
NO MORE PLAYING FAVORITES: RECONSIDERING THE CONCLUSIVE CONGRESSIONAL PRESUMPTION THAT INTERCOLLEGIATE ATHLETICS ARE SUBSTANTIALLY RELATED TO EDUCATIONAL PURPOSES

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I. INTRODUCTION

Athletic competition strengthens not only athletes' bodies, but also their minds by training them in the values of self-discipline, self-sacrifice, hard work, and the pursuit of excellence.¹ In addition, athletes learn important lessons on social values, such as leadership, cooperation, camaraderie, and collective responsibility through participation in competitive events.² The ability of athletic competitions to instill such desirable values in their participants potentially enables intercollegiate athletics to further traditional educational goals by supplementing and enriching the academic experience of student-athletes with valuable life

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1. Lawrence J. Hatab, *The Greeks and the Meaning of Athletics*, in *RETHINKING COLLEGE ATHLETICS* 31, 37 (Judith Andre & David N. James eds., 1991).

2. Letter from Myles Brand, President, NCAA, to Rep. Bill Thomas, Chairman, House Comm. on Ways and Means (Nov. 13, 2006), *available at* http://www2.ncaa.org/portal/media_and_events/press_room/2006/november/20061115_response_to_housecommitteeonwaysandmeans.pdf [hereinafter Brand Letter]. Some authors have gone so far as to argue that athletic competition expresses "meanings and truths about human existence," such as "finitude, uncertainty, and opposition." Hatab, *supra* note 1, at 38.

lessons.³

The reality of intercollegiate athletics, however, is that too often a university's athletic department fails to live up to its great potential.⁴ Contemporary intercollegiate athletics are the uneasy combination of sport, academics, and commerce.⁵ As commercial factors have become increasingly influential within college sports, many athletic departments have begun to operate as businesses, seeking to generate revenue and conducting themselves in a manner that treats education as merely incidental.⁶ To generate revenue, these athletic departments need winning programs; that requires garnering a competitive edge over opponents. In order to remain competitive, many athletic departments recruit, admit, maintain eligibility for, and graduate students who are academically substandard, purely because of their athletic talent. These practices sacrifice the educational integrity of both the athletic department and its parent university.⁷

Although many athletic departments are operated as businesses, they are not taxed as such, and are instead universally exempt from taxation.⁸ The tax law does not differentiate between an athletic department that furthers education by enriching student-athletes and one that operates as a business and considers education merely incidental.⁹ Indiscriminate tax exemption for athletic departments is rooted in the legislative history of the unrelated business income tax, in which Congress pronounced that intercollegiate athletic activities are substantially related to educational purposes, and thus, exempt from federal taxation.¹⁰ In the almost sixty years that have passed since Congress announced its conclusive

3. See Brand Letter, *supra* note 2. But see Robert L. Simon, *Intercollegiate Athletics: Do They Belong on Campus?*, in *RETHINKING COLLEGE ATHLETICS*, *supra* note 1, at 43, 51 (“[E]ven if intercollegiate athletics is not, strictly speaking, an essential element of the university, it adds a desirable educational dimension to it.”).

4. Richard L. Kaplan, *Intercollegiate Athletics and the Unrelated Business Income Tax*, 80 *COLUM. L. REV.* 1430, 1458 (1980) (highlighting some of those shortcomings; for example, athletics consume too much of student-athletes' time).

5. Skip Rozin, *A Weak Policeman Talks Tough When Tackling College Sports and Its Critics*, *WALL ST. J.*, Nov. 1, 2006, at D10.

6. The former president of the University of Michigan, James Duderstadt, summarized the situation saying, “[t]he simplest way to characterize the problem with college sports is to recognize that it is a very profitable commercial entertainment business that is moving farther and farther away from its original academic purposes of the university.” *Id.*

7. See discussion *infra* Part IV.A.3.

8. George F. Will, *Tax Breaks for Football*, *WASH. POST*, Oct. 25, 2006, at A17; Andrew Zimbalist, *Looks Like a Business; Should Be Taxed Like One*, *N.Y. TIMES*, Jan. 7, 2007, at § 8.

9. See discussion *infra* Part II.C.

10. See discussion *infra* Part II.C.

presumption, neither the Internal Revenue Service (“IRS”), the courts, nor legal scholars have directly challenged the factual basis on which the presumption is founded.

This Note will examine the validity of Congress’s presumption that intercollegiate athletics are substantially related to education in light of the current state of intercollegiate athletics. Part II discusses the legal framework within which exempt organizations such as colleges and universities operate and recounts the history of the congressional presumption. Part III traces the development of intercollegiate athletics and evaluates its current state, examining the commercial influences within intercollegiate athletics and the academic performance of student-athletes. Finally, Part IV advocates the elimination of the congressional presumption and examines the implications of such action.

II. DEFINING TAX EXEMPTION FOR UNIVERSITIES AND THEIR ATHLETIC DEPARTMENTS

A. TAX EXEMPTION UNDER I.R.C. § 501(C)(3)

Colleges and universities¹¹ derive their tax-exempt status from § 501(c)(3) of the Internal Revenue Code of 1986 (“I.R.C.”), which provides in relevant part that “corporations, and any . . . fund, or foundation, organized and operated exclusively for . . . educational purposes,” will be exempt from federal taxation.¹²

Under § 501(c)(3), the term “educational purpose” is defined as “the instruction or training of the individual for the purpose of improving or developing his capabilities; or . . . [t]he instruction of the public on subjects useful to the individual and beneficial to the community.”¹³ The Treasury Regulations offer examples of organizations that further educational purposes, including schools providing “a regularly scheduled curriculum, a regular faculty, and a regularly enrolled body of students in attendance at a place where the educational activities are regularly carried on.”¹⁴ Despite the relatively broad definition of “educational” in the context of

11. For the purposes of this paper the term “university” will encompass universities, colleges, and any educational institution that sponsors a team that competes in intercollegiate athletics.

12. I.R.C. § 501(c)(3) (2000). These are not the only organizations exempt from taxation. Sections 501(c)(1)–(28) list the twenty-eight different types of organizations that qualify for exemption under section 501(a).

13. Treas. Reg. § 1.501(c)(3)-1(d)(3)(i)(a)–(b) (as amended in 1990).

14. *Id.* § 1.501(c)(3)-1(d)(3)(ii) ex. 1. Other examples include: organizations devoted to presenting public forums for discussion, organizations that provide courses of instruction through television or radio, and museums, zoos, and planetariums. *Id.* § 1.501(c)(3)-1(d)(3)(ii) exs. 2–4.

§ 501(c)(3), activities bearing only a tenuous relationship to an educational purpose are not entitled to exemption.¹⁵

The organizational element of § 501(c)(3) requires that any university seeking to establish tax exemption must demonstrate that it was created to perform an exempt purpose.¹⁶ In order to satisfy the organizational element, a university's articles of organization¹⁷ must limit its purpose to one, or more, of the exempt purposes provided in § 501(c)(3).¹⁸ Additionally, a university's articles of organization cannot authorize it to conduct activities which are "in themselves . . . not in furtherance" of the exempt purpose of education.¹⁹

In addition to satisfying the organizational test, a university seeking tax-exempt status must also pass the operational test by demonstrating that its activities further its stated educational purpose.²⁰ An organization must meet three requirements:²¹ (1) the organization must engage "primarily in activities which accomplish one or more . . . exempt purposes"; (2) the organization must not allow its net revenue to benefit private shareholders or individuals; and (3) the organization cannot be an "action organization," meaning a substantial part of its activities cannot seek to influence legislation or partake in political campaigning.²² Whether or not an organization passes the operational test is ultimately a question of fact, necessitating an analysis of the specific facts and circumstances of each situation.²³

To be exempt from taxation, § 501(c)(3) requires that a college or

15. I.R.S. Gen. Couns. Mem. 39,496 (Sept. 25, 1985) (stating that the IRS does "not subscribe to the view that a social activity is entitled to exemption merely because there is articulated a possible relationship, no matter how tenuous, between the activity and [an exempt] purpose").

16. Treas. Reg. § 1.501(c)(3)-1(b)(1)(i). Within the context of the federal tax code, "organized" has been determined to mean "created to perform" or "established to promote." *Samuel Friedland Found. v. United States*, 144 F. Supp. 74, 84 (D.N.J. 1956).

17. The term "articles of organization" is defined as "the trust instrument, the corporate charter, the articles of association, or any other written instrument by which an organization is created." Treas. Reg. § 1.501(c)(3)-1(b)(2).

18. *Id.* § 1.501(c)(3)-1(b)(1)(i)(a). In the case of colleges and universities the stated purpose is universally educational; however, § 501(c)(3) includes seven different exempt purposes: religious, charitable, scientific, testing for public safety, literary, educational, and prevention of cruelty to children or animals. I.R.C. § 501(c) (2000).

19. Treas. Reg. § 1.501(c)(3)-1(b)(1)(i)(b).

20. *Id.* § 1.501(c)(3)-1(c)(1).

21. *Id.* § 1.501(c)(3)-1(c)(1)-(3).

22. Typically, the first two factors have been the subject of controversy within the context of taxation and college athletics, while the third factor is a non-issue in this setting. Erin Guruli, *Commerciality of Collegiate Sports: Should the IRS Intercept?*, 12 *SPORTS LAW J.* 43, 46 (2005). This paper will be concerned only with the first requirement. See discussion *infra* Part IV.C.

23. See *St. Louis Union Trust Co. v. United States*, 374 F.2d 427, 432 (8th Cir. 1967).

university be organized and operated *exclusively* for tax-exempt purposes. The term “exclusively” is pivotal to the application of the organizational and operational tests because it establishes how much non-exempt activity is permitted before an organization no longer qualifies for exemption. In 1945, the Supreme Court defined the term “exclusively” in *Better Business Bureau of Washington D.C. v. United States*, by stating that “the presence of a single non-educational purpose, if substantial in nature, will destroy the exemption regardless of the number or importance of truly educational purposes.”²⁴ Accordingly, a non-exempt activity must be more than an “insubstantial” part of the university’s overall activities before its § 501(c)(3) exemption is revoked.²⁵ Thus, a university may conduct non-educational activities without jeopardizing its tax-exempt status, so long as such activity is not substantial.

Even the substantial operation of a non-exempt activity, however, does not *necessarily* preclude a college or university from qualifying for tax exemption under § 501(c)(3).²⁶ For a university to simultaneously operate a substantial trade or business and maintain its § 501(c)(3) exempt status, the trade or business must further the university’s educational purpose, and the university cannot be organized or operated for the primary purpose of conducting the unrelated trade or business.²⁷ To determine the primary purpose for which a university is organized and operated, the facts and circumstances, in particular the size and extent of the activities purportedly furthering educational purposes, are relevant.²⁸ Moreover, while a university can conduct a substantial trade or business without losing its § 501(c)(3) exemption, the income produced by such activities may be subject to taxation pursuant to the unrelated business income tax (“UBIT”).

B. THE UNRELATED BUSINESS INCOME TAX

Before the enactment of the UBIT in 1950, the tax code presented only two possibilities: an organization was either completely taxable or

24. *Better Bus. Bureau of Wash., D.C., Inc. v. United States*, 326 U.S. 279, 283 (1945). Although the Court in *Better Business Bureau* dealt with section 811(b)(8) of the Social Security Act, the relevant provision is “in terms substantially the same as § 501(c)(3) of [I.R.C.]” *Stevens Bros. Found., v. Comm’r*, 324 F.2d 633, 638 (8th Cir. 1963). Indeed, courts routinely apply the *Better Business Bureau* definition of “exclusively” within the context of § 501(c)(3). *See, e.g.*, *Church By Mail, Inc. v. Comm’r*, 765 F.2d 1387, 1391 (9th Cir. 1985); *United States v. Daly*, 756 F.2d 1076, 1083 (5th Cir. 1985).

25. *Treas. Reg.* § 1.501(c)(3)-1(b)(1)(iii).

26. *Id.* § 1.501(c)(3)-1(e)(1).

27. *Id.*

28. *Id.*

completely tax exempt.²⁹ Faced with these two options, courts overwhelmingly upheld the tax-exempt status of university-controlled businesses.³⁰ In a quintessential 1951 case, *C.F. Mueller Co. v. Commissioner*, the Third Circuit, applying the “historical approach,” held that New York University maintained its tax-exempt status even though it operated a macaroni factory for profit.³¹

By 1950, Congress had become concerned that universities were exploiting their exempt status to obtain an unfair competitive advantage over for-profit businesses.³² Universities had become directly involved in the operation of myriad enterprises bearing no relation to their educational programs, including: oil wells, theaters, an airport, citrus groves, haberdasheries, and cattle ranches.³³ Congress feared that the eventual result would be the loss of significant revenue from taxation.³⁴ In order to level the playing field between businesses taxed as for-profit enterprises and the untaxed for-profit enterprises undertaken by tax-exempt organizations such as universities, Congress imposed the UBIT.³⁵ The promulgation of UBIT presented an alternative to the previous quantal approach:³⁶ tax-exempt organizations would be allowed to continue operating unrelated trades or businesses without losing their tax-exempt status, but they would now be taxed on the income generated from such

29. Kaplan, *supra* note 4, at 1433.

30. *Id.* Support for this position came from the 1924 case *Trinidad v. Sagrada Orden de Predicadores*, in which the Supreme Court shaped the “destination of income test,” under which the eventual use of unrelated income—its destination—and not the income’s unrelated source determined an activity’s tax status. *See* *Trinidad v. Sagrada Orden De Predicadores De La Provincia Del Santisimo Rosario De Filipinas*, 263 U.S. 578, 581–82 (1924). *See also*, Kaplan, *supra* note 4, at 1433.

31. *C.F. Mueller Co. v. Comm’r*, 190 F.2d 120, 121, 123 (3d Cir. 1951). Although this case was decided after the enactment of the unrelated business income tax in 1950, that tax was not applied because the tax year in dispute was 1947. *Id.* at 120.

32. John M. Strefeler & Leslie T. Miller, *Exempt Organizations: A Study of Their Nature and the Applicability of the Unrelated Business Income Tax*, 12 AKRON TAX J. 223, 247 (1996) (citing H.R. REP. NO. 81-2319, at 36–37 (1950)).

33. Kaplan, *supra* note 4, at 1432 & n.8 (explaining that *direct* involvement in the operation of businesses with no educational purpose was the natural progression from universities’ original *indirect* participation in unrelated business enterprises through ownership of corporate stock).

34. *Id.* at 1433 (“In an obvious reference to New York University’s ownership of the macaroni company, Representative Dingell expressed the concern of many Congressmen when he said that ‘[e]ventually all the noodles produced in this country will be produced by corporations held or created by universities . . . and there will be no revenue to the Federal Treasury from this industry.’”) (citing *Revenue Revision of 1950: Hearings Before the H. Comm. on Ways and Means*, 81st Cong. 580 (1950) (remarks of Rep. Dingell)).

35. *See id.* at 1434–35. *See also* Treas. Reg. § 1.513-1(b) (as amended in 1983) (stating that the objective in adopting the UBIT was to eliminate a source of unfair competition). UBIT is presently codified in I.R.C. §§ 511–13.

36. Strefeler & Miller, *supra* note 32, at 247.

businesses.³⁷

An “unrelated trade or business” is defined in I.R.C. § 513(a) as “any trade or business the conduct of which is not substantially related . . . to” the performance of an organization’s tax-exempt purpose.³⁸ Thus, the business activities of a tax-exempt organization will be subjected to UBIT if, and only if: “(1) It is income from trade or business; (2) such trade or business is regularly carried on by the organization; and (3) the conduct of such trade or business is not substantially related . . . to the organization’s performance of its exempt functions.”³⁹

UBIT applies to any organization that is exempt from taxation by reason of I.R.C. § 501(a).⁴⁰ Consequently, “UBIT is imposed on virtually all tax-exempt organizations.”⁴¹ Even though state colleges and universities are exempt from federal taxation as instrumentalities of the government, and not as § 501(c)(3) educational organizations, they are specifically subjected to UBIT under § 511(a)(2)(B) of the Internal Revenue Code.⁴²

1. Trade or Business

UBIT requires that the source of the income is a “trade or business.” The term “trade or business” is defined in § 513(c) as “any activity which *is carried on for* the production of income from the sale of goods or the performance of services.”⁴³ An activity will not lose its identity as a trade or business, “merely because it is carried on within a larger aggregate of similar activities or within a larger complex of other endeavors which may, or may not, be related to the exempt purposes of the organization.”⁴⁴

37. Kaplan, *supra* note 4, at 1435. Even with UBIT, § 501(c)(3) still loomed in the distance; too much unrelated business income could still revoke an organization’s § 501(c)(3) tax exemption.

38. I.R.C. § 513(a) (2000).

39. Treas. Reg. § 1.513-1(a). The Supreme Court has explicitly endorsed this approach. *See United States v. Am. Coll. of Physicians*, 475 U.S. 834, 838–39 (1986).

40. I.R.C. § 512(a)(2)(A). Section 501(a) provides exemption from taxation for all of the organizations listed in § 501(c)(1)–(28).

41. 9 MERTENS LAW OF FED. INCOME TAX’N § 34:258 (2007). Notable exceptions to UBIT include “public elementary and secondary schools, certain charitable trusts, certain title holding companies, and corporations organized under an act of Congress which are instrumentalities of the United States.” *Id.*

42. I.R.C. § 511(a)(2)(B).

43. *Id.* § 513(c) (emphasis added). Although the test is phrased in terms of “income” rather than profit, the Code and corresponding regulations seem to use the terms interchangeably. Kaplan, *supra* note 4, at 1438 n.42. Moreover, the fact that § 513 and its accompanying regulation, Treas. Reg. § 1.513-1, provide a definition for the term “trade or business” is significant given that the term appears in “over 50 sections and 800 subsections and in hundreds of places in proposed and final income tax regulations” without a definition for general application or a meaning for all purposes. *See Comm’r v. Groetzinger*, 480 U.S. 23, 27 (1987).

44. I.R.C. § 513(c).

The congressional emphasis on unfair competition as the underlying rationale for UBIT was largely ignored by courts in their efforts to construct a test to determine what was a “trade or business.”⁴⁵ Instead, the courts developed their own “commerciality” and “profit motive” rationales, the subsequent application of which produced conflicting results.⁴⁶ In 1978, the IRS took a position on the issue, stating that “the profit motive rather than the extent of activity is relevant in determining whether an activity is a trade or business.”⁴⁷

In 1986, the Supreme Court attempted to resolve the emerging conflict in *United States v. American Bar Endowment* by expressly rejecting the commerciality test and reemphasizing the original congressional rationale of unfair competition.⁴⁸ The Court, however, neither expressly adopted nor rejected the profit motive test.⁴⁹ Nevertheless, in the over twenty years that have passed since *American Bar Endowment*, the Supreme Court has not further addressed the legitimacy of the profit motive test, and at present, more than half of the circuits have explicitly adopted the profit motive test.⁵⁰

45. Strefeler & Miller, *supra* note 32, at 259. In fact, the Fifth Circuit summarily dismissed the unfair competition rationale stating, “the statute and regulations establish a conclusive presumption that the conduct of a trade or business by an exempt organization [not substantially related to exempt functions] constitutes unfair competition against taxable entities engaged in similar activities. Further inquiry into the competition question therefore becomes unnecessary.” *La. Credit Union League v. United States*, 693 F.2d 525, 542 (5th Cir. 1982).

46. See Strefeler & Miller, *supra* note 32, at 260–63. Under the “commerciality doctrine” a tax-exempt organization was deemed operated in a “commercial” manner, and therefore engaged in a trade or business, if there was a for-profit “counterpart” that engaged in the same activity. *Id.* at 260. Alternatively, courts applying the “profit motive test” looked for the presence of large profits as a sign that the pursuit of profit was the primary purpose of undertaking the activity. *Id.* at 262. The two tests conflicted in situations such as the one arising in *Disabled American Veterans v. United States* where the court held that under the commerciality doctrine, UBIT should not be applied because the presence of a large profit proved that the activity was dissimilar from its “counterparts” who made significantly less. *Id.* at 261–62 (citing *Disabled Am. Veterans v. United States*, 650 F.2d 1178 (Ct. Cl. 1981)). Under the profit motive test, however, the case would most likely have come out differently as the presence of a large profit would have been indicative of a nonexempt primary purpose. *Id.*

47. I.R.S. Gen. Couns. Mem. 37,513 (Apr. 25, 1978).

48. *United States v. Am. Bar Endowment*, 477 U.S. 105, 110–16 (1986).

49. *Id.* at 110 n.1. The issue of the profit-motive test’s legitimacy was not directly addressed, and the only comment on it came in a footnote stating that “several Courts of Appeals have adopted the ‘profit motive’ test to determine whether an activity constitutes a trade or business for purposes of the unrelated business income tax.” *Id.*

50. See, e.g., *American Academy of Family Physicians v. United States*, 91 F.3d 1155, 1157–58 (8th Cir. 1996); *American Postal Workers Union v. United States*, 925 F.2d 480, 483–84 (D.C. Cir. 1991); *Fraternal Order of Police, Illinois State Troopers, Lodge No. 41 v. Comm’r*, 833 F.2d 717, 722 (7th Cir. 1987); *Professional Insurance Agents of Michigan v. Comm’r*, 726 F.2d 1097, 1102 (6th Cir. 1984); *Carolinas Farm & Power Equipment Dealers Association v. United States*, 699 F.2d 167, 170 (4th Cir. 1983); *Louisiana Credit Union League v. United States*, 693 F.2d 525, 532 (5th Cir. 1982). Further, the Supreme Court has held that the profit motive test is the correct test to define “trade or

Under current law, a business activity constitutes a trade or business for the purpose of § 513(a) when the exempt organization cannot negate the presence of primary for-profit *motive*. When an activity amounts to trade or business, then “no part of such trade or business shall be excluded from such classification merely because it does not result in profit.”⁵¹ If a profit motive is present in an activity, the lack of profit is immaterial for two reasons: first, an enterprise might presently operate at a loss, but later become profitable.⁵² In such a case, focusing on the motive for engaging in an enterprise allows for the consistent application of tax law. Second, Treasury Regulation § 1.512(a)-1(a) permits a tax-exempt organization to offset profits from one unrelated business with losses from another unrelated business.⁵³ Thus, losses can actually be of value, and for that reason, the absence of profit—that is, the presence of losses—should not be determinative regarding what qualifies as a trade or business.⁵⁴ Accordingly, what constitutes a trade or business turns on the presence of a profit motive and not on the presence of profit itself.⁵⁵ Inquiry into whether or not a business activity constitutes a trade or business is a factual determination and “requires an examination of the facts in each case.”⁵⁶

2. Regularly Carried On

Next, the trade or business conducted by an exempt organization must be “regularly carried on.” Treasury Regulations state that the key factors in this determination are “the frequency and continuity” with which the activities are conducted and “the manner in which they are pursued.”⁵⁷ Specifically, an exempt organization’s trade or business will be deemed “regularly carried on” for the purposes of UBIT if it is conducted with the same frequency and continuity and is pursued in the same manner as

business” within the context of I.R.C. § 162. *Comm’r v. Groetzinger*, 480 U.S. 23, 35 (1987) (holding that “to be engaged in a trade or business, . . . the taxpayer’s primary purpose for engaging in the activity must be for income or profit”). The Treasury Regulations also state “for purposes of section 513 the term trade or business has the same meaning it has in section 162.” *Treas. Reg. § 1.513-1(b)* (as amended in 1983). Thus, use of the profit motive test in § 513 is justified.

51. *Treas. Reg. § 1.513-1(b)*.

52. Kaplan, *supra* note 4, at 1438.

53. *Treas. Reg. § 1.512(a)-1(a)* (as amended in 2002). “Thus, a college with profits from its ‘unrelated’ noodlemaking business will want to determine whether its money-losing athletics program is also an unrelated trade or business, since those losses can then be offset against the noodle profits in calculating the college’s unrelated business income tax.” Kaplan, *supra* note 4, at 1438.

54. *Treas. Reg. § 1.512(a)-1(a)*.

55. I.R.C. § 513(c) (2000).

56. *Comm’r v. Groetzinger*, 480 U.S. 23, 36 (1987) (quoting *Higgins v. Comm’r*, 312 U.S. 212, 217 (1941)).

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

comparable business activities of a for-profit business.⁵⁸ Accordingly, when a for-profit business typically conducts an activity year-round, the operation of the same activity by a tax-exempt organization for only a few weeks, or days, will not be considered “regularly carried on.”⁵⁹ If, however, the exempt organization were to operate the same activity only once a week, but over the entire year, then it would be considered “regularly carried on.”⁶⁰ Significantly, when the income-producing activity in question is usually operated by a for-profit business on a seasonal basis, then an exempt organization that operates the same activity for a significant portion of the season will be considered to have satisfied the “regularly carried on” requirement.⁶¹

3. Substantially Related To

Finally, and most importantly for the purposes of this Note, the imposition of UBIT requires that the regularly carried on trade or business be unrelated to an organization’s tax-exempt purpose. Section 513(a) defines the term “unrelated trade or business” as “any trade or business the conduct of which is not substantially related . . . to the exercise or performance” of the exempt purpose that provides the basis for an organization’s tax exemption under § 501(c)(3).⁶² The Treasury Regulations provide that in order to be substantially related to an exempt purpose, a trade or business must have a substantial causal relationship with the achievement of its organization’s tax-exempt purpose.⁶³ In turn, a substantial causal relationship exists when an organization’s trade or business “contribute[s] importantly to the accomplishment” of its tax-exempt purpose.⁶⁴ Additionally, the business activities *themselves* must contribute importantly to the accomplishment of the exempt purpose.⁶⁵ Thus, simply providing funds for a tax-exempt organization does not

58. *Id.*

59. *Id.* § 1.513-1(c)(2)(i).

60. *Id.* (“Thus, the operation of a commercial parking lot on Saturday of each week would be the regular conduct of trade or business.”).

61. *Id.* Consider the following example from the Treasury Regulations: “the operation of a track for horse racing for several weeks of a year would be considered the regular conduct of trade or business because it is usual to carry on such trade or business only during a particular season.” *Id.*

62. I.R.C. § 513(a) (2000).

63. Treas. Reg. § 1.513-1(d)(2).

64. *Id.* Before 1968 the test for substantial relationship required that the *principal purpose* of the trade or business in question was to further an exempt purpose. the regulations adopted by the IRS in 1967, however, reformulated the test so that it only required a trade or business to “contribute importantly” to the accomplishment of an exempt purpose. Kaplan, *supra* note 4, at 1450–51. Kaplan has noted that “[w]hile this new test may conform more closely to congressional intent, it is even more difficult to apply.” *Id.* at 1452.

65. *See* Rev. Rule 72-431, 1972-2 C.B. 281.

constitute an important contribution.⁶⁶

In 1986, the Supreme Court, in *United States v. American College of Physicians*, interpreted the use of “conduct” in § 513(a) to focus the inquiry on “the manner in which the tax-exempt organization operates its business” when determining the importance of a contribution.⁶⁷ In addition, the size and extent of a trade or business’s activity must be considered *vis-à-vis* the nature and extent of the exempt function that it ostensibly serves.⁶⁸ If an income-producing trade or business is operated on a larger scale than is reasonably necessary to support the exempt function of the organization, then it will fail the substantial relation requirement.⁶⁹ Finally, the facts and circumstances of a specific case will determine whether an income-producing trade or business contributes importantly to the organization’s tax-exempt purpose.⁷⁰

Even when the business activities of an exempt organization meet the statutory definition of an “unrelated trade or business,” the organization can still avoid the imposition of UBIT if it fits within one of the three exceptions articulated in § 513(a)(1)–(3):

- (1) Any trade or business in which substantially all the work in carrying on such trade or business is performed for the organization without compensation; or
- (2) Any trade or business carried on by an organization described in section 501(c)(3) or by a governmental college or university described in section 511(a)(2)(B), primarily for the convenience of its members, students, [etc.]; or . . .
- (3) Any trade or business which consists of selling merchandise, substantially all of which has been received by the organization as gifts or contributions.⁷¹

When an exempt organization’s business activities satisfy the statutory requirements, and thereby constitute an “unrelated trade or business,” the

66. Treas. Reg. § 1.513-1(d)(1).

67. *United States v. Am. Coll. of Physicians*, 475 U.S. 834, 848–49 (1986) (holding that the manner in which a trade or business is conducted should determine if it contributes importantly to a tax-exempt purpose).

68. Treas. Reg. § 1.513-1(d)(3).

69. J. Patrick Plunkett & Heidi Neff Christianson, *The Quest for Cash: Exempt Organizations, Joint Ventures, Taxable Subsidiaries, and Unrelated Business Income*, 31 WM. MITCHELL L. REV. 1, 8 (2004).

70. Treas. Reg. § 1.513-1(d)(2).

71. *Id.* § 1.513-1(e)(1)–(3). The third exception was primarily intended for the operation of “so-called thrift shops,” and as such is outside the scope of this Note. See Treas. Reg. § 1.513-1(e). The first two exceptions, however, are significant in the discussion of taxation and intercollegiate athletics. See *infra* text accompanying notes 274–80.

organization is compelled to pay taxes on the income produced by that trade or business at the regular corporate tax rate.⁷² The income relevant for the computation of UBIT is the gross income derived from the unrelated trade or business in question, minus any permissible deductions that are directly connected with the carrying on of that business, and adjusted according to any applicable modifications listed in § 512(b).⁷³

C. THE CONCLUSIVE PRESUMPTION

The legislative history surrounding the promulgation of UBIT in 1950 clearly demonstrates a congressional intent to insulate college sports from the imposition of UBIT. During congressional hearings regarding UBIT, information regarding universities' involvement in myriad business activities—from the typical bookstores and university presses to the unusual citrus groves and haberdashers—was presented before the legislative committees.⁷⁴ Yet, neither the House of Representatives nor Senate hearings on UBIT contain a single reference to intercollegiate athletics.⁷⁵ Nevertheless, without investigation, and lacking any supporting testimony, the report from the House Committee on Ways and Means concluded that “athletic activities are substantially related to [the university’s] educational program.”⁷⁶ Similarly, the Senate Finance Committee heard no testimony on the issue of college athletics but still decisively stated in their report that “[a]thletic activities of schools are substantially related to their educational functions.”⁷⁷ The House report further asserted that income from “admissions to football games would not be deemed to be income from an unrelated business,” and the Senate report went on to declare that “a university would not be taxable on income derived from a basketball tournament sponsored by it.”⁷⁸ Thus, with two remarkably brief statements, Congress established a conclusive presumption that intercollegiate athletics further the educational purposes of a university. This presumption has universally protected intercollegiate athletic departments from taxation for the past fifty-seven years.⁷⁹

In 1977, the IRS attempted for the first time to limit the expansive

72. I.R.C. § 511(a)(1) (2000).

73. *Id.* § 512(a)(1).

74. Kaplan, *supra* note 4, at 1432 & n.8, 1436.

75. *Id.* at 1436.

76. *Id.* (citing H.R. REP. NO. 81-2319, at 109 (1950)).

77. Erik M. Jensen, *Taxation, the Student Athlete, and the Professionalization of College Athletics*, 1987 UTAH L. REV. 35, 50–51 (1987) (citing S. REP. NO. 2375, at 505 (1950)).

78. H.R. REP. NO. 81-2319, at 109 (1950); S. REP. NO. 81-2375, at 505 (1950), *reprinted in* 1950 U.S.C.C.A.N. 3053, 3082.

79. *See* Jensen, *supra* note 77, at 51.

scope of Congress's presumption by taxing the revenue athletic departments generated from broadcasting intercollegiate athletic events.⁸⁰ Notably, the IRS did not challenge the validity of the presumption itself; instead, it claimed that the proceeds from broadcast revenues were not comparable to the explicitly tax-exempt proceeds from ticket sales, and as such, were subject to UBIT.⁸¹ After considerable public outrage at the proposed taxation of broadcast revenues, the IRS reversed its position and stated that there was a "logical difficulty [in] distinguishing between large paid admissions and large home audiences."⁸² The IRS admitted that "Congress has apparently concluded that exhibiting the game is related to educational purposes, and we cannot say that merely exhibiting them to a larger audience renders that activity unrelated."⁸³

It was not until the 1990s that the IRS made a renewed attempt to place some limits on the breadth of Congress's presumption.⁸⁴ The increasingly commercial nature of intercollegiate athletics, and the attendant explosion in revenue, caused the IRS to revisit the potential application of UBIT.⁸⁵ In 1990, the IRS claimed, in *National Collegiate Athletic Association v. Commissioner*, that the National Collegiate Athletic Association's ("NCAA") sale of advertising space in programs for the "Final Four" basketball games constituted taxable unrelated business income.⁸⁶ The Tax Court agreed with the IRS, but the Tenth Circuit subsequently reversed the Tax Court's decision, holding that the NCAA failed to satisfy the "regularly carried on" element of UBIT.⁸⁷ The IRS stood by its original position that the NCAA's sale of advertisement space was an unrelated and taxable commercial activity and filed an action on decision in which it refused to acquiesce to the Tenth Circuit's decision.⁸⁸ The action on decision further declared that the relevant time span with

80. Kaplan, *supra* note 4, at 1436–37.

81. *Id.*

82. I.R.S. Tech. Adv. Mem. 78-51-004 (Aug. 21, 1978). *See also* Jensen, *supra* note 77, at 51.

83. I.R.S. Tech. Adv. Mem. 78-51-004 (Aug. 21, 1978).

84. Elizabeth M. Roberts, *Presented to You by . . . : Corporate Sponsorship and the Unrelated Business Income Tax*, 17 VA. TAX REV. 399, 403 (1997).

85. *Id.*

86. NCAA v. Comm'r, 92 T.C. 456, 465–66 (1989).

87. NCAA v. Comm'r, 914 F.2d 1417, 1425–26 (10th Cir. 1990).

88. NCAA v. Comm'r, 914 F.2d 1417 (10th Cir. 1990), *action on dec.*, 1991-015 (July 3, 1991).

"An action on decision (AOD) conveys the recommendation of the Office of Chief Counsel concerning whether the Service will follow a significant adverse opinion." INTERNAL REVENUE SERVICE, INTERNAL REVENUE MANUAL 36.3.1.1, available at <http://www.irs.gov/irm/part36/ch03s01.html#d0e4737> (last visited Nov. 10, 2007). Although AODs are published in the Internal Revenue Bulletin they cannot be cited as precedent. Rather, the purpose of an AOD is to alert IRS personnel to Chief Counsel's current litigating position thereby enhancing IRS consistency with respect to future litigation or dispute resolution. *Id.*

regard to the “regularly carried on” element should include time spent soliciting and preparing the advertisements for publishing.⁸⁹

Although the IRS has made some effort to limit the scope of Congress’s presumption, it has never challenged the fundamental factual validity of the presumption. As a result, the issue of the presumption’s legitimacy has been overlooked, and a body of case law clearly supporting the tax-exempt status of university athletic departments has developed.

III. THE ROLE OF ATHLETICS IN HIGHER EDUCATION

A. THE RISE OF INTERCOLLEGIATE ATHLETICS IN AMERICA

Intercollegiate sporting events originated with the English universities of Oxford and Cambridge, which inaugurated intercollegiate athletics with a cricket match in 1827.⁹⁰ Only two years later, the first Oxford-Cambridge crew race followed.⁹¹ English intercollegiate athletics were the natural outgrowth of the traditional individual sporting events that had occurred on English campuses as early as the 1500s.⁹² This tradition involved participation in sports that reflected students’ aristocratic backgrounds and included favorites such as hunting, equestrian sports, tennis, and boating.⁹³

The origin of American intercollegiate athletics differed greatly from its aristocratic English counterpart; the growth of American college sports corresponded with the industrial boom and in many ways reflects the “capitalistic rush for wealth, power, recognition, and influence” of that time.⁹⁴

American intercollegiate athletics began on August 3, 1852, when the crew teams of Harvard and Yale raced their sculls against each other on Lake Winnepesaukee in New Hampshire.⁹⁵ Despite both crew teams’ enthusiastic naïveté in imagining the race as merely a “jolly lark,” the birth of college sports was unmistakably fueled by commercialism.⁹⁶ The driving force behind the contest was an enterprising railroad magnate named James Elkins, who contrived the race as a means of increasing rail traffic on his unprofitable Boston-Montreal line by hosting the event at one

89. *NCAA v. Comm’r*, 914 F.2d 1417 (10th Cir. 1990), *action on dec.*, 1991-015 (July 3, 1991).

90. RONALD A. SMITH, *SPORTS AND FREEDOM: THE RISE OF BIG-TIME COLLEGE ATHLETICS* 6 (1988).

91. *Id.* at 6–7.

92. *Id.* at 4–6.

93. *Id.*

94. *See id.* at 4.

95. *Id.* at 3.

96. *Id.* at 28.

of the stops on that line.⁹⁷ Believing he stood to make a handsome profit off of the Harvard-Yale match, Elkins approached a member of the Yale Boat Club and presented him with a proposition: “If you will get up a regatta on the Lake between Yale and Harvard, I will pay all the bills.”⁹⁸ While Elkin never made the fortune for which he had hoped, he successfully launched what has become a \$7.8 billion industry.⁹⁹

In the beginning, university administrators considered intercollegiate sports to be outside the school’s function of higher education.¹⁰⁰ Accordingly, the organization and operation of all intercollegiate athletic activity was, by default, exclusively within the purview of students,¹⁰¹ a system under which intercollegiate athletics thrived.¹⁰² Students’ tendencies to ignore academic concerns while organizing intercollegiate athletics, however, soon began to worry faculty and administrators.¹⁰³ A tension quickly developed between the students’ affinity for athletics as a diversion from their studies and administrations’ concern that athletics jeopardized educational integrity by distracting students from their academic pursuits.¹⁰⁴ Thus, even as intercollegiate athletics rapidly expanded, university faculty and administrators were already questioning its place on campus.¹⁰⁵

Following crew, the next student-run sport to appear on campus was baseball.¹⁰⁶ The watershed moment in intercollegiate athletic history, however, was the birth of intercollegiate football on November 6, 1869, when Rutgers played a home game against Princeton.¹⁰⁷ Football originated as a hazing ritual known for broken bones and “violence and brutality.”¹⁰⁸ Although loved by many students, its violent nature led to the

97. *Id.* at 3–4.

98. *Id.* at 3.

99. Brand Letter, *supra* note 2.

100. Joanna Davenport, *From Crew to Commercialism—the Paradox of Sport in Higher Education*, in *SPORT AND HIGHER EDUCATION* 5, 6–7 (Donald Chu et al. eds., 1985).

101. Davenport, *supra* note 100, at 6.

102. SMITH, *supra* note 90, at 119.

103. *Id.* at 120.

104. *Id.* at 118–20.

105. *Id.* at 118–24. In particular, faculty and administrators of the time expressed misgivings about intercollegiate sport because they felt that sports and academics served cross purposes in that sports diverted students’ time and attention away from their educational pursuits. *Id.*

106. *Id.* at 219 (detailing that the first intercollegiate baseball game was played between Amherst and Williams on July 1, 1859). For a detailed discussion of the introduction and early development of intercollegiate baseball see *id.* 52–66.

107. Davenport, *supra* note 100, at 7.

108. SMITH, *supra* note 90, at 67–69.

game's abolition on many campuses.¹⁰⁹ The students, however, were in control of intercollegiate athletics at the time, and thus, despite administrators' protests, football was revived and soon became a mainstay in intercollegiate athletics.¹¹⁰ The lack of an administrative presence resulted in the creation of many different sets of rules for the game, yet each shared the unifying characteristics of "bleeding hands, scarred limbs, and clogged breath."¹¹¹ In the 1880s the introduction of strategic formations and "mass plays" only increased the brutality of the game.¹¹² The dangers of participating had become serious; research conducted by a blue-ribbon committee in 1894 revealed that at least 20 percent of ex-players had suffered some permanent injury.¹¹³

At this point, many administrators again sought to ban football on campuses by declaring it hostile to the educational mission of the institutions the teams purported to represent; those not advocating abolition demanded reform.¹¹⁴ All the same, administrators continued to be hamstrung by the fact that intercollegiate athletics was a student-run enterprise. By 1905, football had reached a crisis point: in that year alone, eighteen players had been killed and 143 seriously injured during participation in football games.¹¹⁵ President Roosevelt summoned representatives from Harvard, Yale, and Princeton and charged them with the task of reforming football.¹¹⁶ In response, thirty institutional representatives gathered in New York and formed the Intercollegiate Athletic Association of the United States—its name would change to the National Collegiate Athletic Association in 1910.¹¹⁷ The NCAA stated that its founding purpose was the national supervision of intercollegiate

109. *Id.* "The faculty banned football for periods at a number of schools, including Brown, Williams, Yale, and West Point," while "[a]t Harvard the annual 'Bloody Monday' contest on the first day of each fall term became such a ferocious meeting of the college new-comers and the cocky sophomores that the faculty banned the annual battle in 1860." *Id.* at 68–69.

110. *Id.* at 69.

111. *Id.* Yale football players developed a reputation for a particularly rough style of play by striking fallen players with their knees and hitting others with a closed fist, the latter of which being generally permissible under most versions of the rules, provided that it was limited to three or fewer times. *Id.* at 89.

112. *Id.* at 88–94. The introduction of the "Flying Wedge" by Harvard in 1892 was a sensation that spurred even greater violence. The tactic was developed by a Boston businessman named Lorin F. Deland, who was neither a Harvard graduate, nor a fan of football, but rather a student of military history who adapted Napoleon's first principal on the concentration of force into a deadly football formation. *Id.* at 90–92.

113. *Id.* at 93.

114. *Id.* at 131.

115. Davenport, *supra* note 100, at 7.

116. *Id.*

117. *Id.* at 8.

athletics “in order that the athletic activities in the colleges and universities of the United States may be maintained on an ethical plane in keeping with the dignity and high purpose of education.”¹¹⁸

The creation of the NCAA signaled university administrations’ newfound desire to supervise and control the activities they had once found threatening.¹¹⁹ To effectuate their control, universities established departments of physical education and integrated intercollegiate sports into these departments.¹²⁰ Yet, the integration of intercollegiate athletics into physical education departments created a new set of problems: collegiate athletics now received university funding, which facilitated commercialization on a scale previously unimaginable.¹²¹ By 1929, the Carnegie Commission released a report entitled *American College Athletics* in which it concluded:

In the United States the composite institution called a university is doubtless still an intellectual agency. But it is also a social, a commercial, and an athletic agency, and these activities have in recent years appreciably overshadowed the intellectual life for which the university is assumed to exist The question is not so much whether athletics in their present form should be fostered by the university, but how fully can a university that fosters professional athletics discharge its primary function.¹²²

The Carnegie Commission’s report generated discussion but resulted in no significant progress or reform.¹²³

Naturally, the integration of athletic programs into physical education departments was not solely responsible for the increasing influence of commerce on intercollegiate athletics.¹²⁴ Another contributing factor was

118. *Id.*

119. See Allen Guttman, *The Anomaly of Intercollegiate Athletics*, in *RETHINKING COLLEGE ATHLETICS*, *supra* note 1, at 17, 18–19.

120. *Id.* at 19.

121. Davenport, *supra* note 100, at 9.

122. Guttman, *supra* note 119, at 20.

123. JAMES J. DUDERSTADT, *INTERCOLLEGIATE ATHLETICS AND THE AMERICAN UNIVERSITY: A UNIVERSITY PRESIDENT’S PERSPECTIVE* 72 (2000). Almost ten years after the Carnegie Commission report, in 1938, the president of the University of Chicago, Robert M. Hutchins, commented on what he felt was the worsening situation of intercollegiate athletics stating that “a college which is interested in producing professional athletes is not an educational institution.” Guttman, *supra* note 119, at 20–21. The next year, Hutchins withdrew the University of Chicago football team from intercollegiate competition. *Id.* at 21.

124. In fact, in the late 1950s, a sign that intercollegiate athletics were becoming increasingly commercial was the movement to separate athletic programs from physical education departments; coaches no longer supported the farce that they were an educational presence on campus and realized that they could make much more money separate from educational departments. Davenport, *supra* note

the development of commercial radio in the early 1920s, which rocketed intercollegiate football to national popularity.¹²⁵ It was television, however, that would truly commercialize intercollegiate athletics.

At first, neither the NCAA nor the athletic programs wanted football games to be televised because they believed it would hurt ticket sales for the games.¹²⁶ Broadcasting intercollegiate sporting events, however, presented a very lucrative opportunity to both the athletic departments and networks, as the majority of production costs were already “borne by the institutions themselves or subsidized by ticket sales.”¹²⁷ Moreover, television networks quickly realized that they could develop massive nationwide audiences by marketing college sports in the exact same way as other commercial activities: generating hype, airing sensationalistic announcers, and staging increasingly spectacular events.¹²⁸ As the commercial possibilities became increasingly apparent to the athletic programs, they reversed their original position and televising games became routine.¹²⁹ By the 1960s and 1970s, television had transformed what had started as a spectator event into mass entertainment on a national scale.¹³⁰

The commercial potential for televising intercollegiate athletic events hit the big-time in 1989 when Columbia Broadcasting System (“CBS”) paid \$1 billion in exchange for exclusive broadcast rights to the NCAA basketball tournament.¹³¹ The CBS-NCAA broadcasting contract not only launched the commercial value of intercollegiate athletics to new heights, but also furnished the NCAA with significant revenue. This revenue in turn granted the organization considerable influence over the governance of intercollegiate athletics.¹³² Not wanting to miss out on the gold rush, all of the major athletic departments quickly entered broadcasting contracts for their football and basketball programs.¹³³ This created a surplus of programmable entertainment, which, coupled with the advent of cable and

100, at 12.

125. DUDERSTADT, *supra* note 123, at 71–72. The first coast-to-coast broadcast was the 1927 Rose Bowl, in which the University of Alabama played against Stanford University. The result was a tie.

126. Davenport, *supra* note 100, at 12.

127. DUDERSTADT, *supra* note 123, at 73.

128. *Id.*

129. Davenport, *supra* note 100, at 12.

130. DUDERSTADT, *supra* note 123, at 73.

131. *Id.* at 75.

132. *Id.* The NCAA’s accumulation of power through its contract with CBS follows “the golden rule of college sports: whoever gets the gold makes the rules.” *Id.*

133. *See id.*

the Entertainment and Sports Programming Network (“ESPN”), increased the influence of commercial pressures. Intercollegiate football and basketball games were soon scheduled on all days of the week and during all times of the day and night to satiate the ravenous consumer demand for athletic entertainment.¹³⁴

B. CONTEMPORARY INTERCOLLEGIATE ATHLETICS—SPORTS, ACADEMICS AND COMMERCE

In 1989, the Knight Commission on Intercollegiate Athletics, a progressive organization advocating reform, commissioned its first report to investigate the state of college sports following the proliferation of widely publicized intercollegiate athletic scandals during the 1980s.¹³⁵ Perhaps unsurprisingly, the report portrayed intercollegiate athletics in a negative light; it did, however, claim that reform was possible.¹³⁶ Ten years later, in 2001, the Knight Commission released a follow-up report to assess the current state of intercollegiate athletics. This report concluded:

After digesting the extensive testimony offered over some six months, the Commission is forced to reiterate its earlier conclusion that ‘at their worst, big-time college athletics appear to have lost their bearings.’ Athletics continue to ‘threaten to overwhelm the universities in whose name they were established.’ Indeed, we must report that the threat has grown rather than diminished. More sweeping measures are imperative to halt the erosion of traditional educational value in college sports.¹³⁷

The Knight Commission was one of the first, but certainly not the last, to expose the tension between the educational integrity of the university and the commercial success of the athletic department that is created when the often separate worlds of sports, academics, and commerce are combined. An examination of athletic departments’ commercial and academic environments will reveal the complicated interplay between these three driving forces of college sports.

1. The Commercial Environment

A focus on winning was apparent as early as the crew matches

134. *See id.*

135. KNIGHT FOUND. COMM’N ON INTERCOLLEGIATE ATHLETICS, A CALL TO ACTION: RECONNECTING COLLEGE SPORTS AND HIGHER EDUCATION 8–9 (2001) [hereinafter A CALL TO ACTION] (“It was small wonder that eight out of 10 Americans questioned in a Louis Harris poll in 1989 agreed that intercollegiate sports had spun out of control.”).

136. *See* KNIGHT FOUND. COMM’N ON INTERCOLLEGIATE ATHLETICS, KEEPING FAITH WITH THE STUDENT ATHLETE: A NEW MODEL FOR INTERCOLLEGIATE ATHLETICS 17, 21–23 (1991).

137. A CALL TO ACTION, *supra* note 135, at 11.

between Harvard and Yale.¹³⁸ Even during the formative years of football, programs hired professional coaches, recruited students for their athletic prowess, and turned an occasional blind eye to educational misconduct in order to increase their chances of winning.¹³⁹ The contemporary pursuit of athletic success, however, has become intertwined with the pursuit of revenue. An examination of the contemporary commercial environment in intercollegiate athletics reveals the extent to which commercial factors influence the decisions of athletic departments.

To start, most universities interact with athletic departments at an arm's length, labeling them as "auxiliary activities" and making them responsible for funding themselves.¹⁴⁰ While a decentralized structure is typical of the modern university, the separate bodies within an institution usually possess control mechanisms—that is, checks and balances—over one another.¹⁴¹ Most universities, however, allow their athletic departments to operate independently of these controls, instead making the university president their sole constraint.¹⁴² Yet, the day-to-day authority of the president is typically delegated to the head of the athletic department: the athletic director.¹⁴³ Consequently, most athletic departments are free to conduct themselves in whatever manner they see fit. This independent structure has often fostered the development of insulated athletic cultures that are separate from, and sometimes expressly at odds with, the academic core of the university.¹⁴⁴

Winning has become synonymous with generating revenue within the present commercial environment of intercollegiate athletics. In 2002, CBS paid \$6.2 billion for the exclusive rights to the NCAA men's basketball tournament until 2013.¹⁴⁵ The NCAA distributes the money from this deal to the athletic programs that participate in the tournament at \$780,000 per

138. See SMITH, *supra* note 90, at 34–37.

139. See *id.* at 71, 147–64 (explaining that one of the athletes who took part in the 1869 Princeton–Rutgers football game had unexcused absences disappear, and documenting "the rise of the professional coach"). See also WILLIAM G. BOWEN & SARAH A. LEVIN, RECLAIMING THE GAME: COLLEGE SPORTS AND EDUCATIONAL VALUES 43 (2003) ("Recruitment of college athletes is hardly new . . . the period from 1895 to 1905 saw student-players become player-students.").

140. DUDERSTADT, *supra* note 123, at 87. In the 1970s the NCAA adopted a policy that a university "strives to finance its athletics programs insofar as possible from revenues generated by the program itself." Myles Brand, President, NCAA, State of the Association Address at the NCAA 99th Annual Convention (Jan. 8, 2005), available at http://www2.ncaa.org/portal/media_and_events/press_room/2005/january/20050108_soa_speech.html [hereinafter State of the Association Address].

141. DUDERSTADT, *supra* note 123, at 102.

142. *Id.*

143. *Id.* at 110.

144. *Id.* at 102.

145. A CALL TO ACTION, *supra* note 135, at 19.

win.¹⁴⁶ The intercollegiate football equivalent of the NCAA tournament are the four—and as of 2006, five—post-season Bowl Championship Series (“BCS”) bowl games.¹⁴⁷ The American Broadcasting Company (“ABC”) pays \$73.5 million annually for the rights to broadcast the BCS-sponsored Sugar, Orange, and Fiesta Bowls.¹⁴⁸ In addition, ABC pays another \$30 million for rights to the fourth BCS-sponsored bowl, the Rose Bowl.¹⁴⁹ Programs that participate in one of the four BCS bowl games receive payouts between \$14 million and \$17 million.¹⁵⁰

Of course, only the most successful programs make it to the NCAA tournament or a BCS bowl, prompting many athletic departments to go to great lengths to secure a competitive edge. In late 2006, the University of Alabama lured Nick Saban away from his position as head coach of the professional football team the Miami Dolphins by offering him \$4 million a year and a bonus of \$800,000 if he took the team to a bowl game.¹⁵¹ Reports from the same year indicate that more than thirty-five college coaches are paid over \$1 million by their universities.¹⁵² Several coaches

146. *Id.*

147. The first post-season bowl game was the Rose Bowl in 1902. Post-season play in intercollegiate football, however, would not be organized until 1994 when the NCAA, four Division I-A athletic conferences, ABC and CBS, formed the Bowl Alliance. Under the Bowl Alliance there were three bowls games—Fiesta, Orange, and Sugar—two of which would act as semi-finals and the third would be the championship “No. 1 v. No. 2” game. In 1996, the PAC-10 and Big Ten athletic conferences—who did not participate in the Bowl Alliance because they had their own championship in the Rose Bowl—decided to join the Bowl Alliance thereby creating the Bowl Championship Series. Under the Bowl Championship Series, the intercollegiate football championship game would rotate among the four BCS bowls. JOHN SANDBROOK, KNIGHT FOUND. COMM’N ON INTERCOLLEGIATE ATHLETICS, DIVISION I-A POSTSEASON FOOTBALL HISTORY AND STATUS § 1 (2004). In 2006, the BCS decided to stop rotating the “No. 1 v. No. 2” game among the four bowls, and created a fifth “championship” game.

148. Mike Steinberger, *US College Sports Graduate to Big Business*, FT.COM, Dec. 16, 2005, <http://search.ft.com/ftArticle?queryText=Mike+Steinberger&aje=true&id=051216007575&page=4>.

149. *Id.*

150. *Id.* In the 2003–04 bowl season, participants in the four BCS bowl games collectively received a payout of \$117.2 million, more than triple the \$30.4 million payout of the 1994–95 season (the last year before the introduction of the Bowl Alliance). SANDBROOK, *supra* note 147, at § 4 tbls.4–6.

151. Zimbalist, *supra* note 8.

152. Letter from Rep. Bill Thomas, Chairman, House Comm. on Ways and Means, to Myles Brand, President, NCAA (Oct. 2, 2006) [hereinafter Thomas Letter] (on file with author).

have salaries nearly twice that.¹⁵³ These salaries outstrip many times over what faculty and administrators earn.¹⁵⁴ Moreover, these figures do not

153. As of November 16, 2006 the top ten intercollegiate football coaches earned the following:

<i>Coach</i>	<i>Institution</i>	<i>Compensation</i>	<i>Maximum Bonus</i>
Bob Stoops	Oklahoma University	3.45 million	745,000
Kirk Ferentz	University of Iowa	2.84 million	1 million
Pete Carroll	University of Southern California	2.78 million	N/A
Mack Brown	University of Texas, Austin	2.66 million	325,000
Tommy Tuberville	Auburn University	2.23 million	716,154
Phillip Fulmer	University of Tennessee, Knoxville	2.05 million	250,000
Jim Tressel	Ohio State University	2.01 million	375,000
Dennis Franchione	Texas A&M	2.01 million	350,000
Frank Beamer	Virginia Tech	2 million	407,500
Al Groh	University of Virginia	1.78 million	940,000

Eleven more football coaches made between \$1.5 and 1.78 million before bonus. Jodi Upton & Steve Wieburg, *Contracts for College Coaches Cover More Than Salaries*, USA TODAY, Nov. 16, 2006, available at http://www.usatoday.com/sports/college/football/2006-11-16-coaches-salariescover_x.htm.

As of March 8, 2007, the top ten intercollegiate basketball coaches earned as follows:

<i>Coach</i>	<i>Institution</i>	<i>Compensation</i>	<i>Tournament Bonus</i>
Tubby Smith	University of Kentucky	2.19 million	50,000
Thad Matta	Ohio State University	1.82 million	260,000
Rick Barnes	University of Texas, Austin	1.8 million	225,000
Tom Izzo	Michigan State University	1.79 million	176,844
Tom Crean	Marquette University	1.68 million	0
Bill Self	University of Kansas	1.63 million	200,000
Bill Calhoun	University of Connecticut	1.5 million	41,667
Roy Williams	University of North Carolina	1.42 million	43,333
Lute Olsen	University of Arizona	1.42 million	205,000
Billy Donovan	University of Florida	1.38 million	150,000

Ten more basketball coaches make over \$1 million. Jodi Upton & Steve Wieburg, *Tournament Success Brings Financial Windfall for Coaches*, USA TODAY, Mar. 8, 2007, available at http://www.usatoday.com/sports/college/mensbasketball/2007-03-08-coaches-salary-cover_N.htm.

154. In the academic year 2005–06, the average annual salary for teachers at all educational institutions, excluding medical schools, was \$70,333. *Average Salaries of Full-Time Faculty Members, 2005–6*, in CHRONICLES OF HIGHER EDUCATION 2006–7 ALMANAC 26, 26 (2007), available at <http://chronicle.com/free/almanac/2006/index.htm>. The average annual salary for professors was \$94,738. *Id.* Professors in legal studies have the highest average annual salary at \$136,634. *Average Faculty Salaries by Selected Fields and Rank at 4 Year Institutions, 2005–6*, in CHRONICLES OF HIGHER EDUCATION 2006–7 ALMANAC 27, 27 (2007), available at <http://chronicle.com/free/almanac/2006/index.htm>. Executive Administrators in 2006–07 earned as follows: Chief Executive Administrators averaged \$275,000 per annum; Provosts averaged \$140,595; Deans of Arts and Sciences averaged \$121,942; and Associate Deans of Arts and Sciences averaged \$94,245. Audrey Williams June, *Administrators' Pay Rises 4%, Beating Inflation for the 10th Consecutive Year*, CHRON. OF HIGHER EDUC., Mar. 2, 2007, at A30, available at <http://chronicle.com/weekly/v53/i26/26a03001.htm>. Midlevel Administrators in 2006–07 earned as follows: Chief Administrative Officers averaged \$129,875, and Chief Financial Officers averaged \$118,586. *Id.* As one university's provost summarized, his school spent more money hiring the head football coach

include perks or bonuses that coaches receive from the university, nor do they include outside contracts—such as “shoe contracts”—which many coaches enter into for profit.¹⁵⁵ The size and nature of intercollegiate coaches’ compensation indicates that coaches are increasingly being valued on the same market as their professional counterparts.¹⁵⁶

The commercial transactions of intercollegiate athletics take place in a winner-take-all market, where only a few athletic departments can profit while the vast majority operate at a loss.¹⁵⁷ Lured by the potential rewards of victory,¹⁵⁸ and often suffering from “notoriously optimistic” estimates on how well they will perform relative to other programs, many athletic departments are willing to try their hand in the winner-take-all marketplace despite a low chance of economic success.¹⁵⁹ Once they have entered this market, athletic departments face incentives to increase spending in order to beat competitor schools and thereby profit.¹⁶⁰ Yet, because athletic departments at other universities face the same incentives to increase spending, the effects are self-canceling, and the anticipated positive result

than it did hiring five department heads—combined. A CALL TO ACTION, *supra* note 135, at 18.

155. Joyce E. Ackerbaum, *Do Coaches’ Shoe Contracts Threaten Universities’ Tax Exempt Status?*, 13 U. MIAMI ENT. & SPORTS L. REV. 155, 155–56 (1996) (citations omitted) (“The term ‘shoe contracts’ refers to the lucrative endorsement deals that coaches have with various shoe manufacturers, such as Nike, Reebok, and Converse. Generally, the shoe contracts are negotiated directly between the coach and the shoe company. The company agrees to pay the coach a certain sum of money as a consultant, and provides a supply of shoes, clothes, and gym bags in exchange for the coach’s team players wearing the shoes.”).

156. See Zimbalist, *supra* note 8 (explaining that the University of Alabama, in essence, outbid the Miami Dolphins for their head coach Nick Saban). Some athletic directors defend coaches’ astronomical compensation by arguing that successful coaches generate millions in revenue. *But see* discussion *infra* Part IV.A.2.

157. ROBERT H. FRANK, KNIGHT FOUND. COMM’N ON INTERCOLLEGIATE ATHLETICS, CHALLENGING THE MYTH: A REVIEW OF THE LINKS AMONG COLLEGE ATHLETIC SUCCESS, STUDENT QUALITY, AND DONATIONS 4 (2004). How winner-take-all markets work is best explained through a game devised by economist Martin Shubik: to start, an auctioneer offers some amount of money—say, \$20—to the highest bidder. Each successive bid must exceed the previous one by a specified amount—say, 50 cents. Once the auction comes to a close, however, both the highest and the second-highest bidders must pay their bids; the highest bidder then gets the \$20 bill and the second highest bidder gets nothing. A pattern almost always emerges: when the bidding approaches \$20, there is a pause as the second bidder, at \$19.50, is reluctant to offer \$20.50. Yet, if he drops out, he will lose \$19.50 for sure, and if he offers \$20.50 and wins, he will lose only 50 cents. Thus, if there is even a small chance he can win, it makes sense to continue. The bidding frequently reaches \$50 before someone finally yields in frustration. *Id.* at 5–6.

158. DUDERSTADT, *supra* note 123, at 133 (citing RICHARD G. SHEEHAN, KEEPING SCORE: THE ECONOMICS OF BIG TIME SPORTS (1996)) (“In terms of their revenue-generating capacity, three college football teams, Michigan, Notre Dame, and Florida, are more valuable than most professional football franchises.”).

159. See FRANK, *supra* note 157, at 8.

160. See *id.* at 10.

is often never realized.¹⁶¹ The result has been an intercollegiate arms race with no apparent limit.¹⁶²

2. The Academic Environment

A maxim of intercollegiate coaching is that “the best way to assure competitive success is to attract great players.”¹⁶³ Yet, there are simply not enough prospective student-athletes who excel at both academics and athletics to fill the basketball and football rosters at all of the 327 NCAA Division I-A institutions with “great players.”¹⁶⁴ Thus, coaches for the “revenue” sports of basketball and football will often recruit and admit student-athletes who do not meet the same academic criteria as the rest of the student body.¹⁶⁵ These coaches circumvent the formal admissions process through “wild card” slots, which permit them to guarantee admission for an exceptional athlete who fails to meet the university’s academic standard.¹⁶⁶ Although the majority of NCAA Division I-A

161. *Id.* at 10–11. See JONATHAN M. ORSZAG & PETER R. ORSZAG, NCAA, THE EMPIRICAL EFFECTS OF COLLEGIATE ATHLETICS: AN UPDATE 6 (2005) (concluding that increased operating expenditures on intercollegiate football or basketball have no statistical relationship to increases in winning).

162. FRANK, *supra* note 157, at 11. *But see* ORSZAG & ORSZAG, *supra* note 161, at 8 (reporting that the hypothesis that football and basketball exhibit an “arms race” in which increased operating expenditures at one school are associated with increases at other schools is not statistically proven). At a number of universities the pressure to win can also be attributed to bond-financed stadium construction. As available revenue increased, some athletic departments chose to invest their surplus revenue in facilities. This construction was typically financed by bonds, which were to be paid back by future athletics-generated revenue. Thus, in order to service the debt of these bonds, the department must continue to generate revenue by winning. As before, these departments become caught in an upward spiral of expenditure intended to ensure victory and increase necessary revenue. State of the Association Address, *supra* note 140.

163. BOWEN & LEVIN, *supra* note 139, at 43 (quoting Robert Malekoff, Division III Athletics: Issues and Challenges 9 (May 2002) (unpublished paper, commissioned by the Andrew W. Mellon Foundation)).

164. DUDERSTADT, *supra* note 123, at 193.

165. *Id.* In response to the fact that 70 percent of the scholarship athletes at the University of California, Los Angeles were “special admits,” Assistant Vice Chancellor Tom Lifka said, “[i]n order to be competitive in Division I-A athletics, you’re going to have to have some flexibility compared to your normal admissions policy.” He continues, “We need those students if we’re going to be competitive in certain sports.” Brent Schrottenboer, *Athletes Going to College Get ‘Special’ Treatment*, SAN DIEGO UNION-TRIB., Dec. 10, 2006, at C1, available at <http://www.signonsandiego.com/sports/20061210-9999-1s10specials.html>.

166. DUDERSTADT, *supra* note 123, at 193–94. The College Board, an organization designed to assist college bound high school seniors in their application process and the designers of the Scholastic Aptitude Test (“SAT”), explains that “Wild Cards” are a “possible model” for college admissions that “might be used with other models to permit staff or faculty to admit a limited number of students on whatever basis they wish. This might be used for high-risk students who have impressed a staff member or a student with a particular talent but otherwise marginal credentials.” GRETCHEN W. RIGOL, COLLEGE BOARD, ADMISSIONS DECISION-MAKING MODELS: HOW U.S. INSTITUTIONS OF HIGHER

schools “do not have highly competitive admissions” to begin with, dropping admissions standards even lower for student-athletes triggers an influx of academically substandard student-athletes into these universities.¹⁶⁷

In 1986, the NCAA passed Proposition 48 in an effort to reduce the academic inadequacy within intercollegiate athletics by instituting minimum requirements for Scholastic Aptitude Test (“SAT”) scores and grade point averages (“GPAs”).¹⁶⁸ Six years later, the NCAA raised these minimums to require all incoming student-athletes to have an SAT score of 820 or higher and a high school GPA in core academic courses of 2.5 or higher.¹⁶⁹ The cut-offs remain at this level today. A report released by the NCAA in 2001 stated that incoming student-athletes in men’s revenue sports had a median high school GPA of 2.98 and a median SAT score of 1009 in 1998.¹⁷⁰ Empirical and anecdotal evidence, however, suggests that many of the more competitive and successful revenue programs in Division I-A have SAT scores and GPAs significantly below the NCAA’s aggregated average.¹⁷¹

EDUCATION SELECT UNDERGRADUATE STUDENTS 45 (2003).

167. DUDERSTADT, *supra* note 123, at 194. Cf. Michael T. Maloney & Robert E. McCormick, *An Examination of the Role That Intercollegiate Athletic Participation Plays in Academic Achievement: Athlete’s Feats in the Classroom*, 28 J. OF HUM. RESOURCES 555, 569 (1993) (presenting data that student-athletes typically enter with academic backgrounds inferior to those of the general student body).

168. DUDERSTADT, *supra* note 123, at 194. African-American student-athletes challenged Proposition 48 on grounds that reliance on these standardized test scores had a disparate impact on racial minorities and was therefore impermissible under title VI. The student-athletes initially received summary judgment from the trial court, but the appeals court reversed and remanded to the trial court, which then entered a judgment for the NCAA. *Cureton v. NCAA*, 198 F.3d 107, 118 (3d Cir. 1999). See generally *Title VI—Third Circuit Upholds Viability of Standardized Test Scores as a Component of Freshman Athletic Eligibility Requirements*, 114 HARV. L. REV. 947 (2001).

169. DUDERSTADT, *supra* note 123, at 194.

170. COREY BRAY, NCAA, ACADEMIC CHARACTERISTICS BY SPORT GROUP OF DIVISION I RECRUITS IN THE 1997 AND 1998 NCAA INITIAL-ELIGIBILITY CLEARINGHOUSE 23 tbl.3b & 24 tbl.4b (2001). A 2007 study of SAT scores’ predictive validity for freshman grades by the College Board reports that 61 percent of students scoring 900–1000 on their SATs obtain a freshman GPA below 2.7, and 22 percent have a first year GPA below 2.0. JENNIFER L. KORBIN, COLLEGE BOARD, DETERMINING SAT BENCHMARKS FOR COLLEGE READINESS 3 tbl.1a (2007). This study did not distinguish between student-athletes and ordinary freshmen, and thus, failed to account for the very different time commitments of a revenue program student-athlete, which would most likely decrease their freshman GPA even more. Cf. Dean A. Purdy, D. Stanley Eitzen & Rick Hufnagel, *Are Athletes Also Students? The Educational Attainment of College Athletes*, in *SPORT AND HIGHER EDUCATION*, *supra* note 100, at 221, 231 (proposing that student-athletes in male revenue sports have a relatively lower probability of receiving an education because of the excessive time demands of varsity athletics both during and between seasons).

171. See, e.g., Maloney & McCormick, *supra* note 167, at 569 (providing evidence of significantly lower GPAs for student-athletes playing basketball and football); Thomas G. Palaima, *The Real Price of College Sports*, CHRON. OF HIGHER EDUC., Nov. 17, 2006, at B12 (stating that in 2005–

Naturally, there is a tendency for student-athletes with previous poor academic performances to ignore their studies and focus on athletics once admitted.¹⁷² NCAA bylaws, however, require that a student-athlete “be enrolled in at least a minimum full-time program of studies, be in good academic standing and maintain progress toward a baccalaureate or equivalent degree.”¹⁷³ Thus, many coaches and athletic departments have developed strategies to keep athletes eligible even if they lack the motivation or ability to keep up in the classroom. In some cases student-athletes are steered toward general undergraduate classes known to be easier,¹⁷⁴ in other cases athletic departments have designed special “educational” programs for athletes with considerably less demanding academic requirements,¹⁷⁵ while others have awarded academic credit for participation in varsity athletics.¹⁷⁶ Still others have provided fraudulent junior college transcripts for transfer credits,¹⁷⁷ and a few have even pressured professors to pass student-athletes who are failing.¹⁷⁸

The last two strategies are explicitly forbidden under the rules promulgated by the NCAA. The NCAA, however, is a notoriously weak regulatory body as it lacks subpoena or interrogatory powers and cannot initiate an investigation until “it receives information that an institution is, has been, or may have been in violation of NCAA legislation.”¹⁷⁹ The threat of NCAA sanctions has accordingly resulted in no noticeable reform; between 1980 and 2000, the percentage of Division I-A institutions that

06, 52 percent of student-athletes in “major sports” at the University of Texas, Austin, had SAT scores below 1005, and the men’s basketball team SAT average was 873).

172. Guttman, *supra* note 119, at 25. This is not to say that all, or most, student-athletes ignore education and focus exclusively on athletics, but rather that this is too often the case. Compare Rivka B. Kern Ulmer, Letter to the Editor, *Positive Experiences with Student-Athletes*, CHRON. OF HIGHER EDUC., Dec. 3, 2004, at B18 (explaining that one professor found the student-athletes she taught to be academically engaged), with A CALL TO ACTION, *supra* note 135, at 16 (quoting a faculty member who stated that “[t]here are students on our football team this year [2000] who will graduate when both faculty and students know they cannot read or write”).

173. 2006–07 NCAA DIVISION I MANUAL, OPERATING BYLAW 14.01.2 (2006).

174. State of the Association Address, *supra* note 140.

175. DUDERSTADT, *supra* note 123, at 195–96 (“Common examples include programs such as physical education, sports management, sports communication, or recreational life.”).

176. Kaplan, *supra* note 4, at 1459.

177. Guttman, *supra* note 119, at 25.

178. *Id.* at 26. A well-known and often decried example comes from the University of Georgia, when in 1982 a professor of remedial English, Jan Kemp, was fired because she refused to pass nine football players who had failed her class for the fourth time. For a detailed account of professor Kemp’s story see FRANCIS X. DEALY, JR., WIN AT ANY COST: THE SELL OUT OF COLLEGE ATHLETICS 78–95 (1990).

179. 2006–07 NCAA DIVISION I MANUAL, ADMINISTRATIVE BYLAW 32.2.1.1. See generally *id.* 32.1–6. This typically means that the NCAA cannot investigate wrongdoing until a school reports itself or the media covers a scandal. Rozin, *supra* note 5.

were censured, sanctioned, or put on probation for major violations of the NCAA rules decreased only from 54 percent to 52 percent.¹⁸⁰

In 1989, a survey revealed that forty-eight of the 106 institutions then in Division I-A had graduation rates under 30 percent for their men's basketball teams and nineteen had equally low rates for their football teams.¹⁸¹ Graduation rates among the present big-time intercollegiate basketball and football programs remain low.¹⁸² In 2006, the NCAA's annual graduation report—which is based on the formula devised by U.S. Department of Education—revealed that 44 percent of men's basketball players and 55 percent of football players in Division I earned degrees.¹⁸³ By way of comparison, 64 percent of the general student body graduates from American universities.¹⁸⁴

A popular misconception is that graduation rates among revenue sports are low simply because more players have been declaring themselves eligible for the draft before graduating.¹⁸⁵ Yet, a mere 1 percent of student basketball players are drafted into the National Basketball Association (“NBA”),¹⁸⁶ and only 2 percent of intercollegiate football

180. A CALL TO ACTION, *supra* note 135, at 12.

181. *Id.* at 9.

182. *Id.* at 15.

183. Brad Wolverton, *Graduation Rates Remain at Record High*, CHRON. OF HIGHER EDUC., Jan. 27, 2006, at A41. Statistics for African-American student-athletes in the top basketball programs are even worse. Less than half of the programs competing in the 2005 men's basketball tournament graduated more than 40 percent of their African-American student-athletes. The same year, forty-five programs failed to graduate *any* African-American players, and the year before, fifty-eight programs failed to graduate a single African-American. Sherrel Wheeler Stewart, *Most Black NCAA Basketball Student-Athletes Aren't Graduating*, TAKE PRIDE! CMTY MAG., Mar. 28, 2005, at i.

184. Thomas Letter, *supra* note 152. NCAA officials have repeatedly objected to the U.S. Department of Education's formula for determining graduation rates because it does not account for transfer students who leave one school and finish at another. *See, e.g.*, Brand Letter, *supra* note 2; State of the Association Address, *supra* note 140. Instead, the NCAA prefers to use its own data on student-athlete transfers to calculate the Graduation Success Rate (“GSR”) of a program. The NCAA contends that the GSR for men's basketball is 59 percent and football is 66 percent. Brand Letter, *supra* note 2. Yet, the use of GSR invalidates the comparison to the U.S. Department of Education data that 64 percent of the general student body graduates. After all, that figure suffers from the same problem regarding transfer students. In addition, this figure includes many students whose situation is wholly dissimilar from that of most student-athletes in revenue sports—e.g., female students, foreign students, students without financial scholarships. A CALL TO ACTION, *supra* note 135, at 15. A more apt comparison would be to male students who enroll full-time in a college or university immediately after graduation from high school, and who continue full-time at the same institution. *Id.* Roughly 75 percent of these students earn a degree, and this figure still excludes transfers. *Id.*

185. State of the Association Address, *supra* note 140 (“Although some [student-athletes] leave to try their hand at professional sports, there are not nearly enough of these young men to explain the disappointing low numbers. The bottom line is that too many student-athletes in these two sports are simply leaving before they earn a degree.”).

186. A CALL TO ACTION, *supra* note 135, at 16.

players are drafted into the National Football League (“NFL”).¹⁸⁷

Beginning in 2005, the NCAA implemented a number of academic reforms centered on a new measurement called the Academic Progress Rate (“APR”) that attempts to gauge an athletic program and department’s academic environment.¹⁸⁸ APR is calculated by awarding each student-athlete one point per semester for remaining eligible and another point for remaining at the institution, and then adding up the points received for all student-athletes and dividing them by the total possible points that could have been received.¹⁸⁹ The present APR cut-off is 925, which roughly translates to 50 percent of the students in the program in question being on track to graduate.¹⁹⁰ Should a program fall below 925, the athletic department will be unable to re-award the ineligible student-athlete’s scholarship for one year.¹⁹¹ According to data collected by the NCAA, 7.2 percent of all Division I programs presently fall below 925.¹⁹² Further, roughly 51 percent of Division I athletic departments have at least one program below the 925 APR cut-off.¹⁹³ Athletically successful programs appear to fall below the cut-off more frequently, as twenty-three of the fifty-six bowl-bound intercollegiate football programs fell below 925 APR in 2005.¹⁹⁴

IV. ELIMINATING CONGRESS’S CONCLUSIVE PRESUMPTION AND THE CONSEQUENCES

The present state of intercollegiate athletics demands reevaluation of the preferential tax status conferred upon it by Congress in 1950. In many cases, athletic departments have become commercial enterprises that exist parallel to, but largely independent of, the colleges and universities that house them.¹⁹⁵ These departments no longer answer to the traditional educational standards of the university, but instead respond to the whims and pressures of a winner-take-all marketplace.¹⁹⁶ The deleterious effects

187. *Id.*

188. Press Release, NCAA, NCAA Div. I Board of Directors Sets Cutlines for Academic Reform Standards, (Jan. 10, 2005), *available at* http://www2.ncaa.org/portal/media_and_events/press_room/2005/january/20050110_d1_bod.html.

189. *Id.*

190. *Id.*

191. *Id.* This is called a “contemporaneous penalty.”

192. *Id.*

193. *Id.*

194. Brad Wolverton, *23 Bowl Teams Fail to Meet NCAA’s Academic Standards*, CHRON. OF HIGHER EDUC., Dec. 16, 2005, at A36.

195. See discussion *supra* Part III.B.1.

196. See A CALL TO ACTION, *supra* note 135, at 14. See also Will, *supra* note 8; Zimbalist, *supra* note 8.

of this commercial model extend beyond the athletic department; they also jeopardize the effective education of student-athletes as well as the financial security of the university.¹⁹⁷ In sum, the substitution of commercial values in the place previously held—at least ideally—by educational values corrupts the rationale underlying Congress’s presumption that intercollegiate athletics are per se substantially related to an educational purpose. Thus, the most elegant solution is to eliminate this presumption.

A. ELIMINATING THE CONCLUSIVE PRESUMPTION OF A SUBSTANTIAL RELATION BETWEEN INTERCOLLEGIATE ATHLETICS AND EDUCATION

In 1950, without the benefit of testimony or investigation, Congress declared that intercollegiate athletics would be presumed to be substantially related to their university’s educational purpose. Neither the IRS nor the tax or appeals courts have challenged the validity of this congressional presumption over the past fifty-seven years.¹⁹⁸ Consequently, a strong legal tradition emerged in which intercollegiate athletics programs are universally related to their university’s educational purpose. As a result of this tradition, both egregiously noneducational and decidedly educational athletic programs have been insulated from taxation for almost sixty years.

Vital to this debate is the definition of an educational purpose. According to Treasury Regulations, the term educational means “[t]he instruction or training of the individual for the purpose of improving or developing his capabilities.”¹⁹⁹ Following the definition, the Regulations provide examples that explicitly include full-time colleges and universities, such as the membership institutions of the NCAA.²⁰⁰

At first blush, it may seem as though intercollegiate athletic programs are substantially related to helping students improve and develop capabilities because they train student-athletes in athletic skills. This generic understanding of the term “capabilities,” however, is overbroad. Universities and colleges hold themselves out as teachers of the traditional skills of the academy, namely intellectual and academic capabilities, and not as athletic minor leagues or athletic trade schools.²⁰¹ As such, the

197. See discussion *infra* Part IV.A.2–3.

198. See *supra* notes 80–89 and accompanying text.

199. Treas. Reg. § 1.501(c)(3)-1(d)(3)(i)(a) (as amended in 1990).

200. *Id.* § 1.501(c)(3)-1(d)(3)(ii) ex. 1.

201. See DUDERSTADT, *supra* note 123, at 88–90 (stating that a university is expected to provide education, scholarship, community service, and moral leadership). Even if a university could be characterized as an athletic vocational school, a problem then arises that for the vast majority of student-athletes, participation in intercollegiate athletics does not lead to a professional career; thus “for

“capabilities” relevant to discussion of the educational purpose in places of higher learning must be primarily academic and intellectual, while the development of athletic skills must be ancillary.²⁰² Thus, to further the educational purpose of a university, an athletic department must contribute to the development of both academic and athletic capabilities of student-athletes. A problem arises when an athletic program chooses to eschew and deemphasize academics, hindering the student-athlete’s development of academic capabilities and thereby undermining the very skills the program is meant to support.

Although the link between higher education and athletics is uniquely American, there is nothing inherent in the nature of athletics that makes this unity irrational.²⁰³ That is to say, there is nothing about intercollegiate athletics themselves that necessitates a conclusion that they are *not* educational. In fact, sports *can* serve to supplement the educational pursuits of the student by offering lessons on leadership, how to follow, self-discipline, sacrifice, and teamwork.²⁰⁴ In the ideal world, intercollegiate athletics would act to enrich the intellectual and academic education of every student-athlete.²⁰⁵

Indeed, it is the potential for intercollegiate athletics to enrich education that makes their current state such a disappointment. Too often, the practical reality is that athletic programs not only fail to meet this potential, but also actually hinder the development of student-athletes’ academic capabilities in the quest for athletic victory and its accompanying revenue. The problematic state of affairs in intercollegiate athletics was readily apparent to the public in the late 1980s, when eight out of ten people polled agreed that intercollegiate athletics had spun out of control, were corrupted by big money, and undermined the traditional role of the university.²⁰⁶ The situation has not improved. In 2001, a report from the Knight Foundation Commission on Intercollegiate Athletics stated that the problems in intercollegiate athletics have “grown rather than diminished.”²⁰⁷ The realities of contemporary intercollegiate athletics

this overwhelming majority, the contribution of athletic participation must be judged in terms of its impact on their college educations.” Kaplan, *supra* note 4, at 1458.

202. This is not to say that the development of athletic capabilities is irrelevant to education, but rather supplemental. In the words of NCAA president Myles Brand: “The central point is that the value of an athletics program must ultimately rest on its support of and integration into the educational mission and traditions of the university.” State of the Association Address, *supra* note 140.

203. See Guttman, *supra* note 119, at 17.

204. See Brand Letter, *supra* note 2.

205. See *id.*

206. A CALL TO ACTION, *supra* note 135, at 9.

207. *Id.* at 11.

evinced a rapidly growing divide between athletics and education at many schools. Continuing to grant athletic departments protection from taxation will undoubtedly maintain the status quo.²⁰⁸

At this juncture the simplest and most equitable way for tax law to account for the reality of college sports is to eliminate the presumption that intercollegiate athletics are substantially related to a university's educational purpose. Three justifications support the elimination of a presumptive substantial relationship: a lack of historical justification, the increasing influence of commerce, and academic underperformance.

1. Lack of Historical Justification

The presence of intercollegiate athletics is so ingrained on the contemporary campus that to propose that academic institutions might not only survive, but also be improved by the abolition of intercollegiate athletics, would likely be considered absurd.²⁰⁹ Yet, it was not always this way; at no point during the seminal stages of intercollegiate athletics was there any pretense that extracurricular sporting activities were substantially related to educational purposes.²¹⁰ In fact, early administrations considered intercollegiate athletics wholly unrelated to a student's academic pursuits.²¹¹ Thus, early administrators either banned intercollegiate athletics outright or relegated their organization and operation to the students.²¹² The educational dimension of intercollegiate athletics was not even considered until roughly fifty years after the first intercollegiate competition.²¹³

Intercollegiate football exemplifies the *ex post facto* addition of educational attributes to a sport after its inception. In the beginning, football was simply a violent hazing ritual that most universities sought to eliminate from their campuses.²¹⁴ As the sport expanded, administrations refused to regulate football because they found its violence antithetical to the purpose of the university and, therefore, outside their purview.²¹⁵ Yet, this only resulted in more fractured bones.²¹⁶ The situation grew steadily

208. *But see* discussion *infra* Part IV.D.

209. Guttman, *supra* note 119, at 18.

210. *See supra* Part III.A.

211. *See* Davenport, *supra* note 100, at 6.

212. *See id.*

213. *See id.* at 8. The founding charter of the Intercollegiate Athletic Association of the United States (soon after renamed the NCAA) is one of the earliest official statements regarding the relationship between intercollegiate athletics and education.

214. SMITH, *supra* note 90, at 67–69.

215. *Id.* at 118–24.

216. *See supra* text accompanying notes 111–16 (explaining the increasing violence in football

worse until the 1905 season resulted in so many deaths and serious injuries that President Roosevelt demanded that administrators take charge.²¹⁷

Ironically, it was not until brutish game play placed football inches from abolition that the connection between education and sport was made. Perhaps attempting to justify their decision to regulate, the administrators who drafted the founding constitution of the NCAA stated its purpose to be the national supervision of intercollegiate athletics “in order that the athletic activities in the colleges and universities of the United States may be maintained on an ethical plane in keeping with the dignity and high purpose of education.”²¹⁸ Still, no direct causal link between athletics and education was proffered, likely because the founding administrators would have found such a proposition inappropriate. Instead, the language “in keeping with the dignity and high purpose of education” probably reflects contemporary administrators’ belief that students’ self-regulation of intercollegiate sports had created a disastrous side show that threatened the basic integrity of the university and desperately needed their guiding hand.

Soon after the founding of the NCAA, colleges and universities began to take control of their athletic programs by integrating them into newly created physical education departments.²¹⁹ This decision firmly established the place of sports on campus by giving them university endorsement. The decision to integrate athletics, however, was due to administrators’ need to control the run-away violence of football and had little, if anything, to do with a relationship between academics and athletics.²²⁰ This became patently obvious in the 1950s when athletic programs began to feel constrained by their status as educational departments and abandoned that model for a more independent one.²²¹ Thus, while athletics were pushed into an actively educational role in the 1920s, the contrived arrangement has since given way to virtually autonomous athletic departments.²²²

The history of intercollegiate athletics reveals no justification for the presumption that athletics and education are substantially related. Instead, history demonstrates that the initial presumption was exactly the opposite, and that by the 1950s the contrived arrangement of integrating athletic departments into the educational community had become a farce.

and consequent rise in injury).

217. See Davenport, *supra* note 100, at 7.

218. *Id.* at 8.

219. Guttman, *supra* note 119, at 19.

220. See Davenport, *supra* note 100, at 8.

221. *Id.* at 12.

222. See *supra* text accompanying notes 140–44.

2. The Influence of Commerce

The commercial environment of contemporary intercollegiate athletics is structured such that winning is a prerequisite for obtaining substantial revenue. Consequently, for many athletic departments, the desire to win has become indistinguishable from the desire to generate greater revenues. The pressure to generate revenue has shifted the central focus of intercollegiate athletics away from enriching the academic experience of the student-athlete.²²³ The focus on commercial success—and its prerequisite athletic success—undermines the academic and financial integrity of both the athletic department and its university.²²⁴ Thus, the commercial nature of contemporary intercollegiate athletics supports the rejection of any presumptive substantial relationship between intercollegiate athletics and education.

The recent commercial boom in intercollegiate athletics began with the introduction of television in the 1950s. Working in conjunction, media corporations and athletic departments quickly began to market intercollegiate athletic competitions as commodities and eventually transformed competitive athletic events into valuable commercial products for public consumption.²²⁵ By 1989, when the NCAA and CBS agreed to a then epic \$1 billion broadcasting deal, many athletic programs would do whatever it took to win games and cash in on the payouts of commercialized athletics. Under the pressure to stay competitive and maximize revenue, these athletic departments often sacrificed academic integrity for a better chance at athletic victory.²²⁶

In order to keep generating revenue, athletic departments need a competitive edge to keep winning. This pressure fuels the exponential climb in the value of coaches' compensation packages.²²⁷ Compensation

223. See discussion *supra* Part III.B.1.

224. See DUDERSTADT, *supra* note 123, at 150–52.

225. *Id.* at 73–75. Most importantly, television raised the financial stakes of intercollegiate competition by creating the potential for successful athletic programs to generate sizeable revenues through the sale of broadcasting rights. Guttman, *supra* note 119, at 21–22. In addition, television spurred the development of the NCAA men's basketball tournament and the BCS bowls into lucrative enterprises through sensationalist marketing that included staging increasingly spectacular events. See *supra* notes 128–32 and accompanying text.

226. State of the Association Address, *supra* note 140 (“[T]he growing need for more wins has increased the competition for outstanding student-athletes and coaches. As a result, the competition for student recruits, especially in the two revenue sports, has led to excesses of the kind played out in headlines much of the past spring.”).

227. *Id.* (“[T]he competition for good coaches has resulted in a market that yields compensation packages for a selected few that puts them in the rarified air of celebrities and at odds with the faculty and others on campus.”).

packages in the millions are becoming routine, as are bonuses in the hundreds of thousands for taking a team to the NCAA tournament or a BCS bowl game.²²⁸ These compensation packages may seem modest when compared to those in professional athletics, but that comparison is fatally flawed as it presumes that college and professional coaches should be considered part of the same marketplace.²²⁹ Such a presumption is entirely inconsistent with the traditional “practice and values of the academy,” given that no faculty member could reasonably expect compensation in-step with counterparts in professional practice.²³⁰ Some athletic directors have argued that the discrepancy between a faculty member and a winning coach is justified because the latter generates significant revenue for the university.²³¹ This argument, however, fails to account for revenue generating faculty and administrators, such as faculty members who direct major research laboratories or fundraising officers who solicit large contributions.²³² All three of the university employees—the coach, the researcher, and the fundraiser—potentially generate significant revenue, yet only the coach has the potential to be compensated in the millions.

By awarding high-profile coaches giant compensation packages, universities convey the distorted message that coaches and athletic programs are more valuable to the university than faculty and educational departments.²³³ This message challenges the integrity of a university because it devalues education and overemphasizes the value of athletic success and revenue.²³⁴

228. Upton & Wieburg, *supra* note 153.

229. The top ten highest paid players in the NFL for the 2005 season made between \$10.6 and \$23.1 million. USA Today Salaries Databases: 2005 Top 25 Players, at <http://asp.usatoday.com/sports/football/nfl/salaries/top25.aspx?year=2005> (last visited Nov. 10, 2007). As of 2006, NFL coaches made an estimated \$2.9 million on average, and at least one coach, Joe Gibbs of the Washington Redskins, made \$5 million. Tom Van Riper, *Most Valuable NFL Coaches*, FORBES.COM, Dec. 18, 2006, at http://www.forbes.com/2006/12/18/nfl-coaches-most-valuable-biz-cx_tvr_1218nfl.html. In the NBA, the top ten highest paid players in 2005–06 made between \$15.8 and \$20 million. USA Today Salaries Databases: 2005–06 Top 25 Players, <http://asp.usatoday.com/sports/basketball/nba/salaries/top25.aspx?year=2005-06> (last visited Nov. 10, 2007). The top ten highest paid NBA coaches in the 2004–05 season earned between \$3.3 and \$6.9 million. InsideHoops.com, NBA Salaries, at <http://www.insidehoops.com/nbasalaries.shtml> (last visited Nov. 10, 2007). Compare with *supra* note 153 (stating that the top ten college football coaches made between \$1.78 and \$3.45 million as of November 16, 2006, and the top ten college basketball coaches made between \$1.38 and \$2.19 million as of March 8, 2007).

230. DUDERSTADT, *supra* note 123, at 156–57. For example, business, engineering and legal professors most often earn only a fraction of what they could earn outside of the academic setting.

231. *Id.* at 153.

232. *See id.* at 154.

233. *See id.* at 153.

234. *See id.*

In short, the primary goal of many university athletic departments is to generate revenue. That revenue, however, rarely, if ever, makes its way back to the university.²³⁵ Nevertheless, most contemporary university administrators encourage the relentless pursuit of athletic success because of its ostensible indirect benefits in terms of increased applications to the university, superior student bodies, and increased alumni donations. Administrators' assumptions regarding the benefit of athletics, however, are generally not supported by empirical evidence.

Athletic success may seem to increase the number of applicants for one of two reasons: either prospective students are sports fans who decide on which schools to apply based on their desire to attend athletic events, or winning teams increase the university's name recognition through visibility in the popular media.²³⁶ Naturally, there are anecdotal instances where the great success of an intercollegiate athletic team, or program, increased the volume of applications received by a university.²³⁷ Indeed, recent studies have supported the notion that the success of a university's athletic department causes an increase in applicants to the university.²³⁸

Empirical data, however, has failed to conclusively prove any relationship between athletic success and the academic quality of an incoming freshman class.²³⁹ Thus, the notion that athletic success generates indirect educational value by increasing the quality of the student body is unsubstantiated.

Moreover, even if there was evidence that academic quality increased with athletic success, it would fail to justify a protected position under the tax code "from a Federal standpoint."²⁴⁰ The federal government's purpose in granting tax exemption to universities is to further education in general, *not* to increase the recognition, reputation or relative quality of one individual institution.²⁴¹

235. See *supra* Part III.B.1.

236. See FRANK, *supra* note 157, at 15.

237. *Id.* at 25. For example, Boston College experienced a 12 percent increase in 1985, the year after a famous come-from-behind win over Miami, in which their quarterback Doug Flutie threw a forty-eight yard touchdown pass in the final seconds of the game. *Id.*

238. ROBERT E. LITAN, JONATHAN M. ORSZAG & PETER R. ORSZAG, NCAA, THE EMPIRICAL EFFECTS OF COLLEGIATE ATHLETICS: AN INTERIM REPORT 11 (2003).

239. *Id.* (noting that the academic literature is divided about whether or not there is a correlation between athletic success and the academic quality of an incoming class).

240. Thomas Letter, *supra* note 152.

241. *Id.* Moreover, even if there was some small correlation between athletic success and academic quality, "that would not imply that investment in a big-time athletic program is an efficient strategy for becoming more selective. The same funds used to boost athletic performance could be used in other ways that make schools more attractive to potential applicants—financial aid, for example, or

Many universities also encourage athletic success, hoping for an indirect financial benefit from alumni donations. Research results on the relationship between athletic success and alumni giving, however, are split. Several studies found no relationship between alumni donations and athletic success,²⁴² others found a statistically significant relationship,²⁴³ and others found a relationship between athletic success and athletic donations; none, however, found a link between athletic success and donations to the university's general fund.²⁴⁴ Nevertheless, even if there is a correlation, it should be noted that athletic programs pass through cycles of success and relative failure, a phenomenon which renders the overall net effect on giving minimal.²⁴⁵ The same argument previously used for increased academic quality is again relevant: the federal government does not provide tax exemption for the benefit of any one institution.²⁴⁶

The winner-take-all market of contemporary intercollegiate athletics is such that only a very few departments will enjoy any noticeable financial reward.²⁴⁷ At the same time, the present commercial environment incentivizes the upward spiral of expenditures for all athletic departments seeking to remain competitive.²⁴⁸ The practical implication is that only the

increased direct marketing, or improved academic programs." FRANK, *supra* note 157, at 14.

242. See, e.g., L. Siegelman & R. Carter, *Win One for the Giver? Alumni Giving and Big-Time College Sports*, 60 SOC. SCI. Q. 284, 291 (1979) (finding no significant relationship between athletic success and alumni giving).

243. See, e.g., R. Baade & J. Sundberg, *Fourth Down and Gold to Go? Assessing the Link Between Athletics and Alumni Giving*, 77 SOC. SCI. Q. 789, 796-99 (1996) (finding that bowl appearances increase giving and basketball success increases giving at public but not private schools); Brian Goff, *Effects of University Athletics on the University: A Review and Extension of Empirical Assessment*, 14 J. OF SPORT MGMT. 85 (2000) (finding that both average and dramatic improvement in athletic success substantially increases general giving to universities).

244. See, e.g., C. Coughlin & K. Erikson, *An Examination of Contributions to Support Intercollegiate Athletics*, 51 S. ECON. J. 180, 193 (1984) (finding that bowl participation and basketball success increases donations to the athletic department); L. Siegelman & S. Bookheimer, *Is It Whether You Win or Lose? Monetary Contributions to Big-Time College Athletic Programs*, 64 SOC. SCI. Q. 347, 354 (1983) (finding that contributions to the athletic department are positively correlated to football success but giving to the annual fund is negatively correlated). For a good summary of the literature in this area see, FRANK, *supra* note 157, at 21-24.

245. FRANK, *supra* note 157, at 26.

246. Thomas Letter, *supra* note 152. The House Committee on Ways and Means also expressed a concern that by providing tax-exemption incentives to donate to athletic departments, the government may detract from donations to other worthy charities. *Id.*

247. See DUDERSTADT, *supra* note 123, at 126 ("[M]any athletic departments in Division I-A will actually admit that when all the revenues and expenses are totaled up, they actually lose money."). See also State of the Association Address, *supra* note 140 ("When all costs are taken into account . . . suspect the number [of institutions] that genuinely balance expenses with revenues is no [sic] much more than a dozen.").

248. State of the Association Address *supra* note 140 ("The popular view is that you have to increase spending to increase wins, and you have to increase wins to increase revenues.").

very few departments that enjoy financial reward will be able to support increasing expenditures on their own, while the majority of departments will need to find outside sources of funding if they want to stay in the race.

Unprofitable athletic programs most often increase their funding through one of two ways: the first strategy is to bring in outside funds from either the university's general revenue or the students in the form of student fees. In the 2004–05 academic year these two sources alone accounted for more than \$1 billion of additional support for athletic departments, and without these funds fewer than 10 percent of athletic departments would have been able to support themselves.²⁴⁹ As the cost of competing in intercollegiate athletics continues to escalate, so does the amount of subsidy necessary to avoid athletic department deficits. In turn, an increase in the subsidy for the athletic department necessitates a decrease in funding for the academic activities of the university.²⁵⁰ Thus, the steady escalation of athletic department expenditures can have tangible and deleterious effects on the financial and educational interests of a university.

A second strategy is to reduce athletic department expenditures by disbanding unprofitable programs—that is, programs in non-revenue sports.²⁵¹ In an effort to more efficiently generate profit, some athletic departments have chosen to eliminate programs that require more funding than they supply and then redirect revenue that previously subsidized the unprofitable programs back into the “revenue” program. Yet, this strategy inevitably reduces the number of student-athletes who can benefit from participation in athletics, while doing little, or nothing, to increase the enrichment of those student-athletes who remain. Thus, downsizing athletic departments overvalues the generation of revenue and undervalues the educational enrichment of student-athletes by subverting the educational aims of intercollegiate athletics. In sum, the commercial dimension of

249. Mark Alesia, *Colleges Play, Public Pays*, INDIANAPOLIS STAR, Apr. 30, 2006, at 1A, available at <http://www.indystar.com/apps/pbcs.dll/article?AID=/99999999/SPORTS06/399990029/1216/LOCAL08>. Without contributions from the general fund and student fees, the number of schools reporting even would have dropped from 115 to 15, and the average deficit would be \$5.7 million. *Id.* The NCAA requires that athletic departments record their finances in budget reports. These reports were obtained by the Indianapolis Star through freedom-of-information requests to the 215 public schools in Division I. One hundred sixty-four institutions responded. Requests were also sent to the 112 private schools in Division I, which had no obligation to release the information. None did. *Id.*

250. *Id.*

251. See Roger G. Noll, *The Economics of Intercollegiate Sports*, in RETHINKING COLLEGE ATHLETICS, *supra* note 1, at 197, 204. In 2003, all women's athletic programs averaged 6 percent of an athletic department's total revenue, and 20 percent of total expenses. DANIEL L. FULKS, NCAA, 2002–03 NCAA REVENUES AND EXPENSES OF DIVISIONS I AND II INTERCOLLEGIATE ATHLETICS PROGRAMS REPORT 30 tbl.3.1 (2005). In the same year men's non-revenue programs averaged 5 percent of men's total revenue, and 21 percent of men's total expenditures. *Id.* at 32 tbl.3.2a.

intercollegiate athletics provides strong evidence that athletics do not necessarily further educational purposes, and thus, the presumption that they do is invalid.

3. Academics—Special Admissions, Academic Underperformance, and Low Graduation Rates

The significant and pervasive financial consequences of big-time intercollegiate athletics increases the likelihood that coaches, feeling the pressure to win, will sacrifice the academic integrity of the university by recruiting, admitting, keeping eligible, and graduating talented athletes who are unqualified for the academic rigors of college-level curricula.²⁵² When this occurs, the educational purpose of the university is actively undermined by the athletic department.²⁵³ Athletic departments that engage in conduct that purposefully subverts education should no longer be offered tax exemption through the presumption that intercollegiate athletics are substantially related to education.

It all begins with recruitment and admissions. Searching for a competitive edge over their opponents, coaches in many of the big-time revenue programs view prospective student-athletes as potential competitive assets rather than future students.²⁵⁴ Consequently, many coaches recruit student-athletes exclusively for their athletic talent, often ignoring their history of poor academic performance.²⁵⁵ Some of these recruits are so academically substandard that they are unable to meet the already low admissions standards at most Division I-A institutions; coaches, however, will often utilize wild card slots to admit them anyway.²⁵⁶ An athletic department that recruits and admits such students demonstrates its priorities: athletic success takes precedence, and education is merely incidental.

Admitting academically substandard student-athletes has direct negative consequences on a university's academic environment. When an athletic program bends academic standards to guarantee admission of student-athletes, they practically ensure that these student-athletes—most

252. See Purdy, Eitzen & Hufnagel, *supra* note 170, at 231.

253. See *id.*

254. See State of the Association Address, *supra* note 140 (“The need for increasing the rate at which the revenue expands has also resulted in an inflated need to increase wins. And the growing need for more wins has increased the competition for outstanding student-athletes . . .”).

255. Guttman, *supra* note 119, at 23 (stating that after the highly touted high school basketball prospect Chris Washburn “failed to answer a single question correctly on his verbal Scholastic Aptitude Test, he was recruited by 150 universities”).

256. DUDERSTADT, *supra* note 123, at 193–94.

often in revenue sports—will be behind academically even before the first day of class. Once classes actually begin, student-athletes in revenue sports traditionally underperform when compared with both the general student body and non-revenue student-athletes.²⁵⁷ Their underperformance impacts the educational environment of a university in two ways: first, habitual underperformance by student-athletes, particularly when coupled with a vocal lack of respect for education, damages the intellectual ethos of a campus.²⁵⁸ Second, underperformance by student-athletes undermines the educational goals of a university through the inefficient use of scarce academic resources; nonathlete students, who likely would have taken greater advantage of the academic resources offered by the university, are rejected in order to make room for student-athletes.²⁵⁹

Academic underperformance by student-athletes also has an indirect negative impact on the educational environment of the university as it often drives an athletic department to undermine educational goals to secure eligibility. NCAA bylaws require that a student-athlete meet minimum academic standards to remain eligible for game day.²⁶⁰ To ensure their eligibility, many athletic departments steer student-athletes toward “trivial,” “easy,” “special,” or “remedial” classes.²⁶¹ While this strategy violates no NCAA bylaw, it does impede the development of the student-athletes’ academic capabilities by preventing them from engaging in intellectually stimulating and challenging coursework. Moreover, this strategy reveals an athletic department’s inverted priorities: education is an obstacle to be overcome and not the primary objective to be enriched, through participation in intercollegiate athletics.²⁶²

As might be expected, student-athletes in these athletic departments often fail to earn a degree.²⁶³ Low graduation rates demonstrate the lack of academic success among student-athletes in revenue sports and reflect the failure of an athletic department to maintain the educational integrity of its

257. BOWEN & LEVIN, *supra* note 139, at 145; Maloney & McCormick, *supra* note 167, at 569; Purdy, Eitzen & Hufnagel, *supra* note 170, at 231.

258. BOWEN & LEVIN, *supra* note 139, at 145 (finding that the longer students are on a campus, the more they detect a negative intellectual impact from athletics).

259. *Id.*

260. 2006–07 NCAA DIVISION I MANUAL, OPERATING BYLAW 14.01.2 (2006).

261. See Kaplan, *supra* note 4, at 1458–59 (“Another practice, called ‘not uncommon’ in a recent report, actually awards academic credit for participation in college sports, again with the objective of continued athletic eligibility.”).

262. Simon, *supra* note 3, at 53. An athletic department’s inverted priorities are even more obvious when it engages in conduct that violates either institutional or NCAA rules on recruiting and eligibility, which are designed to preserve the notion of educational enrichment.

263. Kaplan, *supra* note 4, at 1459.

constituent programs. The numbers speak for themselves: within NCAA Division I, men's basketball programs average a 44 percent graduation rate, and football programs average 55 percent.²⁶⁴ To make matters worse, at some of the more successful institutions the entire athletic *department* falls significantly below these averages.²⁶⁵

Division I averages fall noticeably below the national average of 64 percent. These figures become even worse when compared with the 75 percent of nonathlete students who enroll at a university upon graduation from high school, continue full-time, and earn a degree after four to six years.²⁶⁶ The graduation rates among football and basketball athletes cannot be explained by the 1 percent of basketball players and 2 percent of football players who are drafted into the professional leagues.²⁶⁷ The bottom line is that too many student-athletes are simply failing to earn a degree in four to six years.²⁶⁸ These numbers are indicative of the decidedly nonacademic environment within many athletic programs.

The academic environment within many athletic departments is replete with student-athlete underperformance from recruitment to graduation. For these athletic departments, the relationship between intercollegiate athletics and education is tenuous at best. Thus, a conclusive presumption that intercollegiate athletics are substantially related to education is factually unsupported.

B. IMPACT ON COLLEGE AND UNIVERSITY'S UBIT STATUS

Congress established the presumption that intercollegiate athletics are substantially related to a university's educational purpose during the promulgation of the unrelated business income tax in 1950.²⁶⁹ The presumption specifically addressed the third element of the newly imposed UBIT, which required that any trade or business regularly carried on by a university would not be subject to UBIT if it was substantially related to

264. See Wolverton, *supra* note 183 and accompanying text.

265. For example, the University of Georgia only graduated only 50 percent of its overall student-athletes, Auburn University graduated 51 percent, University of Oklahoma graduated 53 percent, Arizona State University graduated 53 percent, Louisiana State University graduated 54 percent, and Georgia Institute of Technology graduated 54 percent. NCAA, 2006 NCAA REPORT ON THE FEDERAL GRADUATE-RATES DATA (2006), at http://www.ncaa.org/grad_rates/ (follow "Division I" hyperlink and select school by the state in which it is located from the alphabetical drop-down lists).

266. As established earlier, while the NCAA's GSR figures are most likely a better indication of how many student-athletes attain degrees, they are invalid for comparison to the figures provided by the U.S. Department of Education. See discussion *supra* note 184.

267. A CALL TO ACTION, *supra* note 135, at 16.

268. State of the Association Address, *supra* note 140.

269. See discussion *supra* Part II.C.

the exercise or performance of the institution's educational purpose. The unambiguous intent of Congress was to ensure that intercollegiate athletics met this test and were thereby shielded from UBIT.

The proposed rejection of this presumption eliminates the universal exemption of athletic departments. Without a presumed relationship, § 1.513-1(d)(2) of the Treasury Regulations necessitates an inquiry into the specific facts and circumstances of an individual athletic department to determine if it is substantially related to its university's educational purpose. Thus, it becomes necessary to examine the elements of UBIT as applied to athletic departments and to suggest what factors should be relevant in determining whether there is a substantial relationship.

First, it must be established that an athletic department is a "trade or business," which is defined as "any activity carried on for the production of income."²⁷⁰ In recent years, intercollegiate athletic departments have become demonstrably focused on the generation of revenue.²⁷¹ Despite their desire to generate income, many of the athletic departments are unsuccessful: out of the 327 Division I athletic departments, no more than 115—and most likely as few as fifteen—actually operate at a profit.²⁷² The Treasury Regulations, however, make it clear that the presence of profit is not necessary; rather, only the motivation to generate income is necessary.²⁷³ Thus, under the definition of § 513(c), the majority of athletic departments can easily be classified as a "trade or business."

Section 513(a) contains two possible exceptions.²⁷⁴ The first exception applies to a trade or business when "substantially all the work in carrying on such trade or business is performed for the organization without compensation." While student-athletes are not directly

270. Treas. Reg. § 1.513-1(b) (as amended in 1983). The athletic department is the appropriate organizational entity to examine when applying UBIT because it is the smallest self-determining unit within a university's athletic operations. See *supra* notes 140–44 and accompanying text. Specific athletic programs are not the appropriate unit to examine for UBIT because they are subordinate to the athletic department, and as such cannot be said to be "carried on" independently of the athletic department. See DUDERSTADT, *supra* note 123, at 110 (stating that the head of the athletic department is able to hire and fire coaches, is the day-to-day business manager of all programs, and is ultimately responsible for compliance with institutional and NCAA policies and bylaws).

271. See discussion *supra* Part IV.A.2. The pressure to generate revenue is not necessarily avaricious. In fact, the structure of contemporary athletic departments as "auxiliary activities" encourages financial independence. The rationale behind the "profit motive" is, however, irrelevant; all that is required to be a trade or business is that the activity is conducted *for the purpose of producing income*. See I.R.C. § 513(c) (2000); discussion *supra* Part II.B.1.

272. Alesia, *supra* note 249. See State of the Association Address, *supra* note 140 (estimating that roughly twelve Division I-A athletic departments operated at a profit).

273. Treas. Reg. § 1.513-1(b). See *supra* notes 51–55 and accompanying text.

274. I.R.C. § 513(a)(1), (2).

compensated for their participation in athletics, they provide only some of the labor necessary to carry on the trade or business that surrounds and facilitates their competitive events.²⁷⁵ Much of this work is performed by “coaches, trainers, athletic department staff, publicity managers, [and] ticket takers,” all of whom receive compensation in the form of salaries.²⁷⁶ Thus, this exception likely does not apply to athletic departments.

The second exception applies to a trade or business carried on by a tax-exempt organization “primarily for the convenience of its members, students, [etc.]”²⁷⁷ This exception applies only if the activity in question fulfills a university community’s “need,” and the primary objective of the activity is to fulfill this need.²⁷⁸ The only need intercollegiate athletics could satisfy would be the general student body’s need for entertainment.²⁷⁹ At present, this is not a need recognized by the IRS.²⁸⁰

To impose UBIT, it must further be demonstrated that intercollegiate athletics are “regularly carried on.”²⁸¹ Athletics as a professional commercial enterprise operate on a seasonal basis. Accordingly, an intercollegiate athletic program need only operate for a significant portion of the season to satisfy this requirement.²⁸² Intercollegiate athletic seasons are operated during a “significant portion” of the comparable professional season. For basketball, the NCAA season takes place between October and early April, while the NBA season is from October to mid-May. For football, the NCAA season is from September to mid-December, while the NFL season is from September to January. In addition, off-season training for both of the intercollegiate “revenue” sports takes place between regular seasons exactly like their professional counterparts in the NBA and NFL.

Finally, it must be established that an athletic department is not substantially related to the educational purpose of a university.²⁸³ An athletic department’s activities will be substantially related if they

275. Kaplan, *supra* note 4, at 1460.

276. *Id.* There is also an argument to be made that many student-athletes receive compensation in the form of financial aid and scholarships. *See id.* at 1460–63.

277. I.R.C. § 513(a)(2).

278. Kaplan, *supra* note 4, at 1463.

279. *Id.*

280. *Id.* Even assuming that the IRS recognized entertainment as a community need, there is little evidence to support the notion that intercollegiate athletics are conducted primarily for students.

281. Treas. Reg. § 1.513-1(c)(1) (as amended in 1983). This element requires that an intercollegiate athletic program be conducted in the same manner, frequency, and continuity as its for-profit professional counterparts. *See id.*

282. *Id.*

283. I.R.C. § 513(a) (2000).

“contribute importantly” to the furtherance of education.²⁸⁴ In addition, the size and extent of income-producing activities of athletic departments cannot be larger than is reasonably necessary to support education.²⁸⁵ Moreover, the mere contribution of funds does not constitute an important contribution to education.²⁸⁶ Thus, the handful of athletic departments that actually provide their universities with revenue probably cannot rely on that fact to satisfy the substantial relation element.

Applying the test used by the Supreme Court in *American College of Physicians*, an athletic department will “contribute importantly” to education if it conducts its activities in a manner that will “enrich [the] educational experience” of its student-athletes.²⁸⁷ Although there is no objective measure for the “enrichment of [the] educational experience,” certain statistics serve as reliable indicators of the academic environment within an athletic department.²⁸⁸ First, the number, recency, and severity of NCAA or institutional rule infractions will be relevant. This metric can reveal academic fraud, deceit, and recruiting gone awry. Second, an athletic department’s academic attitude can be examined by comparing its student-athletes’ academic performance to that of the general student body. If the median grade point average of an athletic department consistently falls in the lower percentiles of the overall student distribution, then it is unlikely that education is being enriched through participation in athletics. Third, a comparison of graduation rates among student-athletes in a department and their counterparts in the general student body can provide insight as to the academic environment.²⁸⁹ Athletic departments whose student-athletes earn

284. Treas. Reg. § 1.513-1(d)(2). Again, the appropriate definition of “educational” in this context is that which trains students to hone their intellectual and academic abilities. Under this definition, participation in intercollegiate athletics is completely capable of enriching and augmenting this training, but should not in and of itself constitute an educational undertaking. *See supra* notes 201–02 and accompanying text.

285. Treas. Reg. § 1.513-1(d)(3).

286. *Id.* § 1.513-1(d)(2).

287. *See* Brand Letter, *supra* note 2.

288. Given that the athletic department is the organizational entity being evaluated as a trade or business, it follows that the relevant inquiry for a substantial relation should be whether the *athletic department* contributes importantly to the enrichment of the student-athlete. Thus, the principal statistics for this inquiry should reflect the performance of the department overall. An athletic department, however, should be responsible not just for overall educational integrity, but for the integrity of each individual program as well. Accordingly, if even one program *consistently* underperforms academically, this should be considered when determining whether the athletic department contributes importantly to the enrichment of the student-athlete.

289. The NCAA’s GSR formulation should be used as it more accurately reflects the graduation rates of student-athletes by accounting for students who graduate after transferring. In addition, the same formulation should be used to calculate the overall student body to ensure the most accurate graduation rates possible. *See supra* note 184 and accompanying text.

degrees at rates significantly below their university's median are not contributing importantly to the furtherance of education.

In addition, an athletic department that conducts its activities on a larger scale than is reasonably necessary to support the enrichment of a student-athletes' academic experience will not satisfy the substantial relation element.²⁹⁰ The scale of an athletic department's activities may be indicated by the size of its net revenue. The presence of profit, however, does not necessarily doom an athletic department to fail this test, as some degree of profit is reasonably necessary to support the continued enrichment of a larger group of student-athletes.²⁹¹ The generation of excessive profit, however, is not reasonably necessary to enrich the educational experience of the student-athlete, and the profitability of an athletic department is largely irrelevant in terms of educational experience.²⁹² Thus, when an athletic department makes so much money that after funding the nonrevenue sports it still possesses a multi-million dollar surplus, that money will be subject to UBIT.

The following examples illustrate the application of these principles:²⁹³

Example 1: University A. University A's athletic department was punished for one major NCAA rule infraction in 1972, but has had no incidents since. Last year, 91 percent of student-athletes graduated from University A, as compared to 93 percent of students overall. The median GPA for student-athletes at University A is in the 65th percentile of the overall GPA distribution. Last year, the athletic department at University A made a net profit of *negative* \$164,000.

This example is a slam dunk. University A's academic performance is superlative, with no recent infractions, a graduation rate comparable to the general student body and above the national average, as well as remarkable academic performance on the part of the student-athletes. Moreover, University A's finances show no indication of excessive profits, as the total

290. Treas. Reg. § 1.513-1(d)(3).

291. Some profit is actually desirable as it is often necessary to fund less profitable programs that require financial assistance. By funding these programs, the profit is being used to enrich the educational experience of a greater number of student-athletes. Moreover, many programs have good and bad seasons and their revenues reflect it. Allowing athletic departments to make modest profits during successful seasons in order to provide for themselves during unsuccessful seasons ensures the furtherance of education by increasing the financial security of the athletic department.

292. That is to say, a student-athlete who participates in a nonprofitable or moderately profitable athletic department receives the same educational benefit from participating in intercollegiate athletics as the student-athlete in an incredibly profitable athletic program.

293. The examples are based on actual universities.

expense to revenue difference is negative. If the congressional presumption was eliminated, University A's athletic department would still not be subject to UBIT.

Example 2: University B. University B's athletic department is currently on probation for an NCAA rule infraction in 2004, and has been censured, sanctioned, or put on probation five times before, in 1978, 1982, twice in 1985, and in 1997. Last year, 50 percent of student-athletes graduated from University B, as compared to 70 percent of students overall. The median GPA for student-athletes at University B is in the 30th percentile of the overall GPA distribution. Last year, the athletic department at University B made a net profit of \$23.9 million.

This example is as simple as the first. University B's academic performance is unsatisfactory: they are currently on probation and have a long history of major infractions. Twenty percent fewer student-athletes earn their degrees than comparable non-athlete students. Additionally, the student-athletes academically under-perform when compared to the rest of the student body. Moreover, University B's profits are excessive. After all sports—revenue and nonrevenue—are funded, a \$23.9 million surplus remains. Revenue of this magnitude is not reasonably necessary to further education and evinces the lack of a substantial relation between the income-producing activities of the athletic department and the educational purpose of University B. If the congressional presumption was eliminated, University B's athletic department would be subject to UBIT.

Example 3: University C. University C's athletic department has never been censured, sanctioned, or put on probation by the NCAA. Last year, 78 percent of student-athletes graduated from University C, as compared to 75 percent of students overall. The median GPA for student-athletes at University C is in the 50th percentile of the overall GPA distribution. Last year, the athletic department at University C made a net profit of \$17 million.

This example highlights the conjunctive nature of the academic and financial elements in the substantial relationship test. University C's athletic department is exemplary from an academic standpoint: graduation rates are above the national average, the university's average, classroom performance is solid, and the athletic department has never been disciplined. But that is only half the story. A net profit of \$17 million is strong evidence that the athletic department is conducting its operations on a larger scale than is reasonably necessary for the enrichment of student-

athletes' academic experiences.²⁹⁴ In addition, the athletic department cannot avoid UBIT by contributing the profit to University C, as the Treasury Regulations state that the mere provision of funds is not sufficient. Thus, while University C's athletic department has done a laudable job academically, it would most likely be required to pay taxes under UBIT.

C. IMPACT ON COLLEGE AND UNIVERSITY'S § 501(C)(3) TAX STATUS

The proposed reform also has potential repercussions on the tax-exempt status of universities. Once it becomes possible to label an athletic department as an unrelated trade or business for the purposes of UBIT, a corollary issue becomes whether or not the university that houses such an athletic department meets the I.R.C. § 501(c)(3) requirement that a university be "organized and operated exclusively" for educational purposes in order to maintain its federal tax-exemption.²⁹⁵

As long as a university's charter frames the institution's purpose as educational, the organizational element of I.R.C. § 501(c)(3) will be satisfied.²⁹⁶ To satisfy the operational element, a university must demonstrate that it engages primarily in activities that accomplish its educational purpose.²⁹⁷ Distinguishing between the activities of the university and the activities of its relatively autonomous athletic department is necessary. While many athletic departments are primarily engaged in noneducational activities, the complete opposite is true for universities. Most, if not all, universities devote the vast majority of their time, energy, and resources to providing students and faculty an environment in which to study, conduct research, contribute to scholarship, and prepare for future careers as learned professionals.²⁹⁸ In addition, many universities allocate considerable attention and money to the operation of medical hospitals and insurance companies for the benefit of students, faculty and staff.²⁹⁹ Thus, while the athletic department may, at first, seem

294. It should be noted that the use of phrase "reasonably necessary" within Treasury Regulation § 1.513-1(d)(3) necessitates a degree of discretion on the part of the fact finder. What is reasonably necessary should depend on the circumstances of the individual athletic program, as well as what is ideal from a policy standpoint.

295. I.R.C. § 501(c)(3) (2000).

296. Universities' articles of organization conventionally assert an educational purpose. *See, e.g.*, RESTATED CHARTER OF DUKE UNIVERSITY § 2 (2007), available at http://www.provost.duke.edu/pdfs/fhb/FHB_App_A.pdf, ("[T]he purpose[] for which such corporation is organized [is] to . . . perpetuate an institution of higher learning . . .").

297. Treas. Reg. § 1.501(c)(3)-1(c)(1) (as amended in 1990).

298. *See* DUDERSTADT, *supra* note 123, at 87–92.

299. *See id.*

to be the primary activity of the university, it is on average a mere 2.8 percent of the annual budget at NCAA Division I-A institutions.³⁰⁰ Indeed, it would be exceedingly rare for an athletic department to grow so large that the university's primary activity ceased to be educational.

D. EXPANDING TAX LIABILITY AS A MEANS OF REFORM IN INTERCOLLEGIATE ATHLETICS

Finally, the proposed elimination of Congress's conclusive presumption has the potential to introduce much-needed reform within intercollegiate athletics by appropriately structuring the incentives for individual athletic departments.³⁰¹ Elimination of the conclusive presumption that intercollegiate athletics are substantially related to education necessitates the imposition of UBIT on athletic departments that fail to contribute importantly to education.³⁰² Given that many athletic departments operate at the margins financially, their desire to avoid tax liability under UBIT will act as an effective incentive to contribute importantly to educational purposes.³⁰³ Further, because UBIT is based on a profit motive and not actual profit, the incentives will apply to all athletic departments and not just the few successful ones.³⁰⁴ The threat of potential taxation will have two significant impacts on the way in which intercollegiate athletic departments are operated.

First, the risk of tax liability will encourage athletic departments to "contribute importantly" to education. Once academic performance is connected with tangible monetary incentives, it will become a priority for athletic departments. Thus, UBIT will provide an athletic department with incentives to ensure that its student-athletes perform in the classroom and bring their academic studies to fruition by earning a degree. Moreover, the system will no longer reward coaches who admit substandard students through wild card admissions, as these students become a potential tax liability instead of competitive assets. Further, the desire to avoid the imposition of UBIT will pressure coaches to avoid sanctions from supervisory institutions. In short, UBIT will properly incentivize athletic

300. LITAN, ORSZAG & ORSZAG, *supra* note 238, at 13 (reporting that athletic expenditures represented 2.8 percent of "total higher education" spending, and 3.6 percent of "educational & general" spending at NCAA Division I-A institutions).

301. See Selena Roberts, *Big-Time College Sports May Be Due For an Audit*, N.Y. TIMES, Oct. 29, 2006, at § 8 ("The tax code is one of the largest pieces of social legislation. You can encourage and discourage certain behaviors.") (quoting David Williams, a tax lawyer and vice chancellor at Vanderbilt University).

302. See discussion *supra* Part IV.B.

303. See discussion *supra* Part IV.A.2.

304. See discussion *supra* Part II.B.1.

departments to contribute to the academic enrichment of student-athletes by taxing them when they do not.

Second, the threat of potential tax liability will arrest the escalating expenditures that have become a defining characteristic of intercollegiate athletic finances. An athletic department with consistently climbing expenditures exposes itself to the imposition of UBIT because such spending exceeds what is reasonably necessary to support the enrichment of student-athletes' academic experiences through intercollegiate athletic competition. Accordingly, in order to avoid taxation, athletic departments will need to restrain their spending to reasonable levels. The restraint of individual athletic departments will in turn result in a chilling effect on the intercollegiate arms race. Thus, UBIT will decelerate the rate at which athletic expenditures rise by providing individual athletic departments with disincentives for escalating their spending.

The governing bodies that presently oversee intercollegiate athletics lack the ability to properly restructure financial incentives so as to induce reform. To start, the NCAA has neither the power nor the ability to directly regulate the economic activities of its member institutions.³⁰⁵ Instead, the NCAA attempts to encourage reform through the threat of disciplinary action.³⁰⁶ Punitive measures, however, are palliative and do not sufficiently restructure the financial reward system to induce reform. In addition, the NCAA's disciplinary actions are of a limited efficacy as it has no subpoena or interrogatory powers and must wait to be informed of wrongdoing—by either the school itself, or the media—before it conducts an investigation.³⁰⁷ Institutional control over incentives is also severely limited because of the “auxiliary activity” structure which grants most athletic departments a great deal of autonomy.³⁰⁸ Moreover, some university presidents are not willing to rein in their athletic departments as they continue to believe in possible indirect benefits for the university, despite empirical evidence.³⁰⁹ Thus, reforming the tax law by eliminating Congress's conclusive presumption is not only supported by the realities of intercollegiate athletics, but also may be the only solution to the issues currently facing intercollegiate athletics.

305. See Rozin, *supra* note 5 (“When [the NCAA] tried in 1991 to limit the salary of assistant coaches, it was sued on antitrust charges . . .”).

306. See 2006–07 NCAA DIVISION I MANUAL, ADMINISTRATIVE BYLAWS art. 32 (2006); 2006–07 NCAA DIVISION I MANUAL, OPERATING BYLAWS art. 19 (2006).

307. See *supra* note 179 and accompanying text.

308. See *supra* notes 140–44 and accompanying text.

309. See *supra* notes 235–46 and accompanying text.

V. CONCLUSION

In conclusion, the presumption that intercollegiate athletics furthers the educational purpose of a university is fundamentally unsound. While there is nothing inherently uneducational about athletic competition, from their inception, American intercollegiate athletics have often been conducted in a manner that conflicts with education. An examination of the present commercial and academic realities of intercollegiate athletics demonstrates that at many institutions, the athletic department not only fails to contribute to education, but also actually impedes the development of student-athletes' academic capabilities. Accordingly, tax exemption for all athletic departments is founded on a presumption that cannot be factually supported. Current tax law, therefore, should be reformed to eliminate any presumption as to the relationship between intercollegiate athletics and education.

The proposed reform necessitates an examination of an individual athletic department before imposing the unrelated business income tax upon it. Rather than presume that athletics further education, athletic departments will need to establish that they actually do contribute to the furtherance of educational purposes. When making this determination, an athletic department's history of institutional or NCAA sanctions, as well as the academic performance and graduation rate of its student-athletes, must be considered. In addition, an athletic department cannot generate or spend more income than is reasonably necessary to support its educational purpose. Under the proposed reform, athletic departments with a tenuous or incidental relation to education will be subject to taxation, while those that enrich the academic experience of their student-athletes will continue to be exempt.

