive. One can readily observe clusters of preschoolers romping in public parks; stickballers on neighborhood city streets; kids racing wildly on primary school playgrounds; neighborhood hoopsters scrambling for rebounds around a million nets; and rural teens with gloves, mitts, and baseballs on grassy fields every spring. One can watch prepubescent boys and girls practicing soccer’s darting teamwork on well-coached suburban teams from coast-to-coast or squads of ten-year-olds struggling to learn game techniques in their Pop Warner football leagues. See, e.g., Laura Hilgers, *Youth Sports Drawing More than Ever*, CNN.COM (July 5, 2006,

The mere existence of competitive intercollegiate teams seems a natural extension of youthful competition. As the Knight Commission on Intercollegiate Athletics recently reported, one university president, referring to competitive sports, stated, “It’s an integral part of our DNA. . . . It has shaped us since our founding.”<sup>10</sup> Athletics energizes both those who compete and those who are spectators to the competition, be they competitors or former competitors themselves, their families, friends, loyal alumni, nonalumni supporters, sport enthusiasts on the faculty, and each of these groups’ varying social networks. The undeniable magnetism of interscholastic sports competition has been analogized to “85,000 people gathered for a family reunion.”<sup>11</sup>

Regardless of whether someone celebrates this human attraction to competition or condemns it as a barrier to a more utopian ideal based on sharing and cooperation, this much is clear: no realist can deny the presence in our species of a primal need to compete physically or witness such competitions.<sup>12</sup> As ever, human culture responds to human needs and, in a free system, the marketplace responds by satisfying culture’s demands. In the twenty-first century marketplace, interscholastic sports competition has become “a multibillion dollar industry.”<sup>13</sup>

In analyzing the bonds between a community and its sports teams, some commentators have pointed out that a core of tribalism is the

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12:02 PM), <http://www.cnn.com/2006/US/07/03/rise.kids.sports/index.html> (estimating that forty-one million American kids are involved in competitive youth sports each year). The educational and maturational values of competitive athletics at the junior and senior high school levels in America are attested to by both personal anecdotal testimony and empirical studies. The educational and maturational losses to young people—whether star athletes or benchwarmers—from deleting competitive athletics from the schools is exceeded only by the tragic social costs of such loss. See Jim Souhan, *Prep Activities’ Real Cost Appears When They’re Gone*, STARTRIBUNE.COM (Minneapolis-St. Paul, Minn.) (May 17, 2008), [http://www.startribune.com/templates/Print\\_This\\_Story?sid=19033899](http://www.startribune.com/templates/Print_This_Story?sid=19033899) (citing studies that weigh these social costs found in NAT’L FED’N STATE HIGH SCH. ASS’NS, *THE CASE FOR HIGH SCHOOL ACTIVITIES* (2008), available at <http://www.nfhs.org/WorkArea/DownloadAsset.aspx?id=3263>).

10. KNIGHT COMM’N ON INTERCOLLEGIATE ATHLETICS, QUANTITATIVE AND QUALITATIVE RESEARCH WITH FOOTBALL BOWL SUBDIVISION UNIVERSITY PRESIDENTS ON THE COSTS AND FINANCING OF INTERCOLLEGIATE ATHLETICS: REPORT OF FINDINGS AND IMPLICATIONS 43 (2009), available at [http://www.knightcommissionmedia.org/images/President\\_Survey\\_FINAL.pdf](http://www.knightcommissionmedia.org/images/President_Survey_FINAL.pdf).

11. *Id.* “Competitiveness is a product of the cumulative experience of the human race.” Bonime, *supra* note 5, at 153; see also Browne, *supra* note 5, at 515; Daicoff, *supra* note 5, at 1368–69; Holt, *supra* note 5, at D9. For a potential Jungian explanation of the eons-old duration of human fascination with sport, see *supra* note 1.

12. See generally Bonime, *supra* note 5, at 149–66 (“[C]ompetitiveness is a product of the cumulative experience of the human race.”); Browne, *supra* note 5, at 515; Daicoff, *supra* note 5, at 1368–69; Holt, *supra* note 5, at D9.

13. MATTHEW J. MITTEN ET AL., *SPORTS LAW AND REGULATION: CASES, MATERIALS, AND PROBLEMS* 13–14, 237 (2d ed. 2009).

energizing bond between a team and its community.<sup>14</sup> One politically astute observer, former Missouri Senator John Danforth, believes that a “sports team is different from the normal business. . . . A sports team carries with it the support of the community, the identity of the community, and the spirit of the community.”<sup>15</sup> Similarly, judges have recognized this bond between a community and its local sports teams.<sup>16</sup> One court has stated that the community’s bond to its athletic teams “[is] the highly valued, intangible benefits” that are virtually impossible to

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14. John Beisner, *Sports Franchise Relocation: Competitive Markets and Taxpayer Protection*, 6 YALE L. & POL’Y REV. 429, 437–38 (1988). Although Beisner deals with the cultural bond between a city and its *professional* sports teams, the bonding principle seems equally apt for big-time college sports. Charles Davidson, *Sports Still Draw Fans Despite Recession*, 11 ECON SOUTH, no. 3, 2009, [http://www.frbatlanta.org/pubs/econsouth/econsouth\\_vol\\_11\\_no\\_3\\_sports\\_draw\\_fans.cfm?redirected=true](http://www.frbatlanta.org/pubs/econsouth/econsouth_vol_11_no_3_sports_draw_fans.cfm?redirected=true); Ivan Maisel, *Passion, Tradition Elevate College Football over NFL*, ESPN.COM (last updated Aug. 15, 2006, 3:16 PM), <http://sports.espn.go.com/espn/print?id=2549750&type=Columnist&imagesPrint=off>; see also Kristen Martinez, *Pigskin Religion*, CULTURE SHOCK!, <http://web.mit.edu/cultureshock/fa2006/www/essays/football.html> (last visited Aug. 1, 2010) (“I know most of the fans that have season tickets reasonably well because there is such a strong sense of community among the fans and we have such a great time at the games. We look forward to seeing each other at the home games to discuss the referees, players and rivalries. Rivalries in college football can tear apart relationships, friendships, neighborhoods and cities.”).

15. Daniel S. York, Note, *The Professional Sports Community Protection Act: Congress’ Best Response to Raiders?*, 38 HASTINGS L.J. 345, 355 (1987) (citation omitted). Wisconsin Representative Marlin Schneider has stated: “Without the Milwaukee Brewers, Bucks and Packers, [Wisconsin] ain’t nothing but another Nebraska.” Oscar Dixon & Mike Dodd, *Brewers’ Stadium Bill Stirs Response*, USA TODAY, Sept. 29, 1995, at 3C. See generally Matthew J. Mitten & Bruce W. Burton, *New Remedies for Breach of Sports Facilities Use Agreements: Time for Marketplace Realism*, 88 IOWA L. REV. 809, 811 (2003) [hereinafter Mitten & Burton, *New Remedies for Breach of Sports Facilities Use Agreements*]; Matthew J. Mitten & Bruce W. Burton, *Professional Sports Franchise Relocations from Private Law and Public Law Perspectives: Balancing Marketplace Competition, League Autonomy, and the Need for a Level Playing Field*, 56 MD. L. REV. 57, 58 (1997) [hereinafter Mitten & Burton, *Professional Sports Franchise Relocations from Private Law and Public Law Perspectives*].

16. See, e.g., L.A. Mem’l Coliseum Comm’n v. NFL (*Raiders I*), 726 F.2d 1381, 1396–97 (9th Cir. 1984); Metro. Sports Facilities Comm’n v. Minn. Twins P’ship, 638 N.W.2d 214, 221–22 (Minn. Ct. App. 2002) (describing a professional MLB team’s bonds to its community and holding that there exists a cluster of intangible values associated with a community’s sports teams—welfare, recreation, prestige, prosperity, and trade and commerce).

quantify.<sup>17</sup> In college athletics, the relevant community that is emotionally bonded to the team includes more than a dozen overlapping constituencies.<sup>18</sup>

### III. THE HISTORY AND EVOLUTION OF BIG-TIME INTERCOLLEGIATE SPORTS

A brief historical review illustrates that the interlocking competition-culture-marketplace dynamic has driven the trajectory of intercollegiate sports from their inception in 1852 to the present. Briefly examining the principal cycles in the evolution of American intercollegiate athletics will help to clarify this Article's central proposition: elemental forces of human nature create cultural desires, which are quickly satisfied by the creation of products and services through the operation of a free marketplace. This ongoing dynamic creates powerful economic forces with corresponding commercial incentives that generate the potential for social and political conflicts, as well as abuses. The evolution, growth, and commercialization of intercollegiate athletics—with the predictable conflicts and abuses—is a paradigmatic example of these cultural and marketplace phenomena in action.

Athletic competition among American institutions of higher education was, from an early date, based on the British rhetoric of “amateurism”—the ideal of uncompensated competitive sport for its own sake. Uncompensated competition was erroneously viewed as the nature of athletic competition in ancient Greece. This did not reflect reality because successful Greek athletes were paid substantial sums of money

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17. See *Metro. Sports Facilities Comm'n*, 638 N.W.2d at 225 (quoting Mitten & Burton, *Professional Sports Franchise Relocations from Private Law and Public Law Perspectives*, *supra* note 15, at 70–71).

18. Such multiple constituencies would include such groups—many of them holding powerful influence or vested, legally protected rights—as taxpayers; players; fans; alumni; faculty; local, state, and federal politicians; university administrators; sports facility bond underwriters and other private or public debt holders; long-term licensees; contract-holding suppliers and manufacturers; holders of facility naming rights; big media; the NCAA; athletic conferences; university coaches; federal politicians; parents of players; the professional sports leagues; high school players; and agents. For a discussion of the constituencies of a university's interscholastic sports competition, see KNIGHT COMM'N ON INTERCOLLEGIATE ATHLETICS, *COLLEGE SPORTS 101: A PRIMER ON MONEY, ATHLETICS, AND HIGHER EDUCATION IN THE 21ST CENTURY* 3 (2009), available at [http://www.knightcommission.org/index.php?option=com\\_content&view=article&id=344&Itemid=84](http://www.knightcommission.org/index.php?option=com_content&view=article&id=344&Itemid=84); also Bill Haisten, *OSU Gets \$165 Million: Holdenville Native Boone Pickens' Gift to the School's Athletic Department Is Believed To Be a U.S. Record*, *TULSA WORLD*, Jan. 11, 2006, at A1 (reporting that noted financier Boone Pickens, alumni of Oklahoma State University, has given \$165 million to the school's athletic department, the “largest single donation ever to an American university's athletic department”); Martinez, *supra* note 14 (describing her personal experience as a sports fan and the “strong sense of community” that has accompanied it).



for their efforts.<sup>19</sup> Nevertheless, this historically mistaken notion of amateurism became the hallmark of elite British universities, such as Cambridge and Oxford, and flourished by reason of English society's rigid class distinctions and culture of elitism.<sup>20</sup>

However, British elitist practices were not effectuated in America, as illustrated by the fact that Harvard rowing teams from the 1850s onward were awarded money for successful efforts.<sup>21</sup> Universities' intense recruiting of team members, along with the direct or indirect awarding of benefits to athletes, quickly became the hallmark of American intercollegiate sports.<sup>22</sup> Subsequent commonplace practices such as awarding athletic scholarships covering the costs of student-athletes' tuition, room, board, and books that are worth thousands of dollars; hiring professional coaches—including multi-million dollar salaries for Division I FBS and

19. Kenneth L. Shropshire, *Legislation for the Glory of Sport: Amateurism and Compensation*, in *SPORTS AND THE LAW: A MODERN ANTHOLOGY*, *supra* note 7, at 223, 224. Greek athletes were generously rewarded: in one event the prize could be up to ten years worth of wages. *Id.*

20. See Cara Turano, *The Rise of Intercollegiate Football and Its Portrayal in American Popular Literature*, UNIV. GA. J. UNDERGRADUATE RES. OPPORTUNITIES, 2001, <http://www.uga.edu/juro/2001/Turano.html> (last visited Aug. 1, 2010).

21. Harvard rowers' prizes ranged from \$100 to \$500, significant sums in nineteenth century America. Shropshire, *supra* note 19, at 226. The final U.S. stronghold of the Anglophile ideal of amateurism in America was the Olympic teams and the amateurism policies of the International Olympic Committee (IOC) and the Amateur Athletic Union (AAU), which notoriously stripped Jim Thorpe of his two track and field Olympic gold medals in 1913 for playing summertime semiprofessional baseball in the East Carolina League. A more realistic IOC posthumously restored Thorpe's medals seventy years later. *Biography*, JIM THORPE: WORLD'S GREATEST ATHLETE, <http://www.cmgtw.com/sports/thorpe/bio.htm> (last visited Aug. 1, 2010).

22. See generally W. Burlette Carter, *The Age of Innocence: The First 25 Years of the National Collegiate Athletic Association, 1906 to 1931*, 8 VAND. J. ENT. & TECH. L. 211, 230–35 (2006); Craig Lambert, *The Professionalization of Ivy League Sports*, HARVARD MAG., Sept.–Oct. 1997, at 36, 36, available at <http://harvardmagazine.com/1997/09/ivy.html>. In America the rhetoric of “amateurism”—like the educational satire of “fish-grabbing-with-the-bare-hands”—is a nonfunctioning, cultural residue of a fictional past ideal. See generally J. ABNER PEDDIWELL, *THE SABER-TOOTH CURRICULUM* 54–74 (memorial ed. 1972). One radical faculty member ranted: “But, damn it . . . how can any person with good sense be interested in such useless activities?” *Id.* at 72. This satire on the development of modern-day educational curricula surprisingly sheds a great deal of light on the current situation of college athletics in twenty-first century academe. See *id.* at 54–74. Peddiwell's book makes the case that the enduring romance of Paleolithic concepts, possibly valid for human society in a long past era, if ever, continue undiminished after the realities of actual life experience have rendered such concepts moot. See *id.* Is this not exactly on point with the continuing ideology of antiinterscholastic athletics, and its accompanying myth of amateurism, which has persisted for scores of decades after the marketplace has embraced and assimilated big-time sports into the culture?

men's basketball teams—and athletic trainers; recruiting talented athletes; and generating multimillion dollars revenues from gate receipts, broadcast revenues, and sponsorships are notable features of the commercialization of American intercollegiate athletics. Such features belie the characterization of American intercollegiate sports as amateur sports competition.

Reform of abuses seemingly inherent in sports competition among American universities reveals a series of historic landmarks. These landmarks clearly show that popular demand in the marketplace has always fueled the growth and destiny of intercollegiate athletics and reform efforts were never targeted at abolishing competition. Reform efforts illustrate society's continuing struggle to blunt and channel the negative side effects of marketplace demands while still permitting popular athletic competitions to flourish.<sup>23</sup> Because the 1890s saw football teams from prominent universities competing before grandstands packed with student and alumni supporters, excesses and abuses—including brawls—arose.<sup>24</sup> This led to the famed Chicago Meeting in January 1895 that sought better institutional control of intercollegiate sports. The meeting resulted in the formation of the Big Ten as a major college athletic conference to control and regulate the burgeoning popularity of intercollegiate sports events in the Midwest among its member institutions.<sup>25</sup>

Despite the growth of academic conferences and increased regulation and institutional supervision of intercollegiate athletics, serious college football injuries and deaths rocketed to alarming proportions.<sup>26</sup> President Theodore Roosevelt responded by meeting with Ivy League institutions to urge decisive action,<sup>27</sup> and in December 1905, the representatives of sixty-two major institutions met to form the Intercollegiate Athletic Association of the United States (IAAUS), the predecessor to the NCAA.<sup>28</sup> The nascent NCAA became a rulemaking group that promoted the growth of athletic conferences, pushed for greater institutional control of

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23. For a generalized history of college and university sports in America, see KNIGHT COMM'N ON INTERCOLLEGIATE ATHLETICS, *supra* note 18, at 6–8.

24. See Davenport, *supra* note 7, at 219.

25. *Id.* Ironically, the University of Chicago, instrumental in forming the Big Ten, eventually dropped football and left the Big Ten, only to experience a later chapter of Chicago football reborn. See *infra* note 47.

26. See Willie T. Smith III, *Tribute to Flying Wedge a Starting Point for NCAA's Hall*, USA TODAY, Mar. 30, 2000, at 7C; Skip Wood, *Life on Wedge: "No Room for Cowards"*, USA TODAY, Feb. 16, 2005, at 3C.

27. Carter, *supra* note 22, at 215–16; Mark Alesia, *Historians Debate Roosevelt's NCAA Legacy; President Played Key Role in Birth of Organization, but 1905 "Ultimatum" Questioned*, INDIANAPOLIS STAR, Jan. 7, 2006, at 1D; see also *The History of the NCAA*, NCAA.ORG, <http://www.ncaa.org/wps/ncaa?ContentID=1354> (last visited Aug. 1, 2010) ("President Theodore Roosevelt summoned college athletics leaders to two White House conferences to encourage such reforms.").

28. Alesia, *supra* note 27, at 1D; *The History of the NCAA*, *supra* note 27.

intercollegiate sports, and provided a continuing national focal point for discussing problems periodically arising from big-time sports competition. These developments established the NCAA's position within academe's democratic process.<sup>29</sup>

In the 1920s, guided by the NCAA and the booming growth of intercollegiate sports competition and athletic conferences, American institutions of higher education eventually came to recognize intercollegiate athletics as a formal part of their educational mission. More importantly, institutions placed athletic governance into physical education departments and thereby, at least nominally, under university control.<sup>30</sup> Simultaneously, the linkage between alumni and the institution, including the institutional thirst for direct financial support from alumni, became increasingly linked to many universities' intercollegiate sports programs.<sup>31</sup>

The stock market crash of 1929 coincided with the release of the *Carnegie Report*, which summarized the findings of its multiyear project examining the nature of intercollegiate athletics and the relationship to college administrators during the sports boom of the 1920s.<sup>32</sup> The

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29. The NCAA's online history recites significant changes in governance in 1952, 1973, and 1997. *The History of the NCAA*, *supra* note 27. See generally JOSEPH N. CROWLEY, *IN THE ARENA: THE NCAA'S FIRST CENTURY* (2006).

30. CROWLEY, *supra* note 29, at 67; Gabriel A. Morgan, *No More Playing Favorites: Reconsidering the Conclusive Congressional Presumption that Intercollegiate Athletics Are Substantially Related to Educational Purposes*, 81 S. CAL. L. REV. 149, 165 (2007); *To Fix Standards of College Sports: Directors of Athletics and Physical Education Confer in New York This Week*, N.Y. TIMES, Dec. 28, 1919, at S3; see also RICHARD HOFSTADTER & C. DEWITT HARDY, *THE DEVELOPMENT AND SCOPE OF HIGHER EDUCATION IN THE UNITED STATES* 114 (1952) ("[T]here are 'few important schools without an important stadium and without coaches whose salaries top those of the teaching staff.'" (citation omitted)); Carter, *supra* note 22, at 266 ("Schools accused the media of . . . resisting attempts to maintain amateurism by whipping up public opposition to institutional actions.").

31. Some have referred to this era as "The Golden Age of Sports." Davenport, *supra* note 7, at 219–20; see also HOFSTADTER & HARDY, *supra* note 30, at 114 ("The alumnus is important to the university; he is a major source of direct support; he is its lifeline to the community."); Carter, *supra* note 22, at 266.

32. John L. Griffith, *The Carnegie Reports: Another View of the Study of College Athletics Made by the Carnegie Foundation*, 1 J. HIGHER EDUC. 325, 326–27 (1930). The 1929 Carnegie Foundation Report "documented the rampant professionalism, commercialization, and exploitation that were corrupting virtually all aspects of intercollegiate athletics." Charles Farrell, *Historical Overview*, in *THE RULES OF THE GAME: ETHICS IN COLLEGE SPORT* 3, 8 (Richard E. Lapchick & John Brooks Slaughter eds., 1989); see HOWARD J. SAVAGE ET AL., *AMERICAN COLLEGE ATHLETICS, BULLETIN NUMBER TWENTY-THREE* (1929) (known colloquially as the "Carnegie Report"); see also Davenport, *supra* note 7, at 221 ("[The Carnegie Report] described all the abuses in

*Carnegie Report* found “rampant professionalism, commercialization, and exploitation that were corrupting virtually all aspects of intercollegiate athletics,”<sup>33</sup> and documented a litany of institution-specific bad practices.<sup>34</sup> Even during the general belt-tightening of higher education caused by reduced incomes during the Depression era, the problems of illegal player inducements and recruiting seemed to continue unabated.<sup>35</sup>

World War II offered a five-year interregnum in big-time college athletics. With the end of the war and the advent of national television came a resurgence and growth of interscholastic athletics. At the same time, college athletic departments became significant revenue generators, and many became divorced from university physical education department control.<sup>36</sup> Money, usually tied to winning programs, became the driving force in athletic departments, and the fate of university presidents sometimes hinged on the fortunes of their institutions’ athletic teams.<sup>37</sup> Athlete recruiting abuses, basketball scandals, and other distressing events reached a peak.<sup>38</sup>

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college sport and urged the college administrators to take charge and to clean up the situation.”); Robert N. Davis, *Academics and Athletics on a Collision Course*, 66 N.D. L. REV. 239, 245 (1990) (“[The Carnegie Report] focused on abuses in intercollegiate sports and urged that the universities do something to rectify the abuses.”); Eric J. Sobocinski, *College Athletes: What Is Fair Compensation?*, 7 MARQ. SPORTS. L.J. 257, 273 (1996) (“The [Carnegie Report] suggested that recruiting had become corrupt, professionals had replaced amateurs, education was being neglected and commercialism reigned.”); *Study of College Athletics: Carnegie Foundation Reports—Recruiting and Subsidizing Are General—Findings About Cornell*, 32 CORNELL ALUMNI NEWS, 82, 82 (1929) (“Classification of colleges and universities according to the degree and kind of recruiting and subsidizing of athletes is one of the outstanding features of the survey of American college athletics by the Carnegie Foundation for the Advancement of Teaching.”). The litany of abuses identified in the Carnegie Report included the on-campus power of intercollegiate sports competition, administrative failures of oversight of football programs, plus particularized lists of seemingly institution-specific bad behavior. SAVAGE ET AL., *supra*.

33. Farrell, *supra* note 32, at 8; see CROWLEY, *supra* note 29, at 65–66; Griffith, *supra* note 32, at 325–27.

34. See Davenport, *supra* note 7, at 221; Sobocinski, *supra* note 32, at 273–74.

35. CROWLEY, *supra* note 29, at 68; Davenport, *supra* note 7, at 221.

36. Davenport, *supra* note 7, at 222; see Rodney K. Smith, *A Brief History of the National Collegiate Athletic Association’s Role in Regulating Intercollegiate Athletics*, 11 MARQ. SPORTS L. REV. 9, 14 (2000).

37. Davenport, *supra* note 7, at 222; see also Tom Cushman, *Examining NCAA from the Inside Out*, SAN DIEGO UNION-TRIBUNE, Dec. 11, 1995, at C1 (“[T]he entire apparatus [of intercollegiate athletics] is tailored to produce only one thing . . . money for coaches and universities.” (ellipsis in original)); Austin Murphy, *Fast Times at Puhahou*, SPORTS ILLUSTRATED, May 26, 2008, at 61 (quoting George Cross, the President of Oklahoma University in the 1950s, speaking about his desire to “build a university the football team can be proud of”).

38. Davenport, *supra* note 7, at 223; Rodney K. Smith, *The National Collegiate Athletic Association’s Death Penalty: How Educators Punish Themselves and Others*, 62

In response, the NCAA evolved from an advisory body into a powerful national regulatory body that made rules, systematized policing of rules infractions, and imposed sanctions on its member institutions for rules violations.<sup>39</sup> The NCAA was authorized by its member schools to censure, penalize, expel, and enforce sanctions against institutions for rules violations that contravened its basic objective “to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports.”<sup>40</sup>

This did not, however, adversely affect the popularity of intercollegiate athletics or stem the market-driven tide of increasing revenues generated by college sports events. For the past sixty years, the commercialization of intercollegiate sports has continued to grow, largely in response to the enormous popularity of Division I FBS football and men’s basketball and the consequent multimillion-dollar, revenue-generating potential of these sports. For instance, CBS agreed to pay the NCAA \$6 billion from 2002 to 2013 to broadcast its men’s basketball tournament.<sup>41</sup> A May 2009 Congressional Budget Office (CBO) paper, entitled *Tax Preferences for Collegiate Sports*, states that the 2008 NCAA men’s basketball tournament generated approximately \$143 million in revenue for college athletic departments and that FBS bowl games generated roughly the same amount.<sup>42</sup> The CBO paper includes data showing that the 2004–2005 fiscal year average athletic program revenues for universities with Division I FBS football and men’s basketball teams was \$35.2 million.<sup>43</sup>

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IND. L.J. 985, 992 (1987); Dwight Chapin, “*The Fix*” Offers Insight into College Basketball Scandal, S.F. CHRON., Feb. 16, 2002, at C2.

39. Davenport, *supra* note 7, at 222; Smith, *supra* note 36, at 15. As one university president remarked recently, “[N]o one can or will stick his neck out . . . [P]residents have lost their jobs over athletics. Presidents and chancellors are afraid to rock the boat.” KNIGHT COMM’N ON INTERCOLLEGIATE ATHLETICS, *supra* note 10, at 16. For one journalist’s case study of how the NCAA’s rulemaking powers can create a “black market” among high school athletes being recruited by colleges and universities see MICHAEL LEWIS, *THE BLIND SIDE: EVOLUTION OF A GAME 196–205* (2006).

40. NCAA CONST. art. 1, § 1.3.1, reprinted in NAT’L COLLEGIATE ATHLETIC ASS’N, 2009–10 NCAA DIVISION I MANUAL 1, 1 (2009), available at <http://www.ncaapublications.com/p-3934-2009-2010-ncaa-division-i-manual.aspx>.

41. *CBS Renews NCAA B’Ball*, CBS MONEY (Nov. 18, 1999, 8:39 PM) <http://money.cnn.com/1999/11/18/news/ncaa/>.

42. CONGRESSIONAL BUDGET OFFICE, *TAX PREFERENCES FOR COLLEGIATE SPORTS*, at vii (2009).

43. *Id.* at 4.

#### IV. USE OF INTERCOLLEGIATE ATHLETICS AS A WINDOW TO THE UNIVERSITY

America's academic leaders are immersed in society's economic climate. There are intense pressures to attract larger incoming classes of students with stronger academic credentials, increase political and cultural support of their institutions from the larger community, recruit and retain high quality faculty, enlarge fundraising for brick and mortar, expand endowment, and grow their academic programs. In an extremely competitive higher education market, academic leaders increasingly use intercollegiate sports as a catalyst and means to achieve these legitimate ends. This rational conduct is merely a facet of competition in a well-functioning democratic society that embodies the centuries-old American enterprising spirit of doing what is necessary to compete successfully.

Regarding the relationship between competition in intercollegiate athletics and competition within higher education, Sidney McPhee, the president of Middle Tennessee State University, explained:

Competition among institutions of higher education may be perceived as being confined to the playing field. It is not. While we tend to think of higher education as a homogeneous collection of colleges and universities, individually they are varied and aggressively competing with one another for resources, talent and standing. . . . Competition on the playing field as in higher education is a fundamental principle of a free-enterprise system.<sup>44</sup>

Universities allocate funds to intercollegiate athletics based on their perceived institutional value, which is the same way resources are allocated to their academic programs and other activities. The most positive institutional features found in the following examples of institutional success stories—stronger faculty recruitment, larger student bodies with better academic credentials, more financial resources, statewide political clout—are driven in large part by devoting increased resources to intercollegiate athletics. All these institutional stories share one crucial commonality: university leaders perceived and acted upon their perception of a symbiotic interdependence between a successful intercollegiate athletics program and institutional academic growth as an energizing reality in twenty-first century American higher education.<sup>45</sup>

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44. PRESIDENTIAL TASK FORCE ON THE FUTURE OF DIV. I INTERCOLLEGIATE ATHLETICS, *THE SECOND-CENTURY IMPERATIVES: PRESIDENTIAL LEADERSHIP—INSTITUTIONAL ACCOUNTABILITY* 23 (2006), available at <http://coia.comm.psu.edu/NCAA%20Presidential%20Task%20Force%20final%20report%20Oct%2006.pdf>.

45. Attempting to convince her counterpart that the University of Nebraska should remain a member of the Big 12 Conference to prevent its possible demise, which could result in the University of Kansas's loss of membership in a major athletics conference, Kansas chancellor Bernadette Gray-Little stated: "There are some universities that survive and thrive without a large athletic program. I hope we don't have to test that out."

Institutional success stories are not limited to nostalgic tales from a quaint past. A small Catholic college, originally called L'Universite de Notre Dame du Lac, founded in 1842 in a wilderness area of Indiana rose in lockstep with its athletic fame to become the internationally renowned institution named Notre Dame.<sup>46</sup> Similarly, the past century records the storied growth of interscholastic sports among a cluster of highly regarded Midwestern universities that created the Big Ten: Michigan, Chicago,<sup>47</sup> Northwestern, Wisconsin, Purdue, Illinois, and Minnesota.<sup>48</sup> As the following examples illustrate, modern chapters are being written today by many colleges and universities across America.

On New Year's Day 2007, steep underdog Boise State University ran a daring Statue of Liberty play for a two-point conversion and posted a 43–42 overtime upset against the favored Oklahoma Sooners.<sup>49</sup> This soon resulted in millions of dollars in new pledges for the university's business and nursing schools, growth in the number of graduate school inquiries, increased political recognition among Idaho legislators, merchandising contracts, Hollywood inquiries about film rights, national recognition on ESPN and other cable sports shows, leaps in alumni giving and other fundraising not solely directed toward athletics, and local retail business boosts.<sup>50</sup> Officials believe that the energizing bounce to the school and to the community of Boise “will pay off for years.”<sup>51</sup>

The University of Florida's (UF) intercollegiate athletics success is noteworthy for its heated competition with several other Florida universities for higher education support. During recent seasons when the University of Florida won multiple national basketball and football

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Associated Press, *Gray-Little Planned To Call Missouri Too*, ESPN.COM (last updated June 8, 2010, 8:53 AM), <http://sports.espn.go.com/ncaa/news/story?id=5262068>.

46. MURRAY SPERBER, *SHAKE DOWN THE THUNDER: THE CREATION OF NOTRE DAME FOOTBALL 5–7* (Ind. Univ. Press 2002) (1993).

47. The University of Chicago was instrumental in founding the Big Ten Conference in 1897; however, in 1939 President Robert Hutchins abolished football, and Chicago withdrew from the Big Ten. *Big Ten History*, BIG TEN CONF. OFFICIAL ATHLETIC SITE, <http://www.bigten.org/trads/big10-trads.html> (last visited Aug 1, 2010). The university reinstated its intercollegiate football program in 1969. *History of the University*, U. CHI., <http://www.uchicago.edu/about/history.shtml> (last visited Aug. 1, 2010).

48. *Big Ten History*, *supra* note 47. See generally Davenport, *supra* note 7, at 219.

49. Jill Lieber Steeg, *Boise State Fiesta Goes On; Ticket Sales, Fundraising, Marketing Booming*, USA TODAY, Aug. 20, 2007, at C1; Pat Forde, *Broncos Earn Respect with Improbable Victory*, ESPN.COM (last updated Jan. 2, 2007, 10:20 AM), <http://sports.espn.go.com/espn/print?id=2716979&type=Columnist&imagesPrint=off>.

50. See Steeg, *supra* note 49, at C1.

51. *Id.*

championships, UF's fundraising increased by 38% to \$183 million—with only 50% of the increase directed to athletics.<sup>52</sup> UF recently launched a new \$1.5 billion university fundraising campaign,<sup>53</sup> which undoubtedly will benefit from the national notoriety generated by its intercollegiate program.

The University of South Florida (USF), keenly aware of its competitive struggles with UF as well as the University of Miami and Florida State University in the Florida marketplace, took several steps towards expanding its growth and reputation. USF commissioned a national survey of high school students, sought ways to leverage national exposure of athletic success, initiated recruitment efforts for high-performance students tied into football events, and quietly laid plans to capitalize on growing alumni pride with a \$500 million to \$1 billion university fundraising campaign.<sup>54</sup> USF has become a modern paradigm of the linkage between university growth and big-time athletics, or, as one USF student put it, "It's sad, but true: A good athletic program brings attention to the university."<sup>55</sup>

Media attention was USF's objective when it launched its inaugural football season in September 1997.<sup>56</sup> USF President Judy Genshaft makes the point widely accepted by many university administrators that a winning athletic program helps a school recruit top faculty and staff members and better market the school's academic and research programs to prospective students.<sup>57</sup> Genshaft says, "Those top-ranked professors typically come from top-ranked institutions. . . . Most top-ranked institutions also have Tier 1 athletics. . . . You get people introduced through athletics, take them by the hand and introduce them to the rest of the university."<sup>58</sup> Overall, USF's quantitative rise is startling.<sup>59</sup>

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52. Adam Emerson, *USF Officials Prepare for Perks of Success: Short-Term Rise Seen in Donations, Applications*, TAMPA TRIB., Oct. 2, 2007, at 1.

53. *Id.* See also *Florida Tomorrow: The Campaign for the University of Florida*, U. FLA., <http://www.floridatomorrow.ufl.edu/about.htm> (last visited Aug. 1, 2010); *University of Florida Athletics*, U. FLA., <http://www.ufl.edu/athletics/> (last visited Aug. 1, 2010).

54. Emerson, *supra* note 52, at 1.

55. Rodney Thrash, *Now Nation Knows Who Bulls Are*, ST. PETERSBURG TIMES (St. Petersburg, Fla.), Sept. 28, 2007, at 1A; see Emerson, *supra* note 52, at 1.

56. Emerson, *supra* note 52, at 1; Thrash, *supra* note 55, at 1A.

57. Thrash, *supra* note 55, at 1A. A USF website emphasizes the recent growth and prestige of the university as a research center. See *The USF Research Park of Tampa Bay: "Emerging Research Park of the Year,"* USF CONNECT, <http://www.usfconnect.org/Research-Park.asp> (last visited Aug. 1, 2010).

58. Thrash, *supra* note 55, at 1A. In regard to Genshaft's accuracy, note that *U.S. News & World Report* creates a list every year of the top academic institutions throughout the country. See generally *The 2009 Rankings*, U.S. NEWS & WORLD REP., at 88–129. In viewing the list, one can see that many of the top institutions are not only academically inclined but athletically as well. See *id.* Notable schools in order of



When he took office in 1998, North Dakota State University (NDSU) President Joe Chapman had a vision for growth at NDSU beyond its roots as a regional institution.<sup>60</sup> Although not a rabid sports fan himself, a key part of President Chapman's plan for realizing his vision of expansion involved shifting the athletic program to present a new and big-time face to the nation.<sup>61</sup> The athletic budget rose from \$6.2 million in 2003 to \$10.5 million in 2007.<sup>62</sup> In order to generate public support for its increased athletic budget, NDSU also expanded from fifteen doctoral programs to forty-two and more than doubled its research budget.<sup>63</sup> NDSU also moved up to Division II athletics and successfully sought scheduling of Division I opponents.<sup>64</sup> NDSU believed that "[a] successful football program could drive fundraising and rally support" for the school's expanded reach.<sup>65</sup>

Georgia State University (GSU) President Carl V. Patton believes creating a competitive intercollegiate football program is "desirable (if

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academic ranking in the top fifty are Stanford University at fourth, Duke University at eighth, University of Notre Dame and Vanderbilt University tied at eighteenth, University of California—Berkeley at twenty-first, University of Virginia at twenty-third, University of California—Los Angeles at twenty-fifth, University of Michigan at twenty-sixth, University of Southern California at twenty-seventh, University of North Carolina—Chapel Hill at thirtieth, Boston College at thirty-fourth, University of Wisconsin—Madison at thirty-fifth, University of Washington at forty-first, Pennsylvania State University and University of Texas—Austin tied at forty-seventh, and University of Florida at forty-ninth. *Id.* at 88 (ranking the "Best National Universities").

59. Thrash, *supra* note 55, at 1A. USF has enjoyed phenomenal growth in numbers and quality of its student body—enrollment up from 39,000 to 45,000 in five years, making it Florida's third largest public university. *Id.* USF had spent years trying to shed the image of a "commuter school" and to see itself as an equal with the other Florida megacampuses. *Id.* The increased demand for admissions has pushed upward the credentials of USF applicants to an average 3.71 high school GPA in fall 2007, with nearly one applicant in four ranked in the top ten percent of the applicant's high school class. Emerson, *supra* note 52, at 1. This increased admissions demand—allowing greater USF selectivity of student enrollment—is seen as "just one effect of a successful football season." *Id.* "[N]onstop" marketing of USF merchandise has become big business for Tampa-St. Petersburg suppliers. Thrash, *supra* note 55, at 1A. Orders pour into local outfitters from as far away as Brazil, with local banks, governments, and merchants all aboard the USF marketing ride. *Id.*

60. Rachel Blount, *Warning to Gophers: Here Come the Bison*, STAR TRIB. (Minneapolis-St. Paul, Minn.), Oct. 18, 2007, at 1A, available at <http://www.startribune.com/gophers/story/1494456.html>.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

not close to mandatory),”<sup>66</sup> as GSU seeks to transform itself from a commuter school to a “full-rounded college education.”<sup>67</sup> Achieving this “full-rounded college education” meant that the school must become a “real” university.<sup>68</sup> According to Patton, what prospective GSU students mean when they want GSU to be a “real” university “is a university that has successful sports programs, and football is one of the things they want.”<sup>69</sup>

The striking growth and visibility of the University of Connecticut (UConn) has been based on an intercollegiate basketball-centered strategy.<sup>70</sup>

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66. Doug Lederman, *Flocking to Football*, INSIDE HIGHER ED (May 20, 2008), <http://www.insidehighered.com/news/2008/05/20/football>.

67. *Id.*

68. *Id.* Additionally, President Patton found widespread support among GSU alumni, students, and staff. Thus serious discussions for the addition of football began in 2005 and in 2007, and as a step in that direction, Dan Reeves was hired as the lead consultant. *Id.* On April 17, 2008, GSU officially announced that it would begin Division I-AA competition starting in the 2010 season in the Colonial Athletic Association, with home games being played at the Georgia Dome. *Kickoff in 2010: Football Era To Begin at Georgia State*, GA. ST. U. (Apr. 17, 2008), [http://www2.gsu.edu/~wwwexa/news/archive/2008/08\\_0417-football.htm](http://www2.gsu.edu/~wwwexa/news/archive/2008/08_0417-football.htm). GSU also purchased a 3.8-acre tract of land for \$6.6 million on which to build a brand new practice facility. *Georgia State Buys Land for Football Practice Facility*, ATLANTA BUS. CHRON., Oct. 28, 2008, available at 2008 WLNR 20562100. The final piece of the GSU game plan was hiring Bill Curry to be the school’s first head football coach. *See Bill Curry*, GA. ST. ATHLETICS, <http://www.georgiastatesports.com/ViewArticle.dbml?DBOEMID=12700&ATCLID=1480479> (last visited Aug 1, 2010).

69. Lederman, *supra* note 66. As another illustration, Mississippi Governor Haley Barbour’s fall 2009 suggestion that the state’s fifteen community colleges eliminate or significantly downsize their intercollegiate athletics programs to save costs in response to major state budget cuts was met with dismay by college presidents and athletics directors. David Moltz, *Cutting Community College Athletics*, INSIDE HIGHER ED (June 24, 2010), <http://www.insidehighered.com/layout/set/print/news/2010/06/24/athletics>. James Southward, the director of athletics activities for the Mississippi State Board for Community & Junior Colleges stated:

Mississippi has a very storied and prestigious position in community and junior college football, probably more so than any other state. Our football, basketball, baseball and women’s softball teams are very costly to operate, but they’re also the sports that bring students onto campus. It’s kind of a pay-back situation. The feeling among most of our presidents is that if they start cutting out some of these major sports, they would see a drop in enrollment. If that happens, it’s as bad as being cut in funding.

*Id.*

70. *UConn Traditions* reports on President Philip E. Austin’s 10 years of expansion and success in all academic programs in the same breath as noting successes in basketball and soccer. Mike Pesca, *UConn on Defensive as It Aims for Championship*, NPR (Apr. 4, 2009), <http://www.npr.org/templates/story/story.php?storyId=102748053&sc=emaf>; *see also Philip E. Austin: 10 Years as UConn President*, UCONN MAG., Fall/Winter 2006, available at <http://uconnmagazine.uconn.edu/fwin2006/fwin06au.html>; Daniel D. Delaney, *Accounting for Athletics: A Balanced Scorecard Approach* 10–11, app. F (May 6, 2008) (unpublished honors thesis, University of Connecticut), available at <http://digitalcommons.uconn.edu/cgi/viewcontent.cgi?article=1053&>

The UConn story parallels the same script described above respecting Boise State, South Florida, NDSU, and GSU—employing athletics as a useful tool to achieve greater public recognition and prominence.<sup>71</sup> This recognition is then used to generate better and bigger entering classes, alumni support, public funding, and other university objectives.<sup>72</sup> As yet another example, a full-page ad in the business section of the December 8, 2009, edition of the *Chicago Tribune* touted Texas Christian University's 12–0 football season:

[At TCU] we've got more than just a great football team. Our total 24/7 university experience includes a beautiful residential campus, academics that engage students in research, and study abroad programs so Horned Frogs can explore the world. . . .

Big-time athletics. World-class academics. It all adds up to the exceptional TCU experience.<sup>73</sup>

NCAA member educational institutions outside of Division I have also relied on intercollegiate athletics as a means of revitalization or transformation. Adrian College, a liberal arts college in Michigan, used intercollegiate athletics to completely turn itself around in three years. Before 2005, Adrian's administration and faculty despaired because of their slumping enrollment and campus malaise.<sup>74</sup> They decided to use intercollegiate athletics as recruiting tool in an attempt to reverse the decline and, in doing so, discovered "the fountain of youth for small liberal arts colleges."<sup>75</sup> Since 2005, Adrian's enrollment has surged 57% to its highest number—1470—in twenty years, and the academic caliber of students has shot up.<sup>76</sup> Before 2005, Adrian had accepted 93% of its pool of 1200 applicants.<sup>77</sup> Since adopting its athletics-based student recruiting strategy, Adrian now accepts only 72% of the applicants from

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context=srhonorsthesis (revealing an overall increased applicant pool from 13,000 to 21,000 during 2002–2007 and a startling 99% retention rate for student athletes).

71. *Supra* note 70 and accompanying text.

72. *See supra* notes 44–71 and accompanying text; *see also Philip E. Austin: 10 Years as UConn President*, *supra* note 70 (discussing the integral role played by soccer and basketball in President Philip E. Austin's ten years of expansion and success in all academic programs).

73. CHI. TRIB., Dec. 8, 2010, § 1, at 33.

74. Libby Sander, *Athletics Raises a College from the Ground Up*, CHRON. HIGHER ED., Sept. 19, 2008, at A1, A18, available at [http://chronicle.com/weekly/v55/i04/04a00101.htm?utm\\_source=at&utm\\_medium=en](http://chronicle.com/weekly/v55/i04/04a00101.htm?utm_source=at&utm_medium=en).

75. *Id.*

76. *Id.* at A1.

77. *Id.*

a nearly fourfold larger pool of 4200 applications and reports that its student body has better academic credentials.<sup>78</sup>

Roosevelt University, a private university in downtown Chicago, is restoring its intercollegiate athletics program after a nearly twenty-year hiatus.<sup>79</sup> During the past decade, the university has transitioned from a largely commuter institution with adult part-time students to a more residential school with an increasing number of full-time, traditional-aged students, many of whom want the university to bring back intercollegiate athletics.<sup>80</sup> With the approval of Roosevelt's faculty, university administrators are embarking on a plan to create twelve sports teams, not including football, to resume participating in intercollegiate athletics competition in fall 2010, and to rejoin the National Association of Intercollegiate Athletics (NAIA).<sup>81</sup> After five years, Roosevelt plans to apply for admission to NCAA Division III.<sup>82</sup>

Some writers decry the disparity between costs and funding sources of the large, established athletics programs compared to those of smaller programs, dubbing the disparity "The Athletics Tax."<sup>83</sup> As an illustration of this purportedly unfair disparity one writer sets up a comparison between the University of Michigan and Eastern Michigan University—a comparison that is historically uninformed or economically naïve.<sup>84</sup>

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78. *Id.*

79. David Moltz, *Athletic Revival*, INSIDE HIGHER ED (May 15, 2009), <http://www.insidehighered.com/layout/set/print/news/2009/05/15/roosevelt>.

80. *Id.*

81. *Id.*

82. *Id.* Yet another example of this phenomenon: Post University, a for-profit institution that offers fifteen sports in NCAA Division II but has four times as many online students as those attending classes in person, recently joined the Collegiate Sprint Football League, an eastern athletic association whose members include Cornell, Penn State, Princeton, Army, and Navy. David Moltz, *Rubbing Shoulder Pads with Elites*, INSIDE HIGHER ED (Dec. 11, 2009), <http://www.insidehighered.com/news/2009/12/11/football>. The playing rules for sprint football are the same as those for traditional college football, but all players must weigh 172 pounds or less to be eligible to participate. *Id.* Ken Zirkle, Post University's president, hopes that adding sprint football will increase the university's male student body and foster a stronger sense of community among students. He states:

Online students want to take pride in their university. I expect that adding [a sprint football team] will do nothing but enhance that. We already have alumni clamoring for a homecoming event, and a football game is a natural venue for that. Football has a certain mystique, and I know the benefits of it, having experienced them firsthand at other institutions.

*Id.* Others have suggested that sprint football may be an attractive, low-cost option for institutions that recently have discontinued their traditional college football programs, such as Hofstra University and Northeastern University. *Id.*

83. *See, e.g.*, David Moltz, *The Athletics Tax*, INSIDE HIGHER ED (June 1, 2010), <http://insidehighered.com/news/2010/06/01/subsidies>.

84. *Id.* David Moltz underscores the unfairness of the funding differences between the University of Michigan and Eastern Michigan University. *Id.* This view is either

As the president of one major university recently put it, “Mega college athletics . . . reflects the decisions of academic administrators and governing boards at almost all colleges and universities for over a century. It prospers because for the most part we (our faculty, our staff, our alumni, our legislators, our trustees, our students, and our many other constituencies) want it.”<sup>85</sup>

V. COMMERCIALIZED INTERCOLLEGIATE ATHLETICS:  
TWENTY-FIRST CENTURY VALUES CONFLICTS AND  
ADVERSE EDUCATIONAL AND ECONOMIC EFFECTS

The use of intercollegiate sports by university leaders—who must explore all options in an effort to increase the human, financial, and other resources needed by their institutions, as part of their efforts to enable their respective institutions to flourish in an increasingly competitive higher education environment—is a rational response to marketplace realities.<sup>86</sup> On the other hand, the NCAA Constitution

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historically uninformed or economically naïve. If the president and governing board of the University of Michigan have long decided that establishing a strong athletic profile attracts more and better students, faculty, alumni funding, and political support—the usual consensus of college and university presidents—then of course Michigan now enjoys the economic momentum and support from all sources—and to a greater degree than its lesser rivals. Similarly, if the president and governing board of Eastern Michigan University decides today on seeking a stronger athletic profile to enhance EMU’s program, then they face the same front-end costs of any new and aspiring enterprise, public or private. EMU will be forced to seek new funding from all available sources.

85. Lombardi, *supra* note 18.

86. In economic terms:

The noncompulsory nature of higher education forces the institution to behave in a manner similar to the firm. Because students can choose from a variety of colleges, each institution must provide a desirable package at a competitive price to attract applicants. Because higher education services are seen by prospective consumers as both a source of human capital investment and as a consumption good, each college must allocate its resources to achieve maximum benefit. . . .

. . . According to this argument, athletics is consistent with the mission of a university because it develops desirable traits “such as courage, integrity and coolness under pressure.” Clearly, developing these traits is consistent with the view of college as a human capital investment.

. . . According to the utilitarian perspective, college athletics garner local and/or national support for the university, generate revenue to support the university mission, and create a sense of community among students, faculty, and alumni. Note that the utilitarian focus is not just on the benefits of athletics to student-athletes but to the entire university community. From this viewpoint,

provides that college and university presidents have “ultimate responsibility and final authority for the conduct of . . . intercollegiate athletics,”<sup>87</sup> and they must not allow commercialized intercollegiate athletics to assume a role inconsistent with an institution of higher education’s core values and academic mission, or to have harmful economic consequences and effects.<sup>88</sup>

According to the NCAA, “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.”<sup>89</sup> Professor Timothy Davis has aptly characterized this idealized view of intercollegiate athletics espoused by the NCAA as the “amateur/education” model.<sup>90</sup> However, as previously discussed, true amateurism is nonexistent, especially today when many student-athletes receive “compensation” for participating in intercollegiate sports in the form of an economically valuable athletic scholarship that covers the costs of their college tuition, room, board, and books.<sup>91</sup> Nevertheless, this model may accurately encompass most intercollegiate athletics competition and student-athletes, particularly women’s and men’s sports that do not generate net revenues in excess of their production costs.

Those who participate in intercollegiate athletics are expected to strive for excellence in both academics and athletics, unlike professional

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intercollegiate athletics are promoted as spectator sports, contributing to the “consumption good” component of the university “product.”

Daniel R. Marburger & Nancy Hogshead-Makar, *Is Title IX Really To Blame for the Decline in Intercollegiate Men’s Nonrevenue Sports?*, 14 MARQ. SPORTS L. REV. 65, 74–75 (2003) (internal citations omitted).

87. NCAA CONST. art. 6, § 6.1.1, *reprinted in* NAT’L COLLEGIATE ATHLETIC ASS’N 2009–10 NCAA DIVISION I MANUAL, *supra* note 40, at 43.

88. *See id.* at 1. For example, the University of California, Berkeley’s athletics department, despite receiving annual multimillion-dollar institutional subsidies, incurred multimillion dollar operating deficits from 2004–2006 in violation of a University of California system policy requiring university athletic departments to be self-supporting. Doug Lederman, *Bad Time for Sports Overspending*, INSIDE HIGHER ED (Oct., 30, 2009), <http://www.insidehighered.com/news/2009/10/30/ucsports>. In 2007, the university’s central administration forgave \$31 million in previous loans to the athletics department to cover annual deficits, and recently loaned the athletics department \$12 million to cover its projected 2009 and 2010 operating deficits. *Id.* Difficult economic times have forced virtually all other university academic programs and campus operations to cut their budgets, as well as required Berkeley faculty and staff to take unpaid furlough days. *Id.*

89. NCAA CONST. art. 2, § 2.9, *reprinted in* NAT’L COLLEGIATE ATHLETIC ASS’N 2009–10 NCAA DIVISION I MANUAL, *supra* note 40, at 4.

90. Timothy Davis, *Intercollegiate Athletics: Competing Models and Conflicting Realities*, 25 RUTGERS L.J. 269, 270 (1994).

91. *See supra* Part III.

athletes whose sole focus is on the latter objective. Consistent with the educational component of the amateur/education model, student-athletes' participation in intercollegiate athletics does in fact have several academic and future career benefits.<sup>92</sup> Analysis of data from a 2007 NCAA study of 8000 former student-athletes reveals that (1) 88% of student-athletes earn their baccalaureate degrees, compared to less than 25% of the American adult population; (2) 91% of former Division I student-athletes are employed full-time, 11% more than the general population, and average higher income levels than non-student-athletes; (3) 89% of former student-athletes believe the skills and values learned from participating in intercollegiate athletics helped them obtain their current employment in a career other than playing professional sports; and (4) 27% of former Division I student-athletes earn a postgraduate degree.<sup>93</sup> This is substantiated by a similar 1991 economic study.<sup>94</sup>

On the other hand, the commercial/education model, which "assumes that college sports is a commercial enterprise subject to the same economic considerations as any other industry,"<sup>95</sup> more accurately describes intercollegiate sports such as Division I FBS football and men's basketball. Universities' commercial exploitation of the entertainment value of these two enormously popular sports creates an inherent tension with their academic missions and has the potential to overshadow or marginalize the educational aspects of intercollegiate athletics.<sup>96</sup> As

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92. Gary T. Brown, *Research Validates Value, and Values, of Athletics*, NCAA.ORG (Feb. 12, 2007, 1:01:01 AM), <http://web1.ncaa.org/webfiles/NCAANewsArchive/2007/Association-wide/index.html> (follow "Research validates value, and values of athletics" hyperlink).

93. *Id.*

94. See James E. Long & Steven B. Caudill, *The Impact of Participation in Intercollegiate Athletics on Income and Graduation*, 73 REV. ECON. & STAT. 525, 525–29 (1991).

95. Davis, *supra* note 90, at 279.

96. However, this is not inevitable. The "Sweet Sixteen" bracket for the 2009 NCAA Men's Basketball Tournament included several teams—North Carolina, Kansas, Duke, and Villanova—whose members' Academic Performance Rate was near the top of the national academic rankings for teams participating in the Tournament. Compare 2009 Men's NCAA Tournament Bracket, USATODAY.COM (Mar. 16, 2009, 12:09 AM), <http://www.usatoday.com/sports/college/mensbasketball/tourney09/bracket.htm> (documenting the results of the 2009 NCAA Men's Basketball Tournament), with David Moltz, *The Academic Performance Tournament*, INSIDE HIGHER ED (Mar. 16, 2009), [www.insidehighered.com/layout/set/print/news/2009/03/16/ncaa](http://www.insidehighered.com/layout/set/print/news/2009/03/16/ncaa) (documenting the results of the 2009 Inside Higher Ed Academic Performance Tournament). North Carolina, the 2009 on-court men's champion, also won the "Academic Performance Tournament." See 2009 Men's NCAA Tournament Bracket, *supra* (documenting North Carolina's path in the 2009

former NCAA President Myles Brand observed, there is rising concern that the values important to higher education have been “overwhelmed” by the popularity of intercollegiate athletics to media and marketing, and “[a]s pressures to win and to generate revenue increase, the integration of athletics with the academy, the interference with presidential authority by avid fans or governing board members, and the primacy of education in the student-athlete experience all have been threatened.”<sup>97</sup>

In addition to potential conflicts with a university’s academic mission and educational values, the multimillion-dollar cost of producing intercollegiate athletics may have adverse economic effects. According to a February 2009 study commissioned by the NCAA, Division I athletic departments with FBS football and men’s basketball teams increased their spending by an average of almost 10.7% annually from 2004–2007, with their annual revenues increasing by 10.6%, which evidences roughly a one-for-one relationship between athletic expenditures and revenues.<sup>98</sup> This increased spending on intercollegiate athletics was more than double the average 4.9% annual increase in these universities’ overall nonathletics spending during this time period.<sup>99</sup> The study also found data that supports the existence of an “arms race”—“a situation in which the athletic expenditures by a given school tend to increase along with expenditures by *other* schools in the same conference”—at this level of intercollegiate athletics competition.<sup>100</sup> Although the annual salaries of many football and basketball coaches exceed \$1 million,<sup>101</sup> the study

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NCAA Men’s Basketball Tournament resulting in its championship victory); Moltz, *supra* (documenting North Carolina’s path in the 2009 Inside Higher Ed Academic Performance Tournament resulting in its championship victory).

97. Gary T. Brown, *Key Division I Report Calls for Local-Level Financial Solutions*, NCAA.ORG (Oct. 23, 2006, 1:01:10 AM), [http://web1.ncaa.org/web\\_files/NC\\_AANewsArchive/2006/Association-wide/index.html](http://web1.ncaa.org/web_files/NC_AANewsArchive/2006/Association-wide/index.html) (follow “Key Division I report calls for local-level financial solutions” hyperlink). To address the problem of trustee intrusion into presidential governance of intercollegiate athletics, the Association of Governing Boards of Colleges and Universities (AGB) has adopted policies advising trustees to “exercise [their] fiduciary responsibility and oversight for intercollegiate athletics the same way that [they] would for other aspects of the undergraduate experience.” Doug Lederman, *The Board Role in College Sports*, INSIDE HIGHER ED (Apr. 8, 2009), <http://www.insidehighered.com/layout/set/print/news/2009/04/08/agb>. AGB holds that “efforts to achieve an appropriate balance [require that] . . . governing board members will need to lend consistent and public support to their chief executives and academic leaders who are at the forefront of such discussions.” *Id.*

98. JONATHAN ORSZAG & MARK ISRAEL, *THE EMPIRICAL EFFECTS OF COLLEGIATE ATHLETICS: AN UPDATE BASED ON 2004–2007 DATA* 3–4 (2009), *available at* [http://web1.ncaa.org/web\\_files/DI\\_MC\\_BOD/DI\\_BOD/2009/April/04,%20EmpiricalEffects.pdf](http://web1.ncaa.org/web_files/DI_MC_BOD/DI_BOD/2009/April/04,%20EmpiricalEffects.pdf).

99. ORSZAG & ISRAEL, *supra* note 98, at 4.

100. *Id.* at 11.

101. *See infra* note 111.



found no significant relationship between coaching salaries and the teams' winning percentages.<sup>102</sup>

A report concerning the 2004–2006 NCAA revenues and expenses of Division I intercollegiate athletics programs found that only 19 of 119 Division I FBS institutions generated revenues that exceeded their expenses in the 2006 fiscal year.<sup>103</sup> From 2004–2006, only sixteen institutions reported positive net revenues.<sup>104</sup> For 2006, salaries for coaches and administrators accounted for 32% of total expenses.<sup>105</sup> The 2006 median salary for basketball head coaches was \$611,900, a 15% increase from the 2004 median; for football head coaches, it was \$855,500, a 47% increase from the 2004 median.<sup>106</sup> Total athletic department spending was approximately 5% of total university expenses at median FBS institutions.<sup>107</sup>

In a 2009 report analyzing the costs of financing intercollegiate sports, the *Knight Commission on Intercollegiate Athletics* found that a significant majority of college and university presidents regard the increasing costs of maintaining a competitive intercollegiate athletic program as a critical source of budget pressure.<sup>108</sup> The rapidly escalating costs of coaches' salaries are a major barrier to the sustainability of intercollegiate athletics programs.<sup>109</sup>

In 2007, for the first time, the *average* annual salary of the 120 Division 1A football coaches reached \$1 million, excluding perks and bonuses.<sup>110</sup> This average includes over fifty coaches who are making seven figure salaries and at least a dozen who are making \$2 million or more.<sup>111</sup> In December 2009, the University of Texas increased head football coach Mack Brown's annual salary from \$3 million to at least

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102. ORSZAG & ISRAEL, *supra* note 98, at 8.

103. NAT'L COLLEGIATE ATHLETIC ASS'N, 2004–06 NCAA REVENUES AND EXPENSES OF DIVISION I INTERCOLLEGIATE ATHLETICS PROGRAMS REPORT 7, 11, 13 (2008), available at <http://www.ncaapublications.com/productdownloads/RE2008.pdf>.

104. *Id.* at 7.

105. *Id.*

106. *Id.*

107. *Id.*

108. KNIGHT COMM'N ON INTERSCHOLASTIC ATHLETICS, *supra* note 10, at 35–40.

109. *See id.*

110. Steve Wieberg & Jodi Upton, *College Football Coaches Calling Lucrative Plays*, USATODAY.COM (Dec. 5, 2007, 1:56 PM), <http://www.usatoday.com/sports/college/football/2007-12-04-coaches-payNhtml>.

111. *Id.*

\$5 million for the remainder of his contract through 2016.<sup>112</sup> Will Muschamp, Brown's defensive coordinator and "head coach-in-waiting," makes \$900,000 annually, which is nearly \$300,000 more than the university president's yearly salary.<sup>113</sup>

Antitrust law is perceived as a legal impediment to any joint effort to limit the current arms race that is driving up coaching salaries.<sup>114</sup> College and university presidents also consider highly publicized coaching salaries as a source of internal and external friction.<sup>115</sup>

Despite such problems and other criticisms, a vast majority of presidents remain convinced that the net total subjective and objective benefits of intercollegiate athletics programs are a vital component of institutional success in achieving broader objectives, such as attracting student applicants in greater numbers and with stronger credentials, increasing fundraising outside of athletics, improving national visibility and relative reputation vis-à-vis other institutions, and increasing political influence.<sup>116</sup>

## VI. UNIVERSITY ATHLETIC DEPARTMENT REVENUES SHOULD REMAIN EXEMPT FROM FEDERAL TAXATION

Some commentators have taken the position that the increasing commercialization of college and university athletic programs requires a reexamination of federal tax laws pertaining to those programs and congressional modification of these laws.<sup>117</sup> Specifically, the argument is that many intercollegiate athletic programs, particularly those with Division I FBS and men's basketball teams, have become large and profitable businesses insufficiently related to education; as a result, Congress should reexamine whether college and university athletic programs, as well as the NCAA, should be entitled to exemption from

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112. Associated Press, *Brown To Receive \$5M a Season*, ESPN.COM (Dec. 9, 2009), <http://sports.espn.go.com/espn/print?id=4728932&type=HeadlineNew&imagesPrint=off>.

113. Mike Fish, *What Price Glory? The Star's Value*, ESPN.COM (last updated Dec. 17, 2009, 6:44 PM), <http://sports.espn.go.com/espn/print?id=4732298&type=Story&ImagesPrint=off>. By further comparison, Muschamp's annual salary is more than the \$627,109 yearly base salary that which University of Texas Athletic Director DeLoss Dodds makes. See *Florida's Jeremy Foley Ranks as Highest-Paid D-I AD at \$965,000*, SPORTSBUSINESS DAILY (Jan. 8, 2009), <http://www.sportsbusinessdaily.com/article/126729>.

114. KNIGHT COMM'N ON INTERCOLLEGIATE ATHLETICS, *supra* note 10, at 17, 34. See *infra* Part VII for a discussion of potential antitrust law reforms that will enable the NCAA and its member institutions to address the increase in coaching salaries.

115. See KNIGHT COMM'N ON INTERCOLLEGIATE ATHLETICS, *supra* note 10, at 34.

116. *Id.* at 41-47.

117. See, e.g., Gilbert M. Gaul, Op-Ed., *The Department of Lucrative Athletics*, N.Y. TIMES, Nov. 28, 2009, at A19, available at <http://www.nytimes.com/2009/11/28/opinion/28gaul.html?r=1&emc=eta1> ("Another key element fueling the arms race is the increasingly indefensible tax treatment of sports revenues.").

federal taxation, from the Federal Unrelated Business Income Tax (UBIT), or from both.<sup>118</sup>

### A. Federal Tax Exemption

Organizations described in § 501(c)(3) of the Internal Revenue Code (I.R.C.) are exempt from the federal income tax.<sup>119</sup> Organizations qualifying for tax-exempt status also qualify under § 170 for deductibility by individual taxpayers of contributions made to such organizations.<sup>120</sup> Section 501(c)(3) includes institutions that are organized and operated exclusively for one or more of a number of specified purposes, two of which are education and the fostering of national or international amateur sports competition.<sup>121</sup>

The Treasury Regulations (Regulations) provide some definitions and additional requirements for an organization to qualify for tax-exempt status under § 501(c)(3). There are two separate tests that must be satisfied independently: the “organizational test” and the “operational test.”<sup>122</sup> If an organization fails to meet either of those two tests, then it is not exempt from federal income tax.<sup>123</sup>

#### 1. The Organizational Test

The organizational test requires that an organization’s articles of organization meet two requirements: (1) they must limit the purpose of the organization to one or more of the exempt purposes listed in § 501(c)(3) of the I.R.C., and (2) they must not expressly empower the organization to engage in activities that are not in furtherance of one or

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118. *See, e.g., id.* (“Congress essentially exempted colleges from paying taxes on their sports income. The legislators’ reasoning now appears shockingly quaint: that participation in college sports builds character and is an important component of the larger college experience.”).

119. I.R.C. § 501(a), (c)(3) (2006).

120. *Id.* § 170 (2006).

121. *Id.* § 501(a), (c)(3). Additionally, section 501(c)(3) requires that, generally, no portion of the institution’s net earnings may inure to the benefit of any private individual, and no substantial portion of the institution’s activities may be to carry on propaganda, to influence legislation, or to participate or intervene in any political campaign with regard to any candidate for public office. *Id.* § 501(c)(3).

122. Treas. Reg. § 1.501(c)(3)-1(a) (as amended in 2008).

123. *Id.*

more of such exempt purposes, unless such activities are an insubstantial part of the organization's activities as a whole.<sup>124</sup>

Colleges and universities can easily meet the organizational test by specifying in their articles of organization that they are organized exclusively for educational purposes. The existence or extent of an athletic program operated by a college or university is thus not relevant to the issue of whether it meets this test.

The NCAA's primary organizational purpose is to "maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body."<sup>125</sup> The House Ways and Means Committee and the Senate Finance Committee both stated in 1950 that "[a]thletic activities of schools are substantially related to [the] educational functions" of the institutions.<sup>126</sup> Another of the NCAA's purposes is to "retain a clear line of demarcation between intercollegiate athletics and professional sports."<sup>127</sup> As stated above, I.R.C. § 501(c)(3) includes institutions that are organized and operated exclusively "to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment)."<sup>128</sup> The NCAA can easily meet the organizational test by specifying in its articles of organization that it is organized exclusively for these purposes and any other purpose described in I.R.C. § 501(c)(3).

## 2. *The Operational Test*

The operational test requires that an organization be operated exclusively for one or more of the exempt purposes listed in § 501(c)(3) of the I.R.C.<sup>129</sup> An organization will meet this requirement if it engages *primarily* in activities that accomplish one or more of those purposes.<sup>130</sup> An organization will not meet the requirement if "more than an insubstantial part of its activities is not in furtherance of an exempt purpose."<sup>131</sup> An organization may operate a trade or business as a substantial part of its activities and yet meet the requirements of § 501(c)(3) if "the operation of such trade or business is in furtherance of the organization's exempt

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124. Treas. Reg. § 1.501(c)(3)-1(b)(1)(i) (as amended in 2008).

125. Letter from Myles Brand, President, NCAA, to William Thomas, Chairman, House Comm. on Ways and Means 3 (Nov. 13, 2006), *available at* <http://www.ncaa.org/wps/wcm/connect/2fa84c004e0d90aea0caf01ad6fc8b25/20061115responsetohousecommitt eeonwaysandmeans.pdf?MOD=AJPERES&CACHEID=2fa84c004e0d90aea0caf01ad6fc8b25>.

126. S. REP. NO. 81-2375, at 29 (1950); H.R. REP. NO. 81-2319, at 37 (1950).

127. Letter from Myles Brand to William Thomas, *supra* note 125, at 5.

128. I.R.C. § 501(c)(3) (2006).

129. Treas. Reg. § 1.501(c)(3)-1(c)(1) (as amended in 2008).

130. *Id.*

131. *Id.*

purpose or purposes and if the organization is not organized or operated for the primary purpose of carrying on an unrelated trade or business, as defined in section 513” of the I.R.C.<sup>132</sup> Determining the primary purpose for which an organization is organized requires an examination of all the circumstances involved, “including the size and extent of the trade or business and the size and extent of the activities which are in furtherance of one or more exempt purposes.”<sup>133</sup>

These requirements raise a threshold issue with regard to college and university athletic programs: is the operation of an athletic program a trade or business? If so, additional questions remain. Assuming that the operation of an athletic program constitutes a substantial part of a college or university’s activities, it must be determined whether the operation of such a program is in furtherance of a college or university’s exempt purpose or purposes. In addition, it must be determined whether such a program constitutes an *unrelated* trade or business as defined in § 513 of the I.R.C., and if so, whether the college or university is organized or operated for the primary purpose of carrying on such trade or business.

The term *trade or business* is not specifically defined in the I.R.C. The Supreme Court has ruled that “to be engaged in a trade or business, the taxpayer must be involved in the activity with continuity and regularity and that the taxpayer’s primary purpose for engaging in the activity must be for income or profit.”<sup>134</sup> Applying this test in a specific case requires examining all the facts and circumstances.<sup>135</sup> Although each college or university athletic program would thus have to be examined on the basis of its particular facts, it is generally assumed by many commentators that many such programs constitute a trade or business because they seek profit.<sup>136</sup>

Is the operation of an athletic program in furtherance of a college or university’s exempt purpose? As noted above, Congress stated in 1950

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132. Treas. Reg. § 1.501(c)(3)-1(e)(1) (as amended in 2008).

133. *Id.*

134. *Comm’r v. Groetzinger*, 480 U.S. 23, 35 (1987).

135. *Id.* at 36.

136. See, e.g., John D. Colombo, *The NCAA, Tax Exemption, and College Athletics*, 2010 U. ILL. L. REV. 109, 135–36; Erik M. Jensen, *Taxation, the Student Athlete, and the Professionalization of College Athletics*, 1987 UTAH L. REV. 35, 48–49; Richard L. Kaplan, *Intercollegiate Athletics and the Unrelated Business Income Tax*, 80 COLUM. L. REV. 1430, 1449 (1980); James L. Musselman, *Recent Federal Income Tax Issues Regarding Professional and Amateur Sports*, 13 MARQ. SPORTS L. REV. 195, 205 (2003).

that “[a]thletic activities of schools are substantially related to [the] educational functions” of the institutions.<sup>137</sup> Congress made that statement for the purpose of concluding that income from a basketball tournament is not subject to the UBIT.<sup>138</sup> The Internal Revenue Service (IRS) has issued several National Office Technical Advice Memoranda related to application of the UBIT in which it discussed the close relationship of college athletics and education.<sup>139</sup> In a 1980 revenue ruling, the IRS stated that “[a]n athletic program is considered to be an integral part of the educational process of a university, and activities providing necessary services to student athletes and coaches further the educational purposes of the university.”<sup>140</sup> As discussed below, application of the UBIT to a trade or business regularly carried on by an exempt organization requires that the conduct of such trade or business not be substantially related to the organization’s exercise or performance of its exempt function.<sup>141</sup> Determining whether the operation of an athletic program is “in furtherance of” a college or university’s exempt purpose would seem to require a lower standard than determining whether such a program is “substantially related” to the organization’s exercise or performance of its exempt function.<sup>142</sup> Although commentators have suggested that Congress reexamine its position with regard to application of the UBIT to college and university athletic programs,<sup>143</sup> no serious argument has been made that such programs are not in furtherance of a college or university’s exempt purpose.<sup>144</sup>

In addition to the requirement that a college or university’s athletic programs be in furtherance of its exempt purpose, the institution must not be organized for the primary purpose of carrying on an unrelated trade or business.<sup>145</sup> As stated above, determining the primary purpose

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137. S. REP. NO. 81-2375, at 29 (1950); H.R. REP. NO. 81-2319, at 37 (1950).

138. S. REP. NO. 81-2375, at 29; H.R. REP. NO. 81-2319, at 37.

139. I.R.S. Tech. Adv. Mem. 78-51-002 (Dec. 18, 1978); I.R.S. Tech. Adv. Mem. 78-51-004 (Aug. 21, 1978); I.R.S. Tech. Adv. Mem. 78-51-005 (Sept. 24, 1978); I.R.S. Tech. Adv. Mem. 78-51-006 (Sept. 24, 1978).

140. Rev. Rul. 80-296, 1980-2 C.B. 195; *see also* Rev. Rul. 80-295, 1980-2 C.B. 194.

141. I.R.C. § 513(a) (2006).

142. *See* Colombo, *supra* note 136, at 127–29 (discussing whether “in furtherance of” means the same as “substantially related” or whether it could be interpreted more broadly to include an activity the revenue from which is used to further the organization’s charitable activities).

143. *See, e.g.,* Morgan, *supra* note 30, at 150–51.

144. *See* Colombo, *supra* note 136, at 131 (stating that attacking the tax exemption of a university or the NCAA in this manner would face substantial hurdles, but cautioning that the meaning of “in furtherance of” is not entirely clear).

145. *See* Treas. Reg. § 1.501(c)(3)-1(e) (as amended in 2008); *see also* Comm’r v. Groetzinger, 480 U.S. 23, 35 (1987).

for which an organization is organized requires an examination of all the circumstances involved, “including the size and extent of the trade or business and the size and extent of the activities which are in furtherance of one or more exempt purposes.”<sup>146</sup> No serious argument could be made that a college or university is organized or operated for the primary purpose of carrying on its athletic program.

Determining whether the NCAA satisfies the operational test requires a similar, albeit simpler, analysis. Colleges and universities are organized exclusively for educational purposes and operate athletic programs in furtherance of those purposes, while the NCAA is organized primarily to “maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body.”<sup>147</sup> The NCAA’s activities are thus entirely focused on intercollegiate athletics, which both Congress and the IRS have concluded are substantially related to the educational functions of colleges and universities, as discussed above, and clearly foster national and international sports competition. All of the NCAA’s activities will thus be in furtherance of its exempt purposes so long as the activities are related to intercollegiate athletics. The NCAA periodically engages in activities that most assuredly constitute the conduct of a trade or business. A prime example is the NCAA basketball tournament held every year in March, which generates significant revenue.<sup>148</sup> The operation of any such trade or business, however, will almost certainly be in furtherance of the NCAA’s exempt purpose; sponsoring an intercollegiate basketball tournament, for example, undoubtedly furthers the purpose of maintaining intercollegiate athletics as an integral part of the educational program. In addition, any such trade or business will not constitute an unrelated trade or business as defined in § 513 of the I.R.C. because it will be directly related to intercollegiate athletics, and the NCAA is not organized or operated for the primary purpose of carrying on any such trade or business.

### 3. *Other Requirements*

Two other issues are potentially relevant with regard to whether a college or university operating an athletic program qualifies for tax-

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146. Treas. Reg. § 1.501(c)(3)-1(e)(1).

147. Letter from Myles Brand to William Thomas, *supra* note 125, at 3.

148. *See* Morgan, *supra* note 30, at 168.

exempt status under § 501(c)(3): the “private inurement” and “private benefit” limitations.

*i. Private Inurement*

Section 501(c)(3) provides that “no part of the net earnings of . . . [an exempt organization shall inure] to the benefit of any private shareholder or individual.”<sup>149</sup> This language has been interpreted “as prohibiting a ‘siphoning off’ of the assets of an exempt organization to an ‘insider.’”<sup>150</sup> This could occur by an exempt organization paying an unreasonable salary to an insider, thereby paying more than fair market value for the services that the insider provided in exchange for such salary.<sup>151</sup>

The issue that has been occasionally debated with regard to college and university athletic programs is whether the compensation packages awarded to football and basketball coaches by some schools have become sufficiently excessive so as to violate this limitation.<sup>152</sup> There is no real issue here for two principal reasons. First, Congress changed the law in 1996 by enacting § 4958 of the I.R.C.,<sup>153</sup> which imposes excise taxes on certain private inurement transactions. The result has been that private “inurement transactions are almost exclusively dealt with via the excise taxes imposed by that Section, as opposed to withdrawal of exemption.”<sup>154</sup> Second, in determining whether an exempt organization is paying an unreasonable amount of compensation to an insider, thereby violating § 4958, the Regulations provide that “the ‘reasonableness’ of [such] compensation [be] measured by what the market is paying for similar services *including the for-profit market*.”<sup>155</sup> This allows for the compensation of college coaches to be compared to the compensation of coaches in the professional leagues to determine what is reasonable.<sup>156</sup> As a consequence, it has not been seriously argued that the tax exemption of a college or university is at risk under the private inurement limitation based on the amount of compensation it pays its coaches.

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149. I.R.C. § 501(c)(3) (2006).

150. Colombo, *supra* note 136, at 120.

151. *Id.*

152. *Id.* at 120–21.

153. I.R.C. § 4958 (2006).

154. Colombo, *supra* note 136, at 120. Revocation of exemption could still be utilized as a sanction for violation of § 4958 if such violation was sufficiently egregious. *Id.* at 120 n.50 (citing Treas. Reg. 1.501(c)(3)-1(f) (as amended 2008)).

155. *Id.* at 121 (citing Treas. Reg. § 53.4958-4(b)(1)(ii)(A) (2002)).

156. *Id.*



*ii. Private Benefit*

The Regulations pursuant to § 501(c)(3) provide that to qualify for exemption, “it is necessary for an organization to establish that it is not organized or operated for the benefit of private interests such as designated individuals, . . . shareholders of the organization, or persons controlled, directly or indirectly, by such private interests.”<sup>157</sup> These provisions have been interpreted to mean that “an organization can lose its exemption if, as a result of serving its charitable class, it confers an excessive benefit . . . on parties outside of the charitable class.”<sup>158</sup> Although this limitation seems somewhat similar to the private inurement limitation, “[t]he primary differences between [these two limitations] are that the private benefit doctrine (1) can apply to transactions with ‘outsiders’ (that is, independent parties who have no influence over the charity), and (2) can apply even to transactions entered into at fair market value.”<sup>159</sup>

The private benefit limitation has been described as “a quintessential balancing test in which the benefits to private individuals or organizations as a result of a particular activity must be weighed against the charitable benefits the activity produces.”<sup>160</sup> If a transaction is structured such that it appears to excessively favor private interests, it will violate this limitation even though it also serves the charitable class.<sup>161</sup>

The issue with regard to athletic programs of colleges and universities is whether those organizations, along with the NCAA, “provide excessive private benefit to television networks and the professional sports leagues in comparison to the educational benefits provided to the charitable class (i.e., the participating student-athletes).”<sup>162</sup> The argument is that both television networks and professional sports leagues receive substantial benefits from colleges’ and universities’ athletic programs. The television networks benefit in the form of profit when they televise college games. The professional sports leagues benefit in two ways: (1) by effectively utilizing colleges’ and universities’ athletic programs

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157. Treas. Reg. 1.501(c)(3)-1(d)(1)(ii) (as amended in 2008).

158. Colombo, *supra* note 136, at 122.

159. *Id.*

160. *Id.* at 124.

161. *Id.*

162. *Id.* at 125.

for training and development and (2) by avoiding the cost of maintaining those programs directly.<sup>163</sup>

Professor Colombo acknowledges that this argument “seems plausible given the extraordinarily broad scope of the private benefit doctrine” but concludes that it seems highly unlikely to succeed.<sup>164</sup> He points out that the IRS has “never shown any inclination to apply the doctrine in this manner.”<sup>165</sup> In addition, he asserts that “the NCAA can legitimately argue that it tries to keep its distance, and tries to distance college athletes from the pro leagues,” and notes that “the NCAA was not started by the professional sports leagues as a means of sloughing off their training costs to an exempt organization.”<sup>166</sup> Finally, he argues that the television contracts entered into by the NCAA seem fairly negotiated, and there is no evidence that “the NCAA or universities negligently or intentionally ‘underpriced’ their product to give a bigger profit margin to the networks.”<sup>167</sup>

In conclusion, it has not been seriously argued that because colleges and universities operate athletic programs they are not organizations described in § 501(c)(3) of the I.R.C. and are thus not exempt from the federal income tax, no matter how extensive and profitable those programs may be. Likewise, there has been no serious argument that the NCAA does not qualify for exemption under § 501(c)(3).<sup>168</sup>

## B. Unrelated Business Income Tax

### 1. Current Status of the Law

Prior to enactment of the UBIT in 1950, funds received by colleges and universities from any source were sheltered from taxation under the institution’s general tax exemption.<sup>169</sup> Until Congress enacted the UBIT, the law “‘recognized only two possibilities—an organization was either entirely taxable or entirely tax-exempt.’”<sup>170</sup> As a result, the courts generally treated activities conducted by colleges and universities as tax-exempt regardless of whether those activities were in any way related to

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163. *Id.*

164. *Id.* at 125–26.

165. *Id.* at 125.

166. *Id.* at 126.

167. *Id.*

168. *See id.* at 134 (concluding that withdrawing the tax-exempt status of the NCAA, or of colleges and universities because of their athletic programs, is a near impossibility under current law).

169. Musselman, *supra* note 136, at 203–04.

170. *Id.* at 204 (quoting Kaplan, *supra* note 136, at 1433).

the exempt purpose of the institution.<sup>171</sup> This led colleges and universities to conclude that they could engage in business activities totally unrelated to their exempt purpose and enjoy a significant competitive advantage because their profits were exempt from tax. A famous example was New York University's ownership of the C.F. Mueller Company, a leading macaroni producer. When the IRS attempted to tax the company's profits, New York University successfully argued that the profits were exempt from tax on the basis of its general tax exemption.<sup>172</sup> Congress became concerned that the government was losing significant tax revenue from these business operations<sup>173</sup> and that business entities not owned by colleges and universities were suffering from unfair competition.<sup>174</sup> The ultimate result was enactment of the UBIT.

The UBIT imposes a tax, at rates applicable to taxable corporations, on the unrelated business taxable income (UBTI) of most tax-exempt organizations, including those described in § 501(c)(3) of the I.R.C.<sup>175</sup> In addition, public universities are specifically subjected to the UBIT.<sup>176</sup> UBTI is generally defined as the “gross income . . . [of] any organization from any unrelated trade or business . . . regularly carried on by [such organization], less [certain] deductions allowed . . . which are directly connected with the carrying on of such trade or business.”<sup>177</sup>

This definition requires the determination of three issues: (1) whether an activity is a trade or business, (2) whether it is regularly carried on, and (3) whether it is an unrelated trade or business. Although § 513 of the I.R.C. specifically defines the term *trade or business* for purposes of

171. *Id.*

172. *Id.*

173. *See id.* In congressional hearings considering enactment of the UBIT, Representative Dingell stated that “[e]ventually all the noodles produced in this country will be produced by corporations held or created by universities . . . and there will be no revenue to the Federal Treasury from this industry.” *Revenue Revision of 1950: Hearings Before the H. Comm. on Ways & Means*, 81st Cong. 580 (1950) (remarks of Rep. John Dingell).

174. Musselman, *supra* note 136, at 204–05. In his 1950 message to Congress, President Truman stated that “an exemption intended to protect educational activities has been misused in a few instances to gain competitive advantage over private enterprise through the conduct of business and industrial operations entirely unrelated to educational activities.” 96 CONG. REC. 769, 771 (1950) (message from President Harry S. Truman).

175. I.R.C. § 511(a) (2006); Musselman, *supra* note 136, at 204–05.

176. I.R.C. § 511(a)(2)(b).

177. *Id.* § 512(a)(1) (2006); *see also* Musselman, *supra* note 136, at 205 n.68 (citing § 512(a)(1) (“Gross income and deductions are both computed with the modifications provided in section 512(b).”)).

the UBIT,<sup>178</sup> the Treasury Regulations clarify that such term has the identical meaning given it by the Supreme Court for purposes of § 162 of the I.R.C.<sup>179</sup> As discussed above, although each college or university athletic program would have to be examined on the basis of its particular facts, it is generally assumed by commentators that many college and university athletic programs constitute trades or businesses because they seek profit.<sup>180</sup>

The Regulations provide some guidance regarding whether an activity is regularly carried on. Generally, activities of tax-exempt organizations “will ordinarily be deemed to be *regularly carried on* if they manifest a frequency and continuity, and are pursued in a manner, generally similar to comparable commercial activities of nonexempt organizations.”<sup>181</sup> Trade or business activities that are customarily carried on during a particular season will be treated as regularly carried on if they are conducted by an exempt organization during a significant portion of the season.<sup>182</sup> The Regulations cite, as an example, operation of a horse-racing track, which is customarily carried on only during a particular season.<sup>183</sup> Athletic programs presumably would be treated similarly because they are customarily seasonal in nature. It is generally assumed by commentators that athletic programs of colleges and universities are regularly carried on as the Regulations define that term.<sup>184</sup> As stated above, the NCAA periodically engages in activities that undoubtedly constitute the conduct of a trade or business, such as the NCAA basketball tournament held every year in March.<sup>185</sup> It is also generally assumed that those business activities are regularly carried on within the meaning of the Regulations.<sup>186</sup>

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178. I.R.C. § 513(c) (2006).

179. Treas. Reg. § 1.513-1(b) (as amended in 1983). See *supra* notes 134–36 and accompanying text for the meaning of the term “trade or business” for purposes of I.R.C. § 162.

180. See *supra* note 136 and accompanying text.

181. Treas. Reg. § 1.513-1(c)(1) (as amended in 1983).

182. *Id.* § 1.513-1(c)(2)(i) (as amended in 1983).

183. *Id.*

184. See, e.g., Jensen, *supra* note 136, at 50; Musselman, *supra* note 136, at 206–07.

185. See *supra* note 148 and accompanying text.

186. See Colombo, *supra* note 136, at 135–36; Jensen, *supra* note 136, at 48–49; Kaplan, *supra* note 136, at 1449–50; Musselman, *supra* note 136, at 206–07; cf. Nat’l Collegiate Athletic Ass’n v. Comm’r, 914 F.2d 1417, 1422 (10th Cir. 1990) (“Although sponsorship of a college basketball tournament and attendant circulation of programs are seasonal events, the trade or business of selling advertisements is not.” (internal quotation marks omitted)). In this case, the court ruled that advertising revenue earned by the NCAA from the semifinal and final rounds of the Men’s Division I Basketball Championship was not subject to the UBIT because the advertising activity conducted by the NCAA was not regularly carried on. *Id.* The court stressed that advertising was the applicable activity in question, rather than organizing and operating the annual basketball tournament,

In enacting the UBIT, Congress intended to address its concerns that colleges and universities conducting trades or businesses deprived the government of significant tax revenue from those business operations, and enjoyed an unfair competitive advantage over commercial business entities required to pay taxes on their income.<sup>187</sup> Congress could have satisfied those concerns by providing that all trades or businesses conducted by exempt organizations would be subject to the income tax laws in the same manner as commercial business entities. Instead, Congress balanced those concerns against the basic policy for exempting certain organizations from the income tax by providing that an exempt organization would be taxed only on income from trades or businesses that are unrelated to its exempt purpose.

Whether an activity is an unrelated trade or business is a difficult issue and has, in recent years, become more controversial with regard to college and university athletic programs. The I.R.C. defines an unrelated trade or business as “any trade or business [of a tax-exempt organization,] the conduct of which is not substantially related . . . to the [organization’s] exercise or performance . . . of its [exempt] . . . function.”<sup>188</sup> The Regulations provide that a trade or business is substantially related to an organization’s exempt purposes if “the production or distribution of the goods or the performance of the services from which the gross income is derived . . . contribute importantly to the accomplishment of those purposes.”<sup>189</sup> Resolution of this issue “depends in each case upon the facts and circumstances involved.”<sup>190</sup> An important factor is the “size and extent of the activities involved” in operating the trade or business compared to the “nature and extent of the exempt function which they purport to serve.”<sup>191</sup> Thus, if the trade or business is “conducted on a larger scale than is reasonably necessary for performance of” the organization’s exempt functions, “the gross income attributable to that portion of the activities in excess of the needs of exempt functions

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because advertising was the activity that the Commissioner contended was producing UBIT. *Id.*

187. *See supra* notes 174–76 and accompanying text.

188. I.R.C. § 513(a) (2006).

189. Treas. Reg. § 1.513-1(d)(2) (as amended in 1983).

190. *Id.*

191. Treas. Reg. § 1.513-1(d)(3) (as amended in 1983).

constitutes gross income from the conduct of [an] unrelated trade or business.”<sup>192</sup>

In congressional hearings considering enactment of the UBIT, the House Ways and Means Committee and the Senate Finance Committee both concluded that “income of an educational organization from [admission] to football games” is not subject to the UBIT because “[a]thletic activities of schools are substantially related to [the] educational functions” of those institutions.<sup>193</sup> This language has essentially given colleges and universities a free pass under the UBIT with regard to their athletic programs.<sup>194</sup> The IRS made a run at college athletics in 1977, asserting that revenue from the broadcasting rights to the Cotton Bowl football game were subject to the UBIT.<sup>195</sup> The IRS received a significantly negative reaction from the public to that attempt and, in 1978, retracted its earlier position through a series of unpublished Technical Advice Memoranda. These memoranda discussed the close relationship of college athletics and education while favorably comparing in-person viewing of a game with exhibition of the same game on television to a much larger audience.<sup>196</sup> In addition, the IRS issued two revenue rulings in 1980 consistent with its new position on this issue,<sup>197</sup> stating in one such ruling that “[a]n athletic program is considered to be an integral part of the educational process of a university, and activities providing necessary services to student athletes and coaches further the educational purposes of the university.”<sup>198</sup>

## 2. *Should Congress Change the Law?*

In spite of such stalwart support on the part of both Congress and the IRS for exemption from the UBIT of college and university athletic programs, some commentators assert that Congress should reexamine its conclusive statement that “[a]thletic activities of schools are substantially related to [the] educational functions”<sup>199</sup> of those institutions.<sup>200</sup> For

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192. *Id.*

193. S. REP. NO. 81-2375, at 29 (1950); H.R. REP. NO. 81-2319, at 37 (1950).

194. *See* Jensen, *supra* note 136, at 51; Musselman, *supra* note 136, at 207.

195. *See* Jensen, *supra* note 136, at 51 n.68; Musselman, *supra* note 136, at 207.

196. I.R.S. Tech. Adv. Mem. 78-51-002 (Dec. 18, 1978); I.R.S. Tech. Adv. Mem. 78-51-004 (Aug. 21, 1978); I.R.S. Tech. Adv. Mem. 78-51-005 (Sept. 24, 1978); *see* Jensen, *supra* note 136, at 51–52, nn.68–69 & 73; Musselman, *supra* note 136, at 207.

197. Rev. Rul. 80-295, 1980-2 C.B. 194; Rev. Rul. 80-296, 1980-2 C.B. 195.

198. Rev. Rul. 80-296, 1980-2 C.B. 195.

199. S. REP. NO. 81-2375, at 29 (1950); H.R. REP. NO. 81-2319, at 37 (1950).

200. *See, e.g.,* Morgan, *supra* note 30, at 176–77; *see also* FRANK G. SPLITT, *Why the U.S. Should Intervene in College Sports*, in *ESSAYS & COMMENTARIES ON COLLEGE SPORTS REFORM* 5, 5–6 (2005), available at [http://www.thedrakegroup.org/Splitt\\_Essays.pdf](http://www.thedrakegroup.org/Splitt_Essays.pdf) (“An in-depth IRS audit could turn this economic tide and fully expose the NCAA

example, Gabriel Morgan argued that college and university athletic programs have become commercial enterprises that are independent of and detached from the institution, and have departed from the educational standards and values of the colleges and universities that sponsor them.<sup>201</sup> He believes that the extreme commerciality of these programs jeopardizes the education of the student-athletes and the financial security of the university,<sup>202</sup> and that the programs “actually hinder the development of student-athletes’ academic capabilities in their quests for athletic victory and its accompanying revenue.”<sup>203</sup> Morgan proposes that the best solution is to eliminate the congressional presumption that college and university athletic programs are substantially related to the educational purposes of those institutions.<sup>204</sup> Morgan offers three justifications for this proposition. First, he asserts that there is no historical justification for any such presumption.<sup>205</sup> He supports this assertion by discussing the primal stages of American intercollegiate athletics in the nineteenth and early twentieth centuries and their independence from the colleges and universities with which they were associated.<sup>206</sup> In the beginning, college and university “administrations considered intercollegiate athletics wholly unrelated to a student’s academic pursuits.”<sup>207</sup> It was not until the founding of the NCAA in the early twentieth century that colleges and universities asserted control over their athletic programs “by integrating them into newly created physical education departments,” and the purpose of that decision was not to establish a relationship between academics and athletics, but rather to assert control over intercollegiate football and its “run-away violence.”<sup>208</sup> This argument does nothing more than establish that American intercollegiate athletics began in the nineteenth century in a very primitive form and gradually evolved into its modern day structure. It is of no assistance in determining whether there should presently be a

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cartel’s Achilles’ heel—the extremely weak educational basis for the current financial structure of big-time college sports.”). Although Splitt, who is a member of The Drake Group, makes this bald assertion, he offers no legal justification for it. *See id.*

201. *See* Morgan, *supra* note 30, at 176.

202. *Id.* at 176–77.

203. *Id.* at 178.

204. *Id.* at 179.

205. *Id.*

206. *See id.* at 179–80.

207. *Id.* at 179.

208. *Id.* at 180.

presumption that college and university athletic programs are substantially related to educational purposes.

Morgan's second justification for eliminating the congressional presumption is the commerciality of intercollegiate athletics and its focus on the generation of revenue.<sup>209</sup> He believes such a focus "undermines the academic and financial integrity of both the athletic department and its university."<sup>210</sup> He cites the introduction of television as the gateway that ultimately led to today's multibillion-dollar broadcasting contracts, multimillion-dollar compensation packages for coaches, and the pressurized environment created by the need to remain competitive and maximize revenue, resulting in an overemphasis of athletic success and revenue and the devaluation of education.<sup>211</sup>

This premise is the subject of much debate. University administrators assert that the success of university athletic programs translates to "increased applications to the university, superior student bodies, and increased alumni donations."<sup>212</sup> Morgan cites to studies that support "the notion that the success of a university's athletic department causes an increase in applicants to the university"<sup>213</sup> but asserts that the data "failed to conclusively prove any relationship between athletic success and the academic quality of an incoming freshman class."<sup>214</sup> He concludes that "the notion that athletic success generates indirect educational value by increasing the quality of the student body is [thus] unsubstantiated."<sup>215</sup> One could also conclude from that data that the university administrators could perhaps be correct on that point. Even if there is no relationship whatsoever between a successful athletic program and the academic quality of an incoming class, increasing applications to the university by itself constitutes a significant achievement relating to the educational mission of the university. Colleges and universities constantly look for ways to increase their applicant pools for reasons other than increasing the academic statistics of the entering class; a common example is to diversify a university's student body. Morgan also cites to a letter written to Myles Brand, president of the NCAA, from Representative William Thomas, Chairman of the House Ways and Means Committee, for the proposition that the "federal government's purpose in granting tax exemption to universities is to further education in general, *not* to increase the recognition, reputation

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209. *Id.* at 181.

210. *Id.*

211. *See id.* at 181–82.

212. *Id.* at 183.

213. *Id.*

214. *Id.*

215. *Id.*



or relative quality of one individual institution.”<sup>216</sup> Morgan’s argument that academic success does not indirectly increase the quality of a university’s student body presumes that the national applicant pool is finite and competition among colleges and universities for those applicants is a zero-sum game. On the contrary, a much more logical presumption is that college and university athletic competition generally attracts a significant number of applicants with a high interest in athletics who would not otherwise be interested in attending college.

As to the assertion by university administrators that successful university athletic programs result in increased alumni donations, Morgan cites to studies that have shown varying results. Morgan points out that some “studies found no relationship between alumni donations and athletic success, others found a statistically significant relationship, and others found a relationship between athletic success and athletic donations.”<sup>217</sup> Morgan also concludes that whether there is, in fact, a correlation between successful programs and increased donations is irrelevant because athletic programs are not always successful and thus at times fail to attract a high level of donations.<sup>218</sup> According to Morgan, the overall result is that very few programs are profitable and “can have tangible and deleterious effects on the financial and educational interests of a university.”<sup>219</sup> If it is true that very few athletic programs are profitable, it is difficult to understand, as discussed more fully below, why subjecting college and university athletic programs to the UBIT will have any effect whatsoever on the manner in which such programs are conducted.<sup>220</sup> Aside from that observation, it is not difficult to understand why a college or university would seek to maximize alumni donations from whatever source possible to further its educational goals. If increased donations are made to the university’s general fund, the educational benefits are obvious. Even if the increased donations are made only to the athletic programs, educational benefits to the university will result. As donations increase, the university will be able to increase the quality and breadth of the programs, resulting in an increase in the quality and reputation of the university.

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216. *Id.*

217. *Id.* at 184 (internal citations omitted).

218. *See id.*

219. *Id.* at 184–85.

220. *See infra* text accompanying notes 237–43.

The case studies previously described in Part IV are illustrative of the tremendous benefits, educational and otherwise, that colleges and universities have received by increasing the quality of their athletic programs. As discussed above, such benefits include attracting high-quality faculty and students, generating donations and enrichment, reconfiguring their campus identities, and enhancing institutional political clout.<sup>221</sup> Whether the athletic programs are profitable or not is of no consequence; there is no distinction between funding an athletic department and any other department of the university. A college or university, in its normal budgeting process, will allocate its resources based on each department's need for funds, balanced against the institution's overall objectives and goals.

Morgan's third justification for eliminating the congressional presumption is that the academic integrity of colleges and universities will be sacrificed "by recruiting, admitting, keeping eligible, and graduating talented athletes who are unqualified for the academic rigors of college-level curricula," thereby undermining the educational purpose of the institution.<sup>222</sup> In support of this premise, he cites to sources asserting that student-athletes who do not satisfy the academic criteria established for students in general are often recruited and admitted, athletic departments have developed strategies to enable student-athletes to remain eligible in their sport in spite of their lack of motivation and academic ability, and graduation rates for student-athletes are significantly below those for the student body as a whole.<sup>223</sup> He asserts that these issues persist in spite of regulatory attempts at reform by the NCAA<sup>224</sup> and that they result in damage to "the intellectual ethos of a campus" and to "the educational goals of a university."<sup>225</sup>

Student-athletes are not the only group who is recruited and admitted with lower academic statistical qualifications, is the target of strategies designed to assist the group in meeting academic performance standards as students, and graduates at lower rates than the student body as a whole. Admitting an entering class with the highest possible admission statistics is not the sole goal of a college admissions office. Every college and university, for example, allocates substantial resources to achieve and maintain a diverse student body, and virtually everyone agrees that accomplishing that goal significantly improves the educational environment of the institution. If athletic programs are in fact related to

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221. See *supra* note 116 and accompanying text.

222. Morgan, *supra* note 30, at 186.

223. *Id.* at 172–75.

224. *Id.* at 173–76.

225. *Id.* at 187.

the educational purposes of colleges and universities, recruiting student-athletes to participate in such programs and assisting them in meeting academic performance standards are appropriate activities in which colleges and universities should engage. Some of the students who are recruited and admitted for the purpose of achieving a diverse student body would not have been given the opportunity to attend college if not for the diversity they bring to campus; likewise, some students would not be given the opportunity to attend college if they were not athletes.

Morgan suggests that nonathlete applicants who are more academically qualified are rejected for admission so that athletically gifted student-athletes can be admitted, resulting in “the inefficient use of scarce academic resources” because the nonathlete applicants “would have taken greater advantage of the academic resources offered by the university.”<sup>226</sup> That is the same flawed argument used by opponents of diversity admissions programs. Academic statistics based on standardized test scores and high school grades are merely guidelines that college admissions offices use to predict how well a student may perform in college. Many other factors contribute to a student’s ultimate performance, such as maturity level, hard work, and determination. College students often perform at a higher or lower level than their academic statistics predict. In addition, if admissions were based solely on the basis of academic statistics, applicants who would be accepted in place of the student-athletes would have the lowest academic statistics in the entering class; even if academic statistics were perfectly predictive, which they are certainly not, those applicants would not perform significantly better than the student-athletes.

An additional weakness with Morgan’s third justification for eliminating the congressional presumption is that it is largely based on debatable assumptions and statistics. For example, statistics comparing the graduation rates of student-athletes with the student body as a whole have been hotly contested. In his response to Representative William Thomas, Myles Brand reported graduation rate statistics that were significantly different than those cited by Morgan,<sup>227</sup> and he challenged the assumption that student-athletes do not satisfy the academic criteria established for

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226. *Id.*

227. *Compare id.* at 188 (“[W]ithin NCAA Division I, men’s basketball programs average a 44 percentage graduation rate . . .”), with Letter from Myles Brand to William Thomas, *supra* note 125, at 12–13 (“[T]he more accurate graduation rate for Division I male basketball student-athletes is 59 percent.”).

students in general by asserting that Division I scholarship student-athletes, on average, have higher SAT scores and high school grade point averages than college students as a whole.<sup>228</sup>

Morgan's proposal is to eliminate the congressional presumption that college and university athletic programs are substantially related to the educational purposes of those institutions and replace it with a case-by-case factual inquiry into whether an athletic program of a particular college or university is substantially related to the educational purpose of the institution.<sup>229</sup> He suggests factors that should be used to make that determination. First, he states that "the number, recency, and severity of NCAA or institutional rule infractions will be relevant."<sup>230</sup> It is unclear exactly how rule infractions committed by an athletic program could be relevant in determining whether the program is substantially related to the educational purpose of the college or university, and he does not offer any explanation of that statement.

His second and third factors require comparing the academic performance and graduation rates of an athletic department's student-athletes with those of the general student body.<sup>231</sup> He asserts that if the grade point averages and graduation rates of student-athletes are significantly lower than those of the student body as a whole, "it is unlikely that education is being enriched through participation in athletics," and the athletic departments of those institutions "are not contributing importantly to the furtherance of education."<sup>232</sup> This conclusion massively overstates the significance of academic performance of student-athletes to the question of whether a college or university's athletic programs contribute importantly to the accomplishment of the institution's educational purposes. As previously discussed, colleges and universities receive substantial benefits, educational and otherwise, from maintaining high-quality athletic programs.<sup>233</sup> Although the academic performance of an institution's student-athletes is somewhat relevant to the relationship of its athletic programs to its educational purpose and mission, it is just one factor, no more or less important than the many others discussed above.

Morgan's fourth suggested factor is based on a flawed application of the Regulations. This factor relates to a statement made in the Regulations with regard to determining whether a trade or business is substantially related to an organization's exempt purposes: if the trade or business is

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228. Letter from Myles Brand to William Thomas, *supra* note 125, at 10.

229. Morgan, *supra* note 30, at 189.

230. *Id.* at 191.

231. *Id.*

232. *Id.* at 191–92.

233. See *supra* note 116 and accompanying text.

“conducted on a larger scale than is reasonably necessary for performance of” the organization’s exempt functions, “the gross income attributable to that portion of the activities in excess of the needs of exempt functions constitutes gross income from the conduct of [an] unrelated trade or business.”<sup>234</sup> He misapplies the Regulations by taking that sentence out of context to conclude that if an athletic program generates excessive profit it is being conducted on a larger scale than is reasonably necessary for performance of the college or university’s educational functions, and thus is not substantially related to the institution’s exempt purpose.<sup>235</sup>

Morgan’s emphasis on an athletic program’s generation of profit in applying these Regulations is misguided. A more complete discussion of those Regulations allows for an accurate analysis. The sentence in the Regulations immediately prior to the statement used by Morgan in his fourth factor states that, in determining whether a trade or business is substantially related to an organization’s exempt purposes, an important factor is the “size and extent of the activities involved” in operating the trade or business compared to the “nature and extent of the exempt function which they purport to serve.”<sup>236</sup> Next comes the statement used by Morgan: if the trade or business is “conducted on a larger scale than is reasonably necessary for performance of” the organization’s exempt functions, “the gross income attributable to that portion of the activities in excess of the needs of exempt functions constitutes gross income from the conduct of [an] unrelated trade or business.”<sup>237</sup> The Regulations are clearly discussing the *activities* involved in the trade or business, not the *profit* generated by such trade or business. The Regulations give no guidance on the question of when a trade or business is considered to be conducted on a larger scale than is reasonably necessary for performance of the organization’s exempt functions. If athletic programs are in fact related to the educational purposes of colleges and universities, it is difficult to imagine how the size and extent of the activities involved in conducting an athletic program could be greater than is reasonably necessary for performance of an institution’s educational function.

At best, these recent appeals to Congress to subject college and university athletic programs to the UBIT appear to be a cry for increased

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234. Treas. Reg. § 1.513-1(d)(3) (as amended in 1983).

235. Morgan, *supra* note 30, at 192.

236. Treas. Reg. § 1.513-1(d)(3).

237. *Id.*

and more effective regulations of such programs by the NCAA. At worst, these appeals are red herrings aimed at gaining leverage in a quest to diminish the ever-widening influence of intercollegiate athletics in the world of higher education. Morgan, for example, asserts that “the NCAA has neither the power nor the ability to directly regulate the economic activities of its member institutions.”<sup>238</sup> He argues that the threat of potential tax liability under the UBIT will incentivize athletic departments to recruit and admit student-athletes with adequate academic credentials and ensure that its student-athletes academically perform at a satisfactory level and graduate from the institution.<sup>239</sup> Congress did not intend for the UBIT to be a regulatory device for college or university athletic programs or for any other exempt organization. On the contrary, as explained in Part VI.B.1 above, it was intended to address congressional concerns that colleges and universities conducting trades or businesses were able to deprive the government of significant tax revenue from those business operations and enjoy an unfair competitive advantage over commercial business entities required to pay taxes on their income.<sup>240</sup> Moreover, the UBIT would be horrendously inefficient as a means of regulating those programs.

There is probably universal agreement that college and university athletic programs are in need of reform, and most would probably agree that the most competitive and profitable programs are in need of more effective regulation than they currently receive. But that falls far short of concluding that any programs currently in existence are not substantially related to the college or university’s educational purpose. It would be difficult to envision an athletic program that would be so devoid of educational value that it would not contribute importantly to the educational purpose of a college or university. For that to be the case, the athletic program would have to be conducted similar to a professional sports franchise, with virtually no regard given to education of its student-athletes. No athletic program would be allowed to go that far if appropriate and effective regulation is administered by the NCAA. Part VII of this Article proposes an alternative means of congressional legislative reform to ensure that no college or university athletic program becomes so unrelated to the educational purposes of the institution that it would become subject to the UBIT.

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238. Morgan, *supra* note 30, at 196.

239. *Id.* at 195–96.

240. *See supra* notes 173–76 and accompanying text.

*C. Policy Analysis*

A recent article by Professor John Colombo proposes a different approach. Professor Colombo agrees that the current state of the law precludes withdrawal of the “tax exemption from either the NCAA or the individual universities that conduct Division I football and basketball programs,”<sup>241</sup> and precludes application of the UBIT to the NCAA or to college and university athletic programs. In addition, Colombo presents an insightful and well-documented argument that subjecting those institutions to the UBIT would make no difference, other than forcing them to incur significant additional expenditures to comply with the law, because there would ultimately be no net revenue to tax.<sup>242</sup> The NCAA distributes all its net revenue to member schools; those distributions would likely be a deductible expense for tax purposes, leaving little or no unrelated taxable business income that would be subject to the UBIT even if Congress somehow changed the law to make the UBIT applicable to the NCAA.<sup>243</sup> Similarly, most athletic programs of colleges and universities are not profitable, and the few programs that currently show a profit do so in large part because those colleges and universities have no existing incentive to utilize rigorous cost accounting principles with respect to those programs.<sup>244</sup> Application of these principles requires proper allocation of costs to each athletic program for its share of capital expenditures for buildings and equipment, maintenance of facilities, employee costs, and the like.<sup>245</sup> Professor Colombo cites to James Shulman and William Bowen for their conclusion “that if capital costs are properly accounted for, no program would show an actual net profit for accounting purposes.”<sup>246</sup> In addition, if an individual program showed a profit even after proper application of cost-accounting principles, it would not require very sophisticated tax-planning methodologies to eliminate any unrelated business taxable income that might result. As aptly stated by Professor Colombo, “I doubt that the general counsel of,

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241. Colombo, *supra* note 136, at 134.

242. *Id.* at 143.

243. *Id.*

244. *Id.* at 143–44.

245. *Id.*

246. *Id.* (citing JAMES L. SHULMAN & WILLIAM G. BOWEN, *THE GAME OF LIFE: COLLEGE SPORTS AND EDUCATIONAL VALUES* 250 (2001)).

say, the University of Michigan would cower much in the face of a threat by the IRS to apply the UBIT to Michigan's football program."<sup>247</sup>

Colombo nevertheless proposes that Congress change the law despite his conclusions that the law currently precludes withdrawal of the tax exemption from the NCAA or universities conducting athletic programs, precludes applications of the UBIT to the NCAA or those programs, and that subjecting those institutions to the UBIT would make no difference because there would ultimately be no net revenue to tax.<sup>248</sup> He justifies his proposals by asserting that "big-time college athletics does *not* fit any of the theoretical explanations for tax exemption and *does* fit within the rationales for applying the UBIT," and concludes that revenues from college and university athletic programs should thus be taxed as a matter of tax policy.<sup>249</sup>

Professor Colombo acknowledges that "there is no clearly defined underlying theory for why we grant tax exemption to the broad range of organizations that claim charitable status"<sup>250</sup> but then discusses the various theories that have been offered over the years by academics and tax theorists to possibly justify such treatment and concludes that "big-time college athletics appears to fail under all of them."<sup>251</sup> The theories he discusses all make various assumptions: examples include the role charities should play in society and behavioral characteristics of individuals, organizations, and government and their responsiveness to various stimuli.<sup>252</sup> Needless to say, the hypotheses posited by these theorists are highly speculative and subject to disagreement. In addition, Professor Colombo recognizes that under current law it makes no practical difference whether these theories support tax exemption for college or university athletic programs because "tax exemption is applied to entities, not to individual activities of entities," and all such athletic programs constitute only a relatively minor portion of the activities of the college or university operating them.<sup>253</sup>

As explained by Professor Colombo, "the UBIT was enacted precisely to handle this kind of situation . . . to tax revenues from commercial activities undertaken by an otherwise exempt charity."<sup>254</sup> He describes the two principal justifications for adoption by Congress of the UBIT: "protecting the corporate tax base," which he believes is the most

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247. Colombo, *supra* note 136, at 145.

248. *See id.* at 144–46.

249. *Id.* at 146.

250. *Id.* at 147.

251. *Id.* at 148.

252. *See id.* at 147–48.

253. *Id.* at 150.

254. *Id.*



important, and “avoiding ‘unfair competition’ between charities and for-profit service providers.”<sup>255</sup> He also describes two “policy concerns,” one of which is to limit “the extent to which the attention of charitable managers is diverted from their core charitable mission to for-profit empire building.”<sup>256</sup> He asserts that “[g]iving Division I football and basketball revenues a pass under the UBIT clearly offends the corporate tax base protection and diversionary concerns.”<sup>257</sup>

Professor Colombo recognizes that little or no tax revenue would be collected by subjecting college and university athletic programs to the UBIT because “it is likely that only a few of these programs would show a taxable profit after applying rigorous tax-accounting policies to their income and expenses.”<sup>258</sup> As a result, it is difficult to understand how the corporate tax base could be at risk. Colombo nevertheless insists that his point is valid. He uses as an example the U.S. auto industry and asserts that automakers should not receive a tax exemption simply because in recent years they have been unprofitable: “the theoretical tax base should include operations by auto manufacturers, and the potential for future profit cannot be ignored.”<sup>259</sup> But an industry that is unprofitable in some years and profitable in others is clearly distinguishable from college and university athletic programs that, as Professor Colombo readily admits, will never show a profit.

As to Colombo’s diversionary concern, that theory is highly speculative and subject to disagreement. To the extent it has any validity, he fails to adequately explain how current law offends the theory. He baldly asserts that college and university athletic programs “may be the *best* example of how a significant commercial activity diverts the attention of charitable management from their core charitable program to the needs of the commercial business.”<sup>260</sup> To support this assertion, Colombo argues that coaches are hired at increasingly exorbitant salaries to win games rather than provide education, substantial amounts of financial resources

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255. *Id.* at 151. Colombo explains that “economists almost uniformly have rejected the notion that charities engage in ‘unfair competition,’ at least if one defines the term as some sort of predatory pricing or predatory market entry or expansion.” *Id.* For a more complete discussion of Congress’s justification for adopting the UBIT, see *supra* Part VI.B.

256. Colombo, *supra* note 136, at 151.

257. *Id.*

258. *Id.* at 152 n.184.

259. *Id.*

260. *Id.* at 153.

are spent on athletic training facilities and stadiums at the expense of the educational environment of the institution, and university administrators spend substantial amounts of time and money dealing with recruiting violations instead of educational endeavors.<sup>261</sup> Those arguments are mostly conclusory and highly speculative.

Based on his conclusions that “big-time college athletics does *not* fit any of the theoretical explanations for tax exemption and *does* fit within the rationales for applying the UBIT,”<sup>262</sup> Professor Colombo proposes that Congress should (1) “*require* that a certain percentage of revenues from revenue-producing sports such as football and basketball be used to expand nonrevenue athletic opportunities”;<sup>263</sup> (2) impose “targeted expenditure limits, such as capping coaches’ salaries or limiting annual expenditures on recruiting or sports facilities”;<sup>264</sup> and (3) require “the NCAA and universities with athletic programs to provide detailed information both on the financial aspects of their programs (using standardized accounting methods) and on the academic progress of student-athletes.”<sup>265</sup>

Whether all or any of these proposed requirements merit adoption by Congress is debatable, and they may well have positive effects from a policy standpoint. Capping coaches’ salaries could be a violation of antitrust law, as discussed in the next section of this Article.<sup>266</sup> But the question here is how adoption of these requirements has anything to do with tax law. Professor Colombo suggests the answer is that federal tax law be used to enforce them, and he correctly concludes that subjecting the NCAA, college and university athletic programs, or both to the UBIT for violating these requirements would be fruitless because those institutions can easily avoid showing a profit and will avoid paying any tax under the UBIT whether they are subject to it or not.<sup>267</sup> Instead, he suggests that these new rules “be structured as requirements for continued tax exemption of the [college or university] operating the sports [program].”<sup>268</sup> In other words, Colombo recommends that, if a college or university violates these relatively minor rules that affect only its athletic programs, it will lose its tax exemption applicable to the entire institution. This enforcement measure is basically akin to capital punishment. Whether his proposed requirements are justified, they

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261. *Id.*

262. *Id.* at 146.

263. *Id.* at 156.

264. *Id.* at 157.

265. *Id.* at 113.

266. *See infra* Part VII.

267. Colombo, *supra* note 136, at 143–44.

268. *Id.* at 155.

hardly merit such a draconian remedy and may in addition have far-reaching, unintended adverse consequences.

Some or all of Professor Colombo's proposals may well be meritorious, but care must be taken not to change federal tax laws in such a way as to swing the pendulum so far in the opposite direction that educational institutions are unduly punished. Enforcement measures for any new regulations deemed necessary should be specific and appropriate to the harm caused by their breach. In addition, it would be a mistake to further burden and complicate federal tax laws, potentially creating significant costs of federal agency enforcement with new requirements to be met by the NCAA and its member educational institutions, when targeted reform can more effectively achieve some of these objectives and others in an alternate manner.

#### VII. CONDITIONAL ANTITRUST IMMUNITY AS AN EFFECTIVE MEANS OF IMPLEMENTING TARGETED REFORMS OF COMMERCIALIZED INTERCOLLEGIATE ATHLETICS

The commercialization of intercollegiate athletics in response to culturally driven market forces is a largely irreversible trend, which is not necessarily socially undesirable because it can be used to further broaden university academic objectives. Some reform, however, is needed to ensure that the intercollegiate athletics are student-athlete-centered and actually further the purpose of higher education, rather than functioning as a "tail that wags the university dog" or an anchor that inhibits fulfillment of its academic mission. In this Part, the Article proposes using the carrot of federal antitrust law immunity, rather than swinging the stick of threatened federal taxation of athletic department revenues, to implement targeted reforms to correct the most significant problems caused by the commercialization of intercollegiate athletics.

##### *A. Historical Application of Antitrust Law to NCAA Regulation of Intercollegiate Athletics and Proposed Reform*

NCAA rules that limit or regulate the commercial aspects of intercollegiate athletics currently are subject to the federal antitrust laws despite the nonprofit status of the NCAA and its member colleges and

universities.<sup>269</sup> The primary purpose of the antitrust laws is to preserve a competitive marketplace to ensure that consumers receive the benefits of economic competition. Joint agreements in the form of NCAA rules and regulatory activity that unreasonably restrain economic competition among NCAA member universities or in the intercollegiate athletics market violate antitrust law, specifically section 1 of the Sherman Act.<sup>270</sup>

In *NCAA v. Board of Regents of the University of Oklahoma*,<sup>271</sup> the U.S. Supreme Court ruled that NCAA rules limiting the number of college football games that its members could televise annually was an output market restraint that violated the antitrust laws.<sup>272</sup> This decision implicitly recognized the existence of the commercial/education model for some aspects of intercollegiate athletics. The Court established a “rule of reason” framework for determining whether a challenged NCAA rule is reasonable and therefore legal—or unreasonable and therefore illegal, which requires consideration and analysis of both its anticompetitive and procompetitive effects to determine its net economic effects on competition in the relevant market.<sup>273</sup> The Court concluded that jointly limiting the number of televised college football games below the level that would be supplied in a free market responsive to consumer demand has significant anticompetitive effects.<sup>274</sup> This restraint did not further a legitimate procompetitive economic objective, such as maintaining competitive balance among NCAA members’ football teams.<sup>275</sup> Although the Court suggested the antitrust laws should be judicially construed to provide the NCAA with “ample latitude”<sup>276</sup> to maintain the “revered tradition of amateurism in college sports”<sup>277</sup> and to preserve the “student-athlete in higher education,”<sup>278</sup> the Court ultimately ruled that collectively limiting the number of televised college football games did not achieve these objectives.<sup>279</sup>

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269. See, e.g., *Hennessey v. NCAA*, 564 F.2d 1136, 1149 n.14 (5th Cir. 1977) (“While organized as a non-profit organization, the NCAA—and its member institutions—are, when presenting amateur athletics to a ticket-paying, television-buying public, engaged in a business venture of far greater magnitude than the vast majority of ‘profit-making’ enterprises.”).

270. See 15 U.S.C. § 1 (2006).

271. *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85 (1984).

272. *Id.* at 120.

273. *Id.* at 110–13.

274. *Id.* at 113.

275. *Id.* at 114–15.

276. *Id.* at 120.

277. *Id.*

278. *Id.*

279. *Id.*

Similarly, in *Law v. NCAA*,<sup>280</sup> a federal appellate court held that an NCAA rule limiting the yearly compensation of Division I entry-level basketball coaches to \$16,000, which is a restraint on an input necessary to produce intercollegiate basketball, was an antitrust violation.<sup>281</sup> The court found that the “obvious anticompetitive effects”<sup>282</sup> of fixing the cost of coaching, an input necessary to produce intercollegiate athletics, prevented free market competition among NCAA universities for the services of coaches.<sup>283</sup> In contrast to a rule “equaliz[ing] the overall amount of money Division I schools are permitted to spend on their basketball programs,”<sup>284</sup> which would be a procompetitive means of promoting competitive balance, capping the salaries of one category of coaches would not achieve this objective.<sup>285</sup> The court ruled that “cost-cutting by itself is not a valid procompetitive justification”<sup>286</sup> for price fixing, although market competition would lead to higher coaching salaries without this restraint.<sup>287</sup>

In contrast, courts have relied upon the “amateur/education” model of intercollegiate athletics to reject antitrust challenges to NCAA eligibility rules by student-athletes participating in highly commercialized sports, such as Division I FBS football and men’s basketball. For example, in *Banks v. NCAA*,<sup>288</sup> a federal appellate court held that the NCAA’s “no agent” rule and its “no draft” rule do not violate the antitrust laws.<sup>289</sup> The court concluded that both rules legitimately preserve the amateur nature of intercollegiate athletics and that the no draft rule furthers the

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280. *Law v. NCAA*, 134 F.3d 1010 (10th Cir. 1998).

281. *Id.* at 1024.

282. *Id.* at 1020.

283. *See id.* at 1024.

284. *Id.* at 1023.

285. *Id.*

286. *Id.* at 1022.

287. The coaches ultimately won a jury verdict of \$22.3 million, which was increased to \$66.9 million in mandatory treble damages. *MITTEN ET AL.*, *supra* note 13, at 261. The NCAA subsequently settled the case for \$54.5 million in damages and approximately \$20 million in attorneys’ fees and costs to plaintiffs’ attorneys. *Id.*

288. *Banks v. NCAA*, 977 F.2d 1081 (7th Cir. 1992).

289. *Id.* at 1094. Under the no agent rule, a student-athlete loses eligibility to participate in all intercollegiate sports if the athlete agrees to be represented by an agent. *Id.* at 1083–84. Under the no draft rule, a student-athlete loses amateur eligibility in a particular sport, such as NFL football, if the athlete asks to be placed on a professional league’s draft list for the sport. *Id.* at 1083.

procompetitive objective of maintaining “the clear line of demarcation between college and professional football.”<sup>290</sup>

Other courts also have disregarded the commercialized nature of Division I FBS football and men’s basketball by ruling that all NCAA rules to maintain the “amateur” nature of intercollegiate athletics are not unreasonable restraints of trade.<sup>291</sup> This body of precedent holds that such rules are essentially per se legal for purposes of antitrust law.<sup>292</sup> This judicial view appears based on the unproven assumption that the significant popularity and commercial success of intercollegiate athletics are primarily attributable to this self-serving NCAA characterization, thereby demonstrating their responsiveness to consumer demand as required by antitrust law. Thus, a broad range of NCAA rules designed to preserve amateurism are legal regardless of any adverse effects on student-athletes’ economic interests. These rules include prohibiting any price competition among universities or payment of fair market wages for their athletic services, and not allowing student-athletes to receive any athletics-related pecuniary benefits from nonfamily third parties.<sup>293</sup>

In *Board of Regents*, the Supreme Court observed that “[t]he NCAA is an association of schools which compete against each other to attract television revenues, not to mention fans and athletes.”<sup>294</sup> Thus, scholarly commentary generally has been very critical of lower court cases, for inappropriately presuming that NCAA amateurism rules are a noncommercial restraint not subject to antitrust scrutiny or a predominantly procompetitive form of internal regulation necessary to produce intercollegiate athletics.<sup>295</sup>

One scholar has asserted: “Courts should abandon anachronistic precedent based on unrealistic ideals of the ‘amateur’ nature of ‘big-time’ college athletics and develop a principled antitrust jurisprudence

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290. *Id.* at 1090.

291. *See, e.g.*, *McCormack v. NCAA*, 845 F.2d 1338, 1340 (5th Cir. 1988); *Gaines v. NCAA*, 746 F. Supp. 738, 748 (M.D. Tenn. 1990); *Jones v. NCAA*, 392 F. Supp. 295, 303 (D. Mass. 1975); *see also* *Smith v. NCAA*, 139 F.3d 180, 185 (3d Cir. 1998) (relying on *McCormack*, *Gaines*, and *Jones* to support its ruling that student-athlete eligibility rules “are not related to the NCAA’s commercial or business activities” and are not subject to antitrust challenge), *vacated on other grounds*, 525 U.S. 459 (1999).

292. *See generally* MITTEN ET AL., *supra* note 13, at 271–72.

293. *See McCormack*, 845 F.2d at 1343–45.

294. *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 99 (1984).

295. *See, e.g.*, C. Peter Goplerud III, *Pay for Play for College Athletes: Now, More than Ever*, 38 S. TEX. L. REV. 1081, 1093–94 (1997); Daniel E. Lazaroff, *The NCAA in Its Second Century: Defender of Amateurism or Antitrust Recidivist?*, 86 OR. L. REV. 329, 361 (2007); Matthew J. Mitten, *University Price Competition for Elite Students and Athletes: Illusions and Realities*, 36 S. TEX. L. REV. 59, 70–71 (1995); Gary R. Roberts, *The NCAA, Antitrust, and Consumer Welfare*, 70 TUL. L. REV. 2631, 2672–73 (1996); Daniel A. Rascher & Andrew D. Schwarz, *Neither Reasonable nor Necessary: “Amateurism” in Big-Time College Sports*, ANTITRUST, Spring 2000, at 51, 53.

more consistent with the economic realities of college sports in the [twenty-first] century.”<sup>296</sup> Thus, rather than relying on an outdated amateur/education model to reach a contrary conclusion, courts should characterize NCAA amateurism rules as restraints on economic competition among universities for student-athletes’ services, which should be subject to rigorous antitrust scrutiny under the *Board of Regents* rule of reason framework. In other words, the NCAA should be required to prove, as a matter of fact, that collective restraints with anticompetitive effects are outweighed by the procompetitive effects of maintaining academic integrity and the predominantly extracurricular nature of intercollegiate athletics or that competitive balance among its member institutions that cannot be substantially achieved by less restrictive means.<sup>297</sup> It is very questionable whether preservation of the “amateur” nature of intercollegiate athletics in itself is a legitimate procompetitive justification for restraints with anticompetitive effects.<sup>298</sup>

Because of NCAA rules prohibiting any price competition for student-athletes’ services, universities incur artificially reduced “labor” costs to produce sports such as Division I FBS football and men’s basketball and garner economic rent. These cost savings then are used to fund socially desirable objectives, such as subsidizing the costs of producing female and male intercollegiate sports, that do not generate net revenues as well as undesirable ones, such as paying exorbitant annual salaries in excess

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296. Matthew J. Mitten, *Applying Antitrust Law to NCAA Regulation of “Big Time” College Athletics: The Need To Shift from Nostalgic 19th and 20th Century Ideals of Amateurism to the Economic Realities of the 21st Century*, 11 MARQ. SPORTS L. REV. 1, 7 (2000); see also Lazaroff, *supra* note 295, at 356 (“[I]f courts begin to recognize that the academic ideal offered by the NCAA is more of a historical anachronism or a modern fiction, they will no longer be able to justify summary dismissal of student-athlete antitrust claims by simply relying on [*NCAA v. Board of Regents*] dicta that athletes must not be paid.”).

297. Lazaroff, *supra* note 295, at 361–65; Mitten, *supra* note 295, at 75.

298. Rascher & Schwarz, *supra* note 295, at 53 (observing that lower courts improperly assume it is reasonable and necessary to preserve amateurism to produce intercollegiate athletics, an issue not decided by the Supreme Court in *NCAA v. Board of Regents*); see also Davis, *supra* note 90, at 322 (noting that “the invocation of amateurism as a value critical to the operation of big-time intercollegiate athletics, may inhibit the necessary focus on the educational value” of sports competition sponsored by institutions of higher education); Mitten, *supra* note 295, at 78 (“[A]lumni pride and loyalty, tradition, long-standing rivalries, national rankings, conference and national championship tournament competition, and exciting play probably contribute to the public obsession with college sports more than the ‘amateur’ status of college athletes.”).

of \$1 million to head coaches in revenue-generating sports.<sup>299</sup> In addition, NCAA amateurism rules have the unintended consequence of contributing to the athletic arms race by encouraging inefficient nonprice competition for student-athletes' services.<sup>300</sup>

Recently, two different groups of former student-athletes brought class action antitrust litigation against the NCAA in an effort to obtain a share of the revenues generated by their playing abilities and fame than historically has been permitted under NCAA rules. In *O'Bannon v. NCAA*,<sup>301</sup> the plaintiffs alleged that the NCAA's member universities and others' collective refusal to permit former Division I basketball players and FBS football players to share in the multimillion-dollar revenues from the sale of products incorporating their likenesses—even after their intercollegiate athletics eligibility ended—violates the antitrust laws.<sup>302</sup> This case currently is pending in a California federal court, which has ruled that the plaintiffs' complaint pleads sufficient facts to establish the requisite anticompetitive effects under the rule of reason.<sup>303</sup>

In *White v. NCAA*,<sup>304</sup> a group of former Division I-A football and Division I men's basketball players asserted that an NCAA rule limiting the maximum value of their football and basketball scholarships to the value of tuition, fees, room and board, and books—an amount alleged to be less than the full annual cost of attending college—violates antitrust law.<sup>305</sup> The complaint was carefully drafted in an effort to avoid the NCAA's defense that this rule is necessary to preserve the amateur nature of intercollegiate athletics. The court ruled that plaintiffs' complaint sufficiently alleged an anticompetitive agreement among NCAA member universities to fix the economic value of their athletic scholarships effects,<sup>306</sup> but this case subsequently was settled before trial.<sup>307</sup> The

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299. Rascher & Schwarz, *supra* note 295, at 53–54.

300. Mitten, *supra* note 295, at 74–75; see Rascher & Schwarz, *supra* note 295, at 54.

301. Class Action Complaint and Demand for Jury Trial, *O'Bannon v. NCAA*, No. CV 09-3329 (N.D. Cal. July 21, 2009).

302. *Id.* at 2–3. As just one example, in 2008, the University of Florida received approximately \$77,000 in royalties from the sale of football jerseys bearing quarterback Tim Tebow's widely recognized number fifteen jersey. Fish, *supra* note 113.

303. *O'Bannon v. NCAA*, Nos. C09-1967 CW, C 09-3329 CW, C 09-4882 CW, 2010 WL 445190, at \*5 (N.D. Cal. Feb. 8, 2010).

304. Notice of Class Action Settlement and Fairness Hearing, *White v. NCAA*, No. CV06-0999 VBF (MANx) (C.D. Cal. Feb. 4, 2008), available at <http://www.ncaaclassaction.com/settlementnotice.pdf>.

305. Defendant's Motion To Dismiss Plaintiffs' Amended Complaint at 1, *White v. NCAA*, No. CV 06-0999-RGK (MANx) (C.D. Cal. Sept. 20, 2006), available at <http://ncaaclassaction.com/deny.pdf>.

306. *Id.* at 3–4.

307. Notice of Class Action Settlement and Fairness Hearing, *supra* note 304, at 2; see also *White v. NCAA*, NCAA.ORG, <http://www.ncaa.org/wps/portal/ncaahome?WCGLOBALCONTEXT=/wps/wcm/connect/ncaa/NCAA/Academics+and+Athletes/>



settlement terms required the NCAA to make available a total of \$218 million to Division I institutions to provide aid to current student-athletes with financial needs, academic needs, or both; to establish a \$10 million fund to reimburse plaintiffs' future education expenses; to permit Division I institutions to provide student-athletes with insurance for sport-related injuries and year-round health insurance; and to consider future NCAA legislation permitting multiyear student-athlete scholarships and financial aid through graduation to student-athletes who no longer qualify for athletic-based aid.<sup>308</sup>

Despite the historical judicial refusal to apply traditional antitrust law principles to NCAA restraints that adversely affect student-athletes' economic interests, *White* and *O'Bannon* illustrate that the potential recovery of mandatory treble damages and attorneys' fees creates significant incentives for class action antitrust litigation against the NCAA. The risk of potential multimillion-dollar treble damages liability if plaintiffs prevail on the merits of their antitrust claims creates a strong incentive for the NCAA to reach a monetary settlement. Unfortunately, this only resolves the immediate problem by making a one-time wealth transfer that provides only short-term, limited additional economic benefits to some student-athletes. A settlement does not, however, remedy the underlying problems giving rise to student-athletes' antitrust claims or preclude future antitrust litigation by others. The risk of such litigation may inhibit NCAA internal reform aimed at ensuring that revenues generated by commercialized sports more effectively further a university's academic mission and student-athletes' welfare.

Based on concerns about antitrust liability, the NCAA has been reluctant to enact cost control legislation and, currently, is simply encouraging each of its member institutions to individually make financially responsible decisions regarding the resources allocated to its intercollegiate athletics program and its athletics department's expenditures.<sup>309</sup> Effective NCAA internal governance of commercialized

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Education+and+Research/White+v+NCAA/ (last visited Aug. 2, 2010) (describing the requirements and criteria student-athletes must fulfill to receive the settlement benefits).

308. *Information Related to the White Case Settlement: Summary of Settlement and Frequently Asked Questions*, NCAA.ORG., <http://www.ncaa.org/wps/wcm/connect/20c443004e0dacc5a096f01ad6fc8b25/White+settlement+FAQ+%28Revised+9.09%29.pdf?MOD=AJPERES&CACHEID=20c443004e0dacc5a096f01ad6fc8b25> (last visited Aug. 2, 2010) (summarizing the settlement terms).

309. See PRESIDENTIAL TASK FORCE ON THE FUTURE OF DIV. I INTERCOLLEGIATE ATHLETICS, *supra* note 44, at 12.

intercollegiate athletics requires uniform rules and enforcement, which are necessarily the product of agreements and collective decisionmaking among NCAA member institutions, thereby inviting antitrust challenges under section 1 of the Sherman Act.

The Authors propose that Congress provide the NCAA and its member institutions with broad or limited immunity from antitrust liability under section 1 of the Sherman Act,<sup>310</sup> expressly conditioned upon the adoption and implementation of several targeted external reforms to ensure that twenty-first century intercollegiate athletics furthers legitimate higher education objectives, provides student-athletes with the full benefits of their bargain, and enhances the likelihood they will obtain a college education that maximizes their future career opportunities other than playing professional sports.<sup>311</sup> Eliminating the threat of potential antitrust liability under section 1 of the Sherman Act would enable the NCAA and its member institutions to adopt internal reforms that effectively prevent intercollegiate athletics from crossing the line between a primarily educational endeavor to a commercial enterprise, enhance the academic integrity of intercollegiate athletics, promote more competitive balance in intercollegiate sports competition, require university athletic departments to operate with fiscal responsibility, and limit unbridled market competition for inputs such as coaches necessary to produce intercollegiate athletics.

Some commentators have suggested “a legislative solution may not be optimally practical or viable” to remedy antitrust issues raised by NCAA internal regulation and that it is “probably better for the NCAA to address these problems and for the courts to try and resolve these disputes on a case-by-case basis with a more enlightened and modern rule of reason approach.”<sup>312</sup> Although sports-related federal legislation

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310. *See generally* Mitten, *supra* note 295, at 82 (“[By providing antitrust immunity,] Congress, representing broad political and societal perspectives, may establish the bounds of university cooperation required to achieve social welfare objectives that are not furthered by the operation of the free market.”). Congress may want to limit the scope of this immunity to NCAA rules and internal regulations that reduce or eliminate competition among NCAA member institutions for input necessary to produce intercollegiate athletics such as student-athletes and coaches, thereby subjecting output market restraints and other joint restrictions to antitrust challenge under section 1 of the Sherman Act. *See* 15 U.S.C. § 1 (2006). The NCAA would remain subject to monopolization, attempted monopolization, and conspiracy to monopolize claims under section 2 of the Sherman Act. *See id.* § 2 (2006).

311. Like two antitrust scholars explain: “The historical mixing of amateur athletics and academics in America arises out of a socially constructed belief that athletic participation can be an asset to a college education. But if the universities become only preparatory academies for professional sports, there is a breach of this social contract.” Peter C. Carstensen & Paul Olszowka, *Antitrust Law, Student-Athletes, and the NCAA: Limiting the Scope and Conduct of Private Economic Regulation*, 1995 WIS. L. REV. 545, 557.

312. Lazaroff, *supra* note 295, at 371.

is rare, Congress has provided limited antitrust immunity to other national sports regulatory bodies when necessary to enable the achievement of legitimate objectives.<sup>313</sup> However, antitrust law, which prohibits unreasonable conduct but does not require reasonable conduct, is not well-suited to externally regulate NCAA internal governance of intercollegiate athletics, particularly rules and agreements that define this unique brand of athletic competition and the permissible scope of a university's relationship with its student-athletes.<sup>314</sup> Moreover, a piecemeal approach by way of antitrust litigation that merely considers the legality of the particular challenged restraint will not effectively solve macro, systemic problems inherent in the production of commercialized intercollegiate athletics by institutions of higher education. The primary actual and potential problems caused by this blend of athletics and academics are an overemphasis on winning and generating sports-related revenues, a misallocation of scarce university resources to the athletic department, subordination of higher education academic values to the forces of commercialization, and student-athletes' inability to realize the educational benefits of the bargain for providing playing services.<sup>315</sup>

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313. See 15 U.S.C. § 1291 (2006). For example, the Sports Broadcasting Act of 1961, 15 U.S.C. § 1291, permits professional sports league clubs to pool and sell or transfer "all or any part of the rights of such league's member clubs in the sponsored telecasting of the games." The Act's legislative history indicates that it is intended to "enable the member clubs . . . to pool their separate rights in the sponsored telecasting of their games and to permit the league to sell the resulting package of pooled rights to a purchaser, such as a television network, without violating the antitrust laws." S. REP. NO. 87-1087, at 1 (1961), *reprinted in* 1961 U.S.C.C.A.N. 3042, 3042.

314. In contrast to output market restraints, such as limits on the number of televised college football games successfully challenged in *NCAA v. Board of Regents*, it is more difficult to evaluate the economic effects of input market restraints such as the no draft and no agent rules unsuccessfully challenged in *Banks v. NCAA* on consumer welfare, which is the primary objective of antitrust law. Compare *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 120 (1984) ("[B]y curtailing output and blunting the ability of member institutions to respond to consumer preference, the NCAA has restricted rather than enhanced the place of intercollegiate athletics in the Nation's life."), with *Banks v. NCAA*, 977 F.2d 1081, 1094 (7th Cir. 1992) (holding that *Banks* "fail[ed] to allege an anti-competitive impact on a discernible market," and affirming the district court's dismissal for failure to state an actionable claim).

315. Some commentators characterize the primary problem and proposed remedies too narrowly and solely in economic terms. See, e.g., Goplerud, *supra* note 295, at 1089 (advocating NCAA legislation that gives universities the unilateral discretion to pay a stipend up to a maximum amount to individual student-athletes participating in Division I major revenue producing sports); Lazaroff, *supra* note 295, at 372 (suggesting the need to create "greater economic fairness" by giving student-athletes employee status, "pay-for-play," or both); Robert A. McCormick & Amy Christian McCormick, *The Myth of*

*B. Proposed Conditional Antitrust Immunity and  
Potential Beneficial Effects*

The Authors recommend that the federal statute immunizing the NCAA and its member institutions from antitrust liability under section 1 of the Sherman Act be entitled the “Myles Brand Student-Athlete Education and Welfare Act” in honor of former NCAA president Myles Brand, who died on September 16, 2009. A philosophy professor, Brand was the first university president to serve as NCAA president. He was a strong proponent of commercialized intercollegiate athletics who believed that sports are an integral part of higher education and an equally vigorous advocate for NCAA reforms designed to better integrate athletics and academics and to enhance student-athletes’ educational experiences and welfare.

This proposed antitrust immunity would be conditioned upon certain requirements that the NCAA and its member institutions must satisfy to ensure that commercialized intercollegiate athletics are primarily an educational endeavor and that student-athletes in sports generating net revenues receive valuable educational benefits in exchange for their playing services. The following are some possible requirements that could be imposed as conditions of our proposed antitrust immunity:

(1) At least a four-year athletic scholarship that covers the full annual cost of college attendance, which may be taken away only for failing to meet minimum academic requirements, engaging in misconduct, or voluntarily choosing not to continue playing a sport, and tuition funding

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*the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71, 79–81 (2006) (asserting that “grant-in-aid athletes in revenue-generating sports at Division I NCAA schools are ‘employee-athletes,’” which would permit them to unionize, collectively bargain for wages and other employment benefits, and strike to further their economic objectives). It has been estimated that a college football player who will be an NFL draft choice has an average annual market value of \$1.3–1.36 million to his university. Fish, *supra* note 113. An outstanding college quarterback would have a much higher value: University of Florida quarterback Tim Tebow’s estimated annual worth to the school was at least \$2.5 million. *Id.* But see Richard B. McKenzie & E. Thomas Sullivan, *Does the NCAA Exploit College Athletes? An Economics and Legal Reinterpretation*, 32 ANTITRUST BULL. 373, 375–76 (1987) (asserting that NCAA prohibitions on price competition do not artificially reduce the compensation that student-athletes would receive for their services below the amounts offered if competitive bidding by universities were permissible). Paying student-athletes cash compensation would cause competitive imbalances between institutions having the financial resources to do so and those that do not. The payments may also violate Title IX gender equity laws unless such payments were made to a proportionate number of both male and female student-athletes. Because paying student-athletes would increase a university’s costs to produce intercollegiate athletics, it also may result in the reduction of athletic participation opportunities in women’s sports and men’s nonrevenue sports.

for a fifth or sixth year of college education if necessary to complete a bachelor's degree, provided the student-athlete is in good academic standing when the student's intercollegiate athletics ability is exhausted.<sup>316</sup> Providing these additional benefits likely would increase the college graduation rates of Division I FBS football and men's basketball student-athletes, whose efforts generate most intercollegiate athletics revenues. According to 2009 NCAA Graduation Success Rate (GSR) data for Division I, 79% of all student-athletes who entered college in 2002 earned their degrees by the end of 2008 whereas the GSR for both Division I FBS football and men's basketball was only 66%.<sup>317</sup> The corresponding figures from Federal Graduation Rate (FGR) data compiled by the federal government—which does not include student-athletes who transfer out of a university in good standing or incoming transfer students who graduate—are a 64% graduation rate for all Division I student-athletes—two percentage points higher than the general student body—but only 55% for FBS football players and 51% for men's basketball players.<sup>318</sup> Because college graduates generally earn more income during their working career than those who have not earned their degree, it is very important for student-athletes who play football or basketball to graduate from college because of the very low likelihood they will earn a living playing these sports professionally.<sup>319</sup>

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316. Observing that NCAA regulations prohibit member universities from promising or providing scholarship assistance to student-athletes who have exhausted their athletic eligibility, some scholars have opined:

This kind of restriction is entirely consistent with an agreement among colleges not to compete in providing athletes with a real opportunity to acquire a college education. This is only a cost control and appears to be “exploitation . . . by . . . commercial enterprises.” If this is correct, such a restraint would seem to be unlawful and subject to antitrust challenge by any student-athlete denied continued support for his or her education.

Carstensen & Olszowka, *supra* note 311, at 591.

317. Press Release, NCAA, Graduation Rates Reach All-Time Highs (Nov. 18, 2009), available at <http://www.ncaa.org/wps/ncaa?key=/ncaa/NCAA/Media+and+Events/Press+Room/Embargoed/20091118+GSR+Press+Release>.

318. *Id.*

319. Rodney K. Smith & Robert D. Walker, *From Inequity to Opportunity: Keeping the Promises Made to Big-Time Intercollegiate Student-Athletes*, 1 NEV. L.J. 160, 173 (2001) (“[T]he economic value of a college education, as evidenced by a degree, is well in excess of \$500,000, in current dollars, over the working lifetime of the student-athlete, who graduates with a degree, as compared to the athlete who does not receive such a degree.”). These commentators correctly observe:

There is also some lifetime economic benefit to student-athletes who attend but do not graduate from a university, since employees with some higher education

(2) Free medical care or health insurance for all sports-related injuries plus extension of the injured student-athlete's scholarship for a period of time equal to the time the athlete is medically unable to attend class due to injury. This is an important benefit because the NCAA currently permits, but does not require, its member institutions to provide medical care or health insurance for sports-related injuries.<sup>320</sup> Moreover, courts generally hold that student-athletes, including those participating in net revenue generating sports, are not "employees" entitled to recover worker's compensation benefits for intercollegiate athletics-related injuries.<sup>321</sup>

(3) Mandatory remedial assistance and tutoring for entering student-athletes whose indexed academic credentials are below a certain percentile—twenty-fifth percentile, for example—for their university's freshman class. The NCAA's Academic Progress Rate system that holds universities accountable for their students-athletes' collective academic performance and imposes penalties for deficiencies currently provides a strong incentive to voluntarily provide these services,<sup>322</sup> but mandating such assistance probably would do even more to enhance the academic

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tend to generate a higher income over the course of their working lives than do employees with only a high school education. However, that economic benefit is much less than the benefit accruing to a graduate.

*Id.* at 184. For further support of this observation, see Marburger & Hogshead-Makar, *supra* note 86, at 69, observing that U.S. Census data "show that at any age level, persons with a degree in higher education earn more than individuals with a high school education." Chancellor of Vanderbilt University, Gordon Lee, now President of Ohio State University, made a similar reform suggestion that would give NCAA universities a strong incentive to ensure that student-athletes earn a degree. Lee suggested:

[T]he number of athletic scholarships that a school can award should be tied to the graduation rates of its athletes in legitimate athletic programs. If a school falls below a threshold graduation rate, it should be penalized by having to relinquish a certain number of scholarships for the next year's entering class.

Gordon Lee, *Vanderbilt Abolishes Athletic Department*, ATHLETIC SCHOLARSHIPS.NET (Sept. 2003), <http://www.athleticscholarships.net/vanderbiltnews.htm>.

320. NCAA OPERATING BYLAWS art. 16.4, § 16.4.1, *reprinted in* NAT'L COLLEGIATE ATHLETIC ASS'N, 2009–10 NCAA DIVISION I MANUAL, *supra* note 40, at 199–200.

321. *See, e.g.*, *Rensing v. Ind. St. Univ. Bd. of Trustees*, 444 N.E.2d 1170, 1175 (Ind. 1983); *Coleman v. W. Mich. Univ.*, 336 N.W.2d 224, 228 (Mich. Ct. App. 1983); *Waldrep v. Tex. Emp'rs Ins. Ass'n*, 21 S.W.3d 692, 707 (Tex. Ct. App. 2000).

322. In 2009, for the first time, the NCAA banned university sports teams—University of Tennessee—Chattanooga and Jacksonville State University football teams, and Centenary College men's basketball team—from postseason championship competition for team members' poor academic performance based on the four-year average of their Academic Progress Rate (APR). David Moltz, *Classroom Failure, Postseason Ban*, INSIDE HIGHER ED (May 7, 2009), <http://www.insidehighered.com/layout/set/print/news/2009/05/07/ncaa>. Several other university athletic teams were penalized for low APRs by losing scholarships that otherwise could have been awarded to student-athletes. *Id.* On a more positive note, the overall APR for all Division I sports rose three points from 2008 figures and the overall averages for baseball, football, and men's basketball—sports whose team members traditionally underachieved academically—increased more significantly. *Id.*

performance of individual students-athletes most at risk of not succeeding academically.

(4) The creation of a postgraduate scholarship program administered by the NCAA and funded by a designated percentage of the total net revenues generated by intercollegiate football and men's basketball, and perhaps other sports, including the sales of merchandise incorporating aspects of student-athletes' persona, such as team jerseys with numbers identifying individual players. Because the collective effort of all participating student-athletes, including those who are less prominent or talented, is necessary to produce these sports and contribute to an individual player's commercial popularity, all of the athletes should have the opportunity to qualify for educational benefits funded by the commercial exploitation of publicity rights.<sup>323</sup>

There is justification for providing greater educational benefits to student-athletes playing net revenue generating sports such as Division I men's basketball and FBS football. One legal scholar observes that student-athletes who participate in major college basketball and football "are doing something special for their schools" by providing the university with a vital link to alumni, bringing together diverse constituencies, and creating contagious euphoria.<sup>324</sup> He asserts that "[t]hose who provide the occasions for collective euphoria are making a unique contribution to the [university] community and deserve to be recognized for it."<sup>325</sup>

In attempting to discern why graduation rates for student-athletes in Division I men's basketball and FBS football historically have been below male graduation rates for the general student body, some scholars suggest a plausible explanation:

[C]oaches in men's basketball and football at this level demand more of them, in terms of time and energy, than athletes in other programs. While this assertion is speculative because there is little empirical data available in this important area, it makes sense that coaches at this level, who are better paid and are under extreme pressure to win because profits are tied to winning programs, demand more of their players, in order to retain their position, salary and benefits.<sup>326</sup>

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323. In this regard, collective efforts and accomplishments of all students and alumni contribute to university's reputation and value of its degrees, which generally are not individually compensated by the university.

324. Stanton Wheeler, *Rethinking Amateurism and the NCAA*, 15 STAN. L. & POL'Y REV. 213, 235 (2004).

325. *Id.* at 229.

326. Smith & Walker, *supra* note 319, at 168. NCAA rules limit a student-athlete's required participation in in-season, athletics-related activities to a maximum of four

They note that these student-athletes are predominantly persons of color whose athletic abilities generate substantial revenues that fund other intercollegiate sports in which the participating student-athletes are not persons of color and contend there is “a strong argument that they are not receiving an equitable share of the wealth they contribute to generating.”<sup>327</sup> Because providing greater educational benefits to student-athletes in net revenue-generating sports such as men’s football and basketball is facially gender neutral, they suggest that doing so may not violate Title IX gender equity laws because “this is really an equal pay for equal work claim, like that of women coaches who have [unsuccessfully] challenged the differential in compensation between themselves and coaches in men’s sports.”<sup>328</sup>

Antitrust immunity could also be conditioned upon adoption of some of Professor Colombo’s foregoing proposals. Among his worthy proposals are requiring that a certain percentage of the net revenues from sports such as football and basketball be used to fund and expand participation opportunities for student-athletes in sports that do not generate net revenues, or requiring the NCAA and its member universities to provide detailed information concerning their athletic department finances using standardized accounting methods.<sup>329</sup> Some members of Congress may insist that any antitrust immunity be conditioned on the dismantling of the current Division I FBS system, which favors universities in Bowl Championship Series conferences, and the establishment of a national championship playoff system in which all 120 universities with Division I FBS football teams have an equal opportunity to participate.<sup>330</sup>

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hours per day and twenty hours per week. *Report: Players Alleges Rules Were Broken*, ESPN.COM (last updated Aug. 30, 2009, 4:21 PM), <http://sports.espn.go.com/ncf/new/s/story?id=4431717>. A 2006 NCAA survey of 21,000 student-athletes revealed that major college football players voluntarily spent approximately forty-five hours per week on athletic activities, which was more than ten hours per week more than the majority of other sports included in the survey. *Long Hours Expected To Play College Football*, ALLBUSINESS.COM (Sept. 6, 2009), <http://www.allbusiness.com/education-training/curricula-apprenticeships-internships/12890018-1.html>. Ohio State University linebacker Austin Spitler stated that “we’re there from the crack of dawn till 7 or 8 o’clock at night [during football season].” Doug Lesmerises, *In Wake of Michigan Story, Ohio State Football Players Discuss Balance of Buckeyes’ Mandatory vs. Voluntary Activities*, CLEVELAND.COM (Sept. 1, 2009, 3:38 PM), [http://www.cleveland.com/buckeyeblog/index.ssf/2009/09/ohio\\_state\\_buckeyes\\_on\\_balance.html](http://www.cleveland.com/buckeyeblog/index.ssf/2009/09/ohio_state_buckeyes_on_balance.html). “If you want to be good as a team, guys are going to be putting in way more than 20 hours a week,” Spitler said. *Id.*

327. Smith & Walker, *supra* note 319, at 167.

328. *Id.* at 197.

329. See *supra* text accompanying notes 262–65.

330. On December 9, 2009, a House subcommittee passed legislation that makes it illegal to promote a college national championship game “or make a similar representation” unless it results from a playoff system. *Subcommittee OKs College*



Congressional antitrust immunity from section 1 of the Sherman Act would enable the NCAA and its member universities to pursue important socially desirable objectives, some of which otherwise would violate the antitrust laws. The *Law* case<sup>331</sup> currently limits NCAA member institutions' collective ability to control escalating university expenditures on intercollegiate athletics, which in recent years have increased at a rate two to three times more than other higher education expenditures and increasingly require universities to financially subsidize their athletic departments.<sup>332</sup> Given the shield of antitrust immunity, the NCAA could adopt legislation to curb the existing athletic arms race by imposing annual or multiyear per sport aggregate spending caps or limits on certain expenditures—coaches' salaries—for the different levels of intercollegiate athletics competition.<sup>333</sup> In turn, these cost savings could be used to maintain or increase intercollegiate athletics participation opportunities in women's sports and men's nonrevenue sports.<sup>334</sup>

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*Football Playoff Bill*, ESPN.COM (last updated Dec. 10, 2009, 9:46 AM), <http://sports.espn.go.com/ncf/news/story?id=4727426>.

331. *Law v. NCAA*, 134 F.3d 1010, 1023 (10th Cir. 1998); see *supra* text accompanying notes 280–87.

332. See *supra* notes 103–09 and accompanying text.

333. In June 2010, although acknowledging that the antitrust laws prohibit NCAA member institutions from collectively limiting coaches' salaries, the Knight Commission on Intercollegiate Athletics observed that obtaining “an exemption from the antitrust laws for any reason is a complicated, time-consuming, and expensive endeavor that is by no means assured of success,” and recommended “that an exemption not be sought, at least at this time.” KNIGHT COMM'N ON INTERCOLLEGIATE ATHLETICS, RESTORING THE BALANCE: DOLLARS, VALUES, AND THE FUTURE OF COLLEGE SPORTS 18 (2010), available at [http://www.knightcommission.org/index.php?option=com\\_content&view=article&id=503&Itemid=166](http://www.knightcommission.org/index.php?option=com_content&view=article&id=503&Itemid=166). Proposing that “[r]eform of collegiate athletics financing can and must be more immediate and comprehensive than any reform provided through a limited and specific exemption secured through the legislative process,” the Commission recommended “colleges and universities should consider coaches' compensation in the context of the academic institutions that employ them,” and that “[t]heir compensation should reflect the values of the amateur athletics programs that they oversee, not the values of professional sports teams whose major objectives are winning championships and earning profits.” *Id.* Although this a laudable and appropriate objective, the Authors believe that existing market forces provide individual NCAA member institutions with a strong economic disincentive to do so and that the athletic arms race will continue without an antitrust exemption permitting collective cost constraints.

334. Based on their evaluation of empirical evidence and economic analysis, Professors Marburger and Hogshead-Makar explain:

Because the “marginal benefit” of a dollar spent on football and men's basketball at the Division I (especially I-A) level exceeds the marginal benefit of the same sports at Divisions II and III, Division I athletic directors have an economic incentive to dedicate a greater proportion of the budget to these

## VIII. CONCLUSION

Legend has it that King Canute I was the ancient monarch who stood on the ocean shore and commanded the tide not to come in. Not surprisingly, his effort failed. Similarly, the commercialization of intercollegiate athletics is an inevitable market response to our nation's strong cultural passion for sports competition. It is equally inevitable that college and university leaders would seek to use intercollegiate athletics as a means of achieving other legitimate institutional objectives. Because intercollegiate athletics is an integral part of institutions of higher education, the revenues generated by university athletic departments should continue to be exempt from federal taxation. It is, however, necessary to ensure that the increasing commercialization of intercollegiate athletics does not conflict with the academic missions of universities or interfere with student-athletes' educational opportunities. The Authors' proposed solution is that Congress should provide the NCAA and its member universities with a limited exemption from the federal antitrust laws as a means of implementing targeted reforms to ensure that intercollegiate athletics are primarily an educational endeavor rather than commercialized quasi-professional sports.

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sports. The evidence clearly supports this contention. In fact, the largest allocation of resources in favor of football and men's basketball occurs at the Division I-A level, where significant profits in these sports serve as the norm.

. . . . To allow for unbridled growth in their budgets (driven primarily by the prisoner's dilemma), athletic directors resort to exempting football and men's basketball from budgetary considerations and cut men's nonrevenue sports as a means to comply with Title IX.

. . . . As long as football and men's basketball budgets are essentially exempted from budgetary restraints, Title IX proportionality burdens are shifted to the nonrevenue sports. . . . [T]he net decrease in men's nonrevenue sports occurred *only* at the Division I level despite the fact that football and men's basketball are frequently in a position to cross-subsidize the nonrevenue sports. At the Division III level, where the expenditures per participant are substantially more equal between "revenue" and nonrevenue sports, and also between men's and women's sports in general, the net change in the number of men's sports is positive. Marburger & Hogshead-Makar, *supra* note 86, at 92-93 (internal citations omitted).