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Targeted Reform of Commercialized Intercollegiate Athletics

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Abstract

This article observes that American society’s passion for intercollegiate sports competition is an extremely powerful, naturally evolved cultural force. The marketplace responds to cultural forces, and the commercialization of college sports directly reflects the marketplace realities of our society. For example, colleges and universities rationally utilize their intercollegiate athletic programs, particularly NCAA Division 1 FBS football and basketball, as a means to achieve a wide range of legitimate objectives of higher education. Thus, the authors advocate that university athletic department revenues should continue to be exempt from federal taxation, specifically the unrelated business income tax (UBIT), despite the increasingly commercialized nature of intercollegiate sports. However, the commercialization of intercollegiate athletics creates the potential for conflict with a university’s academic mission and the risk that student-athletes may be exploited. The authors propose that Congress provide the NCAA and its member universities with a limited exemption from the federal antitrust laws conditioned upon targeted reforms that will 1) ensure that intercollegiate athletics are primarily an educational endeavor; 2) better enable student-athletes in revenue generating sports to obtain the benefit of their bargain; and 3) protect and maintain student-athletes’ intercollegiate athletics participation opportunities in non-revenue generating sports.

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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 21st 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. For example, in response to substantial public interest in intercollegiate sports, particularly Division 1 Football Bowl Subdivision (FBS) (formerly Division 1-A) football and men’s basketball, colleges and universities rationally invest substantial resources in their athletic departments, as a means to achieve a wide range of legitimate objectives that further their missions: providing a lens through which the nature, scope, and quality of their higher educational services is discovered by the public; attracting faculty, students, and student-athletes; diversifying their student body; forging a continuing bond with alumni, the local community, and other constituents that provides both tangible and intangible benefits; and enhancing their institutional reputations.

We 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 1 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 non-profit 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, we propose that Congress provide the National Collegiate Athletic Association 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 is primarily an educational endeavor and to prevent the excessive allocation of university financial resources to sports as well as to better enable student-athletes in revenue generating sports to obtain the educational benefits of their bargain. In addition, our proposal has
the potential to protect and maintain student-athletes’ intercollegiate athletics participation opportunities in sports that do not generate net revenue.

I. 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 is, in turn, reflected in the economic workings of a free marketplace, as the entire history of intercollegiate sports demonstrates. In short, the structure of America’s intercollegiate athletics derives at its root 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 indicates that human play is an inherent, joy-producing essential of our species. Play is seen as an evolved, natural survival element inherent in humans (and certain other mammals). Researchers conclude that play is an essential human natural selection step that equips people for survival as members of society. The survival tools produced by play include such necessary skills for group survival as human empathy, trust in others, complex problem-solving, knowledge of both personal and interpersonal boundaries, and humor.

Researchers into human behavior confirm that “competitiveness is a product of the cumulative experience of the human race.” American history reveals that humanity’s youthful energy and the need to compete gave rise to public athletic competitions, part of the robustness of America’s settlers. For instance, a youthful Abe Lincoln first became noted for his strength and

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2 Id. Researcher-psychologist Dr. Stuart Brown, studying large numbers of convicted male murderers, found this startling commonality: 100% of the murderers he studied had never learned to play in their youth. This discovery launched Brown into a decades-long study of play. Brown’s conclusions are significant to understanding the deep grip sports competition has on our species. See also Johnson, Christie, & Yawkey, PLAY AND EARLY CHILDHOOD DEVELOPMENT 7, 11, 16-17 (2d Ed, 1999).

athletic ability in frontier Indiana wrestling contests. The same grassroots energy as when Harvard and Yale students created 1852’s first intercollegiate rowing competition, followed by students from Princeton and Rutgers introducing inter-campus college football games. Full-time coaches, formal institutional recognition, big stadiums, widespread sports merchandising, mega-media, and all the rest of today’s sports culture evolved in later decades until we find urban and suburban America bursting with youthful competition and sports.

The mere existence of competitive intercollegiate teams seems a natural extension of youthful competition. As one university president put it, “It’s an integral part of our DNA…. It has shaped us since our founding.” Athletics energizes enthusiasm among both those who compete and those who are spectators to the competition, be they competitors or former competitors themselves, their families, friends, loyal alumni, non-alumni supporters, sport

4 Abraham Lincoln Took On The Town Bully!: At New Salem In 1831 He Wrestled Jack Armstrong Next to Denton Offutt’s Store, available at http://members.aol.com/RVSNorton1/Lincoln48.html (last visited August 5, 2008); Ira Berkow, Sports Of The Times: Honest, Abe Had Athletic Ability, Feb. 12, 1987, N.Y. TIMES, at B29; Hastert, Wellstone Named To Wrestling Hall Of Fame, Feb. 25, 2000, CHICAGO TRIB., at C2 (stating 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.”)


6 Id.

7 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 competitive 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 pre-schoolers 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; rural teens with gloves, mitts, and baseballs on grassy fields every spring. Watch pre-pubescent 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, July 5, 2006, CNN.COM, http://www.cnn.com/2006/US/07/03/rise.kids.sports/index.html (estimating 41 million 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 by empirical studies. The educational and maturational losses to young people—whether star athletes or benchwarmers—of deletion of 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, MINNEAPOLIS STAR TRIB., May 17, 2008, http://www.startribune.com/templates/Print_This_Story?sid=19033899 (citing the studies that weigh these social costs published by the National Federation of State High School Associations, found online at NFHS.org.) (last visited August 5, 2008).

8Knight Commission 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, at 43 (October, 2009) (obtainable at www.artsci.com) (last visited October 27, 2009).
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.”

Regardless of whether you celebrate this human attraction to competition or condemn 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. As ever, human culture responds to human needs and, in a free system, the marketplace responds by satisfying culture’s demands.

In analyzing the bonds between a community and its sports teams it has been noted that a core of tribalism is the energizing bond between a team and its community. A politically astute observer, former Missouri Senator John Danforth, believes 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.” Similarly, judges have recognized this bond between a community and its local sports teams. One court has stated that the community’s

9 Id.


11 John Beisner, Sports Franchise Relocations: Competitive Markets and Taxpayer Protection, 6 YALE L. & POLICY 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. Id. Which Sport Has The Most Loyal Fans?, FOXSPORTS.COM, May 17, 2008, http://community.foxsports.com/blogs/Lisa%20H/2008/05/17WHICH_SPORT_HAS_THE_MOST_LOYAL_FANS (ranking college football as the third best sport for loyalty of fans to the sport behind soccer and NASCAR.); Kristen Martinez, Pigskin Religion, MIT.EDU, http://web.mit.edu/cultureshock/fa2006/www/essays/football.html (the author conveys her beliefs, as a University of Miami fan, that “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.”).


13 See, e.g., Los Angeles Mem’l Coliseum Comm’n v. NFL (Raiders I) 726 F.2d 1381, 1397 (9th Cir. 1984). As the court pointed out The Ninth Circuit (describing a professional MLB team’s bonds to its
bonds to its athletic teams “are the highly valued intangible benefits” which are virtually impossible to quantify.¹⁴ For college athletics, the relevant “community” that is emotionally bonded to the team includes an educational institution’s more than a dozen overlapping constituencies.¹⁵

II. 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. Intercollegiate sports competition has never been insulated from the impact of American culture, both academic and general. Rather, it always has been an integral and representative part of our culture. Briefly reviewing 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 create the potential for social and political conflicts as well as abuses. The evolution, growth, and commercialization of


¹⁵ These 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/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 note ___ infra and accompanying text. Which Sport Has The Most Loyal Fans?, FOXSPORTS.COM, May 17, 2008, http://community.foxsports.com/blogs/Lisa%20H/2008/05/17/WHICH_SPORT_HAS_THE_MOST_LOYAL_FANS (ranking college football as the third best sport for loyalty of fans to the sport behind soccer and NASCAR.) (last visited August 5, 2009); Kristen Martinez, Pigskin Religion, MIT. EDU, http://web.mit.edu/cultureshock/fa2006/www/essays/football.html (the author conveys her beliefs, as a University of Miami fan, that “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.”); 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 (OKLAHOMA), Jan. 11, 2006 (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.”)
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” (i.e., the ideal of uncompensated competitive sport for its own sake). This purportedly was the nature of athletic competition in Ancient Greece, which did not reflect reality because successful Greek athletes were paid substantial sums of money for their efforts (reportedly up to “ten years worth of wages”). 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.

However, British elitist practices were not effectuated in American as illustrated by the fact that Harvard rowing teams from the 1850s onward were known to participate for payment of sums ranging from $100 to $500 (significant dollars in Nineteenth Century America). Universities’ intense recruiting of team members along with the direct or indirect awarding of benefits to athletes quickly became hallmarks of American intercollegiate sports. Subsequent


18 Shropshire, supra note____. The final U.S. stronghold of the Anglophile ideal of amateurism in America was the Olympic teams and the amateurism policies of the IOC and the AAU, which notoriously stripped Jim Thorpe of his two track and field Olympic gold medals in 1913 for playing summertime semi-pro baseball in the East Carolina League, only to have Thorpe’s medals restored posthumously 70 years later by a more realistic IOC. The final U.S. stronghold of the Anglophile ideal of amateurism in America was the Olympic teams and the amateurism policies of the IOC and the AAU, which notoriously stripped Jim Thorpe of his two track and field Olympic gold medals in 1913 for playing summertime semi-pro baseball in the East Carolina League, only to have Thorpe’s medals restored posthumously 70 years later by a more realistic IOC. Jim Thorpe, World’s Greatest Athlete, BIOGRAPHY, online at http://www.cmgww.com/sports/thorpe/bio3.htm.

19 See generally Craig Lambert, The Professionalization of Ivy League Sports, HARVARD MAGAZINE, available at http://harvardmagazine.com/1997/09/ivy.html (last visited July 7, 2008). 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). In America the rhetoric of “Amateurism”—like the educational satire of Fish-Grabbing-With-the-Bare-Hands—is a non-functioning, cultural residue of a fictional misty past ideal. J. ABNER PEDDIGREW (pseudonym for Prof. Harold Benjamin, former Dean of the College of Education, both University of Colorado and University of Maryland ), THE SABRE-TOOTH CURRICULUM 3 et seq. See especially 42-43 for the rant of one radical faculty member, which: “But, damn it, how can any person with good sense be interested in such useless activities?” This satire on the development of modern-day educational curruculm, surprisingly sheds a great deal of light on the current situation of college athletics in 21st Century academe. Peddigrew’s book makes the case that the enduring
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 1 FBS and men’s basketball teams) and athletic trainers, recruiting talented athletes, and generating multi-million dollars revenues from gate receipts, broadcast revenues, and sponsorships are notable features of the commercialization of American intercollegiate athletics, which belies the truth of its continuing self-characterization as “amateur” sports competition.

Reform of abuses seemingly inherent in sports competition among American universities has a series of major turning points that clearly show that popular demand in the marketplace has always feuded the growth and destiny of intercollegiate athletics. It also highlights the continuing struggle to blunt and channel the negative side effects of marketplace demands. Because the 1890’s saw football teams from prominent universities competing before grandstands packed with student and alumni supporters, excesses and abuses—including brawls—arose. This led to the famed Chicago Meeting in January 1895 to seek better institutional control of intercollegiate sports, which led to 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.

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. President Theodore Roosevelt responded by meeting with Ivy League

romance of Paleolithic concepts, possibly valid (if ever) for human society in a long past era, continue undiminished after the realities of actual life experience have rendered such concepts moot. Isn’t this exactly in point with the continuing ideology of anti-interscholastic 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?

20 For a generalized history of college & university sports in America see The Knight Foundation, COLLEGE SPORTS 101: A Primer on Money, Athletics, and Higher Education in the 21st Century (October, 2009) which can be found online at www.knightcommission.org/pdfgenerator/pdfs/document_12566570175.pdf (last visited October 26, 2009).

21 Davenport, supra note ______ at 219.

22 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.

23 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.
institutions to urge decisive action, and in December 1905 the representatives of sixty-two major institutions met to form the Athletic Association of the United States (AAUS), the predecessor to the National Collegiate Athletic Association (NCAA). The nascent NCAA became a rule-making group which promoted the growth of athletic conferences, pushed for greater institutional control of intercollegiate sports, and provided a continuing national focal point for discussion of the problems periodically arising from big-time sports competition, thereby establishing the NCAA’s position within academe’s democratic process.

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 and, more importantly, to place its governance into physical education departments and thereby, at least nominally, under university control. 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.

The stock market crash of 1929 coincided with the release of the Carnegie Report, which summarized the findings of its multi-year project examining the nature of intercollegiate athletics and the relationship to college administrators during the sports boom of the 1920s. It found

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25 Id.


“rampant professionalism, commercialization, and exploitation that were corrupting virtually all aspects of intercollegiate athletics” and documented a litany of institution-specific bad practices. Even during the general belt-tightening of higher education caused by reduced incomes during The Great Depression era, the problems of illegal player inducements and recruiting seemed to continue unabated.

World War II offered a five-year interregnum in big-time college athletics. A rocketing resurgence and growth—tied in part to the advent of national TV—during which college athletic departments became significant revenue generators divorced from by university physical education department control then followed. 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 institution’s athletic teams. Athlete recruiting abuses, basketball scandals, and other distressing events reached a peak.
In response, the NCAA evolved from an advisory body to a powerful national regulatory body, which made rules, systematized policing of rules infractions, and imposed sanctions on its member institutions for rules violations. The NCAA was authorized by its member schools to censure, penalize, expel, and enforce sanctions against institutions for rules violations that contravene 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.”

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 60 years, the commercialization of intercollegiate sports has continued to grow, largely in response to the enormous popularity of Division 1 FBS football and men’s basketball and the consequent multi-million dollar revenue generating potential of these sports. For instance, CBS agreed to pay the NCAA $6 billion from 2002 through 2013 to broadcast its men’s basketball tournament. A May 2009 Congressional Budget Office (CBO) paper titled “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. The CBO paper includes data showing that the 2004-05 fiscal year average athletic program revenues for universities with Division 1 FBS football and men’s basketball teams was $35.2 million.


37 Davenport supra note____ at 223. Rodney K. Smith, A Brief History of the National Collegiate Athletic Association’s Role In Regulating Intercollegiate Athletics, 11 MARQ. SPORTS L. REV. 9, 15 (2000); see also Lewis, supra note____ at 197-207, 219-27. As one university president remarked recently, “[N]o one can or will stick his neck out…. Presidents have lost their jobs over athletics. Presidents and chancellors are afraid to rock the boat….“ Knight Report, supra note____, at 16.


III. Use of Intercollegiate Athletics As A Window to the University

America’s academic leaders are immersed in society’s current economic pressures. There are intense pressures to attract larger incoming classes of students with stronger academic credentials, to increase political and cultural support of their institutions from the larger community, to recruit and retain high quality faculty, enlarge fundraising for brick and mortar, expand endowment, and to 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 on the part of university presidents and governing boards is merely a facet of competition in a well-functioning democratic society, which is embedded in human nature and modern culture and embodied by the centuries’ old American enterprising spirit of doing what is necessary to compete successfully.

Regarding the similarities between intercollegiate athletics and 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 is higher education is a fundamental principle of a free-enterprise system.”

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 prominent features found in the following examples of institutional success stories (e.g., stronger faculty recruitment, larger student bodies with better academic credential, more financial resources, statewide political clout, etc.), which are driven in large part by devoting increased resources to intercollegiate athletics all 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 21st century American higher education.

Institutional success stories are not limited to nostalgic tales from a quaint past when a small Catholic college, originally called L’Universite de Notre Dame du lac, founded in 1842 in a

wilderness area of Indiana rose in lock-step with its athletic fame to become the internationally-renowned institution named Notre Dame; nor the storied growth of highly regarded Midwestern universities like Michigan, Ohio State, Chicago, Wisconsin, and Minnesota which created The Big Ten. As the following examples illustrate, modern chapters are being written today by many colleges and universities.

On New Year’s Day 2007, underdog Boise State University ran a daring Statue of Liberty play for a two-point conversion and posted a 42-43 overtime victory against the mighty Oklahoma Sooners. It resulted in millions of dollars in new pledges for the university’s business and nursing schools; growth in the number and quality of admissions; increased political recognition among Idaho legislators; merchandising contracts; sale of 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. Officials believe that the energizing bounce to the school and to the community of Boise “will pay off for years.”

The University of Florida extraordinary intercollegiate athletics success is noteworthy because of 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 championships, UF’s fundraising increased by 38% to $183 million—with only 50% of the increase directed to athletics. UF recently launched a new $1.5 billion university fundraising campaign, which undoubtedly will benefit from the national notoriety generated by its intercollegiate program.

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42 Murray Sperber, Shake Down the Thunder: The Creation of Notre Dame Football 5-7 (2002 ed.).

43 The University of Chicago was instrumental in founding the Big Ten Conference in 1889. However, in 1939, President Robert Hutchins abolished football and Chicago withdrew from the Big Ten. The university reinstated its intercollegiate football in 1969. The University of Chicago website, History of the University, online at [http://www.uchicago.edu/about/history/shtml](http://www.uchicago.edu/about/history/shtml) (last visited November 1, 2009).

44 Davenport supra note ____.


46 Id.

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. USF commissioned a survey of high school students nationally, sought ways to leverage national exposure of athletic success, initiated recruitment efforts for high-performance student tied into football events, and quietly laid plans to capitalize on growing alumni pride with a $500 million to $1 billion university fundraising campaign. 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.”

This was USF’s objective when it launched its inaugural football season in September 1997. USF President Judy Genshaft makes the point widely accepted by many top 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. 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.” Overall, USF’s quantitative rise is startling.

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49 Thrash and Emerson, supra note______.

50 A USF website emphasizes the recent growth and prestige of the university as a research center. See especially THE USF RESEARCH PARK OF TAMPA BAY: “Emerging Research Park of the Year” online at http://www.usfconnect.org/ (last visited October 31, 2009).

51 Adam Emerson, TAMPA TRIB., October 1, 2007) (available online at http://www.printthis.clickability.com/pt/cpt?action=cpt&title=USF+Officials+Prepare+F. 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. In viewing the list, one can see that many of the top institutions are not only academically inclined, but athletically as well. Notable schools in order of academic ranking in the top 50 are Stanford University at #4, Duke University at #8, University of Notre Dame and Vanderbilt University tied at #18, University of California – Berkeley at #21, University of Virginia at #23, University of California – Los Angeles at #25, University of Michigan at #26, University of Southern California at #27, University of North Carolina at #30, Boston College at #34, University of Wisconsin at #35, University of Washington at #41, Penn State University at #47, University of Texas at #48, and University of Florida at #49. National Universities Rankings: Best Colleges 2009, U.S. NEWS & WORLD REPORT, available at http://colleges.usnews.rankingsandreviews.com/college/national-search/page+2.

52 Adam Emerson, TAMPA TRIB., October 1, 2007) (available online at http://www.printthis.clickability.com/pt/cpt?action=cpt&title=USF+Officials+Prepare+F. USF has enjoyed phenomenal growth in numbers and quality of its student body (enrollment up from 39,000 to 45,000 in
When he took office in 1998 North Dakota State University President Joe Chapman had a vision for growth at NDSU beyond its roots as a regional institution. Although not a rabid sports fan himself, a key part of President Chapman’s game plan for realizing his vision of expansion involved shifting the athletic program to present a new and big-time face to the nation. The athletic budget rose from $6.2 million in 2003 to $10.5 in 2007. In order to generate public support as it expanded from 15 doctoral programs to 42 and more than doubled its research budget, NDSU moved up to Division II athletics and successfully sought scheduling of Division I opponents. NDSU believed that “a successful football program could drive fundraising and rally support” for the school’s expanded reach.

Georgia State University (GSU) President Carl V. Patton believes creating a competitive intercollegiate football program is "desirable if not close to mandatory," as GSU seeks to transform itself from a commuter school to a "full-rounded college education." To achieve this “full-rounded college education” meant the school must become a real university. According to five years making it Florida’s third largest public university). USF had spent years trying to shed the image of “a commuter school” and to see itself as an equal with the other Florida mega-campuses. The increased demand for admissions has pushed upward the credentials of USF applicants to an average 3.71 high school GPA [Fall 2007], with nearly 1 applicant in 4 ranked in the top ten percent of their high school classes. This increased admissions demand—allowing greater USF selectivity of student enrollment—is seen as “just one effect of a successful football season.” “Nonstop” marketing of USF merchandise has become big business to Tampa-St. Petersburg suppliers. Orders pour in to local outfitters from as far away as Brazil, with local banks, governments, and merchants all aboard the USF marketing ride. Thrash & Emerson supra note________.


54 Id.
55 Id.
56 Id.
59 Doug Lederman, Flocking to Football, May 20, 2008, http://www.insidehighered.com/news/2008/05/20/football (last visited August 1, 2008). 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, as a step in that direction, Dan Reeves was hired as the lead consultant. On April 17, 2008, GSU officially announced that they will begin Division I-AA competition starting in the 2010 season in the Colonial Athletic Association, with home games being played at the Georgia Dome. GSU also purchased a 3.8 acre tract of land for $6.6 million on
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.”  

According to a National Public Radio special report by Joe Pescas, the striking growth and visibility of the University of Connecticut has been based on an intercollegiate basketball-centered strategy. The UConn story follows the same script as that used by Boise State, South Florida, NDSU, and GSU; namely, using athletics as a device to achieve greater public recognition and prominence. This is then used to generate better and bigger entering classes, alumni support, and public funding, and other university objectives. As yet another example, one of the authors noticed a full page ad in the business section of the December 8, 2009 edition of the Chicago Tribune touting Texas Christian University’s 12-0 football season: [At TCU] we’ve got more than just a great football team. Out 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.”

NCAA member educational institutions outside of Division 1 have also relied on intercollegiate athletics as a means of revitalization or transformation. Adrian College, a moribund 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. They decided to use intercollegiate athletics as recruiting tool in an attempt to reverse the decline and "discovered the fountain of youth for small liberal arts colleges.” Since 2005 Adrian’s enrollment has surged 57% to its highest number (1,470) in twenty years and the academic caliber of students has shot up. Before 2005 Adrian had accepted 93% of its pool of 1,200 applicants. Since adopting its athletics-based student recruiting which to build a brand new practice facility. The final piece of the GSU game plan was hiring Bill Curry to be the school’s first head football coach.

60 Doug Lederman, *Flocking to Football*, May 20, 2008,  

61 Mike Pesca, *U Conn Growth Due to Basketball As it Aims for Championship*, NPR program online at  
http://www.npr.org/templates/story/story.php?storyId=102748053&sc=ema (last visited April 8, 2009);  
see also UConn Tradition, respecting President Phillip E Austin’s 10 years of expansion and success in all academic programs linked to soccer and basketball. UCONN MAGAZINE, Vol. 7, Number 3, (Fall/Winter 2006) online at  

62 L. Sander, *Athletics raises a college from the ground up*, September 19, 2008,  
CHRONICLE OF HIGHER EDUCATION (LAST VISITED ON OCTOBER 15, 2009).  
strategy, Adrian now accepts only 72% of the applicants from a nearly fourfold larger pool of 4,200 applications and reports that its student body has better academic credentials.

Roosevelt University, a private university in downtown Chicago, is restoring its intercollegiate athletics program after a nearly 20-year hiatus.\(^{63}\) 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. 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. After five years, Roosevelt plans to apply for admission to NCAA Division III.\(^{64}\)

As the president of one major university recently put it, “Mega college athletics…reflects the decisions of academic administrators, 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.”\(^{65}\)

IV. Commercialized Intercollegiate Athletics: 21st 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


\(^{64}\) Yet another example of this phenomenon: Post University, a for-profit institution that offers 15 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, Princeton, Army, and Navy. 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. Ken Zirkle, Post’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.” 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. David Moltz, *Rubbing Should Pads With Elites*, INSIDE HIGHER ED., December 11, 2009 available at [http://www.insidehighered.com/news/2009/12/11/football](http://www.insidehighered.com/news/2009/12/11/football) (last visited December 14, 2009).

of their efforts to enable their respective institutions to flourish in an increasingly competitive higher education environment—is a rational response to marketplace realities.\(^66\) On the other hand, the NCAA constitution provides that college and university presidents have “ultimate responsibility and final authority for the conduct of intercollegiate athletics,”\(^67\) 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.\(^68\)

According to the NCAA, “[s]tudent-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.”\(^69\) Professor Timothy Davis has

\(^{66}\) 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, 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).


\(^{68}\) For example, the University of California-Berkeley’s athletics department, despite receiving annual multi-million dollar institutional subsidies, incurred multi-million dollar operating deficits from 2004-2006 in violation of a University of California system policy requiring university athletic departments to be self-supporting. 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. 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. Doug Lederman, *Bad Time for Sports Overspending*, Inside Higher Ed, October 30, 2009, available at http://www.insidehighered.com/news/2009/10/30/ucsports (last visited December 15, 2009).

aptly characterized this idealized view of intercollegiate athletics espoused by the NCAA as the “amateur/education” model.70 However, as previously discussed, true “amateurism” is non-existent, 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. 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 athletes whose sole focus is on the later 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. Analysis of data from a 2007 National Collegiate Athletic Association study of 8,000 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 1 student-athletes are employed full-time (11% more than the general population), and on average, have 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 1 student-athletes earn a postgraduate degree.71 This is substantiated by a similar 1991 economic study.72

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,”73 more accurately describes intercollegiate sports such as Division 1 FBS football and men’s basketball. Universities’ commercial exploitation of the entertainment value of these two enormously popular sports creates an inherent tension


73 See Davis, supra note __ at 279.
with their academic mission and the potential to overshadow or marginalize the educational aspects of intercollegiate athletics. As 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. As pressures to win and to generate revenue increase, the integration of athletics with the academy, the interference with presidential authority by avid fans or trustees, and the primacy of education in the student-athlete experience have all been threatened.”

In addition to potential conflicts with a university’s academic mission and educational values, the multi-million dollar cost of producing intercollegiate athletics may have adverse economic effects. According to a February 2009 study commissioned by the NCAA, Division 1 athletic departments with FBS football and men’s basketball teams increased their spending by an average of almost 10.7% annually from 2004-07 with their annual revenues increasing by 10.6%, which evidences roughly a one-for-one relationship between athletic expenditures and revenues. This increased spending on intercollegiate athletics was more than double the average 4.9% annual increase in these universities’ overall non-athletics spending during this time period. The study also found data that supports the existence of an “arms race” (i.e., “a situation in which the athletic

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74 However, this is not inevitable. The “Sweet Sixteen” bracket for the 2009 NCAA men’s basketball tournament included several teams (e.g., North Carolina, Kansas State, BYU, Duke, and Villanova) whose members’ aggregate academic performance was near the top of the national rankings for the sport. North Carolina, the 2009 on-court champion, also won academic honors. (as happened in the tournament) followed by other powerhouse teams from. David Moltz, The Academic Performance Tournament, INSIDE HIGHER ED, March 16, 2009 available at www.insidehighered.com/layout/set/print/news/2009/03/16/ncaa last visited 3/17/09.

75 Letter from Myles Brand, President, NCAA, to Rep. Bill Thomas, Chairman, House Comm. on Ways and Means (Nov. 13, 2006) (Brand Letter) at 4, available at http://www2.ncaa.org/portal/media and events/press room/2006/november/20061115 response to housecommitteeonwaysandmeans.pdf. 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 you [sic] would for other aspects of the undergraduate experience.” AGB holds that “efforts to achieve an appropriate balance [require that]…governing board members lend consistent and public support to their chief executives and academic leaders who are in the forefront of such discussions.” http://agb.org/. See Doug Lederman, The Board Role in College Sports, INSIDE HIGHER ED, April 8, 2009, online at http://www.insidehighered.com/layout/set/print/news/2009/04/08/agb (last visited October 31, 2009).

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. Although the annual salaries of many football and basketball coaches exceed $1 million, the study found no significant relationship between coaching salaries and the team’s winning percentage.

A report concerning the 2004-06 NCAA Revenues and Expenses of Division 1 Intercollegiate Athletics Programs found that only 19 of 119 Division 1 FBS institutions generated revenues that exceeded their expenses in the 2006 fiscal year. From 2004-06, only 16 institutions reported positive net revenues. For 2006, salaries for coaches (17%) and administrators (15%) accounted for 32% of total expenses. 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). Total athletic department spending is approximately 5% of total university expenses at median FBS institutions.

In a 2009 report analyzing the costs of financing intercollegiate sports, the Knight Commission 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. The rapidly escalating costs of coaches’ salaries are a major barrier to the sustainability of intercollegiate athletics programs.

In 2007, for the first time, the average annual salary of the 120 Division 1A football coaches reached $1 million (exclusive of numerous perks and myriad bonuses). This average includes over 50 coaches who are making seven figures and at least a dozen who are making $2 million or more. In December 2009 the University of Texas increased head football coach Mack Brown’s annual salary from $3 million to at least $5 million for the remainder of his contract.

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79 Id. at 35-41.

through 2016. 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.

Antitrust law is perceived as a legal impediment to any joint effort to limit the current “arms race” that is driving up coaching salaries. (Potential antitrust law reforms to enable the NCAA and its member institutions to address this issue are discussed in section __, infra.)

College and university presidents also consider highly publicized coaching salaries as a source of internal and external friction.

Nevertheless, 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.

V. 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 that federal tax laws pertaining to those programs be reexamined and ultimately modified by Congress. 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 federal taxation and/or from the federal unrelated business income tax (“UBIT”).

**A. Federal Tax Exemption**

Organizations described in section 501(c)(3) of the Internal Revenue Code (IRC) are exempt from the federal income tax. Organizations qualifying for tax-exempt status also qualify under section 170 for deductibility by individual taxpayers of contributions made to such organizations. Section 501(c)(3) includes institutions which 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 sports competition.

The Treasury Regulations (Regulations) provide some definitions and additional requirements for an organization to qualify for tax-exempt status under section 501(c)(3). There are two separate tests that must be satisfied independently of the other: the “organizational” test; and the “operational” test. If an organization fails to meet either of those two tests it is not exempt.

**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 section 501(c)(3) of the IRC; and (2) they must not expressly empower the organization to engage in activities which are not in furtherance of one or more of such exempt


87 I.R.C. §§ 501(a) and 501(c)(3).

88 I.R.C. § 170.

89 I.R.C. §§ 501(a) and 501(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.

90 Treas. Reg. § 1.501(c)(3)-1(a).

91 Id.
purposes, unless such activities are an insubstantial part of such organization’s activities as a whole.  

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.” 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. Another of the NCAA’s purposes is to “retain a clear line of demarcation between intercollegiate athletics and professional sports.” As stated above, IRC section 501(c)(3) includes institutions which are organized and operated exclusively “to foster national or international sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment).” 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 IRC section 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 section 501(c)(3) of the IRC. It will be regarded as meeting this requirement if it engages *primarily* in activities which accomplish one or more of those

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95 Brand Letter, *supra* note __, at 3.

96 I.R.C. § 501(c)(3).

97 Treas. Reg. § 1.501(c)(3)-1(c)(1).
purposes. It will not be so regarded if “more than an insubstantial part of its activities is not in furtherance of an exempt purpose.” An organization may operate a trade or business as a substantial part of its activities and yet meet the requirements of section 501(c)(3) if “the operation of such trade or business is in furtherance of the organization’s exempt purpose or purposes and if the organization is not organized for the primary purpose of carrying on an unrelated trade or business, as defined in section 513” of the IRC. 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.”

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 section 513 of the IRC, 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 IRC. The Supreme Court has ruled that a taxpayer is “engaged in a trade or business [when he is] involved in [an] activity with continuity and regularity [and his] primary purpose for engaging in the activity [is] for income or profit.” Application of this test in a specific case requires examination of all the facts and circumstances. While each college or university athletic program would thus have to

98 Id.
99 Id.
100 Treas. Reg. § 1.501(c)(3)-1(e)(1).
101 Id.
103 Id. at 36.

Is the operation of an athletic program in furtherance of a college or university’s exempt purpose? As noted above, Congress stated in 1950 that “[a]thletic activities of schools are substantially related to [the] educational functions” of the institutions.\footnote{H.R. REP. NO. 2319, 81st Cong., 2d Sess. (1950), \textit{reprinted in} 1950-2 C.B. 380, 409; S. REP. NO. 2375, 81st Cong., 2d Sess. (1950), \textit{reprinted in} 1950-2 C.B. 483,505.} Congress made that statement for the purpose of concluding that income from ticket sales for football games is not subject to the UBIT. 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.\footnote{Tech. Adv. Mem. 78-51-002 (1978); Tech. Adv. Mem. 78-51-004 (1978); Tech. Adv. Mem. 78-51-005 (1978); Tech. Adv. Mem. 78-51-006 (1978).} 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.”\footnote{Rev. Rul. 80-296, 1980-2 C.B. 195. \textit{See also} Rev. Rul. 80-295, 1980-2 C.B. 194.} 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.\footnote{I.R.C. § 513(a).} 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.\footnote{See Colombo, \textit{supra} note __, at 21-24 (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).} While commentators have suggested that Congress reexamine its position with regard to application of the UBIT to college and university athletic...
programs,\textsuperscript{110} no serious argument has been made that such programs are not in furtherance of a college or university’s exempt purpose.\textsuperscript{111}

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. As stated above, 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.”\textsuperscript{112} 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.”\textsuperscript{113} 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 such 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 profit.\textsuperscript{114} 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 section 513 of the IRC because it will be directly related to intercollegiate athletics;

\textsuperscript{110} See generally Morgan, \textit{supra} note __.

\textsuperscript{111} See Colombo, \textit{supra} note __, at 25 (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).

\textsuperscript{112} Treas. Reg. § 1.501(c)(3)-1(e)(1).

\textsuperscript{113} Brand Letter, \textit{supra} note __, at 3.

\textsuperscript{114} Morgan, \textit{supra} note __, at 168.
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-exempt status under section 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.” This language has been interpreted “as prohibiting a ‘siphoning off’ of the assets of an exempt organization to an insider.” 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.

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. There is no real issue here for two principal reasons. First, Congress changed the law in 1996 by enacting section 4958 of the IRC, 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.” Second, in determining whether an exempt organization is paying an unreasonable amount of

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115 I.R.C. § 501(c)(3).
116 Colombo, supra note __, at 12.
117 Id.
118 Id. at 13.
119 I.R.C. § 4958.
120 Colombo, supra note __, at 12. Revocation of exemption could still be utilized as a sanction for violation of section 4958 if such violation was sufficiently egregious. Id. at 12 n.41, citing Treas. Reg. 1.501(c)(3)-1(f).
compensation to an insider and is thereby violating section 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.”\textsuperscript{121} 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.\textsuperscript{122} 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.

ii. Private Benefit

The Regulations pursuant to section 501(c)(3) provide that “it is necessary [to qualify for exemption] for an organization to establish that it is not organized or operated for the benefit of private interests such as designated individuals, \ldots shareholders of the organization, or persons controlled directly or indirectly, by such private interests.”\textsuperscript{123} 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 \ldots on parties outside of the charitable class.”\textsuperscript{124} While this limitation seems somewhat similar to the private inurement limitation, “[t]he primary differences between [these two limitations] are that (1) the private benefit doctrine can be applied to transactions with ‘outsiders’ (that is, independent parties who have no influence over the charity) and (2) private benefit can apply even to transactions entered into at fair market value.”\textsuperscript{125}

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.”\textsuperscript{126} 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.\textsuperscript{127}

\textsuperscript{121} Colombo, supra note __, at 13 (citing Treas. Reg. § 53.4958-4(b)(1)(ii)(A)).
\textsuperscript{122} Colombo, supra note __, at 13.
\textsuperscript{123} Treas. Reg. 1.501(c)(3)-1(d)(1)(ii).
\textsuperscript{124} Colombo, supra note __, at 15.
\textsuperscript{125} Id.
\textsuperscript{126} Id. at 17.
\textsuperscript{127} Id.
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 (e.g., the participating student-athletes).” 128 The argument is that the television networks receive substantial benefits in the form of profit when they televise college games, and the professional sports leagues receive substantial benefits by effectively utilizing the colleges and universities as training and development programs and avoiding the cost of maintaining those programs directly.129

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.130 He points out that the IRS has “never shown any inclination to apply the doctrine in this manner.”131 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 reminds us that] the NCAA was not started by the professional sports leagues as a means of sloughing off their training costs to an exempt organization.”132 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 . . . .”133

In conclusion, it has not been seriously argued that because colleges and universities operate athletic programs they are not organizations described in section 501(c)(3) of the IRC 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 section 501(c)(3).134

128 Id. at 17-18.
129 Id. at 18.
130 Id. at 18-19.
131 Id. at 18.
132 Id.
133 Id. at 19.
134 See id. at 27 (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).
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.\textsuperscript{135} Until the UBIT was enacted, the law “recognized only two possibilities—an organization was either entirely taxable or entirely tax-exempt.”\textsuperscript{136} 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 the exempt purpose of the institution.\textsuperscript{137} 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.\textsuperscript{138} Congress became concerned that the government was losing significant tax revenue from these business operations,\textsuperscript{139} and that business entities not owned by colleges and universities were suffering from unfair competition.\textsuperscript{140} 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

\textsuperscript{135} Musselman, \textit{supra} note __, at 203-04.

\textsuperscript{136} \textit{Id.} at 204 (quoting Kaplan, \textit{supra} note __, at 1433).

\textsuperscript{137} Musselman, \textit{supra} note __, at 204.

\textsuperscript{138} \textit{Id.}

\textsuperscript{139} \textit{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.” \textit{Revenue Revision of 1950: Hearings Before the House Comm. on Ways and Means, 81st Cong. 2d Sess. 19, 580 (1950)} (remarks of Rep. Dingell) [hereinafter \textit{House Hearings}].

\textsuperscript{140} Musselman, \textit{supra} note __, at 204. 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.” \textit{Message of the President, 96 Cong. Rec. 769, 771, reprinted in House Hearings}. 
section 501(c)(3) of the IRC.\textsuperscript{141} In addition, public universities are specifically subjected to the UBIT.\textsuperscript{142} UBIT 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.”\textsuperscript{143}

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. While section 513 of the IRC specifically defines the term “trade or business” for purposes of the UBIT,\textsuperscript{144} the Regulations clarify that such term has the identical meaning given it by the Supreme Court for purposes of section 162 of the IRC.\textsuperscript{145} As discussed above, while 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 a trade or business because they seek profit.\textsuperscript{146}

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.”\textsuperscript{147} 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.\textsuperscript{148} The Regulations cite operation of a horse racing track, which is customarily carried on only during a particular season, as an example;\textsuperscript{149} athletic programs presumably would be treated

\textsuperscript{141} I.R.C. § 511(a). Musselman, supra note __, at 204-05.

\textsuperscript{142} I.R.C. § 511(a)(2)(b).

\textsuperscript{143} I.R.C. § 512(a)(1) (gross income and deductions are computed with certain modifications provided in section 512(b)). Musselman, supra note __, at 205.

\textsuperscript{144} I.R.C. § 513(c).

\textsuperscript{145} Treas. Reg. § 1.513-1(b). See supra notes 17-18 and accompanying text for the meaning of the term “trade or business” for purposes of IRC section 162.

\textsuperscript{146} See supra note __ and accompanying text.

\textsuperscript{147} Treas. Reg. § 1.513-1(c)(1).

\textsuperscript{148} Treas. Reg. § 1.513-1(c)(2)(i).

\textsuperscript{149} Id.
similarly because they are customarily seasonal in nature. It is generally assumed by commentators that athletic programs of colleges and universities are regularly carried as the Regulations define that term.\textsuperscript{150} 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. It is also generally assumed that those business activities are regularly carried on within the meaning of the Regulations.\textsuperscript{151}

In enacting the UBIT, Congress was intent on addressing its concerns stated above 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. 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 IRC defines an unrelated trade or business as “a 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.”\textsuperscript{152} 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.”\textsuperscript{153} Resolution of this issue

\textsuperscript{150} See Musselman, supra note __, at 206-07; Jensen, supra note __, at 50.

\textsuperscript{151} See Colombo, supra note __, at 29-30; Musselman, supra note __, at 207; Jensen, supra note __, at 48-49; Kaplan, supra note __, at 1449-50. Cf. Nat’l Collegiate Athletic Ass’n v. Comm’r, 914 F.2d 1417 (10th Cir. 1990). 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. Colombo, supra note __, at 30; Musselman, supra note __, at 207 n.85; Kaplan, supra note __, at 1422. The court stressed that advertising was the applicable activity in question, rather than organizing and operating the annual basketball tournament, because advertising was the activity that the Commissioner contended was producing UBTI. Colombo, supra note __, at 30; Musselman, supra note __, at 207 n.85; Kaplan, supra note __, at 1422.

\textsuperscript{152} I.R.C. § 513(a).

\textsuperscript{153} Treas. Reg. § 1.513-1(d)(2).
“depends in each case upon the facts and circumstances involved.”\textsuperscript{154} 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.”\textsuperscript{155} 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 constitutes gross income from the conduct of [an] unrelated trade or business.”\textsuperscript{156}

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 “athletic activities of schools are substantially related to [the] educational functions” of those institutions.\textsuperscript{157} This language has essentially given colleges and universities a free pass under the UBIT with regard to their athletic programs.\textsuperscript{158} 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.\textsuperscript{159} The IRS received a significantly negative reaction from the public to that attempt and responded in 1978, retracting its earlier position by issuing a series of unpublished National Office Technical Advice Memoranda discussing the close relationship of college athletics and education, and favorably comparing exhibition of a game in person with exhibition of a game on television to a much larger audience.\textsuperscript{160} In addition, the IRS issued two revenue rulings in 1980 consistent with its new position on this issue,\textsuperscript{161} 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

\textsuperscript{154} Id.

\textsuperscript{155} Treas. Reg. § 1.513-1(d)(3).

\textsuperscript{156} Id.


\textsuperscript{158} See Musselman, supra note __, at 207; Jensen, supra note __, at 51.

\textsuperscript{159} See Musselman, supra note __, at 207; Jensen, supra note __, at 51 n.68.


activities providing necessary services to student athletes and coaches further the educational purposes of the university.\footnote{162}{Rev. Rul. 80-296, 1980-2 C.B. 195.}

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 “athletic activities of schools are substantially related to [the] educational functions” of those institutions.\footnote{163}{H.R. REP. No. 2319, 81st Cong., 2d Sess. (1950), reprinted in 1950-2 C.B. 380, 409; S. REP. No. 2375, 81st Cong., 2d Sess. (1950), reprinted in 1950-2 C.B. 483, 505. See, e.g., The Drake Group, supra note ___ (while The Drake Group makes this bald assertion, it offers no legal justification for it); Morgan, supra note __.}

For example, Gabriel Morgan has asserted 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.\footnote{164}{Id. at 176.}

He believes that the extreme commerciality of these programs jeopardizes the education of the student-athletes and the financial security of the university,\footnote{165}{Id. at 177.} and that the programs “actually hinder the development of student-athletes’ academic capabilities in the quest for athletic victory and its accompanying revenue;”\footnote{166}{Id. at 178.} 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.\footnote{167}{Id. at 179.} He offers three justifications for this proposition.

First, he asserts that there is no historical justification for any such presumption. He supports this assertion by citing to sources 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.\footnote{168}{Id.} In the beginning, college and university “administrations considered intercollegiate athletics wholly unrelated to a student’s
academic pursuits.” 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.” 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 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. He believes such a focus “undermines the academic and financial integrity of both the athletic department and its university.” He cites the introduction of television as the gateway that ultimately led to today’s multi-billion dollar broadcasting contracts, multi-million 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.

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.” 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,” but asserts that the data “failed to conclusively prove any relationship between athletic success and the academic quality of an incoming freshman class.” He concludes that “the notion that athletic success generates indirect educational value by increasing

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169 Id.
170 Id. at 180.
171 Id. at 181.
172 Id.
173 Id. at 181-82.
174 Id. at 183.
175 Id.
176 Id.
the quality of the student body is [thus] unsubstantiated."\textsuperscript{177} One could also conclude from that data that the university administrators could perhaps be correct on that point. But 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 would constitute 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 would be to diversify a university’s student body. Morgan also cites to a letter written to Myles Brand, President of the NCAA, from Representative Bill 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 or relative quality of one individual institution.”\textsuperscript{178} That argument presumes 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; 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.”\textsuperscript{179} But he 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; the result is that very few programs are profitable and “can have tangible and deleterious effects on the financial and educational interests of a university.”\textsuperscript{180} 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.

\textsuperscript{177} Id.
\textsuperscript{178} Id.
\textsuperscript{179} Id. at 184.
\textsuperscript{180} Id. at 184-85.
on the manner in which such programs are conducted. But 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; but 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.

The case studies described in Section IV.A above 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, such benefits include attracting high-quality faculty and students, generating donations and enrichment, reconfiguring their campus identities, and enhancing institutional political clout. 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. In support of this premise, he cites to sources asserting that student-athletes are often recruited and admitted who do not satisfy the academic criteria established for students in general; that 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 that graduation rates for student-athletes are significantly below those for the student body as a whole. He asserts that these issues persist in spite of regulatory attempts at reform by the NCAA, and that they result in damage to “the intellectual ethos of a campus” and to “the educational goals of a university.”

181 See infra notes __ and accompanying text.
182 Morgan, supra note __, at 186.
183 Id. at 172-76.
184 Id. at 173-76.
185 Id. at 187.
Student-athletes are not the only group who are recruited and admitted with lower academic statistical qualifications, are the target of strategies designed to assist them in meeting academic performance standards as students, and graduate 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 would agree that accomplishing that goal significantly improves the educational environment of the institution. If athletic programs are in fact related to the educational purposes of colleges and universities, recruiting student-athletes to participate in such programs and assisting them in meeting academic performance standards would be 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 non-athlete 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 non-athlete applicants “would have taken greater advantage of the academic resources offered by the university.” 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, just to name a few. There are many examples of college students performing at a higher or lower level than their academic statistics would 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 assumptions and statistics with respect to which there is wide disagreement. 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

\[186\] *Id.*
Representative Bill Thomas, Myles Brand reported graduation rate statistics that were significantly different than those cited by Morgan, and he challenged the assumption that student-athletes do not satisfy the academic criteria established for 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.

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 to 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. 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.” 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. 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.” 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. While the academic performance of an institution’s student-athletes is somewhat relevant to the

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188 Brand Letter, supra note __, at 10.
189 Morgan, supra note __, at 189.
190 Id. at 191.
191 Id.
192 Id. at 191-92.
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 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 “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.”\(^{193}\) 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.\(^{194}\)

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.”\(^{195}\) 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.”\(^{196}\) 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 would be 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

\(^{193}\) Treas. Reg. § 1.513-1(d)(3).

\(^{194}\) Morgan, supra note __, at 192.

\(^{195}\) Treas. Reg. § 1.513-1(d)(3).

\(^{196}\) Id.
conducting an athletic program could be greater than is reasonably necessary for performance of an institution’s educational function. These recent appeals to Congress to subject college and university athletic programs to the UBIT appear in reality to be at best a cry for increased and more effective regulation of such programs by the NCAA, and at worst a red herring 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.” 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 insure that its student-athletes academically perform at a satisfactory level and graduate from the institution. The UBIT was never in any way intended to be a regulatory device for college or university athletic programs or for any other exempt organization; on the contrary, as explained in Section 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 to enjoy an unfair competitive advantage over commercial business entities required to pay taxes on their income. 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.

197 Morgan, supra note __, at 196.

198 Id. at 195-96.
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,” and precludes application of the UBIT to the NCAA or to college and university athletic programs; in addition, he 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. The NCAA distributes all its net revenues to member schools; those distributions would likely be a deductible expense for tax purposes, leaving little or no unrelated business taxable income that would be subject to the UBIT even if Congress somehow changed the law to make the UBIT applicable to the NCAA. 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; application of such principles would require 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. 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.” 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, say, the University of

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199 Colombo, supra note __, at 27.

200 Colombo, supra note __, at 36.

201 Id. at 37.

202 Id. at 38.

203 Id. (citing JAMES L. SHULMAN AND WILLIAM G. BOWEN, THE GAME OF LIFE: COLLEGE SPORTS AND EDUCATIONAL VALUES 250 (2002)).
Michigan would cower much in the face of a threat by the IRS to apply the UBIT to Michigan’s football program.”

Despite Professor Colombo’s conclusions that the current state of the law precludes withdrawal of the tax exemption from the NCAA or college and universities conducting athletic programs, and precludes application of the UBIT to the NCAA or to those programs, and that subjecting those institutions to the UBIT would make no difference in any event because there would ultimately be no net revenue to tax, he nevertheless proposes that Congress change the law. 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.

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[,]” 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.” 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. 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 in any event whether any of these theories support tax exemption for college or university athletic programs because all such programs constitute only a relatively minor portion of the activities of the college or university operating them, and “tax-exemption is applied to entities, not to individual activities of entities.”

As explained by Professor Colombo, “the UBIT was enacted precisely to handle this kind of situation: that is, to tax revenues from commercial activities undertaken by an otherwise

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204 Colombo, supra note __, at 39.
205 Id. at 41.
206 Id.
207 Id. at 43.
208 Id. at 42-43.
209 Id. at 45.
He describes the two principal justifications for adoption by Congress of the UBIT, as more fully discussed in Part __F.2.a of this article: “protecting the corporate tax base,” which he believes is the most important, and “avoiding ‘unfair competition’ between charities and for-profit service providers.” 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.” 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 . . .”

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.” As a result, it is difficult to understand how the corporate tax base could be at risk; but he insists that his point is nevertheless 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.” But an industry that is unprofitable in some years and profitable in others is clearly distinguishable from college and university athletic programs which, as Professor Colombo readily admits, will never show a profit. As to his diversionary concern, that theory is highly speculative and subject to disagreement. To the extent it has any validity, he fails to adequately explain how it is “offended” by current law. 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.” To support this assertion, he argues that coaches are hired at increasingly exorbitant

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210 *Id.*

211 *Id.* at 46. He 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.*

212 *Id.*

213 *Id.* at 47.

214 *Id.* at 48 n.155.

215 *Id.*

216 *Id.* at 48.
salaries to win games rather than provide education, substantial amounts of financial resources 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. 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[,]” Professor Colombo proposes three specific requirements Congress should impose on the NCAA or colleges and universities operating athletic programs: (1) Congress should “require that a certain percentage of revenues from revenue-producing sports such as football and basketball be used to expand nonrevenue athletic opportunities[;]” (2) Congress should impose “targeted expenditure limits, such as capping coaches’ salaries or limiting annual expenditures on recruiting or sports facilities[;]” and (3) Congress should require “both 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.”

Whether all or any of these proposed requirements merit adoption by Congress is certainly 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. But the question here is how adoption of these requirements has anything to do with tax law. The answer suggested by Professor Colombo is that federal tax law be used to enforce them. He correctly concludes that subjecting the NCAA and/or college and university athletic programs 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. Instead, he suggests that these new rules “be structured as requirements for continued tax exemption of the [college or university] operating the sports program.”

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217 Id. at 41.
218 Id. at 51.
219 Id. at 53.
220 Id. at 4.
221 Id. at 51.
222 Id.
words, he 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, an enforcement measure basically akin to capital punishment. Whether his proposed requirements are justified or not, they 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 with new requirements to be met by the NCAA and its member educational institutions, along with creating the potentially significant costs of federal agency enforcement, when targeted reform can more effectively achieve some of these objectives and others in an alternate manner, as discussed in the following section.

VI. 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 broader 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 section we propose that 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 non-profit status of
the NCAA and its member colleges and universities. 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 such as NCAA rules and regulatory activity that unreasonably restrain economic competition among its member universities or the intercollegiate athletics market violate antitrust law, specifically §1 of the Sherman Act.

In *NCAA v. Board of Regents of the University of Oklahoma*[^225], 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, thereby implicitly recognizing the existence of 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 (i.e., legal) or unreasonable (i.e., illegal), which requires consideration and analysis of both its anticompetitive and pro-competitive effects to determine its net economic effects on competition in the relevant market. It 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. This restraint did not further a legitimate pro-competitive economic objective such as maintaining competitive balance among NCAA members’ football teams. Although the Court suggested the antitrust laws should be judicially construed to provide the NCAA with “ample latitude”[^226] to maintain the “revered tradition of amateurism in college sports”[^227] and to preserve the “student-athlete in higher education,”[^228] collectively limiting the number of televised college football games did not achieve these objectives.

[^223]: *Hennessey v. NCAA*, 564 F.2d 1136, 1149, n. 14 (5th Cir. 1977) (“[w]hile 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.”).


[^226]: Id. at 120.

[^227]: Id.

[^228]: Id.
Similarly, in *Law v. NCAA*, federal appellate court held that an NCAA rule limiting the yearly compensation of Division 1 entry-level basketball coaches (i.e., “restricted-earnings” coaches) to $16,000 (a restraint on an input necessary to produce intercollegiate basketball) was an antitrust violation. The court found that the “obvious anticompetitive effects” of fixing the cost of an input necessary to produce intercollegiate athletics (e.g., coaching) prevented free market competition among NCAA universities for the services of coaches. In contrast to a rule “equaliz[ing] the overall amount of money Division 1 schools are permitted to spend on their basketball programs,” which would be a pro-competitive means of promoting competitive balance, capping the salaries of one category of coaches would not achieve this objective. The court ruled that “cost-cutting by itself is not a valid procompetitive justification” for price fixing, although market competition would lead to higher coaching salaries without this restraint. The coaches ultimately won a jury verdict of $22.3 million, which was increased to $66.9 million in mandatory treble damages. The NCAA subsequently settled the case for $54.5 million in damages and approximately $20 in attorneys’ fees and costs to plaintiffs’ attorneys.

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 1 FBS football and men’s basketball. For example, in *Banks v. NCAA*, a federal appellate court held that the NCAA’s “no agent” rule (a student-athlete loses eligibility to participate in all intercollegiate sports if he agrees to be represented by an agent) and its “no draft” rule (a student-athlete loses his amateur eligibility in a particular sport such as NFL football if he asks to be placed on a professional league’s draft list for the sport) do not violate the antitrust laws. The court concluded that both rules legitimately preserve the amateur nature of intercollegiate athletics, and that the “no draft” rule furthers the pro-competitive

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230 Id. at 1020.

231 Id. at 1023.

232 Id. at 1022.

233 977 F.2d 1081 (9th Cir. 1992), cert. denied, 508 U.S. 908 (1993).
objective of maintaining “the clear line of demarcation between college and professional football.”

Other courts also have disregarded the commercialized nature of Division 1 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. This body of precedent holds that such rules are essentially *per se* legal for purposes of antitrust law. This judicial view appears based on the unproven assumption that the significant popularity and commercial success of intercollegiate athletics is 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 to preserve amateurism are legal regardless of any adverse effects on student-athletes’ economic interests (e.g., prohibiting any price competition among universities or payment of fair market wages for their athletic services; not allowing student-athletes to receive any athletics-related pecuniary benefits from non-family third parties).

In *Board of Regents*, the Supreme Court observed that “[t]he NCAA is an association of schools that compete against each other to attract television revenues, not to mention fans and athletes.” Scholarly commentary generally has been very critical of lower court cases such as *Banks* for inappropriately presuming that NCAA amateurism rules are a non-commercial restraint not subject to antitrust scrutiny or a predominantly pro-competitive form of internal regulation necessary to produce intercollegiate athletics.

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234 Id. at 1090.

235 See, e.g., McCormack v. NCAA, 845 F.2d 1338 (5th Cir. 1988); Gaines v. NCAA, 746 F. Supp. 738 (M.D. Tenn. 1990); Jones v. NCAA, 392 F. Supp. 295 (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).


237 468 U.S. at 99.

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 more consistent with the economic realities of college sports in the 21st century.” 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 anti-competitive effects are outweighed by the pro-competitive effects of maintaining academic integrity and predominantly extracurricular nature of intercollegiate athletics and/or competitive balance among its member institutions that cannot be substantially achieved by less restrictive means. It is very questionable whether preservation of the “amateur” nature of intercollegiate athletics in itself is a legitimate pro-competitive justification for restraints with anticompetitive effects.

Because of NCAA rules prohibiting any price competition for student-athletes’ services, universities incur artificially reduced “labor” costs to produce sports such as Division 1 FBS football and men’s basketball and garner economic rent. These cost savings then are used to fund socially desirable objectives (e.g., subsidizing the costs of producing female and male intercollegiate sports that do not generate net revenues) and/or undesirable ones (e.g., paying exorbitant annual salaries in excess of $1 million to

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239 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 Marquette Sports Law Review 1(2000). See also Lazaroff, supra note _ at 356 (“if 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.”).

240 Lazaroff, supra note 237 at 361-65; Mitten, supra note 238 at 75.

241 Rascher, & Schwarz, supra note _ 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 _ at 322 (“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 238 at 78 (suggesting that “alumni pride and loyalty, tradition, long-standing rivalries, national rankings, conference and national championship competition, and exciting play probably contribute to the public obsession with college sports more than the ‘amateur’ status of college athletes.”).
head coaches in revenue generating sports). In addition, NCAA amateurism rules have the unintended consequence of contributing to the athletic arms’ race by encouraging inefficient non-price competition for student-athletes’ services.

Recently, two different groups of former student-athletes have 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, the plaintiffs alleged that the NCAA’s member universities and others collectively refused to permit former Division 1 basketball players and FBS football players to share in the multi-million revenues from the sale of products incorporating their likenesses—even after their intercollegiate athletics eligibility ended—violates the antitrust laws. This case currently is pending in a California federal court.

In White v. NCAA, 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 (which is approximately $2,500 to $3,000 less than the full annual cost of attending college) violates antitrust law. 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, but this case subsequently was settled before trial. The settlement terms required the NCAA to make available a total of $218 million to Division 1 institutions to provide aid to current student-athletes with financial and/or academic needs; to establish a $10 million fund to reimburse plaintiffs future education.

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242 Id. at 53-54.

243 Id. at 54; Mitten, supra note 237 at 74-75.

244 CV09-3329 (N.D. Cal., filed July 21, 2009).

245 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 #15. Mike Fish, What Price glory? The Star’s Value, ESPN.com, December 14, 2009, available at http://sports.espn.go.com/espn/print?id=4732298&type=Story&imagesPrint=off (last visited on December 14, 2009).

246 Notice of Class Action Settlement and Fairness Hearing, White v. NCAA, CV06-0999 (C.D. Cal., filed February 4, 2008).
expenses; to permit Division 1 institutions to provide student-athletes with insurance for sport-related injuries and year-round health insurance; and to consider legislation permitting multi-year student-athlete scholarships and financial aid through graduation to student-athletes who no longer qualify for athletic-based aid.  

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 multi-million dollar treble damages liability if plaintiffs prevail on the merits of their antitrust claims creates a strong NCAA incentive to reach a monetary settlement, which 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.  But a settlement does not remedy the underlying problems giving rise to student-athletes’ antitrust claims or preclude future antitrust litigation by others, the risk of which may inhibit NCAA internal reform to ensure that the revenues generated by commercialized sports more effectively further a university’s academic mission and student-athletes’ welfare.

Because of antitrust liability concerns, 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.  Effective NCAA internal governance of commercialized intercollegiate athletics requires uniform rules and enforcement, which are necessarily the product of agreements and collective decision-making among NCAA member institutions, thereby inviting antitrust challenges under §1 of the Sherman Act.

We propose that Congress provide the NCAA and its member institutions with broad or limited immunity from antitrust liability under §1 of the Sherman Act.

247 The settlement terms are summarized on the White v. NCAA Class Action Website at http://www.ncaaclassaction.com/ (last visited on December 15, 2009).

248 Second Century Imperatives, supra note __ at __.

249 Mitten, supra note 238 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 regulation that reduces or eliminates competition.
expressly conditioned upon the adoption and implementation of several targeted external reforms to ensure that 21st 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. Eliminating the threat of potential antitrust liability under §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 necessary to produce intercollegiate athletics such as coaches.

Some 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.” Although sports-related federal legislation is rare, Congress has provided limited antitrust immunity to other national sports regulatory bodies when necessary to enable the achievement of legitimate objectives. However, antitrust law, which prohibits unreasonable conduct but does

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among NCAA member institution for inputs necessary to produce intercollegiate athletics such as student-athletes and coaches, thereby subjecting output market restraints and other joint restrictions to antitrust challenge under §1. The NCAA would remain subject to monopolization, attempted monopolization, and conspiracy to monopolize claims under §2 of the Sherman Act (15 U.S.C. §2).

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250 As 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 Olszowski, Antitrust Law, Student-Athletes, and the NCAA: Limiting the Scope and Conduct of Private Economic Regulation, 1995 Wis. L. Rev. 545, 557.

251 Lazaroff, supra note __ at 371.

252 For example, the Sports Broadcasting Act of 1961, 15 U.S.C. § 1291 et seq., 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 broadcasting of their games and to permit the league to sell the resulting package of pooled rights to a purchaser, such as a television network,
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. Moreover, a piecemeal approach by way of antitrust litigation that merely considers the legality of the particular challenged restraint (which may result in judicial invalidation of some NCAA rules with socially desirable effects) 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 scare 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.

253 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.

254 Some commentators characterize the primary problem and proposed remedies too narrowly and solely in economic terms. See, e.g., Lazaroff, supra note ___ at 372 (suggesting the need to create “greater economic fairness” by giving student-athletes employee status and/or pay for play); Robert A. McCormick & Amy Christian McCormick, The Myth of the Student-Athlete: The College Athlete As Employee, 81 Wash. L. Rev. 71, 79 (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); Goplerud, supra note ___ 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). It has been estimated that a college football player who will be an NFL draft choice has an average annual market value of $1.3-1.6 million to his university. An outstanding college quarterback would have a much higher value; University of Florida quarterback Tim Tebow’s estimated annual worth is at least $2.5 million. Mike Fish, What Price glory? The Star’s Value, ESPN.com, December 14, 2009, available at http://sports.espn.go.com/espn/print?id=4732298&type=Story&imagesPrint=off (last visited on December 14, 2009). But see Richard B. McKenzie & E. Thomas Sullivan, Does the NCAA Exploit College Athletes?—An Economics and Legal Reinterpretation, Antitrust Bull., Summer 1987, at 373 (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 and violate Title IX gender equity laws unless such payments were made to 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 non-revenue sports.
B. Proposed Conditional Antitrust Immunity and Potential Beneficial Effects

We recommend that the federal statute immunizing the NCAA and its member institutions from antitrust liability under §1 of the Sherman Act be titled 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 they are an integral part of higher education, and his advocacy for NCAA reforms to better integrate athletics and academics and to enhance student-athletes’ educational experiences and welfare was equally vigorous.

Our proposed antitrust immunity would be conditioned upon certain requirements that the NCAA and/or its member institutions must satisfy to ensure that commercialized intercollegiate athletics are primarily an educational endeavor and that student-athletes in sports that generate 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 to continue playing a sport) and tuition funding for a fifth or sixth year of college education if necessary to complete a bachelor’s degree if the student-athlete is in good academic standing when his or her intercollegiate athletics ability is exhausted. 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

255 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 that: “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 __ at 591.
men’s basketball was only 66%. 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. 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.

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 he 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. Moreover, courts generally hold that student-athletes, including those participating in net revenue


257 Id.

258 Rodney K. Smith & R.D. Walker, From inequity to opportunity: keeping the promises made to big-time intercollegiate student-athletes, 1 Nevada L. J. 160, 173 (2001) (“the 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 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. See also Marburger & Hogshead-Mackar, supra note __ 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.”)

generating sports, are not “employees” entitled to recover worker’s compensation benefits for intercollegiate athletics-related injuries.\textsuperscript{260}

3) Mandatory remedial assistance and tutoring for entering student-athletes whose indexed academic credentials are below a certain percentile (e.g., 25\textsuperscript{th}) 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,\textsuperscript{261} but mandating such assistance probably would do even more to enhance the academic performance of individual students-athletes most at risk of not succeeding academically.

4) The creation of a post-graduate 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 (e.g., team jerseys with numbers identifying individual players). Because the collective efforts of all participating student-athletes, including those who are less prominent or talented, are necessary to produce these sports and contribute to an individual player’s commercial popularity, all of them should have the opportunity to qualify for educational benefits funded by the commercial exploitation of publicity rights.\textsuperscript{262}

There is justification for providing greater educational benefits to student-athletes playing net revenue generating sports such as Division 1 men’s basketball and FBS football. One legal scholar observes that student-athletes who participate in major


\textsuperscript{261} In 2009, for the first time, the NCAA banned university sports teams (e.g., University of Tennessee-Chattanooga and Jacksonville State University football teams; 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). Several other university athletic teams were penalized for low APRs by losing scholarships that otherwise could have been awarded to student-athletes. 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. David Moltz, Classroom Failure, Postseason Ban, INSIDE HIGHER ED, May 7, 2009, online at http://www.insidehighered.com/layout/set/print/news/2009/05.07/ncaa (last visited December 15, 2009).

\textsuperscript{262} In this regard, collective efforts and accomplishments of all students and alumni contribute to university’s reputation and value of its degrees, which generally is not individually compensated by the university.
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.\(^{263}\) 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.”\(^{264}\)

In attempting to discern why graduation rates for student-athletes in Division 1 men’s basketball and FBS football historically have been below male graduation rates for the general student body, some scholars suggest a plausible explanation: “coaches 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.”\(^{265}\) 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 and contend there is “a strong argument that they are not receiving an equitable share of the wealth they contribute to generating.”\(^{266}\)

Because providing greater educational benefits to student-athletes in net


\(^{264}\) Id. at 229.

\(^{265}\) Smith & Walker, supra note __, at 168. NCAA rules limit a student-athlete’s required participation in in-season athletics-related activities to a maximum of four hours a day and twenty hours per week. A 2006 NCAA survey of 21,000 student-athletes revealed that major college football players voluntarily spent approximately 45 hours per week on athletic activities, which was more than 10 hours a week more than the majority of other sports included in the survey. Angelique S. Chengelis, 20-Hour Rule for NCAA Athletes Broken Regularly, Detroit News, September 4, 2009 available at [http://www.detroitnews.com/article/20090904/SPORTS0201/909040333](http://www.detroitnews.com/article/20090904/SPORTS0201/909040333) (last visited September 5, 2009). 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. “If you want to be good as a team, guys are going to be putting in way more than 20 a week,” he said. Doug Lesmerises, In Wake of Michigan Story, Ohio State Football Players Discuss Balance of Buckeyes’ Mandatory vs. Voluntary Activities, Plain Dealer, September 1, 2009, available at [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) last visited September 5, 2009).

\(^{266}\) Id. at 167.
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.”

Antitrust immunity could also be conditioned upon adoption of some of Professor Columbo’s foregoing proposals; in particular, 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. Some members of Congress may insist on that any antitrust immunity be conditioned on the dismantling of the current Division 1 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 1 FBS football teams have an equal opportunity to participate.

Congressional antitrust immunity from §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 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. Given the shield of antitrust immunity, the NCAA could adopt legislation to curb the existing athletics’ arms race by imposing annual or multi-year per sport aggregate spending caps or limits on certain expenditures (e.g., coaches’ salaries) for the different levels of intercollegiate

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267 Id. at 197.

268 See supra notes ___ and accompanying text.


270 See supra notes ___ and accompanying text.
athletics competition. In turn, these cost savings could be used to maintain or increase intercollegiate athletics participation opportunities in women’s sports and men’s non-revenue sports.  

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 are 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. Our 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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271 Based on their evaluation of empirical evidence and economic analysis, Professors Marburger and Hogshead-Mackar 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 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-Mackar, supra note __ at 92-93.