

NCAA'S CALL TO THE BULLPEN: BRING IN CONGRESS TO SAVE THE COLLEGE GAME WITH AN ANTITRUST EXEMPTION

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I. INTRODUCTION

Billion-dollar television-rights contracts to broadcast sports, corporate logos on jerseys and stadiums, and million-dollar compensation contracts are terms one may associate with professional sports.¹ However, these terms are now commonplace within the intercollegiate athletic environment.² The National Collegiate Athletic Association's ("NCAA") fundamental policy of amateurism³ has taken a backseat since the Supreme Court's decision in *NCAA v. Board of Regents of the University of Oklahoma*.⁴ The Supreme Court found the NCAA's regulations on commercial aspects of intercollegiate athletics violated section 1 of the Sherman Antitrust Act ("section 1").⁵ This ruling allowed commercialization and exploitation of student-athletes to skyrocket.⁶ Universities are stuck in an arms race forcing them to spend

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¹See Dannean J. Hetzel, *Professional Athletes and Sports Teams: The Nexus of Their Identity Protection*, 11 SPORTS LAW. J. 141, 143 (2004) (stating that professional athletes such as Tiger Woods sign endorsement contracts worth millions of dollars).

²See Matthew J. Mitten et al., *Targeted Reform of Commercialized Intercollegiate Athletics*, 47 SAN DIEGO L. REV. 779, 787-88 (2010) (noting that intercollegiate athletics commonly generate multimillion-dollar revenues "from gate receipts, broadcast revenues, and sponsorships").

³2012-13 NCAA DIV. I MANUAL 1 (2012) [hereinafter DIV. I MANUAL], available at <http://www.ncaapublications.com/productdownloads/D113.pdf> (setting forth Constitution 1.3.1).

⁴See *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 120 (1984).

⁵See *id.*

⁶See *infra* Parts V.A.

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exorbitant amounts of money to remain competitive in athletics, while academic funding remains stagnant.⁷ For intercollegiate athletics to return to its roots of amateurism, Congress must provide the NCAA with an antitrust exemption.⁸ An antitrust exemption will allow the NCAA to reform revenue-sharing principles to emphasize academic purposes and carry out the model for amateurism in intercollegiate athletics.⁹

This Article scrutinizes the rise of commercialization and exploitation in intercollegiate athletics and proffers a solution to return to the amateur-athletic model. Part II offers a brief history of the NCAA. Part III provides a background for antitrust analysis under section 1. Part IV reviews prior antitrust litigation against the NCAA. Part V explains the commercialization and exploitation of student-athletes due to the deregulation of commercial aspects within intercollegiate athletics. Part VI outlines the pending antitrust threat to the NCAA, which could change the entire NCAA business model. Part VII proposes the positive benefits an antitrust exemption could provide the NCAA, universities, student-athletes, and regular academic students.

II. BRIEF HISTORY OF THE NCAA

One of the first intercollegiate athletic events pitted Harvard University against Yale University in a race to the finish buoys.¹⁰ More than 150 years ago, an ivy league regatta laid the foundation for NCAA governance.¹¹ Even in the early days of intercollegiate athletics, the

⁷See *infra* Parts V.A.1-3.

⁸See *infra* Part VII; Brad Wolverton, *Watchdog Group's Proposal Calls for Antitrust Exemption for NCAA*, THE CHRON. OF HIGHER EDUC. (Oct. 11, 2013), <http://chronicle.com/blogs/players/watchdog-groups-proposal-calls-for-antitrust-exemption-for-ncaa/33711>.

⁹See *infra* Part VII.

¹⁰Rodney K. Smith, *A Brief History of the National Collegiate Athletic Association's Role in Regulating Intercollegiate Athletics*, 11 MARQ. SPORTS L. REV. 9, 10 (2000).

¹¹See MATTHEW J. MITTEN ET AL., SPORTS LAW AND REGULATION: CASES, MATERIALS, AND PROBLEMS 100 (2d ed. 2009).

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need for regulation was apparent;¹² Harvard, in an attempt to gain an advantage against its opponent, utilized the skills of a coxswain who was not a student at the university.¹³ As intercollegiate athletics progressed towards the twentieth century, universities began to realize the difficulty in managing these types of events.¹⁴ Development of rules committees and conferences began in the early twentieth century, but the committees and conferences lacked a central focus.¹⁵ In 1905, due to a rash of deaths and serious injuries in intercollegiate football, President Theodore Roosevelt held a White House conference to discuss a review of football rules.¹⁶ Additionally, representatives of major intercollegiate football programs met to discuss regulations.¹⁷ Through a mutual effort between the White House and universities, sixty-two universities founded the Intercollegiate Athletic Association (“IAA”).¹⁸ The earliest principles that the IAA developed focused on amateurism, education, and sportsmanship.¹⁹ In 1910, the IAA retitled itself the NCAA.²⁰

Intercollegiate athletics continued to gain popularity and entrenched itself as vital part of higher education.²¹ Greater access to higher education and the beginning of television expanded the

¹²*See id.* (stating that President Eliot of Harvard University found admission prices to athletic events were turning “amateur contests into major commercial spectacles”).

¹³Smith, *supra* note 10, at 11 (explaining that universities sought unfair advantages “from the beginning of organized intercollegiate athletics”).

¹⁴*See* MITTEN, *supra* note 11, at 100.

¹⁵*See* W. Burlette Carter, *Student-Athlete Welfare in a Restructured NCAA*, 2 VA. J. SPORTS & L. 1, 9 (2000).

¹⁶Smith, *supra* note 10, at 12.

¹⁷*Id.*

¹⁸MITTEN, *supra* note 11, at 101.

¹⁹Carter, *supra* note 15, at 11 (stating that universities intended to instill a set of athletic values into the student-athletes).

²⁰*Id.*

²¹MITTEN, *supra* note 11, at 101.

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popularity of intercollegiate athletics even further and raised issues of commercialization.²² Through the 1950s, the NCAA attempted to adapt to the increase in commercialization by creating the Committee on Infractions, which allowed the NCAA to sanction intercollegiate athletic programs for exploiting student-athletes.²³ By the early 1970s, the NCAA's authority for rule making and enforcement had grown exponentially due to the increased commercialization of intercollegiate athletics.²⁴ However, not all applauded the NCAA's expansion of authority.²⁵ The NCAA received criticism for failing to rein in commercialism and for vigorously enforcing its regulatory authority.²⁶ Again, the NCAA developed changes to address the criticisms, but commercialization, and the opportunities that flow from commercialization, triggered university presidents to take a more active role in NCAA governance.²⁷

Higher education was suffering economically in the 1980s; therefore, the university presidents felt the need to take an active role in NCAA governance to facilitate cost-containment measures.²⁸ However, more revenue became a reality when the Supreme Court decided that the NCAA violated antitrust laws by controlling broadcast-television rights of intercollegiate football games.²⁹

The university presidents' injection into the NCAA governance

²²*Id.* at 102 (expanding athletic programs, along with "gambling scandals and recruiting excesses," required the NCAA to expand).

²³*Id.*

²⁴Smith, *supra* note 10, at 15-16.

²⁵*See id.* at 16 (stating that the U.S. House of Representatives Subcommittee on Oversight and Investigation scrutinized the NCAA's enforcement processes).

²⁶*Id.*

²⁷MITTEN, *supra* note 11, at 103.

²⁸*Id.* (finding that university presidents began to understand the procedures of the NCAA and took more of an interest in governance).

²⁹*See* NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 118-20 (1984).

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completely changed the structure of the NCAA.³⁰ The Executive Committee and Board of Directors, composed of presidents and chief executive officers of member institutions, have made numerous reforms since the 1990s.³¹ All the while, commercialization of intercollegiate athletics and the strain on the NCAA continues.³²

III. APPLICABLE ANTITRUST LAW

The Sherman Antitrust Act protects consumers by ensuring the competitive process goes unharmed, which necessitates market participants to lower prices and produce higher-quality products to compete.³³ Section 1 provides: “Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal.”³⁴ While a literal interpretation of section 1 intimates that every contract is a restraint on trade, the consensus of courts is that section 1 outlaws only “unreasonable restraints” on trade or commerce.³⁵

To present a *prima facie* violation of section 1, a plaintiff must show that (1) an organization “participated in an agreement that (2) unreasonably restrained trade in the relevant market.”³⁶ Prior interpretation held the Sherman Antitrust Act as only preventing commercial, *business world* entities from agreeing to unreasonably

³⁰Smith, *supra* note 10, at 17.

³¹*Id.*; see MITTEN, *supra* note 11, at 104-08 (explaining the reforms, which include stricter eligibility rules, Division I university certification process, academic progress rate, and graduation success rate).

³²Smith, *supra* note 10, at 21-22.

³³Town of Concord, Mass. v. Bos. Edison Co., 915 F.2d 17, 21-22 (1st Cir. 1990).

³⁴15 U.S.C. § 1 (2012).

³⁵State Oil Co. v. Khan, 522 U.S. 3, 10 (1997).

³⁶Law v. NCAA, 134 F.3d 1010, 1016 (10th Cir. 1998).

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restrain trade;³⁷ yet professional associations fit within the coverage of
the Sherman Antitrust Act,³⁸ including nonprofit associations.³⁹ The
relevant market takes into account “geography as well as product use,
quality, and description.”⁴⁰ The relevant geographic markets include
effective competition areas where consumers have alternative sources of
supply.⁴¹ The relevant product markets include “the pool of goods or
services that enjoy reasonable interchangeability”⁴² Courts
analyze a restraint on trade by using one of two analyses: illegal per se
analysis or rule of reason analysis.⁴³ An illegal per se restraint on trade
is “entirely void of redeeming competitive rationales” and illegal on its
face.⁴⁴ The rule of reason analysis balances the anticompetitive effects
against the procompetitive rationale of the restraint on trade to
determine if the restraint is unreasonable.⁴⁵ As the antitrust precedent
developed, universities started realizing that the NCAA was a profit-
making enterprise and potentially subject to the Sherman Antitrust

³⁷*Marjorie Webster Junior Coll., Inc. v. Middle States Ass’n of Colls. & Secondary Schs.*, 432 F.2d 650, 654 (D.C. Cir. 1970) (explaining that the Sherman Antitrust Act proscriptions do not reach “noncommercial aspects of the liberal arts and the learned professions”); *see* MITTEN, *supra* note 11, at 239.

³⁸*See Goldfarb v. Va. State Bar*, 421 U.S. 773, 787 (1975) (holding that professional associations are not exempt from the Sherman Antitrust Act).

³⁹*Hennessey v. NCAA*, 564 F.2d 1136, 1149 (5th Cir. 1977) (holding that the NCAA does not have a blanket exception from antitrust laws because of its nonprofit, educational aspects).

⁴⁰*Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1063 (9th Cir. 2001) (quoting *Oltz v. St. Peter’s Cmty. Hosp.*, 861 F.2d 1440, 1446 (9th Cir. 1988)).

⁴¹*Id.*

⁴²*Id.*

⁴³*Law v. NCAA*, 134 F.3d 1010, 1016 (10th Cir. 1998).

⁴⁴*Id.* (quoting *SCFC ILC v. Visa USA, Inc.*, 36 F.3d 958, 963 (10th Cir. 1994)).

⁴⁵*Id.* at 1016-17.

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Act,⁴⁶ which set the stage for *NCAA v. Board of Regents*.⁴⁷

IV. ANTITRUST LAW APPLIED TO THE NCAA

The seminal Supreme Court case of *NCAA v. Board of Regents* involved two universities challenging the NCAA's television plan on antitrust grounds.⁴⁸ Since the early 1950s, the NCAA "Television Committee" controlled the output of television-broadcasted intercollegiate football under the justification that broadcasting intercollegiate football on television negatively affects live attendance.⁴⁹ The NCAA developed a plan to negotiate with the broadcast networks; under the plan, the NCAA restricted the networks under certain ground rules in televising games.⁵⁰ Furthermore, member universities were unwelcome to stray outside of the television plan.⁵¹

Consisting of five major conferences and major college football programs, the College Football Association ("CFA") was developed to further the interests of the major college football programs within the NCAA.⁵² In 1979, the CFA members felt the need to have a bigger impact on the development of the NCAA television plan.⁵³ As a show of muscle, the CFA solicited a contract offer from a broadcast company outside the NCAA's television plan.⁵⁴ The NCAA countered by

⁴⁶*Hennessey v. NCAA*, 564 F.2d 1136, 1149 n.14 (5th Cir. 1977).

⁴⁷*NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85 (1984).

⁴⁸*Id.* at 88.

⁴⁹*Id.* at 89-90.

⁵⁰*Id.* at 90 (explaining the television contracts, which placed limits on the number of games televised and number of university appearances per year).

⁵¹*Id.* The University of Pennsylvania challenged the television committee plan. *Id.* However, the University of Pennsylvania reconsidered and abided by the plan after the four schools scheduled to play backed out. *Id.*

⁵²*Id.* at 89.

⁵³*Id.* at 94.

⁵⁴*Id.* at 94-95.

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threatening penalties against the universities that participated in the
CFA's plan.⁵⁵ Two members of the CFA, the University of Oklahoma
and the University of Georgia, answered the NCAA by filing a lawsuit
that ultimately reached the Supreme Court in 1984.⁵⁶

The Court began the analysis by finding that the NCAA engaged
in an agreement to restrain trade.⁵⁷ The NCAA is composed of a group
of member institutions that voted on regulations to provide the NCAA a
basis for negotiations with the broadcast networks.⁵⁸ Because the
member institutions voted on the NCAA's comprehensive plan, the
member institutions were unable to compete against each other for
television rights.⁵⁹ Moreover, the NCAA television contract put an
artificial cap on the amount of games permitted for broadcast.⁶⁰ The
Court found this type of agreement as a classic horizontal price-fixing
scheme.⁶¹ Typically, a horizontal price-fixing scheme and output
limitation is illegal per se.⁶² However, the Court determined that the
illegal per se analysis is inadequate to properly analyze a section 1
claim against the NCAA.⁶³ The rule of reason analysis is a more
appropriate review because the NCAA requires some restraints on
competition to survive.⁶⁴ Examples of acceptable restraints include:
field-of-play rules, enforcement rules, eligibility rules, and other

⁵⁵*Id.* at 95.

⁵⁶*See id.*

⁵⁷*Id.* at 98.

⁵⁸*Id.* at 99.

⁵⁹*Id.*

⁶⁰*Id.*

⁶¹*Id.*

⁶²*Id.* at 100.

⁶³*Id.* at 100-01.

⁶⁴*Id.* at 101.

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noncommercial rules.⁶⁵ The Court agreed with the respondents' arguments regarding the anticompetitive impact the NCAA television contract had on trade.⁶⁶ The NCAA television contract limited the number of televised games, which caused increased prices for television rights and harm to consumers.⁶⁷ After reviewing the NCAA's proposed procompetitive rationale of establishing an efficient marketing strategy, preserving competitive balance, and protecting live attendance, the Court found that the NCAA failed to meet the burden of proving that the procompetitive rationale of the restraint outweighed the anticompetitive impacts.⁶⁸ Finally, the Court determined that intercollegiate football broadcasts are unique in the fact that no other programming is comparable; therefore, intercollegiate football broadcasts are a separate market, and the NCAA possesses all of the market power for those broadcasts within the United States of America.⁶⁹ After the full antitrust analysis, the Court held that the NCAA's regulations on commercial aspects of intercollegiate athletics violated section 1.⁷⁰

In subsequent years, the NCAA has faced numerous antitrust challenges arguing that certain NCAA rules restrain trade.⁷¹ In *Law v. NCAA*, the Tenth Circuit Court of Appeals affirmed a permanent injunction against the NCAA's rule for restricted-earning coaches.⁷² The Restricted Earnings Coach rule capped compensation for entry-level coaches at \$16,000 per year while also reducing Division I

⁶⁵*Id.* at 101-02, 117.

⁶⁶*Id.* at 106.

⁶⁷*Id.* at 106-07.

⁶⁸*Id.* at 114-17.

⁶⁹*Id.* at 111-12.

⁷⁰*Id.* at 120 (ruling that the NCAA's restriction on output is inconsistent with the Sherman Antitrust Act).

⁷¹See *infra* notes 72-75 and accompanying text.

⁷²*Law v. NCAA*, 134 F.3d 1010, 1024 (10th Cir. 1998).

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basketball coaching staffs.⁷³ The Tenth Circuit mirrored the analysis
promulgated in *NCAA v. Board of Regents* and found that the NCAA
unreasonably restrained trade in the market for intercollegiate basketball
coaches.⁷⁴ However, courts have stood firm on upholding NCAA rules
that govern eligibility, enforcement, and other noncommercial rules.⁷⁵

The clear point resonating from antitrust litigation against the
NCAA is that regulations on the commercial aspects of intercollegiate
athletics are illegal.⁷⁶ Unfortunately, this revelation has brought about
the unforeseen consequences of shifting the focus away from the
fundamental principles of the NCAA and placing the emphasis on the
bottom dollar.⁷⁷

V. COMMERCIALIZATION AND EXPLOITATION OF INTERCOLLEGIATE ATHLETICS AND THE EFFECTS ON THE UNIVERSITIES AND THEIR STUDENT-ATHLETES

The NCAA's founding principles are to protect student-athletes
and emphasize education,⁷⁸ which fits under the guise of amateurism.⁷⁹
The NCAA defines amateurism as: "Student-athletes shall be amateurs
in an intercollegiate sport, and their participation should be motivated
primarily by education and by the physical, mental and social benefits

⁷³*Id.* at 1013-14.

⁷⁴*Id.* at 1024.

⁷⁵*E.g.*, *Smith v. NCAA*, 139 F.3d 180, 187 (3d Cir. 1998) (holding that the NCAA's Postbaccalaureate Bylaw eligibility rule is a reasonable restraint on trade because it furthers fair competition and survival of intercollegiate athletics); *McCormack v. NCAA*, 845 F.2d 1338, 1343 (5th Cir. 1988) (holding that NCAA eligibility rules are reasonable restraints of trade and not in violation of the Sherman Antitrust Act).

⁷⁶*See supra* notes 72, 74-75 and accompanying text.

⁷⁷*See infra* Part V.

⁷⁸*NCAA Core Purpose and Values*, NCAA, <http://www.ncaa.org/about/ncaa-core-purpose-and-values> (last visited Feb. 28, 2014).

⁷⁹*See Remaining Eligible: Amateurism*, NCAA, <http://www.ncaa.org/remaining-eligible-amateurism> (last visited Feb. 4, 2014, 3:30 PM) (noting that amateurism is critical to ensuring that education is the athlete's highest priority).

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to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises.”⁸⁰ However, the interpretation of the Sherman Antitrust Act and its application to the NCAA blurred the meaning of amateurism.⁸¹ The absence of regulations on commercial aspects of intercollegiate athletics has led to commercialization and exploitation of student-athletes.⁸²

A. Television Contracts and Corporate Sponsorships

Chaos developed within the landscape of intercollegiate athletics after the Supreme Court in *NCAA v. Board of Regents* found the NCAA’s horizontal price-fixing scheme violated antitrust laws.⁸³ The CFA immediately put their members’ games up for sale to the highest bidder.⁸⁴ Eventually, conferences and universities realized the attractiveness of negotiating individually and broke away from the CFA.⁸⁵ As a result, conferences began to expand their roster of universities and extend their coverage into new markets.⁸⁶ With the increasing popularity of intercollegiate athletics and evolution of technology, a “perfect storm” for commercialization developed.⁸⁷

⁸⁰Div. I MANUAL, *supra* note 3, at 4.

⁸¹*See supra* Part IV.

⁸²*See infra* Part V.A-B.

⁸³*See* *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 120 (1984) (holding that by interfering with “the ability of member institutions to respond to consumer preference, the NCAA has restricted rather than enhanced the place of intercollegiate athletics in the Nation’s life”); *see infra* note 84.

⁸⁴ANDREW ZIMBALIST, UNPAID PROFESSIONALS: COMMERCIALISM AND CONFLICT IN BIG-TIME COLLEGE SPORTS 101 (Princeton Univ. Press 1999) (noting the CFA’s haste to sign deals with various broadcast companies).

⁸⁵*Id.* at 101-02.

⁸⁶*Id.* at 102.

⁸⁷*See* Jack F. Williams, *The Coming Revenue Revolution in Sports*, 42 WILLAMETTE L. REV. 669, 670-71 (2006) (discussing the effect that technology has on sports business models).

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Television-broadcast companies realized they had a gold mine and started paying large amounts of money to dig into that mine.⁸⁸ The Knight Commission on Intercollegiate Athletics, a group of intercollegiate athletic reformers,⁸⁹ recently published financial data regarding television contracts connected to NCAA member institutions.⁹⁰ The media contracts for the top five NCAA Division I conferences are set to generate an average annual revenue of \$1.098 billion;⁹¹ the Big Ten and Pac-12 conferences lead the way with an average annual revenue to each member institution of approximately \$20 million.⁹² Even more shocking, the NCAA signed a fourteen-year television-rights contract for its men's basketball tournament with CBS and Turner Sports for \$10.8 billion, or approximately \$771 million per year.⁹³

Furthermore, the increased popularity of intercollegiate athletics has caught the attention of the corporate world.⁹⁴ Corporate sponsors take advantage of the unique marketing platform that intercollegiate

⁸⁸See ZIMBALIST, *supra* note 84, at 101 (noting the numerous broadcast companies that spent millions in exchange for rights to various football games).

⁸⁹See *About*, KNIGHT COMM'N ON INTERCOLLEGIATE ATHLETICS, <http://www.knightcommission.org/about/about-background> (last visited Feb. 4, 2014, 4:00 PM) (explaining that the Knight Commission seeks to “ensure that intercollegiate athletics programs operate within the educational mission of their colleges and universities”).

⁹⁰See *Media Contracts for Five Major Conferences*, KNIGHT COMM'N ON INTERCOLLEGIATE ATHLETICS 1 (2011), http://www.knightcommission.org/images/pdfs/2011_tv_contract_big5.pdf (providing a chart with financial data regarding the conference media contracts).

⁹¹*Id.*

⁹²*Id.*

⁹³Thomas O'Toole, *NCAA Reaches 14-Year Deal with CBS/Turner for Men's Basketball Tournament, Which Expands to 68 Teams for Now*, USA TODAY (Apr. 22, 2010, 4:09 PM), <http://content.usatoday.com/communities/campusrivalry/post/2010/04/ncaa-reaches-14-year-deal-with-cbturner/1>.

⁹⁴See ZIMBALIST, *supra* note 84, at 136.

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athletics provides by placing their marks both off and on the field.⁹⁵ Intercollegiate football bowl games previously named after fruits, flowers, and city landmarks changed to bowl games with corporate trademark titles.⁹⁶ Now, universities offer stadium facades to the corporate world for naming rights.⁹⁷ Sports apparel companies compete to place their trademarks on jerseys, shoes, wristbands, etc.⁹⁸ Universities license their mascot and name to obtain royalties on merchandise sales.⁹⁹

Intercollegiate athletics' popularity dramatically increased due to more output of athletic events on television.¹⁰⁰ The expansive coverage of student-athletes understandably places them under a significant amount of pressure to perform both on and off the field.¹⁰¹ Moreover, corporate exploitation of student-athletes, through the university's dealings, may force athletes to "look the other way" in certain

⁹⁵*See id.* at 137-38.

⁹⁶Adam R. Schaefer, Recent Development, *Slam Dunk: The Case for an NCAA Antitrust Exemption*, 83 N.C. L. REV. 555, 560-61 (2005).

⁹⁷*Id.*

⁹⁸*See* Rachel Bachman, *Oregon Athletic Department Quietly Extends Nike Contract Through 2018*, THE OREGONIAN, Mar. 27, 2010, http://blog.oregonlive.com/behindducksbeat/2010/03/oregon_athletic_department_qui.html (indicating the unique relationship between Nike and the University of Oregon's athletic program).

⁹⁹*See, e.g., About CLC*, COLLEGIATE LICENSING CO., <http://www.clc.com/About-CLC.aspx> (last visited Jan. 30, 2014) (explaining the Collegiate Licensing Company's trademark licensing services).

¹⁰⁰*See* MITTEN, *supra* note 11, at 102.

¹⁰¹*See* Nicole Auerbach, *The Good and Bad of Twitter and College Athletes*, USA TODAY (Jan. 10, 2013), <http://www.usatoday.com/story/sports/college/other/2013/01/10/college-athletes-twitter-criticism-johnny-manziel-kentucky/1823959/>; Travis Gumphrey, *Pressure on Athletes May be Too Great*, THE DAILY COUGAR (Nov. 29, 2010), <http://thedailycougar.com/2010/11/29/pressure-on-athletes-may-be-too-great/>.

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situations.¹⁰² While commercialization certainly has an effect on
student-athletes, it also affects regular academic students.¹⁰³

In order to stay competitive, university athletic departments are spending massive amounts of money¹⁰⁴ and making decisions that are not necessarily in the best interests of the entire student body.¹⁰⁵ Perhaps many students enjoy attending their respective university athletic events, but likely just as many students prefer to attend the university science lab or theatre.¹⁰⁶ One may think that with the amount of money involved in intercollegiate athletics there is certainly some money available for the academic endeavors of the university.¹⁰⁷ However, most university athletic departments operate at a loss, which requires the university to subsidize the difference from academic funds.¹⁰⁸ The lack of money in a majority of university athletic

¹⁰²See ZIMBALIST, *supra* note 84, at 141-42 (explaining that sports apparel and shoe companies using subcontractors in foreign countries fail to provide adequate working conditions and wages).

¹⁰³See *infra* text accompanying notes 148-52.

¹⁰⁴See generally *Restoring the Balance: Dollars, Values, and the Future of College Sports*, KNIGHT COMM'N ON INTERCOLLEGIATE ATHLETICS 1, 7 (2012), http://www.knightcommission.org/images/restoringbalance/KCIA_Report_F.pdf [hereinafter *Restoring the Balance*] (explaining that top athletic programs spend millions of dollars per year, at an increasing rate).

¹⁰⁵See generally *infra* Part V.A.1-3 (explaining that university spending on athletic programs often does not benefit the university as a whole and may be to the detriment of its academic programs).

¹⁰⁶Andrew Smyth & Alexandra Conway, *Poll: Arts Events Prove More Popular than Sports*, THE BROWN DAILY HERALD (Apr. 12, 2013), <http://www.browndailyherald.com/2013/04/12/poll-arts-events-prove-more-popular-than-sports/> (explaining that at Brown University “[s]tudents are more likely to attend events in the performing and visual arts than varsity sports”).

¹⁰⁷See *infra* Part V.A.1-3.

¹⁰⁸*College Sports 101: A Primer on Money, Athletics, and Higher Education*, KNIGHT COMM'N ON INTERCOLLEGIATE ATHLETICS 13-15 (2009), http://www.knightcommission.org/index.php?option=com_content&view=article&id=344&Itemid=84 [hereinafter *College Sports 101*]; see ZIMBALIST, *supra* note 84, at 157.

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departments may be a result of out-of-control spending to attract student-athletes to the university.¹⁰⁹ The circular argument, known as the arms race, proceeds like this: To obtain the large revenue from television rights and corporate sponsors, the university has to win; for the university to win, the university needs to recruit top-level student-athletes; to recruit top-level student-athletes, the university needs to spend money to attract the top-level student-athletes.¹¹⁰ The following subsections address the arms race dilemma and its negative impact on universities and their student-athletes.

1. Increased spending on athletic facilities

Universities realize the old adage, “keeping up with the Joneses,” still runs true today.¹¹¹ Student-athletes would rather workout in a first-class facility with state-of-the-art equipment than in a musty basement with rusty equipment.¹¹² Similarly, most donors and alumni would rather sit in skyboxes and seat-back chairs than in metal bleachers.¹¹³ Universities realize this reality and compete against each other to build the best and brightest facilities hoping to attract potential

¹⁰⁹*See infra* Part V.A.1-3.

¹¹⁰*See generally* John C. Weistart, *Can Gender Equity Find a Place in Commercialized College Sports?*, 3 DUKE J. GENDER L. & POL’Y 191, 211-12 (1996) (explaining the pressures to increase revenue).

¹¹¹*See* David Hale, *Moving the Chains, Dollar by Dollar*, ESPN COLL. FOOTBALL (Aug. 9, 2013), http://espn.go.com/college-football/story/_/id/9543925/florida-state-seminoles-look-level-playing-field-sec-gridiron-their-checkbook (“It’s a matter of keeping up with the Joneses, and while all the extra spending might be largely superficial, Fisher said, it’s a game top schools can’t risk sitting out.”).

¹¹²*See id.* (explaining that when it comes to recruiting, investing in luxury amenities is key because “[w]hen you’re asking guys to come from a distance and bypass a lot of places, there has to be a reason to go there besides just winning”).

¹¹³Kelli M. Dugan, *Gateway to Crimson Tide Football*, BUS. ALA., Mar. 2012, available at <http://www.businessalabama.com/Business-Alabama/March-2012/Gateway-to-Crimson-Tide-Football/> (recognizing that skyboxes attract donors and alumni).

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student-athletes and donors.¹¹⁴ A 2005 NCAA task force estimated that 20% of athletic department spending goes towards facilities.¹¹⁵ Recently, some high-level intercollegiate athletic programs have made large purchases:¹¹⁶ the University of Kentucky built a \$30 million basketball practice facility;¹¹⁷ the University of Georgia spent \$31 million on a weightlifting facility;¹¹⁸ and the University of Michigan spent \$226 million to modernize Michigan Stadium.¹¹⁹ Some argue that facilities require maintenance and improvement.¹²⁰ While the argument has merit, others argue spending on athletic facilities is overzealous, especially when the universities limit some of the facilities solely to the

¹¹⁴*See College Sports 101, supra* note 108, at 16-17 (recognizing that “different athletics programs woo 17- or 18-year-old high school seniors with the most lavish practice facility, shiniest academic study center or snazziest arena”); *see also Former Lady Topper Joins WKU Development Office*, WKU ATHLETICS, <http://www.wkusports.com/genrel/011206aaa.html> (last visited Feb. 4, 2014) (recognizing that improved facilities “help not only in recruiting students and student-athletes but also in attracting donors and prospective donors”).

¹¹⁵*College Sports 101, supra* note 108, at 16-17.

¹¹⁶*See infra* notes 117-19 and accompanying text.

¹¹⁷*See College Sports 101, supra* note 108, at 16-17.

¹¹⁸*Id.*

¹¹⁹Jim Carty, *Renovated Michigan Stadium is Set to Open*, N.Y. TIMES, Sept. 3, 2010, available at http://www.nytimes.com/2010/09/04/sports/ncaafootball/04stadium.html?_r=1&.

¹²⁰*See* Bill King, *Race for Recruits*, SPORTS BUS. J., Dec. 5, 2005, available at <http://www.sportsbusinessdaily.com/Journal/Issues/2005/12/20051205/SBJ-In-Depth/Race-For-Recruits.aspx> (“High school students are young and impressionable. They’re swayed not only by coaches, but by facilities. When they see the big wow factor, that plays into their decision to some extent. And when somebody else has something and you don’t, they notice. Improving your facilities is one way to move ahead.”).

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student-athletes.¹²¹ The University of Oregon's football locker room requires a thumbprint scan to enter,¹²² and Texas A&M's luxury football locker room houses 130 oak lockers.¹²³

Although many university athletic departments fail to generate a profit,¹²⁴ facility upgrades continue throughout the NCAA landscape.¹²⁵ Where does the money come from? Universities use several different methods to finance their facilities.¹²⁶ Universities, or entities tied to a university, may issue tax-exempt bonds to secure the necessary funds.¹²⁷ A university may also obtain the capital necessary by fundraising.¹²⁸ However, underlying these seemingly innocent methods of raising money is a tax issue.¹²⁹ Investors that purchase tax-exempt bonds do

¹²¹See *infra* notes 122-23 and accompanying text; see also Liz Clarke, *Maryland Athletics' Financial Woes Reveal a Broken College Sports Revenue Model*, THE WASH. POST, June 28, 2012, available at http://www.washingtonpost.com/sports/colleges/maryland-athletics-financial-woes-reveal-a-broken-college-sports-revenue-model/2012/06/28/gJQAmEvx9V_story.html (“[T]he current model of college sports, marked by overzealous spending in pursuit of success in football and men’s basketball, is broken.”).

¹²²King, *supra* note 120.

¹²³*Id.*

¹²⁴See *College Sports 101*, *supra* note 108, at 13 (finding that most university athletic programs depend on allocated revenue from the school).

¹²⁵See *supra* text accompanying notes 111-13, 116-19; King, *supra* note 120 (explaining that the university spent \$15.2 billion on athletic facilities in just ten years).

¹²⁶See Kristi Dosh, *Multiple Ways to Finance College Stadiums*, ESPN, (June 14, 2012, 11:08 AM), http://espn.go.com/blog/pac12/post/_id/39977/multiple-ways-to-finance-college-stadiums (utilizing bonds, donations, corporate naming rights, and other strategies to finance stadiums).

¹²⁷*Id.*

¹²⁸Dan Springer, *Taxpayers Footing the Bill for College Football Stadium Frenzy*, FOX NEWS (Mar. 11, 2013) <http://www.foxnews.com/politics/2013/03/11/taxpayers-footing-bill-for-college-football-stadium-frenzy/>.

¹²⁹*Id.*

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not pay taxes on the interest,¹³⁰ and donors contribute large amounts of
money in exchange for a charity tax break.¹³¹ Moreover, the NCAA and
universities are nonprofit charitable organizations that benefit from tax
exemption.¹³² Therefore, the NCAA and university revenue, charitable
donations, and interest on bonds does not factor into the calculation of
United States tax revenue.¹³³ As a result, marginal tax rates rise
requiring American taxpayers to pay more taxes.¹³⁴

While a benefit is likely to evolve from such facility upgrades,
the benefit is narrow compared to the broad cost.¹³⁵ In certain
circumstances, utilization of the facility upgrades is limited to student-
athletes and athletic department staff.¹³⁶ Yet, the broad cost spreads
throughout American taxpayers due to the tax structure.¹³⁷

2. Athletic department and coaching salaries

Lute Olson, former University of Arizona men's basketball

¹³⁰Dosh, *supra* note 126.

¹³¹Springer, *supra* note 128.

¹³²I.R.C. § 501(c)(3) (2012); see John D. Colombo, *The NCAA, Tax Exemption, and College Athletics*, 2010 U. ILL. L. REV. 109, 113-14 (2010) (showing that universities gain exemption status through educational activities).

¹³³See Springer, *supra* note 128 (explaining that charity tax breaks cost the U.S. Treasury \$36 billion in 2011).

¹³⁴See *id.* (giving tax breaks takes money out of the tax revenue thus increasing marginal rates across the board).

¹³⁵See generally *Restoring the Balance*, *supra* note 104, at 7 (“[T]op programs are expected to have athletics budgets exceeding \$250 million by 2020 . . . serving an average of 600 student-athletes . . .”).

¹³⁶See *supra* notes 116-19 and accompanying text; see King, *supra* note 120 (illustrating that most football facilities are built near the stadium or practice fields to serve players only).

¹³⁷See *supra* notes 129-34 and accompanying text (explaining that Americans pay more because of tax breaks).

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coach, said, “[t]here is no question we are overpaid.”¹³⁸ The average salary for a head coach at the 2013 men’s basketball tournament was \$1.47 million.¹³⁹ Nick Saban¹⁴⁰ and John Calipari¹⁴¹ lead the college ranks in their respective sports with a yearly salary just shy of \$5.4 million.¹⁴² Just as sports teams have up-and-down seasons, so does the economy.¹⁴³ The effects of a down economy have recently hit Bowling Green State University, as the president decided to downsize faculty by 11%.¹⁴⁴ The Bowling Green State Falcons team finished the 2012-2013 football season with an 8-5 record, culminating in a loss in the Military Bowl.¹⁴⁵ Bowling Green State head football coach, Dave Clawson,

¹³⁸ZIMBALIST, *supra* note 84, at 74.

¹³⁹Erik Brady et al., *Pitino, Calipari Among Highest-Paid College Basketball Coaches*, USA TODAY, July 1, 2013, <http://www.usatoday.com/story/sports/ncaab/2013/04/03/highest-paid-ncaa-tournament-coaches-rick-pitino-john-calipari/2048859/>.

¹⁴⁰Nick Saban is the head football coach at the University of Alabama. *2013 Alabama Football Roster*, ROLLTIDE.COM, <http://www.rolltide.com/sports/m-footbl/mtt/alab-m-footbl-mtt.html> (last visited Apr. 10, 2013).

¹⁴¹John Calipari is the head men’s basketball coach at the University of Kentucky. *Official Men’s Basketball Roster*, UNIV. OF KY., <http://www.ukathletics.com/sports/m-baskbl/mtt/ky-m-baskbl-mtt.html> (last visited Apr. 10, 2013).

¹⁴²USA Today & Louisville Courier Journal, *John Calipari Gets \$400K Pay Increase From Kentucky*, USA TODAY, May 4, 2012, <http://usatoday30.usatoday.com/sports/college/mensbasketball/sec/story/2012-05-04/kentucky-calipari-contract/54747788/1>.

¹⁴³*Compare* Andrew Bary, *Dow Closes in on 10,000 Mark Yet Again*, BARRON’S, Nov. 26, 2001, at MW3 (explaining economic trends after an economic downturn), *with 2012 Football Schedule*, BOWLING GREEN STATE UNIV., <http://bgsufalcons.com/schedule.aspx?schedule=227&path=football> (last visited Jan. 27, 2014) (showing a trend in winning seasons from 2010 to 2013).

¹⁴⁴*See* John Warner, *Why We Should Talk About the Football Coach’s Salary When Faculty are Let Go*, INSIDE HIGHER ED, Jan. 23, 2013, <http://www.insidehighered.com/blogs/just-visiting/why-we-should-talk-about-football-coachs-salary-when-faculty-are-let-go>.

¹⁴⁵*2012 Football Schedule*, *supra* note 143.

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received \$363,000 compensation for his services in 2012.¹⁴⁶ The
Bowling Green State football expenses surpassed their own revenues by
approximately \$2.5 million.¹⁴⁷

Increases in athletic costs doubles that of increases in academic
spending.¹⁴⁸ On average, the top five Football Bowl Subdivision
athletic conferences spend 6.7 times more on student-athletes than
regular academic students.¹⁴⁹ As 34.6% of athletic department
expenditures goes towards compensation for staff and coaches,¹⁵⁰
university presidents are sending a clear message that athletics is taking
precedence over the importance of academics.¹⁵¹ Instead of student fees
going towards retaining professors conducting research to cure cancer,
or towards other academic causes, that money goes to fund
multimillion-dollar staff and coaching salaries.¹⁵²

3. Conference realignment

As the arms race continues, universities look for the most
efficient path to revenues.¹⁵³ Television-rights contracts offer a great
opportunity for universities to obtain revenue.¹⁵⁴ Universities are aware

¹⁴⁶USA TODAY SPORTS COLLEGE FOOTBALL COACHES SALARIES DATABASE, <http://www.usatoday.com/story/sports/ncaaf/2012/11/19/ncaa-college-football-head-coach-salary-database/1715543/> (last visited Apr. 10, 2013) (insert name in query to find results).

¹⁴⁷*Id.*

¹⁴⁸Donna M. Desrochers, *Academic Spending Versus Athletic Spending: Who Wins?*, DELTA COST PROJECT AT AMERICAN INSTITUTES FOR RESEARCH 2, 4 (Jan. 2013), http://www.deltacostproject.org/sites/default/files/products/DeltaCostAIR_AthleticAcademic_Spending_IssueBrief.pdf.

¹⁴⁹*Id.* at 4, 7.

¹⁵⁰*Id.* at 8.

¹⁵¹*See id.* at 1, 4, 7.

¹⁵²*See id.* at 6, 9, 10.

¹⁵³*See supra* Part V.A.

¹⁵⁴*See supra* Part V.A.

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of the increasing costs of athletics and hope to defray the rising costs by securing a spot in a top-level conference with large television-rights contracts.¹⁵⁵ The University of Maryland, a founding member of the Atlantic Coast Conference (“ACC”), decided to join the Big Ten Conference starting in 2014.¹⁵⁶ The president of the University of Maryland justified the move by explaining, “[Maryland] will be able to ensure the financial sustainability of Maryland athletics for decades to come.”¹⁵⁷ Just a year earlier, the University of Maryland cut eight varsity sports due to self-described money problems.¹⁵⁸ Boise State University and San Diego State University were set to join the Big East Conference.¹⁵⁹ Yes, two West Coast universities planned to join a conference made up of primarily East Coast teams.¹⁶⁰ But with the Big East Conference breakup and Bowl Championship Series

¹⁵⁵*See, e.g., infra* notes 156-60 and accompanying text.

¹⁵⁶Barry Svrluga & Alex Prewitt, *Big Ten Expansion: Maryland Leaves ACC, Joins Conference in Financial Move*, WASH. POST (Nov. 19, 2012), http://www.washingtonpost.com/sports/colleges/maryland-joins-big-ten-leaving-acc/2012/11/19/e24531dc-3268-11e2-9cfa-e41bac906cc9_story.html.

¹⁵⁷*Id.*

¹⁵⁸Eric Prisbell, *Maryland Accepts Recommendation, Will Cut Eight Varsity Sports Programs*, WASH. POST (Nov. 21, 2011), http://articles.washingtonpost.com/2011-11-21/sports/35282196_1_varsity-sports-programs-loh-athletic-director-kevin-anderson.

¹⁵⁹Jeremy Fowler, *San Diego State Returns to Mountain West; Big East Looks to Future*, CBS SPORTS (Jan. 16, 2013, 2:27 PM), <http://www.cbssports.com/collegefootball/blog/jeremy-fowler/21563706/san-diego-state-returning-to-mountain-west-big-east-commish-looks-to-future>.

¹⁶⁰*See generally* Allen Grove, *Mountain West Conference: The Schools of the MWC Have Many Academic and Athletic Strengths*, ABOUT.COM, <http://collegeapps.about.com/od/choosingacollege/tp/mountain-west-conference.htm> (last visited Feb. 4, 2014) (showing the teams and the respective locations of the schools that make up the Mountain West Conference); Allen Grove, *Big East Conference: A Diverse Group of 10 Colleges and Universities*, ABOUT.COM, <http://collegeapps.about.com/od/choosingacollege/tp/big-east-conference.htm> (last visited Feb. 1, 2014) (showing the teams and the respective locations of the schools that comprise the Big East Conference).

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restructuring,¹⁶¹ the schools returned to the Mountain West
Conference.¹⁶² The original Big East Conference, renamed the
American Athletic Conference,¹⁶³ dissolved when several top programs
realigned with bigger conferences and the Catholic 7 broke off.¹⁶⁴

So what is the rationale for the dizzying conference
realignment? Money and exposure are the likely reasons for
universities to realign.¹⁶⁵ The University of Maryland's struggling
athletic department moved to the Big Ten Conference,¹⁶⁶ where the
average annual income for a member institution is approximately \$6.5
million more than Maryland's former conference.¹⁶⁷ This same
rationale is applicable to the former, top-level Big East Conference
universities realigning with bigger conferences.¹⁶⁸ The smaller
universities realize television provides exposure for the university, not

¹⁶¹See generally George Schroeder, *Agreement on BCS Playoff Structure Reached*, USA TODAY (Nov. 12, 2012, 8:27 PM), <http://www.usatoday.com/story/sports/ncaaf/bowls/2012/11/12/bcs-playoff-presidents-meeting-college-football-denver/1700455/> (explaining the new BCS playoff structure that guarantees access to the teams from the five non-power conferences, which includes the Mountain West Conference).

¹⁶²Fowler, *supra* note 159.

¹⁶³Brett McMurphy, *Old Big East Now American Athletic*, ESPN (Apr. 4, 2013, 11:49 AM), http://espn.go.com/college-sports/story/_/id/9130997/former-big-east-named-american-athletic-conference.

¹⁶⁴*Id.*

¹⁶⁵See generally *supra* Part V.A (illustrating the revenue potential that conference realignment provides).

¹⁶⁶See *supra* note 156 and accompanying text.

¹⁶⁷*December 3, 2012—Updated Financial Data: Media Contracts for Five Major Conferences*, KNIGHT COMMISSION ON INTERCOLLEGIATE ATHLETICS, <http://www.knightcommission.org/resources/press-room/787-december-3-updated-financial-data> (last visited Apr. 10, 2013) (showing the 2012 financial data for the five power conferences).

¹⁶⁸See *id.*

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to mention the money from the television rights.¹⁶⁹

In pursuit of revenue, the universities appear to place blinders on regarding the negative impacts of conference realignment.¹⁷⁰ The relationship between the university and respective conference is contractual.¹⁷¹ The ACC's contract with the University of Maryland contains a liquidated damages clause.¹⁷² Originally, the fee for breaching the contract was \$20 million, but the ACC university presidents apparently raised the fee to \$50 million prior to the University of Maryland's realignment with the Big Ten Conference.¹⁷³ As the University of Maryland balked at the figure, the ACC filed a lawsuit seeking a declaration that the school owes the fee.¹⁷⁴ The already struggling University of Maryland athletic department is expending money to leave the ACC, but also to litigate against the

¹⁶⁹See generally Dan Wolken, *Tulsa Officially Joins the Former Big East*, USA TODAY (Apr. 2, 2013, 4:46 PM), <http://www.usatoday.com/story/sports/ncaab/2013/04/02/tulsa-officially-joins-the-big-east/2045809/> (showing that smaller schools are attempting to move into bigger conferences for both exposure and financial reasons).

¹⁷⁰See *infra* notes 172-182 and accompanying text (explaining that realignment will cost the school large sums of money and require student-athletes to travel farther).

¹⁷¹See Alex Prewitt, *ACC's \$50 Million Exit Fee Went Into Effect 'Immediately'*, WASH. POST (Nov. 18, 2012), <http://www.washingtonpost.com/blogs/terrapins-insider/wp/2012/11/18/accs-50-million-exit-fee-went-info-effect-immediately/> (highlighting that the ACC has an official bylaw regarding the "Withdrawal of Members").

¹⁷²*Id.*

¹⁷³*Id.*

¹⁷⁴See Chris Korman, *ACC Files Lawsuit Against Maryland in North Carolina Court*, BALT. SUN, Nov. 27, 2012, http://articles.baltimoresun.com/2012-11-27/sports/bal-acc-files-lawsuit-against-maryland-in-north-carolina-court-20121127_1_acc-council-loh-acc-presidents (discussing the negotiations and procedural posturing between the two parties).

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ACC.¹⁷⁵ Furthermore, the move to the Big Ten Conference will likely
increase the University of Maryland's travel budget.¹⁷⁶ The ACC is
comprised of universities located on the eastern seaboard,¹⁷⁷ whereas
now the University of Maryland will continually make trips to the
Midwest to play against Big Ten Conference universities.¹⁷⁸ The
increased travel concern is not limited to money because the travel will
also affect the student-athletes' time on academics.¹⁷⁹ Longer trips
force student-athletes to leave campus earlier and return later, which
ultimately requires the student-athletes to miss classes.¹⁸⁰

Increased travel negatively affects student-athletes' academic
experience, but also regular academic students' payment of student fees

¹⁷⁵See Barry Svrluga & Alex Prewitt, *Big Ten Expansion: Maryland Leaves ACC, Joins Conference in Financial Move*, WASH. POST, Nov. 19, 2012, http://articles.washingtonpost.com/2012-11-19/sports/35506096_1_wallace-d-loh-big-ten-expansion-taylor-kemp (explaining that the shortfalls experienced by the University of Maryland's athletic budget will be alleviated by joining the Big Ten Conference despite the litigation with the ACC); *supra* notes 172-74 and accompanying text (outlining the financial predicament that the University of Maryland found itself in).

¹⁷⁶See *infra* notes 177-78 and accompanying text.

¹⁷⁷The current ACC member institutions include: Boston College, Clemson University, Duke University, Florida State University, Georgia Institute of Technology, University of Maryland, University of Miami, University of North Carolina, North Carolina State University, University of Virginia, Virginia Polytechnic Institute and State University, and Wake Forest University. ATLANTIC COAST CONFERENCE, <http://www.theacc.com/#!/> (last visited Jan. 28th, 2014).

¹⁷⁸The current Big Ten member institutions include: University of Illinois, Indiana University, University of Iowa, University of Michigan, Michigan State University, University of Minnesota, University of Nebraska, Northwestern University, Ohio State University, Pennsylvania State University, Purdue University, and University of Wisconsin. *About the Conference*, BIG TEN CONFERENCE, <http://www.bigten.org/school-bio/big10-school-bio.html> (last visited Jan. 28th, 2014).

¹⁷⁹See J. Christopher Proctor, *Conference Realignment Takes Toll on Students*, USA TODAY COLL. (May, 22nd 2012, 9:40 AM), <http://www.usatodayeducate.com/staging/index.php/sports/conference-realignment-takes-toll-on-students> (discussing that increased travel will strain student-athletes).

¹⁸⁰See *id.* (illustrating that conference realignment will result in conference opponents being thousands of miles apart).

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goes towards litigation costs and travel expenses rather than to academic-oriented projects.¹⁸¹ This conduct sends the message that when push comes to shove, the universities focus on money and not academia.¹⁸²

B. Pay-for-Play Dynamic

In the *NCAA v. Board of Regents* majority opinion, Justice Stevens states, “[i]n order to preserve the character and quality of [college football], athletes must not be paid, must be required to attend class, and the like.”¹⁸³ However, critics, including NCAA coaches, believe that student-athletes deserve compensation.¹⁸⁴ The argument is that the student-athletes generate a large amount of revenue in intercollegiate athletics; therefore, the student-athletes deserve a slice of the pie.¹⁸⁵ The counter-argument is that student-athletes are already paid.¹⁸⁶ A full grant-in-aid covers tuition, fees, room and board, books, and other expenses related to attendance.¹⁸⁷ President of the NCAA, Mark Emmert, proposed a plan that would provide student-athletes with

¹⁸¹See Desrochers, *supra* note 148, at 2, 10 (explaining that most NCAA athletic programs are not self-sufficient and rely on subsidies from their students’ tuition dollars); *supra* text accompanying notes 175-78 (discussing the University of Maryland’s financial situation of having increased travel expenses while litigating against its former conference).

¹⁸²See *supra* text accompanying notes 148-52 (discussing the amount of money allocated per student athlete compared to that allocated for the typical student, and the potential for monetary gain if a university’s athletic program thrives).

¹⁸³*NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 102 (1984).

¹⁸⁴See Edward Aschoff, *Steve Spurrier Wants Players Paid*, ESPN (June 1, 2012), http://espn.go.com/college-football/story/_/id/7990235/south-carolina-gamecocks-coach-steve-spurrier-wants-pay-football-players (outlining Steve Spurrier’s proposal for paying players beyond what NCAA currently allows).

¹⁸⁵*Id.*

¹⁸⁶See DIV. I MANUAL, *supra* note 3, at 200 (providing that student-athletes receive compensation for their athletic performance).

¹⁸⁷See *id.* (illustrating the different forms of compensation that student-athletes receive).

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a \$2,000 stipend.¹⁸⁸ However, 161 member institutions voted to
override the proposal because the plan adds pressure to an already rigid
budget facing athletic departments.¹⁸⁹ Some proposals would limit the
stipends to the revenue-producing sports of men's basketball and
football.¹⁹⁰ However, these types of proposals lack recognition of title
IX requirements.¹⁹¹ Furthermore, another argument exists regarding
classifying student-athletes as employees.¹⁹² If providing these student-
athletes with money beyond the NCAA's definition of "cost of
attendance"¹⁹³ suggests an employer-employee relationship, universities
may be subject to labor laws and workers compensation statutes.¹⁹⁴

The pay-for-play dynamic not only strays away from the
NCAA's principles of amateurism,¹⁹⁵ but also costs the universities
more money to subsidize the athletic departments. The increased
expense, again, will likely divert funds from academic-oriented
programs to athletics.¹⁹⁶

¹⁸⁸Jeremy Fowler, *NCAA President Mark Emmert Hopes to Unveil New Stipend Plan in April*, CBS SPORTS, (Jan. 1, 2013), <http://www.cbssports.com/collegefootball/blog/jeremy-fowler/21483211/ncaa-president-mark-emmert-hopes-to-unveil-new-stipend-plan-in-april> (stating the NCAA's plan to propose a retooled stipend program).

¹⁸⁹*Id.*

¹⁹⁰*Could \$200 Bankrupt College Sports?*, DAWGSONLINE (Sept. 23, 2010), <http://www.dawgsonline.com/tag/ncaa/page/2/>.

¹⁹¹20 U.S.C. § 1681 (2012) (explaining that title IX regulations will require stipend distribution to be equal between men and women).

¹⁹²*See infra* note 194.

¹⁹³DIV. I MANUAL, *supra* note 3, at 200.

¹⁹⁴Robert A. McCormick & Amy Christian McCormick, *A Trail of Tears: The Exploitation of the College Athlete*, 11 FLA. COASTAL L. REV. 639, 644-45 (2010).

¹⁹⁵DIV. I MANUAL, *supra* note 3.

¹⁹⁶*See supra* note 108 and accompanying text.

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**VI. ANTITRUST LAWSUIT THAT MAY BE THE STRAW TO BREAK
THE NCAA'S BACK**

A legal scholar calls this “the most significant legal threat the NCAA is facing.”¹⁹⁷ Athletic directors are concerned that this case could cause “seismic” changes to intercollegiate athletics,¹⁹⁸ which could force major conferences to consider adopting a nonscholarship structure similar to Division III athletics.¹⁹⁹ This case is *In re NCAA Student-Athlete Name & Likeness Litigation*,²⁰⁰ a consolidation of *Keller v. Electronic Arts Inc.*²⁰¹ Plaintiffs Keller and O’Bannon are former student-athletes claiming multiple causes of action against the NCAA, the Collegiate Licensing Company, and Electronic Arts Incorporated.²⁰²

O’Bannon’s complaint claims that the defendants engaged in a price-fixing conspiracy and group boycott in violation of section 1 of the Sherman Antitrust Act.²⁰³ The defendants have used the plaintiffs’ images and likeness in several different mediums, including DVDs,

¹⁹⁷Paul Elias, *NCAA Battles Former Players’ Lawsuit Over Revenues*, ABC NEWS (Apr. 1, 2013), <http://www.foxnews.com/sports/2013/04/01/ncaa-battling-lawsuit-filed-by-former-players-seeking-to-compensate-student/> (quoting Michael McCann, University of New Hampshire law professor and sports law expert).

¹⁹⁸Stewart Mandel, *USC’s Haden: Ed O’Bannon Case Could Cause Seismic NCAA Change*, SPORTS ILLUSTRATED (Apr. 1, 2013), <http://sportsillustrated.cnn.com/college-football/news/20130401/pat-haden-ed-obannon-ncaa/> (explaining the University of Southern California athletic director’s comments on the “Ed O’Bannon case”).

¹⁹⁹Andy Staples, *Delany: Big Ten Could De-Emphasize Athletics if O’Bannon Plaintiffs Win*, SPORTS ILLUSTRATED (Mar. 18, 2013), <http://sportsillustrated.cnn.com/college-football/news/20130318/big-ten-jim-delany-ncaa-obannon/> (explaining Jim Delany’s comments about downsizing the emphasis on athletics if the O’Bannon plaintiffs prevail in litigation).

²⁰⁰*In re NCAA Student-Athlete Name & Likeness Litigation*, No. C 09-1967 CW, 2010 WL 5644656, at *1 (N.D. Cal. Dec. 17, 2010).

²⁰¹Consolidated Amended Class Action Complaint ¶ 1, *Keller v. Elec. Arts Inc.*, No. C 09-01967 CW, 2010 WL 908883 (N.D. Cal. March 10, 2010) [hereinafter *Complaint*].

²⁰²*Id.* ¶¶ 6-7.

²⁰³*Id.* ¶¶ 25-26.

video games, and photos for commercial gain.²⁰⁴

Student-athletes are required to sign several documents to participate in intercollegiate athletics, including Form 08-3a.²⁰⁵ Form 08-3a states: “You authorize the NCAA [or a third party acting on behalf of the NCAA (e.g., host institution, conference, local organizing committee)] to use your name or picture to generally promote NCAA championships or other NCAA events, activities or programs.”²⁰⁶ O’Bannon states that signing Form 08-3a relinquishes a student-athlete’s right to their image and likeness to the NCAA in perpetuity.²⁰⁷ But for this relinquishment, a student-athlete may negotiate their image and likeness rights with potential suitors and “receiv[e] compensation in connection with the commercial exploitation”²⁰⁸ Thus, O’Bannon argues that the NCAA illegally restrained trade in violation of section 1 of the Sherman Antitrust Act.²⁰⁹ As previously discussed,²¹⁰ O’Bannon will have to show that the NCAA participated in an agreement to unreasonably restrain trade in a relevant market.²¹¹ The market for use of student-athlete images and likenesses appears relatively clear as indicated by the sale of DVDs, video games, and photos.²¹² The district

²⁰⁴*Id.* ¶¶ 46-54.

²⁰⁵Michael McCann, *NCAA Faces Unspecified Damages, Changes in Latest Anti-trust Case*, SPORTS ILLUSTRATED (July 21, 2009), http://sportsillustrated.cnn.com/2009/writers/michael_mccann/07/21/ncaa/.

²⁰⁶*See, e.g., Form 08-3a Academic Year 2008-09: Student Athlete Statement-Division I*, UNIV. OF KY., http://www.ukathletics.com/doc_lib/compliance0809_sa_statement.pdf (last visited Feb. 1, 2014) (bracket in original).

²⁰⁷McCann, *supra* note 205.

²⁰⁸Complaint, *supra* note 201, ¶ 9.

²⁰⁹*Id.* ¶ 26.

²¹⁰*See supra* Part III.

²¹¹*See supra* Part III.

²¹²*See, e.g.,* McCann, *supra* note 205.

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court will then have to use the rule of reason analysis,²¹³ by weighing the anticompetitive effects against the procompetitive rationale, to determine if the restraint on trade is unreasonable.²¹⁴

Recently, Chief District Judge Wilken decided to give the plaintiffs a full hearing on their attempt for class-action certification by denying the NCAA's motion to strike class certification.²¹⁵ Although a nominal victory, the ruling indicates that Judge Wilken is willing to hear the class certification on the merits.²¹⁶

If O'Bannon were to prevail, the NCAA would suffer a tremendous blow causing the association to make drastic changes to the NCAA business model.²¹⁷ An O'Bannon victory may require universities to share revenues with student-athletes, revenues that already fail to meet the expenses of most athletic departments.²¹⁸ This loss of revenue may force universities to cut non-revenue-producing sports,²¹⁹ or completely alter the structure of the athletic department model.²²⁰

²¹³*See supra* notes 62-64 and accompanying text.

²¹⁴*See supra* note 45 and accompanying text.

²¹⁵Steve Berkowitz, *Judge Lets Class-Action Efforts in O'Bannon Case Go On*, USA TODAY, Jan. 30, 2013, <http://www.usatoday.com/story/sports/ncaaf/2013/01/30/ncaa-obannon-players-lawsuit-name-and-likeness/1877031/>.

²¹⁶*Id.*

²¹⁷McCann, *supra* note 205 (indicating that damages may reach the hundreds of millions of dollars range).

²¹⁸*See supra* note 108.

²¹⁹*See, e.g., supra* note 158 and accompanying text.

²²⁰*See Staples, supra* note 199 and accompanying text (discussing how a favorable judgment for the plaintiffs in the O'Bannon case could cause schools to "de-emphasize athletics").

**VII. AN ANTITRUST EXEMPTION AND ITS EFFECT ON
UNIVERSITIES AND THEIR STUDENT-ATHLETES**

Justice White, joined by Justice Rehnquist, predicted that the majority opinion in *NCAA v. Board of Regents* would lead to an intercollegiate athletic arms race.²²¹ In the dissenting opinion, Justice White stated that the NCAA television regulations “prevent institutions with competitively and economically successful programs from taking advantage of their success by expanding their programs, improving the quality of the product they offer, and increasing their sports revenues.”²²² Justice White continued by saying a lack of regulations would lead member institutions “to engage in activities that deny amateurism,”²²³ and the free market does not “serve the ends and goals of higher education”²²⁴

Justice White certainly foreshadowed the modern NCAA landscape.²²⁵ The amount of money spent on student-athletes continues to outpace spending on regular academic students.²²⁶ To resurrect the founding principles of the NCAA, a change in the trend of intercollegiate athletics commercialization is necessary.²²⁷ Let us not forget that university presidents have had a major role in the governance of the NCAA since the 1980s,²²⁸ and it is unlikely the university

²²¹*See* *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 123 (1984) (White, J., dissenting).

²²²*Id.* at 122.

²²³*Id.* (quoting Note, Antitrust and Nonprofit Entities, 94 HARV. L. REV. 802, 817 (1981)).

²²⁴*Id.* at 122.

²²⁵*See id.* at 135-36 (stating that the NCAA’s television-contract limitations would preserve amateurism and encourage student-athletes to choose a school for academic reasons).

²²⁶Desrochers, *supra* note 148, at 2, 6.

²²⁷*See supra* Part V.

²²⁸MITTEN, *supra* note 11, at 103.

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presidents would be willing to cut back on the revenue stream available.²²⁹ Therefore, the NCAA should make a plea to Congress for a Sherman Antitrust Act exemption.²³⁰ An antitrust exemption would provide the NCAA “ample latitude” to maintain amateurism.²³¹ With an antitrust exemption, the NCAA will be free to regulate the commercial aspects of intercollegiate athletics and engineer a revenue-distribution model that supports the principles of amateurism.²³² Furthermore, the NCAA will be able to accentuate the important nexus between academics and athletics.²³³

A. The Effect an Antitrust Exemption May Have on Commercialization, the Arms Race, and the Pay-for-Play Dynamic

An antitrust exemption would allow the NCAA to develop a revenue-distribution model that emphasizes amateurism and competitive balance.²³⁴ The NCAA could equitably distribute revenue from television-rights contracts to member institutions.²³⁵ This would minimize commercial competition amongst member institutions; thus, lessening the incentive to realign with big conferences.²³⁶ This measure would reduce the amount of travel expenses and increase regional rivalries.²³⁷ In addition, minimizing commercial competition will take the pressure off universities to “keep up with the Joneses” with respect

²²⁹See Schaefer, *supra* note 96, at 564.

²³⁰See, e.g., Wolverton, *supra* note 8.

²³¹NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 120 (1984).

²³²See *generally id.* at 121-22 (explaining the original purpose of the NCAA and how revenue jeopardizes that purpose).

²³³See Wolverton, *supra* note 8 (stating that an exemption would allow the NCAA to “better [align] commercial interests with education”).

²³⁴See Wolverton, *supra* note 8.

²³⁵See *supra* Part V.A.

²³⁶See *supra* Part V.A.3.

²³⁷See *supra* notes 176-82 and accompanying text.

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to facilities.²³⁸ Universities will be able to spend within their means
without the worry of losing recruits to big-spending universities.
Coaching and staff salaries could be subject to a more reasonable
budget, which will ease the financial and hiring strain.²³⁹ By closing
down the arms race, the massive spending on intercollegiate athletics
will decrease, possibly equating to student fee decreases and elimination
of athletic subsidies.²⁴⁰

Furthermore, an antitrust exemption would shut down the play-
for-pay dynamic and allow the NCAA to avoid the potentially massive
damages from the *In re Student-Athlete Name & Likeness Licensing
Litigation*.²⁴¹ The antitrust exemption will preclude the extra expense to
pay players, but also preserve amateurism.²⁴² The NCAA can
recommence principles of amateurism and retreat from housing a minor
league system for the National Football League and National Basketball
Association.²⁴³

***B. The Effect an Antitrust Exemption May Have on Academic
Reform Within Intercollegiate Athletics***

In 2010, the Knight Commission on Intercollegiate Athletics
("Knight Commission") released a comprehensive report on ways to
control spending within intercollegiate athletics.²⁴⁴ The report,

²³⁸See *supra* Part V.A.1.

²³⁹See *supra* Part.V.A.2.

²⁴⁰See *supra* note 152 and accompanying text.

²⁴¹See McCann, *supra* note 205 and accompanying text.

²⁴²See *supra* Part V.B (discussing the current dilemma in college athletics concerning
payment of student-athletes).

²⁴³See generally Thomas R. Kobin, Comment, *The National Collegiate Athletic
Association's No Agent and No Draft Rules: The Realities of Collegiate Sports are
Forcing Change*, 4 SETON HALL J. SPORT L. 483, 512-513 (1994) (explaining that the
National Football League does not have a need to invest revenue in developing young
players because the development occurs in the NCAA).

²⁴⁴See generally *Restoring the Balance*, *supra* note 104, at 1-7 (discussing financial
and educational reform in college athletics).

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Restoring the Balance, suggested greater transparency regarding intercollegiate athletic spending and a change in revenue sharing to incentivize education.²⁴⁵ The Knight Commission asks for NCAA member institutions' financial reports, which should include long-term debt and capital spending, to be available to the public.²⁴⁶ The publicized reports will help with comparisons and induce universities to be more accountable for their expenditures on athletics.²⁴⁷ In an effort to reinforce the importance of academics, the Knight Commission recommends a revenue distribution structure that rewards university athletic departments for reaching certain academic benchmarks.²⁴⁸ An Academic-Athletics Balance Fund program would receive a percentage of revenue to distribute to universities for higher graduation rates and the proper balance between athletic and academic spending.²⁴⁹ The Knight Commission's first two recommendations play into the third recommendation, treating student-athletes as student-athletes and not professionals.²⁵⁰ By minimizing the arms race, universities would be less inclined to realign with conferences that require extended travel.²⁵¹ This would minimize intrusion upon the student-athletes' academic schedules.²⁵²

Clearly, market forces have driven intercollegiate athletics into a commercial frenzy;²⁵³ unfortunately, student-athletes and regular academic students suffer the negative effects of that

²⁴⁵*Id.*

²⁴⁶*Id.* at 11-12.

²⁴⁷*Id.* at 12.

²⁴⁸*Id.* at 14.

²⁴⁹*Id.* at 15.

²⁵⁰*Id.* at 16.

²⁵¹*See generally* Part VII.A (stating that an equitable distribution of television revenues would discourage conference realignment).

²⁵²*Restoring the Balance, supra* note 104, at 16.

²⁵³*See supra* Part V.A.

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commercialization.²⁵⁴ An antitrust exemption would allow the NCAA
to regain control of the commercial aspects of intercollegiate athletics
and mold a healthy future for universities, student-athletes, and regular
academic students.²⁵⁵

VIII. CONCLUSION

Without the NCAA's power to regulate commercial aspects of intercollegiate athletics, universities have allowed commercialization to invade amateur sports. By refocusing efforts to academics and redrawing the line of demarcation between amateur and professional sports, the virtue of intercollegiate athletics will prosper again.²⁵⁶ College students and alumni will still go to games and cheer, athletic competition will still be fierce, and student-athletes will receive the skills necessary to "go pro in something other than sports."²⁵⁷ Congress holds the key to opening the door to a prosperous and sound intercollegiate athletic landscape, and that key is in the shape of an

²⁵⁴See *supra* Parts V.A.1-3, V.B, VI.

²⁵⁵See Len Elmore, *Exempt the NCAA from Antitrust*, THE CHRON. OF HIGHER EDUC. (Dec. 11, 2011), <https://chronicle.com/article/Exempt-the-NCAA-From-Antitrust/130073/> (stating that the NCAA has the potential to offer reform to all aspects of intercollegiate sports if allowed an exemption from antitrust laws).

See Michael J. Cretilli, *The Good, Bad and Ugly About the Commercialization of Amateur Sports*, HUFFINGTON POST SPORTS (April 5, 2011), http://www.huffingtonpost.com/michael-j-critelli/amateur-sports_b_844686.html (stating that commercialization has crept into college sports in the recent years).

²⁵⁶See *Restoring the Balance*, *supra* note 104, at 16; see generally Cretilli, *supra* note 256 (stating that commercialization in sports amongst young athletes distorts and destroys the people and college institutions, as colleges "select poorly educated athletes who stay in college for [one or two] years instead of highly qualified students").

²⁵⁷See *NCAA Launches Latest Public Service Announcements, Introduces New Student-Focused Website*, NCAA (March 13, 2007), <http://fs.ncaa.org/Docs/PressArchive/2007/Announcements/NCAA%2BLaunches%2BLatest%2BPublic%2BService%2BAnnouncements%2BIntroduces%2BNew%2BStudent-Focused%2BWebsite.html> (announcing an NCAA public service announcement to highlight the profound effects college sports have on those who pursue careers in something other than athletics).

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NCAA antitrust exemption bill.²⁵⁸

²⁵⁸See Wolverton, *supra* note 8 (stating that a college-sports watchdog group wants Congress to propose “a limited antitrust exemption for the association to help it constrain runaway spending in big-time sports while better aligning commercial interests with education”).