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A Regulatory Solution to Better Promote the Educational Values and Economic Sustainability of Intercollegiate Athletics

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INTRODUCTION: COMPETING MODELS OF INTERCOLLEGIATE
ATHLETICS

The National Collegiate Athletic Association (NCAA) Constitution sets forth the ideals that its member educational institutions are supposed to follow in collectively governing intercollegiate athletics in the United States.¹ It expressly states that the NCAA’s objective is “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.”² It also states that “[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.”³ Another key constitutional principle states that “programs shall be administered in keeping with prudent management and fiscal practices to assure the financial stability necessary for providing student-athletes with

¹ NCAA, 2013–14 NCAA DIVISION I MANUAL §§ 2.1–2.16 (2013) [hereinafter NCAA MANUAL], available at <http://www.ncaapublications.com/productdownloads/D114.pdf>.

² NCAA MANUAL, *supra* note 1, § 1.3.1.

³ *Id.* § 2.9.

adequate opportunities for athletics competition as an integral part of a quality educational experience.”⁴

Professor Timothy Davis has characterized this idealized view of intercollegiate athletics as the “amateur/education model.”⁵ This “amateurism” component may accurately describe Division III intercollegiate sports competition and student-athletes, and to some extent also Division I and II women’s and men’s sports that do not generate net revenues in excess of their production costs. Consistent with its educational component, student-athletes’ participation in intercollegiate athletics provides several academic and future career benefits. For example, a 2007 NCAA study of 8000 former student-athletes reveals that: (1) eighty-eight percent of student-athletes earn their baccalaureate degrees, compared to less than twenty-five percent of the American adult population; (2) ninety-one percent of former Division I student-athletes are employed full-time, eleven percent more than the general population, and enjoy higher average income levels than non-student-athletes; (3) eighty-nine percent 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) twenty-seven percent of former Division I student-athletes earn a postgraduate degree.⁶

Davis contrasts the way in which most collegiate sports operate with how universities in the most popular and successful athletic conferences (e.g., ACC, Big Ten, Big 12, Pac 12, SEC) operate “big-time” in Division I men’s basketball and football programs.⁷ These

⁴ *Id.* § 2.16.

⁵ Timothy Davis, *Intercollegiate Athletics: Competing Models and Conflicting Realities*, 25 RUTGERS L.J. 269, 270 (1994) (emphasis added).

⁶ Gary T. Brown, *Research Validates Value, and Values, of Athletics*, NCAA.ORG (Feb. 12, 2007, 1:01 AM), <http://fs.ncaa.org/Docs/NCAANewsArchive/2007/Association-wide/research%2Bvalidates%2Bvalue,%2Band%2Bvalues,%2Bof%2Bathletics%2B-%2B02-12-07%2Bncaa%2Bnews.html>. A 2013 study showed that eighty-two percent of student-athletes who enrolled in colleges in 2006 have earned their degrees. Michelle Brutlag Hosick, *Division I Student-Athletes Make the Grade*, NCAA.ORG (Oct. 24, 2013), <http://www.ncaa.org/about/resources/media-center/news/division-i-student-athletes-make-grade>. These numbers are vastly improved from the landmark study of Long and Caudill. See generally James E. Long & Steven B. Caudill, *The Impact of Participation in Intercollegiate Athletics on Income and Graduation*, 73 REV. ECON. & STAT. 525 (1991).

⁷ See Davis, *supra* note 5, at 276 n.33. The NCAA responded to increased commercialization, particularly with regard to television revenues and the desire for a postseason playoff for schools unlikely to receive postseason bowl invitations, by dividing Division I schools for purposes of football into discrete subdivisions, originally Division I-

two sports are based on a “commercial/education model,” which “assumes that college sports is a commercial enterprise subject to the same economic considerations as any other industry.”⁸ At the outset, it is important to recognize that the enormous popularity and commercialization of college sports is not a recent phenomenon. The first intercollegiate athletic competition, a rowing competition between Harvard and Yale in 1852, was sponsored by a railroad seeking to attract passengers via its new route to the lake on which this event took place.⁹ In the 1890s, football teams from prominent universities played before large crowds of exuberant students and alumni.¹⁰ In the nineteenth century, members of successful Harvard rowing teams were paid monetary prizes ranging from \$100 to \$500.¹¹ In 1906, when the NCAA was founded, some college baseball players also played in summer professional baseball leagues.¹² At the time of its founding in 1896, the Big Ten Conference permitted two athletes on the schools’ football teams to be professionals in that sport.¹³ The 1929 Carnegie Report noted the rampant commercialization of intercollegiate sports with accompanying abuses such as corruption, exploitation, and professionalism.¹⁴

The steadily increasing trend of commercialization, which has been fueled in recent years by new media technologies needing popular

A and I-AA, later renamed as the Football Bowl Subdivision and the Football Championship Subdivision. Kemper C. Powell, *A Façade of Amateurism: An Examination of the NCAA Grant-in-Aid System Under the Sherman Act*, 20 *SPORTS LAW. J.* 241, 244–45 (2013). Recent NCAA structural reforms are likely to further reorganize big-time college football governance, as members of the largest football conferences will attain additional self-governing autonomy. Nicole Auerbach, *NCAA Debate on Changes to Governance Structure to Continue*, USA TODAY (Jan. 18, 2014, 8:11 PM), <http://www.usatoday.com/story/sports/college/2014/01/18/ncaa-convention-closes-governance/4640857/>.

⁸ Davis, *supra* note 5, at 279.

⁹ Andrew Zimbalist, *Inequality in Intercollegiate Athletics: Origins, Trends and Policies*, 6 *J. INTERCOLLEGIATE SPORT* 5, 5 (2013).

¹⁰ J. Davenport, *From Crew to Commercialism—The Paradox of Sport in Higher Education*, in *SPORTS AND THE LAW: A MODERN ANTHOLOGY* 218, 218 (Timothy C. Davis, Alfred D. Mathewson & Kenneth L. Shropshire eds., 1999).

¹¹ Kenneth L. Shropshire, *Legislation for the Glory of Sport: Amateurism and Compensation*, in *SPORTS AND THE LAW: A MODERN ANTHOLOGY*, *supra* note 10, at 223, 224.

¹² See, e.g., Charlie Bevis, *Walter Clarkson*, SOC’Y AM. BASEBALL RES., <http://sabr.org/bioproj/person/b2cd1049> (last visited Feb. 4, 2014).

¹³ *On the Issues with Mike Gousha: NCAA President Mark Emmert*, MARQUETTE UNIV. (Sept. 16, 2013), <http://law-media.marquette.edu/Mediasite/Play/604e43c2fe1a4fda88f65338d1b853ca1d>.

¹⁴ John L. Griffith, *The Carnegie Reports: Another View of the Study of College Athletics Made by the Carnegie Foundation*, 1 *J. HIGHER EDUC.* 325, 325–27 (1930).

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content to attract viewers and advertisers—sports is one of the few things that millions of people watch live¹⁵—should not be surprising. The United States marketplace responds to cultural forces and strong public demand for popular products such as intercollegiate football and basketball games. Thus, the commercialization of college sports directly reflects the marketplace realities of our society. Commercialization also responds to social needs: history demonstrates that humans have a primal need to compete physically or witness athletic competitions. Intercollegiate athletics competition energizes both participating athletes and spectators, a wide and diverse interconnected tribal group that includes athletes' family members and friends, university students, faculty, administration, alumni, non-alumni supporters, and thousands of others.¹⁶ The undeniable magnetism of intercollegiate sports competition has been analogized to "85,000 people gathered for a family reunion."¹⁷

While we agree with Davis's claim that commercialized college sports operate in a fundamentally different way than the amateur sports ideal, we do not believe that big-time college sports are subject to the same economic forces as purely commercial enterprises like professional sports. Although Davis's description is likely true on the revenue side,¹⁸ as athletic directors seek to maximize the commercial return on big-time sports,¹⁹ nonprofit universities do not distribute the profits generated by commercially successful football and men's basketball programs to shareholders. Indeed, athletic directors are

¹⁵ Zimbalist, *supra* note 9, at 13–14.

¹⁶ Matthew J. Mitten, James L. Musselman & Bruce W. Burton, *Targeted Reform of Commercialized Intercollegiate Athletics*, 47 SAN DIEGO L. REV. 779, 784 (2010).

¹⁷ *Id.*

¹⁸ DONNA M. DESROCHERS, DELTA COST PROJECT AT AM. INST. FOR RESEARCH, ACADEMIC SPENDING VERSUS ATHLETIC SPENDING: WHO WINS? 9 (2013), available at <http://www.deltacostproject.org/> ("Newly negotiated television contracts are expected to significantly boost athletic revenues for the top programs in coming years, creating even more disparity in college athletics. For the top five conferences (ACC, Big 10, Big 12, Pac-12, and SEC), current media contracts are expected to generate more than \$1 billion per year, with average conference revenues ranging from \$12 million to \$20 million per school per year. College sports are big business, and these contracts exceed the annual media contracts for Major League Baseball, the National Hockey League, and the National Basketball Association.").

¹⁹ For example, it is difficult to imagine how big-time football programs would have behaved any differently with regard to TV revenues if they were solely intending to maximize profits. Stephen F. Ross, *Radical Reform of Intercollegiate Athletics: Antitrust and Public Policy Implications*, 86 TULSA L. REV. 933, 965 (2012) [hereinafter Ross, *Radical Reform*].

typically motivated to spend surplus revenues from football and men's basketball programs on socially worthy causes, which often include a broad range of intercollegiate sports for elite athletes that do not generate sufficient revenues to pay their costs,²⁰ and occasionally subsidies for university academic and educational programs.²¹ We suggest that the desire to continue and expand these expensive programs is the real motivation for engaging in anticompetitive practices that might be unlawful if engaged in by for-profit non-sports enterprises (e.g., agreeing to a cap on the value of scholarships student-athletes receive for their playing services).

Today, America's academic leaders face

intense pressures to attract larger incoming classes of students with stronger academic credentials, increase political and cultural support of their institutions from the larger community, recruit and retain high quality faculty, enlarge fundraising for brick and mortar, expand endowment, and grow their academic programs. In an extremely competitive higher education market, academic leaders increasingly use intercollegiate sports as a catalyst and means to achieve these legitimate ends. This [seemingly] rational conduct is merely a facet of competition in a well-functioning democratic

²⁰ See Cork Gaines, *Texas Longhorns: How the Richest School in College Sports Makes and Spends Its Millions*, BUS. INSIDER (Sept. 17, 2013, 4:11 PM), <http://www.businessinsider.com/texas-longhorns-how-the-richest-school-in-college-sports-makes-and-spends-its-millions-2013-9?op=1> ("It's clear [that] the football and men's basketball teams support the rest of the athletic department. Those two teams combine for approximately 70% of the revenue but only 24% of the expenses."). For example, Ohio State University's athletic department declared \$123,604,626 of total revenue for the reporting year from summer 2012 through summer 2013. Data for Ohio State University, *Equity in Athletics Data Analysis Cutting Tool*, OFFICE OF POSTSECONDARY EDUC., <http://ope.ed.gov/athletics/index.aspx> (follow "Get data for one institution" hyperlink; then enter "Ohio State University" in the "Name of Institution" field and select "NCAA Division I-A" as the Sanctioning Body; then follow "Ohio State University" hyperlink; then follow "Revenue and Expenses") (last visited Jan. 28, 2014). Of the total, men's basketball contributed \$18,781,682 and the football team contributed \$61,131,726 in revenue. *Id.* Ohio State offers its over 1000 athletes at least thirty-six varsity sports. Liz Young, *Athletic Director Gene Smith Named Ohio State Vice President, Contract Extended to 2020*, THELANTERN.COM (Jan. 29, 2014), <http://thelantern.com/2014/01/athletic-director-gene-smith-named-ohio-state-vice-president-contract-extended-2020/>.

²¹ See, e.g., Chris Cusack, *New Fund to Funnel Athletics Revenue to Duke Libraries*, THE CHRONICLE (May 25, 2011), <http://www.dukechronicle.com/articles/2011/05/26/new-fund-funnel-athletics-revenue-duke-libraries>; *Department of Athletics Increases Support to Main Library to \$9 Million*, OHIO STATE UNIV. (Aug. 15, 2008), <http://www.osu.edu/news/newsitem2089>; *UT Athletics Provides Financial Update*, UNIV. TENN. (Aug. 27, 2012), <http://www.utsports.com/genrel/082712aab.html>.

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society that embodies the centuries-old American enterprising spirit of doing what is necessary to compete successfully.²²

On the other hand, some (including one of us) have expressed concern that, at least to some extent, the diversion of funds otherwise available for educational purposes to subsidize intercollegiate athletics is the result of special interest pressure by powerful alumni

²² Mitten, Musselman & Burton, *supra* note 16, at 792. Sports economist Rodney Fort has characterized a university's funding of its athletic department as a budget allocation to provide a service (e.g., entertainment, identity/loyalty, branding) that furthers broader institutional objectives (e.g., increased giving to general fund, more and better student applications, favorable legislative treatment, better faculty and administrators, value added to student-athletes). RODNEY FORT & JASON WINFREE, 15 SPORTS MYTHS AND WHY THEY'RE WRONG 22–40 (2013). Many universities have used intercollegiate athletics as a tool to achieve greater public recognition and prominence. See Jon Solomon, *Alabama Reports \$143.4 Million in Athletic Revenue, up 16% from a Year Earlier*, AL.COM (Oct. 22, 2013, 2:42 PM), http://www.al.com/sports/index.ssf/2013/10/alabama_reports_1434_million_i.html; *Univ. of Alabama's Stringent Standards on Possible Trademark Infringements Examined*, SPORTS BUS. DAILY (Nov. 19 2013), <http://www.sportsbusinessdaily.com/Daily/Issues/2013/11/19/Marketing-and-Sponsorship/Alabama.aspx>. But see DESROCHERS, *supra* note 18, at 2–4 (stating that based on recent research, “evidence of the ancillary benefits of college sports is mixed” with increased student applications from university athletic success “primarily associated with success in football (winning championships in particular), and the bump generally lasts only a year or two”; also noting studies find “little connection” between university's athletic success and alumni giving with any positive effects “more often relate[d] to football, rather than basketball, success and is usually limited to athletic rather than general university donations”). For example, Notre Dame's reputation as an internationally renowned university developed in lockstep with its athletic success on the gridiron. Mitten, Musselman & Burton, *supra* note 16, at 793. During recent seasons when the University of Florida won multiple national basketball and football championships, its “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.” *Id.* at 793–94 (citations omitted). The increasing “growth and visibility of the University of Connecticut . . . has been based on an intercollegiate basketball-centered strategy,” *id.* at 796, and the recent success of the Boise State University football program has conferred similar benefits. *Id.* at 793. At the same time, the extent to which athletics has diverted university resources from their core mission has been widely criticized at a variety of institutions. Richard Vedder, *The 'Arms Race' in College Sports*, STAR TRIBUNE (Dec. 30, 2013, 6:17 PM), <http://m.startribune.com/opinion/?id=238117351>; see also Marybeth Gasman, *Morris Brown College: Its Plight, and How it Can Be Saved*, WASH. POST (Aug. 29, 2012, 1:08 PM), http://www.washingtonpost.com/blogs/therootdc/post/morris-brown-college-its-plight-and-how-it-can-be-saved/2012/08/29/071e3cc4-f1dc-11e1-892d-bc92fee603a7_blog.html; Kevin Kiley, *Fighting too many Fires*, INSIDE HIGHER ED (June 3, 2013), <http://www.insidehighered.com/news/2013/06/03/rutgers-president-faces-controversy-multiple-fronts-including-athletics>; Grant Wahl & George Dohrmann, *Welcome to the Time Big Time*, SI.COM (Nov. 19, 2001), <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1024363/index.htm>.

and politicians who demand a level of “big-time sports” that their fellow sports fans will not support with their own dollars.²³

Part I of this Article discusses the tensions on a university’s educational mission and the adverse effects on student-athletes from the commercialization of big-time college sports, and the NCAA’s inability to effectively balance these conflicts consistent with its constitutional objectives. Part II observes that the professionalization of commercialized big-time college sports is not a solution that would further the public interest or student-athletes’ welfare. Part III asserts that the primary objectives of any reforms should be to ensure that student-athletes receive the educational benefits that are the hallmark of the NCAA’s self-professed line of demarcation between intercollegiate and professional sports.

Parts IV and V explain why neither NCAA internal reforms nor external reforms imposed by antitrust law, respectively, will solve these problems. Part VI recommends new federal legislation to effectively maintain the socially worthy benefits of the commercial/educational model of intercollegiate athletics for student-athletes and consumers. A key component of this law would be the establishment of an independent federal regulatory commission, which would provide an inclusive and transparent rule-making process readily accessible to all intercollegiate athletics stakeholders and the public. To ensure that its rules have a reasonable basis, we propose independent review through arbitration. Although the commission’s rules would not be legal mandates, their voluntary adoption by the NCAA and its member institutions would immunize anticompetitive restraints in connection with big-time college sports from judicial scrutiny under federal and state antitrust laws.

We conclude by asserting that the prospect of antitrust immunity should provide the NCAA and its member institutions with a significant incentive to voluntarily adopt and comply with the commission’s rules, which would enable the NCAA to fulfill its

²³ Ross, *Radical Reform*, *supra* note 19, at 940–41; ASS’N OF GOVERNING BODS. OF UNIVS. & COLLS., TRUST, ACCOUNTABILITY, AND INTEGRITY: BOARD RESPONSIBILITIES FOR INTERCOLLEGIATE ATHLETICS 2 (2012), *available at* <http://agb.org/sites/agb.org/files/KnightReport.pdf> (“Although public and independent colleges, universities, and systems have their own governing boards and enjoy relative autonomy, they seem much less independent when it comes to intercollegiate sports. Powerful interests that benefit financially from big-time sports, as well as fans and booster clubs with emotional investments, can distort the clarity of mind required for effective governance.”). For a procedural proposal to limit special interest pressure, see text accompanying notes 130–39, *infra*.

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constitutional objectives: (1) preserving the line between a commercial/education model and a commercial/professional model for intercollegiate sports; (2) enhancing the academic integrity of intercollegiate athletics; (3) promoting more competitive balance in big-time intercollegiate sports; and (4) requiring university athletic departments to operate with fiscal responsibility.

I

TENSIONS CAUSED BY COMMERCIALIZED BIG-TIME COLLEGE SPORTS

The use of intercollegiate sports by university leaders as part of their efforts to enable their respective institutions to flourish in an increasingly competitive higher education environment is a rational response to marketplace realities. However, this effort to commercially exploit the entertainment value of big-time football and men's basketball has created an inherent tension with other goals that university leaders are urged to pursue.²⁴ First, the competition for scarce resources between athletic programs and academic programs has the potential to distort the university's core functions of teaching and research.²⁵ A January 2013 analysis of universities' academic and

²⁴ See JOHN CUMMINS & KIRSTEN HEXTRUM, *THE MANAGEMENT OF INTERCOLLEGIATE ATHLETICS AT UC BERKELEY: TURNING POINTS AND CONSEQUENCES* 6 (2013), available at <http://cshe.berkeley.edu/publications/management-intercollegiate-athletics-uc-berkeley-turning-points-and-consequences> ("With all the controversy and conflict surrounding college sports, why do athletic departments continue to enjoy such a privileged yet problematic position in the academy? While college presidents cite the camaraderie sports bring to the campus, and the NCAA points to the educational experience offered to student athletes, many scholars and social critics rightly point to one reason: the money, or put more accurately, the *potential* to earn millions of dollars for the university, a potential rarely realized. It is within this highly commercialized context that administrators, coaches, campus leaders and alumni ultimately place undue pressure on student athletes to perform athletically at the expense of their academic work.").

²⁵ See RAWLINGS PANEL ON INTERCOLLEGIATE ATHLETICS AT THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL 3 (Aug. 29, 2013) [hereinafter RAWLINGS PANEL], available at <http://www.ecs.org/html/Document.asp?chouseid=10885>. A panel of experts asked to report to the Chancellor of the University of North Carolina found the following premise necessary for their recommendations:

Institutions of higher learning exist primarily to discover and to disseminate knowledge; winning sporting events is peripheral to those basic missions. As a result, a university's athletics program must fit within the context of its core missions, and in no way violate them. Herein lies the principal challenge of intercollegiate athletics, since an institution's desire to win must always be balanced against the core interests of the institution as a whole. Maintain the integrity of the fundamental missions, and the model works. Fail to maintain

athletic spending by the Delta Cost Project at the American Institutes for Research concluded:

The difference between academic and athletic spending among Division I colleges and universities is striking. Each of the three subdivisions spent similarly on academics, ranging from roughly \$11,800 to \$13,600 per [full time equivalent] student in 2010 But among [the 120 big-time football programs], the median athletic expenditure per athlete was about \$92,000, more than six times the per-student academic expense. Across the [Division I big-time football programs and non-football] institutions, per-capita spending was three times higher on athletics as on academics, with athletic spending per athlete upwards of \$36,000 in each [Division I] subdivision.²⁶

Despite the multibillion dollar revenues collectively generated by big-time football and men's basketball programs,²⁷ under certain accounting conventions relatively few Division I athletic departments (no more than approximately twenty to twenty-five each year) have revenues that equal or exceed their respective costs of producing intercollegiate athletics.²⁸ As a result, university subsidies to Division I athletic departments are common and may be the norm at many institutions.²⁹ Even if athletic departments are economically self-

integrity and the potential exists for the model to fail, and to cause serious damage to the institution.

Id. Although we largely agree with the panel's articulated premise, their restatement of the primary purpose of higher education seems to shortchange the experiential aspect of knowledge dissemination to students. Indeed, accepting this statement might well lead to a conclusion that big-time sports have no place in higher education. If one believes, as we do, that winning sporting events provides important life lessons to the participating student-athletes, creates social cohesion that facilitates learning and professional advancement for students and alumni, as well as revenue sources that can be tapped to directly subsidize a university's core mission, then a more accurate statement is to describe winning sporting events as potentially complementary to, rather than peripheral to, the university's basic objectives.

²⁶ DESROCHERS, *supra* note 18, at 4.

²⁷ In fiscal year 2010, Division I athletic programs generated \$6 billion in revenues. *Id.* at 1.

²⁸ DANIEL L. FULKS, NCAA, REVENUES & EXPENSES: 2004–2012 NCAA DIVISION I INTERCOLLEGIATE ATHLETICS PROGRAMS REPORT 8, 13 (2013), *available at* <http://www.ncaapublications.com/p-4306-revenues-and-expenses-2004-2012-ncaa-division-i-inter-collegiate-athletics-programs-report.aspx>.

²⁹ Studies finding that big-time college athletics is not financially self-sufficient depend on several critical accounting assumptions, because universities are not required to follow any generally accepted accounting principles. Universities typically receive an internal fund transfer from the athletics program to cover the "cost" of athletic scholarship, although the marginal cost to major universities of educating student-athletes is a fraction of that amount, and most institutions would not replace these student-athletes with tuition-paying non-athletes if athletic scholarships disappeared. If this fund transfer were

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sufficient, there is no self-evident policy reason that football and men's basketball surpluses should necessarily be spent on non-revenue Division I sports as opposed to other university programs.

Second, commercialization of big-time sports has the potential to overshadow or marginalize the educational aspects of intercollegiate athletics, particularly for athletes of color who constitute the majority of athletes playing Division I men's basketball (58%) and football (46.5%) during the 2012–13 season,³⁰ thereby blurring the “clear line of demarcation between intercollegiate athletics and professional sports.”³¹ According to the NCAA's Graduation Success Rate (GSR), eighty-two percent of Division I student-athletes who entered college for the first time in 2006 graduated within six years.³² However, the percentages of men's basketball players (73%) and football players (71%) who graduated were lower.³³ These sports historically have

discounted, many “money losing” athletic departments would see their balance sheets turn from red to black. On the other hand, many universities do not “charge” the athletic department for the actual cost of university facilities, which may mean that some “self-sufficient” athletic programs really are not. For a preliminary discussion of these issues, see Ross, *Radical Reform*, *supra* note 19, at 947.

³⁰ *Race and Gender Demographics Search*, NCAA.ORG, <http://web1.ncaa.org/rgdSearch/exec/saSearch> (select academic year “2012-2013,” “Division I,” and “Basketball” or “Football”; then follow “View Report”) (last visited Jan. 28, 2014).

³¹ NCAA MANUAL, *supra* note 1, § 1.3.1.

³² Allie Grasgreen, *Athletes Grad Rates Back Up*, INSIDE HIGHER ED, (Oct. 25, 2013), <http://www.insidehighered.com/news/2013/10/25/after-slight-dip-athletes-graduation-rates-back>.

³³ *Id.* This phenomenon exists even at some of America's most academically elite universities. A recent analysis of the graduation rates of student-athletes who entered the University of California-Berkeley from 1998–2005 concluded:

The graduation rate for UC Berkeley's revenue generating teams are the lowest in the department. Men's basketball went four years with none of their scholarship student athletes graduating. This brought down their average to a 58% graduation rate over this eight year period. Football also has sub-par graduation rates. Over the past eight years, football graduation rates have ranged from a high of 72% to a low of 31%. Football has the lowest average team graduation rate with only 50% of their scholarship athletes graduating. The numbers are even more grim when broken down by race. In particular, the black scholarship football players, many of whom are special admits, have gone from a high of 80% to a low of 18%. The NCAA also tracks graduation rates by compiling four-year averages to even-out any anomalies. In this data set, the black graduation rates range from a high of 63% to a low of 30%. Three of the seven four-year averages mark the black graduation rate in the 30s. . . . On the whole, the student athlete graduation rates are commendable. These students face additional pressures, time commitments, and schedule conflicts that are in many ways unique to the student athlete subculture. Yet when the graduation rates are disaggregated by race, gender, and sport, a different picture emerges, particularly

had the lowest graduation rates for all NCAA sports, and 2013 was the first year in which both sports had a graduation rate of more than seventy percent.³⁴ Moreover, the graduation rates for black basketball players (68%) and black football players (64%) were even lower.³⁵

Third, in light of contemporary economic realities—including the NCAA's \$11 billion men's basketball tournament television contract,³⁶ the more than \$100 million in annual revenues raised by several athletic departments,³⁷ and coaches' multimillion dollar salaries³⁸—the current structure results in significant economic exploitation of elite Division I football and men's basketball players, without whose efforts these revenues would not be possible. Moreover, schools have increased expenditures on facilities and training for athletes designed to enhance their potential for winning games now and for a professional career later, while insisting on time

for black male revenue athletes. These abysmal retention rates for black male revenue athletes illustrate that the most visible students of the athletic department are failing to earn a degree from UC Berkeley.

Cummins & Hextrum, *supra* note 24, at 20.

³⁴ Grasgreen, *supra* note 32. After a recent scandal involving fake classes, members of the University of North Carolina-Chapel Hill staff have admitted to loosening academic standards for athletes. Sara Ganim, *UNC: We Failed Students 'For Years,'* CNN (Jan. 29, 2014, 1:36 PM), http://edition.cnn.com/2014/01/28/us/ncaa-athletes-unc/index.html?hpt=us_c2.

³⁵ Grasgreen, *supra* note 32.

³⁶ Richard Sandomir & Pete Thamel, *TV Deal Pushes N.C.A.A. Closer to 68-Team Tournament*, N.Y. TIMES, Apr. 23, 2010, http://www.nytimes.com/2010/04/23/sports/ncaa-basketball/23ncaa.html?_r=0.

³⁷ See *College: Finances*, USA TODAY, <http://www.usatoday.com/sports/college/schools/finances/> (last visited Jan. 28, 2014).

³⁸ *College: Salaries*, USA TODAY, <http://www.usatoday.com/sports/college/salaries/> (last visited Jan. 28, 2014). A brief word here is in order to respond to those who advocate an antitrust immunity to permit NCAA schools to limit salaries for coaches. See Brad Wolverton, *Watchdog Group's Proposal Calls for Antitrust Exemption for NCAA*, CHRONICLE OF HIGHER EDUC. (Oct. 11, 2013), <http://chronicle.com/blogs/players/watchdog-groups-proposal-calls-for-antitrust-exemption-for-ncaa/33711>. We see no public policy justification for asking successful college coaches to disproportionately shoulder the burden of funding socially worthy causes such as non-revenue sports or a university's teaching and research programs. The University of Alabama's multimillion dollar investment in Nick Saban's salary, *College: Salaries, supra*, seems to us to be just as prudent as the University of Michigan's multimillion dollar investment in expanding Michigan Stadium. See Adam Jacobi, *Michigan AD: 120,000-Seat Stadium a Possibility*, CBSSPORTS.COM (May 26, 2011, 6:10 PM), <http://www.cbssports.com/mcc/blogs/entry/24156338/29601474>. To be sure, for a university to spend excessively to hire or retain a coach where funding is not being generated by the coaches' own team raises different policy questions. But we see no basis to distinguish a university's imprudent expenditure on a football coach from a university's imprudent decision to operate multiple sports at the Division I level.

commitments analogous to full-time employment as a condition of an athletic scholarship.³⁹ These demands make it difficult to sustain the claim that athletes playing for nationally-prominent programs do so primarily for the intrinsic benefits of athletics participation.⁴⁰

Fourth, even if a significant majority of big-time football and basketball players are not economically exploited—because the educational opportunities provided by an athletic scholarship along with an intercollegiate platform for developing their playing skills into a potential professional sports career is a fair trade for their services—many believe that the current system, with its comparatively lower graduation rates for these athletes, results in a socially undesirable exploitation of athletes.⁴¹ These athletes ought to receive education and training for academic success, as they are statistically much more likely to turn pro in something other than sports.⁴²

For a variety of reasons (structural ones are discussed below in Part V), the NCAA has neither effectively nor fairly accommodated these tensions as big-time athletics have become increasingly commercialized. This trend has led to an “arms race” of expenditures: (1) the top schools capable of earning nine-figure revenues spend millions on coaches, facilities, recruiting, and a variety of other things to maintain status in football and basketball; (2) other schools increase expenditures, even without the surpluses generated by the biggest programs, to try to keep up; (3) athletic directors with the professional and ideological incentive to promote broad-based intercollegiate programs use increased profits to subsidize or provide larger budgets for non-revenue sports; (4) non-revenue sport programs adopt the competitive mind-sets of big-time football and men’s basketball programs in terms of demands to win and

³⁹ Although 1991 NCAA legislation prohibits universities from requiring student-athletes to spend more than twenty hours a week in connection with their respective sports, a 2010 survey found that Division I football and men’s basketball players reported spending substantially more time on required and voluntary sport-related activities (43.3 and 39 hours a week respectively), which is more time than they spent on academic endeavors. RAWLINGS PANEL, *supra* note 25, at 14.

⁴⁰ *Id.*

⁴¹ See, e.g., Powell, *supra* note 7, at 243.

⁴² Only 1.2% of NCAA men’s basketball players and 0.9% of NCAA football players go on to play professionally. *Probability of Competing Beyond High School*, NCAA.ORG, <http://www.ncaa.org/about/resources/research/probability-competing-beyond-high-school> (last updated Sept. 2013).

impositions on the time commitments for student-athletes;⁴³ and (5) few universities seriously consider whether funds invested in intercollegiate athletics would be better spent on teaching and research or other aspects of its respective academic missions. The NCAA has neither determined that these multimillion dollar expenditures meet its own constitutional goal of prudent investment⁴⁴ in intercollegiate athletics, nor has it taken any steps to correct this development. Indeed, the NCAA has no detailed regulations enforcing this constitutional principle.⁴⁵

Despite the multibillion dollar revenues generated annually by big-time sports, the economic value of the permissible benefits provided to big-time football and men's basketball players remains capped at a level several thousand dollars below the actual full cost of attendance.⁴⁶ Increased sport-related time demands preclude any meaningful ability for poor student-athletes to seek part-time employment to enable them to have access to the funds available to most of their nonathlete classmates.⁴⁷ Super-star athletes who nevertheless comply with NCAA prohibitions against the receipt of "extra benefit[s]"⁴⁸ despite receiving no or little family financial support, experience a lifestyle far below that of most of their classmates and almost all the fans who are entertained by their athletic performance. Absent NCAA rules restricting their ability to receive any economic benefits other than the value of a full athletic scholarship (i.e., tuition, fees, room, board, and books), these athletes likely would earn substantial economic rewards based on their

⁴³ This may occur even at America's most academically elite universities. Cummins & Hextrum, *supra* note 24, at 2 (observing that UC Berkeley's twenty-seven varsity sports other than football and men's basketball "are also vulnerable to the current commercial pressures in college sports. For example, the Pac-12 television network will now offer coverage of Olympic sports").

⁴⁴ NCAA MANUAL, *supra* note 1, § 2.16.

⁴⁵ *See id.*

⁴⁶ *Id.* §§ 2.13, 15, 15.1.1 (excepting Pell Grants from the total financial aid allowed for athletes); *Federal Pell Grants*, FED. STUDENT AID, U.S. DEP'T OF EDUC., <http://studentaid.ed.gov/types/grants-scholarships/pell> (last visited Jan. 28, 2014) ("The maximum Federal Pell Grant award is \$5,645 for the 2013–14 award year"); Tyson Hartnett, Why College Athletes Should Be Paid, HUFF POST (Oct. 21, 2013, 7:41 PM), http://www.huffingtonpost.com/tyson-hartnett/college-athletes-should-be-paid_b_4133847.html; Jason Kirk, No, College Football Players Aren't Unionizing for Pay-for-Play, SB NATION (Jan. 28, 2014, 6:43 PM), <http://www.sbnation.com/college-football/2014/1/28/5354718/college-football-players-union-pay-for-play>.

⁴⁷ *See* NCAA MANUAL, *supra* note 1, § 12.4.

⁴⁸ *Id.* § 16.11.2.2.

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intercollegiate athletics accomplishments and fame.⁴⁹ However, college athletes currently cannot unionize and engage in multiemployer collective bargaining on a national basis with all NCAA Division I universities producing “big-time” men’s basketball and football for more favorable contract terms, despite a recent determination by the Chicago regional office of the National Labor Relations Board that Northwestern University scholarship football players are university employees.⁵⁰ Moreover, courts generally will not imply additional, more favorable terms despite this disparity of bargaining power.⁵¹

Throughout society, and particularly among those who consume and set policy for intercollegiate sports, there is a widely accepted view that the public interest is furthered by a system in which college football and basketball players are student-athletes who are expected to strive for excellence in both academics and athletics, unlike professional athletes whose sole focus is on the latter objective. As former Ohio State football coach Woody Hayes said:

The coach will squeeze every bit of football from each player that he can, but in return the coach must give that man every legitimate measure of help he needs to get ‘the rest’ of his education. . . . we feel that the man who plays college football and does not graduate has been cheated.⁵²

Based on NCAA graduation rates for Division I men’s basketball (73%) and FBS football players (71%), more than one-quarter of

⁴⁹ Players like Johnny “Football” Manziel are incredibly marketable. One endorsement company believes a single tweet would earn Manziel nearly \$3500. Kavitha A. Davidson, *Johnny Football Is More Gronk Than Brady*, BLOOMBERG VIEW (Jan. 9, 2014, 5:28 PM), <http://www.bloomberg.com/news/2014-01-09/johnny-football-is-more-gronk-than-brady.html>. Upon being drafted by the Broncos, NCAA sensation Tim Tebow realized his endorsement value was worth tens of millions of dollars. *Tim Tebow Says He Has Turned down ‘Seven-Figure’ Endorsement Deals*, HUFF POST (May 3, 2010, 8:17 PM, updated May 25, 2011, 5:30 PM), http://www.huffingtonpost.com/2010/05/13/tim-tebow-says-he-has-tur_n_575761.html.

⁵⁰ Northwestern University and College Athletes Players Association, 13-RC-121359 (N.L.R.B. Region 13, Mar. 26, 2014), *available at* http://www.espn.go.com/pdf/2014/0326/espn_uniondecision.PDF. The National Labor Relations Act applies only to private employers (e.g., Northwestern, a private university), not the public universities (e.g., The Ohio State University) that constitute the vast majority of the NCAA’s 351 Division I members. *List of NCAA Division I Institutions*, WIKIPEDIA.COM, http://en.wikipedia.org/wiki/List_of_NCAA_Division_I_institutions (last updated Mar. 31, 2014, 3:37 PM).

⁵¹ *See, e.g.*, *Ross v. Creighton Univ.*, 957 F.2d 410 (7th Cir. 1992); *Jackson v. Drake Univ.*, 778 F. Supp. 1490 (S.D. Iowa 1991).

⁵² W. WOODROW HAYES, *YOU WIN WITH PEOPLE!* 12 (1973).

them do not graduate within six years of entering college.⁵³ Approximately one-third of black basketball and football players (32% and 36% respectively) do not earn a degree within this time frame.⁵⁴ Thus, these student-athletes are being cheated under the view espoused by former coach Hayes.⁵⁵ Although NCAA regulations requiring student-athletes to make genuine academic progress towards a degree⁵⁶ and denying postseason eligibility to schools with unacceptably low graduation rates in a sport⁵⁷ address past systemic abuses and attempt to maintain the academic integrity of intercollegiate athletics (particularly big-time sports), significant problems remain. In particular, the current system of commercialized big-time sports fails to acknowledge, much less to effectively address, that both universities and student-athletes (many of whom are teenagers) have an incentive to focus unduly on short-term goals, such as a winning season or a future professional career, instead of the long-term benefits of earning a college degree.

⁵³ Grasgreen, *supra* note 32.

⁵⁴ *Id.*

⁵⁵ In chapter 6 of his Ph.D. dissertation, which is titled “The Role of Education in Pursuing the Dream of a Professional Football Career,” former NFL player George Koonce, writes:

The [former college football] players interviewed in this study had high expectations regarding their identities as college students but were surprised to find they were not taken seriously as students or young scholars. They were often let off the hook when it came to participation in classes; thus, they began to feel that little was expected of them when it came to school. They were merely athletes. Though they were told to go to classes and to participate in study halls, they began to understand that they were being made to feel secure about their academic behaviors and achievements when perhaps they should not have felt so. The coaching staff determined their schedules, and then, exhausted by practices, the athletes could not truly keep up with their schoolwork. They found themselves going from feeling optimistic to being overwhelmed when it came to school. They noticed that other athletes around them were not motivated when it came to school and eventually, they too disengaged from academics.

George Earl Koonce, Jr., *Role Transition of National Football League Retired Athletes: A Grounded Theory Approach* 105–06 (May 2012) (unpublished Ph.D. dissertation, Marquette University) (on file with author).

⁵⁶ See *supra* note 50 and accompanying text.

⁵⁷ NCAA MANUAL, *supra* note 1, § 14.02.1; Adam Himmelsbach, *UCONN is Among Those Barred from Postseason Basketball*, N.Y. TIMES, June 21, 2012, http://www.nytimes.com/2012/06/21/sports/ncaabasketball/uconn-basketball-is-among-those-to-receive-post-season-ban.html?_r=0.

II

PROFESSIONALIZATION OF COMMERCIALIZED COLLEGE SPORTS IS
NOT THE SOLUTION

The appropriate response to the multibillion dollar commercialization of big-time football and men's basketball is not professionalization of those who participate in these sports. North American professional sports operate on a purely commercial/professional model, with dominant sports leagues controlled by individual clubs owned by investors seeking to maximize their profits.⁵⁸ Although, like these sports, big-time college football and basketball are enormously popular forms of entertainment with very substantial commercial value, they should not be based on the commercial profit-maximizing model characteristic of professional sports.

First, even from a purely commercial perspective, it is unclear whether any institutions would benefit from operating a professional model. The quality of play in college football and men's basketball is far below that of the National Football League and National Basketball Association, and is more akin to a far less commercially successful professional sport, such as minor league baseball.⁵⁹ Absent clear product differentiation from professional sports, college sports might lose a significant portion of their audience. Moreover, output might be substantially reduced if the many schools currently offering big-time football were required to fully compete in a labor market for the services of talented intercollegiate players.

Second, adoption of the professional model would create numerous legal issues for schools, such as tax liability,⁶⁰ labor,⁶¹ and workers'

⁵⁸ This is in model contrast to the European model of sport, where professional sports leagues are often composed of and operated by "win maximizing" clubs, Stefan Kesenne, *Revenue Sharing and Competitive Balance in Professional Team Sports*, 1 J. SPORTS ECON. 56 (2000), and all sports are under an integrated pyramid subject to regulation by a national governing board as part of an international federation. See generally James A.R. Nafziger, *European and North American Models of Sports Organization*, in HANDBOOK ON INTERNATIONAL SPORTS LAW 88–111 (James A.R. Nafziger & Stephen F. Ross eds., 2011).

⁵⁹ Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla. (*Board of Regents*), 468 U.S. 85, 101–02 (1984).

⁶⁰ See generally John D. Colombo, *The NCAA, Tax Exemption, and College Athletics*, 2010 U. ILL. L. REV. 109.

⁶¹ See generally Michael H. LeRoy, *An Invisible Union for an Invisible Labor Market: College Football and the Union Substitution Effect*, 2012 WIS. L. REV. 1077.

compensation.⁶² These legal issues do not arise if intercollegiate athletics is operated as an integral part of the university's educational program.

The demands of big-time football and men's basketball (particularly in-season) require significantly more time than an avocation, and virtually all participants receive an athletic scholarship (a form of pay for play) that negates any true "amateur" status.⁶³ Nevertheless, students' participation in intercollegiate athletics should not be motivated solely or primarily by economic rewards as is the case with professional athletes. If elite young athletes are going to participate in a professional sports competition, public policy certainly does not dictate that competitions be organized by major universities rather than professional enterprises. In contrast, there is a public policy justification for preferring the intercollegiate athletics model to the minor league professional sports model. College sports provide a large number of athletes, who recognize that the probability of a successful future professional sports career is low, with the opportunity to leverage their athletic abilities into academic achievement that might otherwise be unavailable to them.

To be sure, some athletically-gifted young men may participate in big-time football or men's basketball solely as a platform to enhance their future professional playing prospects, exhibiting a short-sighted disregard for the objective reality that the probability of a successful professional sports career is low.⁶⁴ Ideally, these athletes would have the option of pursuing a professional career immediately,⁶⁵ or selecting a mixed-model of intercollegiate athletes (neither strictly amateur⁶⁶ nor fully professional) in which they can develop

⁶² See generally Michael J. Mondello & Joseph Beckham, *Workers' Compensation and Collegiate Athletes: The Debate over the Pay for Play Model: A Counterpoint*, 31 J.L. & EDUC. 293 (2002).

⁶³ See generally *Taylor v. Wake Forest Univ.*, 191 S.E.2d 379 (N.C. Ct. App. 1972) (holding that the NCAA academic requirements constituted the only standard for measuring academic success and a student who refused to participate in practice to improve academic performance violated his contractual obligation to the University and lost his scholarship).

⁶⁴ *Probability of Competing Beyond High School*, *supra* note 42.

⁶⁵ Clearly, elite baseball and hockey players can choose between developing their skills through minor league professional sports and intercollegiate athletics. Increasingly, basketball players can make the same choice, either through the NBA's Development League, *Frequently Asked Questions*, NBA DEV. LEAGUE, <https://dleague.ryouts.nba.com/FAQs.aspx> (last visited Jan. 30, 2014), or by playing professionally overseas.

⁶⁶ Richard T. Karcher, *The Battle Outside of the Courtroom: Principles of "Amateurism" vs. Principles of Supply and Demand*, 3 MISS. SPORTS L. REV. 1, 2 (forthcoming 2014) ("In essence, 'amateurism' is nothing more than a term designating a

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athletically as well as educationally. When there is no alternative option, as is currently the case with NFL football,⁶⁷ society must choose whether to organize big-time college football under the commercial/educational model or the commercial/professional model. Selecting the former because it promotes wider educational access for many seems justified, even at the risk of making some paternalistic choices for those who prefer not to take advantage of educational opportunities that are mandated by the model.

III

A BETTER ALTERNATIVE: ENSURING STUDENT-ATHLETES IN COMMERCIALIZED SPORTS ACTUALLY RECEIVE THE BENEFITS THAT DISTINGUISH INTERCOLLEGIATE AND PROFESSIONAL SPORTS

Intercollegiate football and men's basketball players generally devote more time to their sports and have lower graduation rates than other intercollegiate athletes.⁶⁸ We believe a preferred policy alternative is to ensure that these student-athletes receive the educational, physical, mental, and social benefits that schools ought to provide them, in return for their commercially successful participation in commercialized intercollegiate athletics. This approach is more consistent with the economic and social benefits of retaining intercollegiate athletics as an integral part of a university's educational program. These benefits are likely to be more economically beneficial to student-athletes in the long term than compensating them with cash for their playing services (like professional athletes), as a free-market antitrust-driven approach may require.⁶⁹

business model. 'Principles of amateurism' mean whatever the NCAA says they mean, and they apply whenever the NCAA says they apply.'").

⁶⁷ *Clarett v. Nat'l Football League*, 369 F.3d 124, 143 (2d Cir. 2004) (holding that the NFL's rule requiring a player to be three years removed from high school before becoming draft eligible does not violate antitrust law and adding that the union can create standards for its members).

⁶⁸ See RAWLINGS PANEL, *supra* note 25, at 12.

⁶⁹ Empirical studies have found that former male intercollegiate athletes earn higher annual incomes on average than otherwise similar nonathletes in non-sports careers. Daniel J. Henderson, Alexandre Olbrecht & Solomon W. Polachek, *Do Former College Athletes Earn More at Work?*, 41 J. HUM. RESOURCES 558 (2006); James E. Long & Steven B. Caudill, *The Impact of Participation in Intercollegiate Athletics on Income and Graduation*, 73 REV. ECON. & STAT. 525 (1991).

Although NCAA academic reforms⁷⁰ have minimized egregious examples of exploitation of individual student-athletes such as Dexter Manley⁷¹ and Kevin Ross,⁷² the prevailing commercialized model of big-time sports remains inconsistent with the fundamental NCAA principle that athletes “should be protected from exploitation by . . . commercial enterprises.”⁷³ We parse the NCAA’s governing principles to acknowledge the fundamental economic reality that major universities are themselves “commercial enterprises” when promoting football and men’s basketball.⁷⁴ If we consider why a university would expect a student-athlete to forego part-time employment and commit forty or more hours per week in-season to intercollegiate athletics, certainly one answer is the commercial benefit to the university from offering big-time sports. Many student-athletes are so multi-talented that they can excel at all aspects of college life.⁷⁵ However, some student-athletes struggling

⁷⁰ See *supra* notes 56–57.

⁷¹ Dexter Manley, a former NFL football player, admitted that he never learned to read despite spending four years in college while playing football for Oklahoma State University. Dexter Manley, *Until He Tackled His Illiteracy, the Redskins’ Gridiron Terror Lived in Fear of the ABC’s*, PEOPLE (Sept. 25, 1989, 1:00 AM), <http://www.people.com/people/article/0,,20121269,00.html>.

⁷² *Ross v. Creighton Univ.*, 957 F.2d 410, 412 (7th Cir. 1992) (explaining that Ross earned a D average in his classes and attended a year of remedial education with grade school children before he could no longer afford additional education).

⁷³ NCAA MANUAL, *supra* note 1, § 2.9.

⁷⁴ Under an alternative parsing of the NCAA principle, even if universities are per se excluded from the description of “commercial enterprises,” a university that promotes a level of commercialism so that it can receive revenue from corporate sponsors or television rights sales is failing to protect student-athletes from exploitation from these organizations.

⁷⁵ See, e.g., *Campbell Trophy Winner Urschel to be Honored at BCS National Championship*, PENN STATE (Jan. 6, 2014), <http://news.psu.edu/story/299261/2014/01/06/academics/campbell-trophy-winner-urschel-be-honored-bcs-national>. John Urschel, a two-time All-Big Ten offensive lineman and 2013 Third Team All-American football player at Penn State, received the Campbell Trophy awarded to the outstanding scholar-athlete for combining his on-field success with academic excellence including serving as an instructor during football season for his senior year (he had already graduated) and securing publication of an article in *Celestial Mechanics and Dynamic Astronomy* and another paper in the journal *Communications in Mathematical Finance*. *Id.* As another example, in 2014, Ohio State senior guard Aaron Craft, who holds the Big Ten career record for steals, was selected as the Defensive Player of the Year by the National Association of Basketball Coaches and honored as the Capital One Academic All-America of the Year for Division I men’s basketball. Ari Wasserman, *Aaron Craft Named the Defensive Player of the Year by the National Association of Basketball Coaches*, CLEVELAND.COM (Apr. 4, 2014, 6:14 AM), http://www.cleveland.com/osu/index.ssf/2014/04/aaron_craft_named_the_defensiv.html; Doug Lesmerises, *Ohio State’s Aaron Craft Named College Basketball’s Academic All-America of the Year*, CLEVELAND.COM

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academically would likely focus on short-term professional success by foregoing the benefits of a college degree for some marginal improvement on the gridiron or court. Thus, colleges and universities that insist upon such a commitment can be fairly characterized as exploiting these athletes in order to advance their own commercial interests.

Public policy suggests, then, that reform proposals acknowledge that long-term interests are not served by the short-term “bargain” between ostensibly “student-athletes” focused primarily on their professional careers and college athletic programs that value their services. Rather, as we detail in Part VI, a better alternative is reform that creates programs designed to ensure that student-athletes participating in big-time sports receive the fullest opportunity to gain the benefits that a college education can offer.

IV

NCAA INTERNAL REFORM—BY ITS ECONOMICALLY SELF- INTERESTED MEMBER UNIVERSITIES—WILL NOT EFFECTIVELY RESOLVE THE PROBLEM

One of us has previously detailed the inherent structural problems when economically self-interested members govern a dominant professional sporting competition and make the rules governing the sport. These members may adopt rules for the best interest of the competition as a whole, but may use their power over economic relationships between themselves and with third parties to further their own narrow, parochial self-interest.⁷⁶ These problems are exacerbated in the case of the NCAA, an organization with monolithic power to govern big-time intercollegiate sports, which must not only balance the varied economic goals of its more than 1000 members, but also pursue noneconomic values that justify the anticompetitive effects of its rules and governance decisions. As Tom McMillen, a former United States Representative and University of Maryland and NBA basketball star, observed, “[t]here is just too

(Feb. 21, 2013, 5:29 PM) http://www.cleveland.com/osu/index.ssf/2013/02/ohio_states_aaron_craft_named_1.html.

⁷⁶ See generally STEPHEN F. ROSS & STEFAN SZYMANSKI, *FANS OF THE WORLD UNITE! A (CAPITALIST) MANIFESTO FOR SPORTS CONSUMERS* (2008).

much money involved in the multibillion-dollar industry that is college athletics to expect the participants to police themselves.”⁷⁷

Consider the NCAA constitutional principle promoting competitive equity in athletics among member schools.⁷⁸ As any fan of the University of California Golden Bears football team (its last Rose Bowl visit was 1959)⁷⁹ can attest, the NCAA obviously does not promote strict parity among individual athletic conferences, much less among all Division I universities that compete in big-time football or men’s basketball. Indiana University’s president no doubt has a different view on the desirable extent of competitive equity in intercollegiate athletics (at least regarding football) than his Ohio State University counterpart. Even if NCAA Division I member universities could reach an agreement on competitive equity, it is unrealistic to expect them to appropriately resolve the conflict between this objective, which promotes fan interest in intercollegiate athletics, and the NCAA constitutional principle that student-athletes should not be exploited. This is especially apparent given that the five Division I power conferences advocate increasing the value of an athletic scholarships to the full cost of university attendance.⁸⁰ Not surprisingly, other Division I member schools with fewer commercial opportunities overrode this proposed NCAA legislation, primarily based on economic concerns regarding the increased costs of providing competitive intercollegiate athletic programs.⁸¹

Self-governing organizations also struggle to solve problems relating to wasteful expenditures. For example, in all likelihood the University of Oregon would have vigorously opposed rules barring its new training and locker facilities,⁸² while Ohio State University

⁷⁷ C. Thomas McMillen, *Accountability on the Quad*, N.Y. TIMES, Aug. 1, 2011, <http://www.nytimes.com/2011/09/01/opinion/how-to-referee-college-sports.html>.

⁷⁸ NCAA MANUAL, *supra* note 1, § 2.10.

⁷⁹ Jeff Faraudo, *New Cal Football Coach Sonny Dykes Talks Rose Bowl Goal*, SAN JOSE MERCURY NEWS (Dec. 6, 2012, 3:54 PM), http://www.mercurynews.com/ci_22140817/new-cal-coach-sonny-dykes-talks-rose-bowl.

⁸⁰ Andy Staples, *Full-Cost-of-Attendance Scholarship Debate Could Break up the FBS*, SI.COM (Mar. 8, 2012, 10:04 AM), http://sportsillustrated.cnn.com/2012/writers/andy_staples/03/08/presidents-scholarships/.

⁸¹ *Id.*

⁸² See Tom Ley, *Oregon’s New “Football Performance Center” Is a Decadent Monstrosity*, DEADSPIN.COM (July 31, 2013), <http://deadspin.com/oregons-new-football-performance-center-is-a-decadent-975295515>; Daniel Uthman, *Stunning Amenities in Oregon’s New Football Facility*, USA TODAY (Aug. 1, 2013, 1:28 AM), <http://www.usatoday.com/story/sports/ncaaf/2013/08/01/outrageously-unique-amenities-in-oregons-new-football-facility-hatfield-dowlin-complex/2606223/>.

would likely oppose limits on its use of private jets for recruiting.⁸³ In contrast, observers give significant weight to NASCAR's independence from the racing teams for that sport's success in limiting automotive engineering expenditures that would result in vast costs with minimal benefit to consumers.⁸⁴ Consistent with this view, the Supreme Court has recognized that limiting competition among retailers of a product is often anticompetitive when the limits are produced by agreement among the retailers, but often promotes competition when the limits are imposed on retailers pursuant to a policy adopted by a separate firm such as the manufacturer.⁸⁵

Like numerous other American voluntary membership associations, the NCAA is a private organization whose members have significant authority and freedom to make and enforce their own rules.⁸⁶ However, unlike members of the Moose Lodge who can join another similar group such as the Elks if they are unhappy with its rules, those dissatisfied with NCAA regulations cannot simply quit and join another co-equal national body that governs intercollegiate athletics. This important principle was judicially recognized in England over half a century ago (before the United Kingdom enacted effective competition or employment discrimination laws), in a challenge to a regulation by another private organization—the Jockey Club—that barred female trainers.⁸⁷ The eminent British jurist Lord Denning held that the common law needed to evolve to condemn the male-only regulation because there was a broader public interest when a sporting organization exercises dominance in the field.⁸⁸

Just as the Jockey Club of the “Mad Men” era excluded women, the NCAA, if free from external constraint, would continue to short-change the long-term welfare of student-athletes. The most recent controversy, where modest additional benefits (a small stipend for

⁸³ See Ross, *Radical Reform*, *supra* note 19, at 953–54.

⁸⁴ ROBERT G. HAGSTROM, *THE NASCAR WAY: THE BUSINESS THAT DRIVES THE SPORT* 35–37 (1998).

⁸⁵ Compare *United States v. General Motors Corp.*, 384 U.S. 127, 130 (1966) (agreement by retail car dealers to pressure General Motors to cease supply to discount rival was unlawful), with *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 56–58 (1977) (television manufacturer's policy limiting number of authorized retailers in major markets was lawful unless evidence demonstrably showed harmful effects).

⁸⁶ See *Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 183 (1988) (describing the NCAA).

⁸⁷ See *Nagle v. Feilden*, [1966] 2 Q.B. 633 (Eng.).

⁸⁸ *Id.*

spending money and other expenses that many universities include in nonathletic aid in determining the full cost of an education) were rejected, largely because of the parochial self-interest of some member schools (who did not want to bear the additional cost), demonstrates that the NCAA structure inhibits policies that redress student-athlete exploitation. In addition, the NCAA's track record with regard to the interests of other stakeholders establishes a clear and predictable pattern: reforms that address public interest concerns take a back seat to the status quo when a significant number of member schools' economic interests would be adversely affected.⁸⁹ Because the NCAA is a private organization, the NCAA has no duty to articulate precisely why it has balanced its conflicting goals in the manner it has chosen.

If there is a public interest in maintaining big-time intercollegiate athletics, by ensuring that the commercialized aspects of the sport coexist with noncommercial aspects that provide educational benefits to participating student-athletes, as well as economic and cultural benefits to the rest of the university community, reform must come from a source external to the NCAA.⁹⁰ To date, the NCAA's critics have sought reform through innovative attempts to use contract law to challenge perceived unfairness in NCAA rules⁹¹ and by launching

⁸⁹ For example, prior to the external restraint of an antitrust judgment in *Board of Regents*, 468 U.S. 85, 135–36 (1984), the NCAA exploited consumers by limiting access to football games; after the judgment, the number of games tripled in one year. PAUL C. WEILER ET AL., *SPORTS AND THE LAW: TEXT, CASES AND PROBLEMS* 888 (4th ed. 2011). Likewise, without regard for any coherent justification based on its unique role in managing college athletics, the NCAA exploited college assistant coaches by limiting their salaries. *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010, 1013–15 (10th Cir. 1998).

⁹⁰ Daniel E. Lazaroff, *An Antitrust Exemption for the NCAA: Sound Policy or Letting the Fox Loose in the Henhouse?*, 41 PEPP. L. REV. 229, 246 (2014) (advocating that any NCAA antitrust immunity should be “subject to independent regulatory oversight” to ensure that “the NCAA would not be able to act solely in its own economic interest,” but concluding that “it is difficult to articulate just what agency or oversight body would be capable of taking on the enormous task”). We agree with the need for independent regulatory oversight as a condition of NCAA antitrust immunity, while proposing federal legislation that would establish a regulatory regime for furthering the legitimate objectives of the commercial/education model of big-time intercollegiate athletics. See *infra* Part VI.

⁹¹ A number of state courts have creatively applied the contract law doctrine of third party beneficiaries to judicially review the particular application of an NCAA rule to an individual student or coach. This doctrine, especially where combined with the court's refusal to enforce NCAA rules that violate public policy, can be effective in some limited contexts. See, e.g., *Oliver v. Nat'l Collegiate Athletic Ass'n*, 920 N.E.2d 203 (Ohio Ct. C.P. 2009) (refusing to enforce NCAA rule barring baseball player selected in a professional draft from consulting an attorney in the next room in evaluating whether to turn pro). However, another leading case indicates the limits of this doctrine. *Bloom v. Nat'l Collegiate Athletic Ass'n*, 93 P.3d 621 (Colo. App. 2004) was a substantive

antitrust actions against specific NCAA policies.⁹² As we explain below, antitrust law appropriately requires commercial firms to compete with a principal focus on enhancing welfare for paying customers, while failing to meaningfully deal with ways in which non-commercial firms may act contrary to the public interest. Because our model for big-time college sports does not seek a purely commercial approach, antitrust challenges are a highly imprecise means of demanding reform. We discuss antitrust law and its limits in the following two Parts.

V

ALTHOUGH NCAA SCHOOLS HAVE MONOPSONY POWER IN THE MARKET FOR “BIG-TIME SPORTS PLAYING SERVICES,” ANTITRUST LAW DOES NOT PROVIDE AN EFFECTIVE SOLUTION THAT ACCOMMODATES THE PUBLIC INTEREST IN CONTINUING UNIVERSITY PARTICIPATION IN COMMERCIALIZED INTERCOLLEGIATE SPORTS

One strategy for remedying the economic exploitation of student-athletes by commercialized college sports programs has been to challenge NCAA regulations under the federal antitrust laws. For a variety of reasons, we believe that use of the Sherman Act⁹³ is an ill-fitting solution to these problems. The Supreme Court has recognized that the Sherman Act was primarily designed to focus on for-profit

challenge to NCAA regulations that permit student-athletes to retain eligibility in one sport whilst turning pro in another sport, but barring endorsement income. In this case, a member of the Colorado Buffalos football squad was a professional skier, barred from endorsing skis. *Id.* at 622. However, contract law theory did not allow him to prevail, because the “contract” itself—the NCAA rules—explicitly prohibited the income he sought to receive. *Id.* at 627. As these cases illustrate, contract law is ineffective in barring rules that are not really necessary to maintain the commercial/education model and worthless in mandating specific reforms to improve the model.

⁹² See, e.g., *Smith v. Nat’l Collegiate Athletic Ass’n*, 139 F.3d 180 (3d Cir. 1998) (rejecting challenge to rule barring players from playing as graduate students at a second university); *Banks v. Nat’l Collegiate Athletic Ass’n*, 977 F.2d 1081 (7th Cir. 1992) (rejecting challenge to rules barring players from signing with agents or submitting name for professional draft); *McCormack v. Nat’l Collegiate Athletic Ass’n*, 845 F.2d 1338 (5th Cir. 1988) (rejecting challenge to suspension of Southern Methodist University football team for widespread cash payments to players); *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, No. C 09-3329CW, 2010 WL 445190 (N.D. Cal. Feb. 8, 2010) (rejecting pretrial efforts to dismiss challenge to NCAA rule requiring players to waive in perpetuity all publicity rights for performing for a university). See also *Jenkins v. Nat’l Collegiate Athletic Ass’n*, No. 3:14-cv-01678, (D.N.J., filed Mar. 17, 2014) (alleging the NCAA cap on economic value of athletic scholarships violates §1 of Sherman Act).

⁹³ 15 U.S.C. §§ 1–7 (2012).

commercial enterprises and that antitrust analysis must account for the unusual contexts in which nonprofit entities engage in and potentially restrain trade.⁹⁴ However, antitrust law is not well-suited for case-by-case judicial application to an industry characterized by pro- and anticompetitive trade restraints where a widely-accepted social goal is the use of monopoly profits for worthy causes. This is precisely the commercial/education model that describes big-time college sports.⁹⁵

In a 1984 case, *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma*,⁹⁶ a majority of the Supreme Court, having rejected the dissent's contention that amateurism justified any commercial restraint by NCAA member schools, identified a procompetitive economic justification for a variety of NCAA regulations: product differentiation. The Court then proceeded to pronounce that "athletes must not be paid, must be required to attend class, and the like."⁹⁷ The Court provided no empirical support for the assertion that these rules were necessary to "preserve the character and quality of the 'product.'"⁹⁸

Since then, lower courts have mimicked this approach by rejecting various challenges to rules justified by the NCAA as promoting amateurism and maintaining the clear line of demarcation from professional sports without any serious consideration as to if and how the precise rule in question actually served the product differentiation goal articulated by the Supreme Court. Under current antitrust law, courts have ruled that a broad range of NCAA rules designed to preserve amateurism are legal regardless of any adverse effects on student-athletes' economic interests, including rules prohibiting any price competition among universities or payment of fair market wages for their athletic services or forbidding student-athletes to receive any athletics-related pecuniary benefits from nonfamily third parties.⁹⁹

⁹⁴ See, e.g., *Goldfarb v. Va. State Bar*, 421 U.S. 773 (1975).

⁹⁵ For this reason, detailed in the text to follow, our proposal meets the standard for exemption recommended by the Antitrust Modernization Commission: "competition cannot achieve important societal goals that trump consumer welfare." ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATION viii (2007).

⁹⁶ 468 U.S. 85, 102 (1984).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ See, e.g., *Justice v. Nat'l Collegiate Athletic Ass'n*, 577 F. Supp. 356 (D. Ariz. 1983); see also *Agnew v. Nat'l Collegiate Athletic Ass'n*, 683 F.3d 328, 344–45 (7th Cir. 2012) ("It is not until payment above and beyond educational costs is received that a player is considered a 'paid athlete.' . . . The NCAA's limitation on athlete compensation beyond educational expenses . . . directly advances the goal of maintaining a 'clear line of

One of us has previously observed that courts' reliance upon the amateur/education model of intercollegiate athletics to summarily reject student-athletes' antitrust challenges to NCAA amateurism eligibility rules is inconsistent with the current economic realities of big-time football and men's basketball.¹⁰⁰ Courts should recognize that the commercial/education model applies to big-time college football and men's basketball. In a 2013 case, *In re NCAA Student-Athlete Name & Likeness Licensing Litigation (O'Bannon)*, a federal judge did so by rejecting the NCAA's argument that all of its amateurism rules are per se legal as a matter of law, regardless of whether they have anticompetitive effects in a properly defined relevant market.¹⁰¹ A group of current and former football and men's basketball student-athletes alleged that the NCAA violated federal antitrust law by conspiring with Electronic Arts and Collegiate Licensing Company (who previously settled their claims) to restrain competition in the market for the commercial use of their names, images, and likenesses "in game footage or in videogames."¹⁰² The court rejected the NCAA's argument that the athletes' claims were "nothing more than a challenge to the NCAA's rules on amateurism" and therefore must be dismissed under *Board of Regents*, which stated in dicta that "[i]n order to preserve the character and quality of the NCAA's 'product,' athletes *must not be paid*."¹⁰³

On the other hand, not all NCAA rules designed to maintain the amateur nature of intercollegiate sports, or more appropriately the unique brand of college sports, have the requisite anticompetitive effects necessary to subject them to antitrust scrutiny. As a threshold matter, although all amateurism regulations constitute input market restraints that are the product of an agreement among NCAA member universities, their respective anticompetitive effects, if any, must be identified. In other words, a particular NCAA amateurism rule potentially violates the Sherman Act only if it reduces economic competition among NCAA member schools for student-athletes' services and harms consumer welfare. This may be a threshold that

demarcation between intercollegiate athletics and professional sports,' and thus is best categorized as an eligibility rule aimed at preserving the existence of amateurism and the student-athlete." (citations omitted)).

¹⁰⁰ Mitten, Musselman & Burton, *supra* note 16, at 829–37.

¹⁰¹ No. C 09-1967 CW, 2013 WL 5778233, at *6 (N.D. Cal. Oct. 25, 2013).

¹⁰² *Id.* at *2.

¹⁰³ *Id.* at *5 (alteration in original) (citation omitted).

immunizes regulations that do not serve the public interest in a commercial/education model of intercollegiate athletics from antitrust scrutiny.¹⁰⁴

O'Bannon illustrates both current problems as well as the difficulties if antitrust law is used as the principal means of correcting commercial exploitation of student-athletes who participate in big-time sports. The initial litigation was brought by Ed O'Bannon, a former UCLA basketball star.¹⁰⁵ O'Bannon challenged an alleged agreement among NCAA schools that required student-athletes, as a condition of participating in intercollegiate athletics, to permanently waive any rights to publicity arising out of their intercollegiate athletic participation.¹⁰⁶ He specifically complained that his likeness was being used by EA Sports in a video game, years after he had left UCLA and, indeed, even after he had retired from a successful career in professional basketball.¹⁰⁷

It is difficult to perceive a procompetitive economic justification for this restraint, especially if the damages sought by O'Bannon's complaint were limited to royalties to be paid to *former* student-athletes on a pro rata basis after they had completed their eligibility. Can anyone seriously claim that Pauley Pavilion (where UCLA plays its basketball games) will face empty seats, or that the Pac-12 Network will face dwindling ratings, if fans know that the student-athletes representing UCLA will, years down the road, receive video game royalties?

These issues get a bit more difficult if we consider whether the clear line of demarcation between college and pro sports would be crossed or blurred by providing a trust fund for royalties for current players. To date, federal judges have not been willing to seriously consider the boundaries of this clear line of demarcation, which has been solely defined and established by the NCAA's amateurism rules.

¹⁰⁴ Thus, the court of appeals in *Banks v. National Collegiate Athletics Association*, 977 F.2d 1081, 1091–92 (7th Cir. 1992), found that the NCAA's decision to operate sports on an amateur basis meant there was no relevant economic market where member schools competed against each other for the commercial athletic "services" of players. This allowed the court to dismiss an antitrust complaint without any examination of whether the regulations exploited student-athletes or genuinely served any noncommercial educational goals. *Id.*

¹⁰⁵ *O'Bannon*, at *1.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at *2.

Instead, most courts have characterized such rules as virtually per se legal under antitrust law.¹⁰⁸

To the extent that the antitrust law theories raised in *O'Bannon* are applied to limits on player compensation paid by NCAA universities rather than third parties, such as EA Sports, the issues become even more complex. First, courts are likely, even on serious reconsideration, to reaffirm Justice Stevens's observation in *Board of Regents* that product differentiation requires that intercollegiate athletes be full-time students.¹⁰⁹ This means that the cost of an education is a condition of participation in big-time college sports.

Second, if it is lawful for the NCAA to require student-athletes to be enrolled as full-time students at the colleges that they represent on the field or court, the next question is whether antitrust laws would allow the NCAA to regulate a university's decision on what fees to charge the student-athlete for the education it mandates. In a model of competition that antitrust presumes, colleges will gladly pay for education for the top stars, and will indeed likely pay far in excess of the cost of education for the small handful of players whose skills are so superior to the likely alternative player that they are worth significant sums.¹¹⁰ However, for many and probably most student-athletes, their "Value Over Replacement" (VORP) is not likely to be very high, especially entering college from high school.¹¹¹ Given the existing legal barriers and other practical difficulties of unionizing

¹⁰⁸ See *supra* notes 99–106 and accompanying text.

¹⁰⁹ 468 U.S. 85, 101–02 (1984).

¹¹⁰ For those unfamiliar with the world of sabermetrics, the concept is encapsulated in a baseball metric called "Value Over Replacement Player" or "VORP." *Value over Replacement Player–VORP*, SPORTING CHARTS, <http://www.sportingcharts.com/dictionary/mlb/value-over-replacement-player-vorp.aspx> (last visited Jan. 31, 2014).

¹¹¹ In this regard, it is important to recognize that all major league professional athletes in the United States earn hefty salaries regardless of their value to their respective clubs, not because of the free market, but because the unions representing each league's players have collectively negotiated such a high minimum salary. The minimum salary for an NHL player for the 2013–2014 season is \$550,000. COLLECTIVE BARGAINING AGREEMENT BETWEEN NATIONAL HOCKEY LEAGUE AND NATIONAL HOCKEY LEAGUE PLAYERS' ASS'N, art. 11.12 (2012). The minimum MLB salary for the 2014 season is \$500,000. 2012–2016 BASIC AGREEMENT, MLB & MLBPA, art. VI, § A (2012). In the NBA, the minimum salary is dependent upon years of service, the lowest possible salary during the 2013–14 season is \$490,180 and can only be offered to a rookie. NBA COLLECTIVE BARGAINING AGREEMENT, Exhibit C, C-1 (2011). For the 2014 season, the minimum NFL salary for an active player is \$420,000. COLLECTIVE BARGAINING AGREEMENT, NFL & NFL PLAYERS' ASS'N, art. 26, § 1(a) (2011).

college athletes on a national basis,¹¹² the likely effect of a purely antitrust remedy will be to correct the economic exploitation of a handful of star players participating in big-time intercollegiate sports at the expense of most other Division I football and men's basketball players, whose economic value would not justify a full athletic scholarship.¹¹³

Third, there is widespread support that society *wants* big-time college football and men's basketball programs to create surplus funds that can be spent on socially worthy causes, such as broad-based intercollegiate athletic programs for students skilled in non-revenue generating sports and university academic programs. Antitrust law requires the NCAA to prove, as a matter of fact, that the anticompetitive effects of its amateurism rules—which are the product of an agreement among its collective member universities—are justified as narrowly tailored to achieve procompetitive effects that lower price, increase output, or render output more responsive to consumer preferences.¹¹⁴ Examples of procompetitive justifications are preserving a different brand of athletic competition than professional sports or maintaining a level of competitive balance among its member institutions that fans prefer. Although NCAA amateurism rules artificially reduce universities' "labor" costs of producing big-time football and men's basketball programs by prohibiting any price competition for players' services and institutions use these cost savings to fund socially desirable objectives, this is not

¹¹² See *supra* note 50 and accompanying text.

¹¹³ Consider the antitrust litigation in professional football brought by members of a development squad whose skills were not sufficient to make the major league roster. Prior to the NFL owners' adoption of a rule limiting salaries to \$1000 per week, the plaintiffs received compensation ranging from \$2187 to \$6250 per week. *Brown v. Pro Football, Inc.*, No. 90-1071, 1992 WL 88039, at *2 (D.D.C. Mar. 10, 1992). Thus, many of the best professional football players in the world, who were not on a professional team roster, earned less than \$35,000 in 1988 in a completely free market. By way of comparison, in 1989 Chicago Bears star linebacker Mike Singletary earned \$750,000 and Hall of Fame Quarterback Dan Marino earned just shy of \$1.5 million. Rodney Fort, *NFL Salaries 1989* (1989), available at <https://umich.app.box.com/s/41707f0b2619c0107b8b/1/320026231/2560907831/1>. If a development squad player's value in a free market is that low, we believe it is highly probable that, even at a major program like Ohio State or Alabama, an untested recruit will not be worth the full cost of education. Josephine R. Potuto, William H. Lyons & Kevin N. Rask, *What's in a Name? The Collegiate Mark, the Collegiate Model, and the Treatment of Student-Athletes*, 92 OR. L. REV. 879, 918–33.

¹¹⁴ *Board of Regents*, 468 U.S. 85, 100–01 (1984).

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a *procompetitive* economic justification for anticompetitive conduct.¹¹⁵

Fourth, antitrust law is not the most effective means of ensuring that revenues generated by these sports more effectively further a university's academic mission and student-athletes' welfare or that big-time collegiate sports programs do not exploit student-athletes and consumers. Although the Sherman Act prohibits unreasonable conduct, it does not require reasonable conduct. Nor is it "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."¹¹⁶

Finally, a piecemeal approach by way of antitrust litigation that merely considers the legality of the particular challenged restraint will not effectively solve systemic problems inherent in the production of commercialized intercollegiate athletics by institutions of higher education. These problems include an overemphasis on winning and generating sports-related revenues, a misallocation of scarce university resources to the athletic department, subordination of higher education academic values to the forces of commercialization, and student-athletes' inability to realize the educational benefits of the collegiate experience.¹¹⁷

VI

EXTERNAL REGULATION BY AN INDEPENDENT COMMISSION IS THE BETTER SOLUTION

The commercial/education model calls for the continued operation of big-time commercial sports on college campuses. At least three aspects of this model suggest that its continuation is in the public interest. First, the affiliation with the collegiate tradition provides entertainment value and public cohesion among alumni and the community in ways that a purely professional minor sports competition cannot provide. Second, the commitment to integrate

¹¹⁵ *Cf.* Nat'l Soc'y of Prof'l Engineers v. United States, 435 U.S. 679, 692–93 (1978) (holding that restricting bidding is illegal anticompetitive action); *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010, 1021–24 (10th Cir. 1998) (holding that making coaching positions available to younger people and cost reduction are not valid procompetitive justifications).

¹¹⁶ Mitten, Musselman & Burton, *supra* note 16, at 837.

¹¹⁷ *Id.* at 801–04.

athletics with education that makes the model work provides distinctive societal benefits by providing athletically gifted young men and women with college education opportunities they might not otherwise have. Third, if the NCAA's constitutional goal of "prudent investment" were taken seriously, it enables financially struggling universities with the potential ability to support teaching and research through subsidies from surplus funds generated by the school's intercollegiate athletics program.

This model inevitably results in economic cross-subsidies, effective in furthering socially worthy objectives only if NCAA member schools agree to fund academic support programs for student-athletes, non-revenue sports, and university teaching and research programs with surpluses. Surplus funds, in a completely professionalized market, would be dissipated through competition by paying top stars a sum equal to their short-run economic value to their respective teams. As demonstrated above, any decision to engage in anticompetitive behavior, in order to advance economic justifications that do not promote competition, should not be entrusted entirely to a private organization or its members. Nor can this model effectively ensure that athletes and their fellow classmates benefit in a socially desirable way from these surpluses if such a judgment is left to each university. Thus, we propose a flexible regulatory regime that will more reliably effectuate the public interest in intercollegiate sports than the current system of NCAA monolithic control and domination subject only to piecemeal and ineffectual antitrust review.

In perhaps the best antitrust decision in legal history, Judge William Howard Taft (later President and United States Supreme Court Chief Justice) forcefully condemned judicial decisions that "have assumed the power to say, in respect to contracts which have no other purpose and no other consideration on either side than the mutual restraint of the parties, how much restraint of competition is in the public interest, and how much is not."¹¹⁸ The jurisprudential lesson is that this Solomon-like power, if not to be exercised by unelected federal judges, should lie with our elected representatives in Congress. They do have the power to exempt specific private economic conduct from the federal antitrust laws and to protect public welfare through an alternative regulatory scheme. To ensure that the public and student-athletes who participate in big-time intercollegiate

¹¹⁸ *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 283–84 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

athletics realize the full benefits of the commercial/educational model of intercollegiate athletics, we propose that Congress do so.

An independent commission overseeing big-time intercollegiate athletics would serve a number of socially beneficial functions. It would limit the ability of those wielding power within the NCAA to adopt rules and make decisions that unduly exploit consumers, student-athletes, and other stakeholders. It would also avoid the problem of socially suboptimal internal rules and governance that necessarily arise when participating members govern a sport in their own parochial self-interest. By creating an independent regulatory commission with rule-making authority to ensure that surplus revenues generated by big-time intercollegiate sports are spent on socially worthy causes, voluntary adoption of the commission's rules by the NCAA and its member universities would justify providing their implementation with immunity from antitrust challenges.

We propose that federal intercollegiate athletics reform legislation contain the following key features:

1. Creation of an independent commission and mandate procedures assuring transparency and access to all stakeholders, including a process akin to the notice-and-comment requirements of informal rulemaking under the Administrative Procedure Act.¹¹⁹
2. Inclusion of certain specific substantive provisions discussed *infra* that would ensure that big-time intercollegiate athletics are reformed in a socially beneficial way and that the commercial/education model operates consistent with the public interest.
3. Authorization for the Commission to promulgate non-binding proposed rules to regulate intercollegiate athletics and direct the Commission to consider and adopt, reject, or modify specific proposals that do not warrant congressional mandate.
4. A grant of antitrust immunity to any university, athletic conference, or the NCAA for conduct taken in compliance

¹¹⁹ 5 U.S.C. §§ 551–59 (2012). The notice requirement includes: a description of the rule, the legal authority and the time and place that the public can comment; “interested persons” must have the opportunity to submit “written data, views, or arguments with or without opportunity for oral presentation”; and it must be published at least thirty days before enactment with a statement considering the public submissions. *Id.* § 553; *see also* JERRY L. MASHAW, RICHARD A. MERRILL & PETER M. SHANE, ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM 508–12 (6th ed. 2009).

with the Commission's rules, provided that any stakeholder allegedly harmed by these entities' conduct in compliance with the subject rule(s) may seek independent review to ensure that the rules have a reasoned basis consistent with the public interest.

A variety of professional sports organizations throughout the world, as well as consumers, have benefited from regulation by an entity independent of the participating competitors. One of us has previously detailed the benefits to stock car racing of NASCAR's independent role as a competition organizer.¹²⁰ Key regulations relating to integrity and other specific issues in North American major professional sports leagues (e.g., MLB, NBA, NFL, NHL), whose members are independently owned and operated clubs with divergent economic interests, have been effectively governed by an independent commissioner with broad best interests of the game authority.¹²¹ In Australia, the sport of rugby was recently reorganized with the creation of an independent commission to achieve the potentially conflicting goals of organizing a commercially successful major league club competition, training and developing national teams in international representative competitions, and supporting amateur and grass-roots development of the sport.¹²² An independent commission would likely yield similar benefits with regard to the conflict-laden arena of rule-making in big-time college sports.

Adherence to mandatory procedures, including those equivalent to informal rulemaking under the Administrative Procedure Act, would significantly increase the transparency and inclusiveness of commission rulemaking in contrast to the current structure of economically self-serving rulemaking by NCAA member universities. This process would particularly facilitate the opportunity for student-

¹²⁰ ROSS & SZYMANSKI, *supra* note 76, at 70–107.

¹²¹ As detailed by the court in *Milwaukee American Association v. Landis*, 49 F.2d 298 (N.D. Ill. 1931), MLB owners responded to their own inability to respond effectively to the “Black Sox” match-fixing scandal marring the 1919 World Series by appointing an independent commissioner “with all the attributes of a benevolent but absolute despot.” *Id.* at 299. However, today baseball’s commissioner does not have such unlimited powers. Unless a matter “involves the integrity of, or public confidence in, the national game of Baseball,” the Commissioner may not regulate with regard to a host of matters that the MLB Constitution assigns to the clubs collectively or individually. MLB, MAJOR LEAGUE CONSTITUTION, art. II, § 4 (2008); WEILER ET AL., *supra* note 89, at 27. Nor can the MLB Commissioner be relied upon to protect various stakeholders from exploitation, given the retained ability of MLB owners to fire the Commissioner.

¹²² See *Australian Rugby League Commission*, NRL.COM, <http://www.nrl.com/About/ARLCommission/tabid/10891/Default.aspx> (last visited Jan. 31, 2014).

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athletes' perspectives to be heard.¹²³ Moreover, a procedural requirement that the commission provide a reasoned explanation for its regulatory decisions (akin to that required for informal rulemaking) would allow for greater transparency in how conflicting objectives were accommodated and limit the ability of NCAA universities and their representatives to lobby the commission for rules that advance their own economic interests to the detriment of others or to engage in unchallenged pretextual reasoning. Finally, because the proposed legislation would confer antitrust immunity for conduct that complies with commission regulations, this procedure will require the commission to consider traditional competition policy objections to proposed regulations. Furthermore, the commission must explain why the public interest is served by what courts applying antitrust law might find to be an anticompetitive practice without an overriding procompetitive economic justification.¹²⁴

It is both sound policy and sound politics to expect that, for this legislation to warrant Congress's time and attention (and ultimately its enactment), a core of three mandatory substantive requirements need to be included therein to ensure that big-time intercollegiate athletics are reformed in a socially beneficial manner.

First, schools should be required to guarantee at least a four-year athletic scholarship, "which may be taken away only for failing to meet minimum academic requirements, engaging in misconduct, or voluntarily choosing not to continue playing a sport."¹²⁵ The practice of running a player off a squad because the coach determines that a more gifted athlete could better use the athletic scholarship is inconsistent with the commercial/education model of intercollegiate athletics and crosses the line of demarcation into professional sports. Likewise, in sports in which partial scholarships are permitted, the student-athlete should be protected from a scholarship reduction except as a consequence of unsatisfactory academic performance or misconduct. The public interest in wider educational access afforded by intercollegiate athletics is frustrated if athletic considerations result in a student's loss of opportunity to obtain a degree.

¹²³ Zimbalist, *supra* note 9, at 5, 22.

¹²⁴ Congress could invite or mandate competition advocacy by the Department of Justice's Antitrust Division or the Federal Trade Commission to provide the commission with expert analysis of the extent to which its regulations would immunize otherwise illegal practices.

¹²⁵ Mitten, Musselman & Burton, *supra* note 16, at 838.

Second, schools should be required to provide free medical care or health insurance for all sports-related injuries. Injured student-athletes should also receive a scholarship extension for a period of time equal to the time the athlete is medically unable to attend class due to injury.¹²⁶

Third, the NCAA should be required to eliminate its requirement that any university seeking to participate in a Division I sports competition must operate at least fourteen sports at the Division I level.¹²⁷ The legislation should authorize the commission to permit the NCAA to condition a university's receipt of NCAA championship revenues in excess of expenses on the use of those funds for specified purposes, including the operation of additional sports. However, our view of the commercial/education model suggests that universities should have the freedom to make their own independent judgment as to whether funding a large number of non-revenue sports at the Division I level is the best use of these revenues, or whether these revenues should be devoted instead to academic endeavors such as teaching and research. To provide an oversimplified illustration, if a school were to determine that operating a Division I men's basketball program serves its educational mission, and complies with Title IX by operating an equivalent women's basketball program,¹²⁸ for it to then be required to spend funds it would prefer to spend on English professors in order to fund Division I lacrosse and tennis programs is both unsound social policy as well as inconsistent with the NCAA's own principles calling for athletic programs to be operated as an integral part of the educational program.¹²⁹

To facilitate the success of our proposed federal legislation, we believe that its mandatory substantive provisions should be limited. However, in exercising its rule-making authority, we believe the following ideas warrant the commission's consideration:

- "Mandatory remedial assistance and tutoring for entering student-athletes whose indexed academic credentials are below a

¹²⁶ *Id.* at 840.

¹²⁷ NCAA MANUAL, *supra* note 1, § 20.9.6.

¹²⁸ More than forty years ago, Congress enacted Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681, evidencing its intention that providing equal athletic participation opportunities to both men and women is a socially worthy public policy objective, a judgment we do not seek to question. Moreover, we are not advocating that Title IX be amended as part of our proposal for reform of big-time intercollegiate athletics.

¹²⁹ See NCAA MANUAL, *supra* note 1, § 1.3.1.

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certain percentile—twenty-fifth percentile, for example—for their university’s freshman class.”¹³⁰

- “The creation of a postgraduate scholarship program administered by the NCAA and funded by a designated percentage of the total net revenues generated by intercollegiate football and men’s basketball, and perhaps other sports, including the sales of merchandise incorporating aspects of student-athletes’ persona, such as team jerseys with numbers identifying individual players.”¹³¹
- Redefining a “full athletic scholarship” to provide additional funds in a manner that would not compromise the “clear line of demarcation” between college and professional sports; for example, a “full” scholarship might include, in addition to tuition, fees, books, supplies, and minimal room and board, funds for additional housing, clothing, travel home, and modest personal spending that would not exceed the amount that is received from family sources by the top quartile of students at the athlete’s university.
- Permitting partial athletic scholarships in all sports with an active program to supplement this aid with need-based aid.¹³²
- Reducing the overall number of scholarships for big-time college football.¹³³
- Requiring university trustees to adopt procedures to explicitly consider teaching and research alternatives to the investment in intercollegiate athletic programs that are not financially self-supporting.¹³⁴

¹³⁰ Mitten, Musselman & Burton, *supra* note 16, at 840.

¹³¹ *Id.* at 841.

¹³² One of us has previously detailed why this proposal would facilitate a more-informed choice of schools by athletic recruits and promote output-increasing competitive balance. Ross, *Radical Reform*, *supra* note 19, at 952–58.

¹³³ One of us has previously detailed why this proposal would facilitate output-increasing competitive balance while affording the university cost savings to be used on other socially worthy causes. *Id.*

¹³⁴ ASS’N OF GOVERNING BODS. OF UNIVS. & COLLS., *supra* note 23, at 3 (recommending that university’s board of trustees “should act decisively to uphold the integrity of the athletics program and its alignment with the academic mission of the institution”); *see also* RAWLINGS PANEL, *supra* note 25, at 9 (“We believe that Boards of Trustees, presidents, commissioners, athletics directors, and the public more generally, should focus on the objective of bringing greater alignment between athletic and academic expenditures at the institutional level as a way of preserving the virtues and benefits of intercollegiate athletics and teaching and research on each of our campuses.”).

- Requiring schools to offer additional scholarship aid to student-athletes who leave school in good academic standing and later seek to complete their college education.
- Requiring schools to offer financial or other incentives, such as a graduation bonus, to student-athletes, or at the very least to at-risk student-athletes to increase graduation rates for Division I football and men's basketball.
- Requiring each Division I university's intercollegiate athletics department to be financially self-sufficient (i.e., its revenues exceed its expenses over a designated period, such as three to five years). This would give each university the flexibility to determine which mix of sports to offer and invest in to achieve its individualized academic and intercollegiate athletics mission consistent with Title IX.¹³⁵
- Requiring the NCAA to distribute a significant percentage of pooled football and men's basketball revenues to reward individual universities for achieving objectives consistent with values of intercollegiate athletics (e.g., high graduation rates) and to determine whether additional redistribution of pooled funds to facilitate competitive balance in big-time football and men's basketball would maximize overall fan appeal or serve other distinctive interests.¹³⁶

We do not advocate that the commission's regulations have the direct force of law. Rather, we recommend that the legislation provide that the NCAA, along with the individual institutions and athletic conferences that voluntarily opt to adhere to the entirety of commission regulations, receive a statutory immunity for conduct

¹³⁵ Cf. Ross, *Radical Reform*, *supra* note 19, at 949.

¹³⁶ See Zimbalist, *supra* note 9, at 21–22 (“[E]qualizing the distribution of revenue may address both the goal of promoting greater competitive balance and the goal of containing costs. Serendipitously, it may also rebalance the scales in favor of educational attainment and educational growth. . . . Importantly, revenue redistribution can accomplish the important goal of changing the incentives facing intercollegiate athletics by lowering the distribution tied to commercial success and raising the distribution tied to educational success. . . . [I]n 2011–12 the NCAA distributed \$467 million [to Division I universities]. . . . [But] none of the \$467 million is allocated according to the academic success of student-athletes or other measures of school educational success. Restructuring these NCAA distributions, then, would not only be desirable from the perspective of financial solvency and blunting the incentives toward commercialism, but also from the perspective of incentivizing schools’ focus on educational outcomes.”). At the same time, we note that the empirical evidence from professional sports does not clearly demonstrate that, from a commercial or consumer-welfare perspective, increased competitive balance is necessarily desirable for big-time sports. See, e.g., Stefan Szymanski, *The Economic Design of Sporting Contests*, 41 J. ECON. LITERATURE 1137, 1153–55 (2003).

taken in compliance with the regulations. This will exempt them from liability under federal antitrust statutes and state laws that might outlaw practices implemented pursuant to these rules as contrary to state antitrust law, common law, or public policy.

In order to ensure that the public interest is truly served by such an exemption, it is essential that there be external legal review of the commission's regulations. Judicial review of commission decisions under the Administrative Procedure Act is one means to provide oversight. However, court dockets are crowded, and federal judges often lack expertise in this area. For this reason, we advocate conditioning antitrust immunity on the willingness of the NCAA, athletic conferences, and individual schools to submit disputes over whether a commission regulation is the product of open and transparent procedures and reasoned decision-making to private arbitration. We suggest that Congress borrow from the Ted Stevens Olympic and Amateur Sports Act,¹³⁷ which requires that disputes between Olympic sport athletes and national governing bodies for these sports be resolved by final and binding arbitration pursuant to the American Arbitration Association's commercial arbitration procedures.¹³⁸

¹³⁷ 36 U.S.C. §§ 220501–220529 (2012).

¹³⁸ *Id.* § 220509. The legislation would therefore clearly protect the NCAA and its member institutions against antitrust litigation for adhering to rules adopted by the commission that meet procedural standards. Different considerations arise considering litigation accusing the NCAA or a university of improperly failing to follow commission regulations with regard to specific conduct (for example, an eligibility determination for a student-athlete). In this instance, we believe that de novo arbitration, again akin to that provided for in the Stevens Act for specific competition-related determinations made by national governing boards, is the best model. To illustrate, suppose that the commission enacted regulations barring intercollegiate athletics participation for student-athletes who knowingly received payment for athletics participation from a professional sports club, and that this regulation was either upheld under administrative review or not challenged in a timely manner. This would bar a student-athlete ruled ineligible by the NCAA from challenging the action on the grounds that the rule itself was unlawful. But suppose the plaintiff sued on the grounds that the NCAA had incorrectly determined that he had violated the rule. We propose that the commission adopt a separate regulation that student-athletes can be required, as a condition of intercollegiate athletics participation, to submit all disputes to binding arbitration. This would mean that the eligibility question would be reviewed quickly and finally by an independent arbitrator. (Alternatively, the NCAA would have the option of preserving its own prerogative to determine eligibility unconstrained by outside arbitration, but then risk antitrust exposure in the event that a plaintiff could demonstrate that their ruling was not in compliance with the commission's rules as well as otherwise stated in an antitrust claim.)

Mandating binding arbitration for disputes otherwise immune from federal or state antitrust challenges serves several purposes. It ensures that the regulatory commission policies are truly based on reasoned decisions. Where public policies—including those inconsistent with free competition—are preferred, review similar to that used by courts to review decisions of administrative agencies assures that the commissioners articulate justifications. The legislation should provide that arbitral review of the commission's immunity-conferring regulations be akin to rational basis judicial review of informal rule making¹³⁹ (not *de novo* review), ensure that stakeholders were afforded the ability to comment on the proposed rule, and that the commission explained its rationale for making its rule and for rejecting alternatives.

At the same time, one of the primary reasons for using arbitration to resolve sports-related disputes is the need for, and the ability of private arbitration to provide, a speedy resolution of time-sensitive issues. Legislation could provide a short window of perhaps fifteen to thirty days for those adversely affected by a commission regulation to demand arbitration and mandate that an arbitral panel render its decision within forty-five to sixty days of a hearing.

CONCLUSION

A commercial/education model for intercollegiate athletics posits that major colleges and universities will offer popular and commercially lucrative sporting entertainment as part of an integrated scheme that provides athletically-gifted students with increased educational opportunities and uses surplus funds generated by big-time football and men's basketball for socially worthy causes. The current structure of self-interested internal governance by the NCAA's member universities, combined with external micro-regulation by means of antitrust and contract law litigation on a case-by-case basis, is not the most effective means to achieve this objective. The existing internal rulemaking process used by the NCAA and its member schools has not adequately achieved the NCAA's own objectives of protecting student-athletes from commercial exploitation, ensured that all student-athletes receive the educational opportunities inherent in making intercollegiate athletics an integral part of a university's educational mission, established rules essential to clearly demarcate college and professional sports,

¹³⁹ See MASHAW, MERRILL & SHANE, *supra* note 119, at 514–18.

