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BY EDUCATION OR COMMERCE: THE LEGAL BASIS FOR THE FEDERAL REGULATION OF THE ECONOMIC STRUCTURE OF INTERCOLLEGIATE ATHLETICS

Alfred Dennis Mathewson*

I. INTRODUCTION

Every year the media trumpets the latest escalation in college coach salaries. In the opening days of 2007, newspapers across the country provided details about the hiring of Nick Saban as the head football coach at the University of Alabama with a contract in excess of $30 million.[1] His employment was followed by the widely publicized courtship of basketball coach Billy Donovan by the University of Kentucky which reportedly tried to lure him from the University of Florida with compensation in excess of $2.5 million per year.[2] Donovan rejected their overtures and remained at Florida with a new contract for similar dollars.[3] The Donovan story, however, was only a marquee story on a long list of coaching contracts this year.[4] The compensation packages of college coaches grab attention by their magnitude and owe much of their controversy to their size relative to the compensation levels of university presidents and faculty members.[5] Stories of rising costs are matched by those about rising revenues.

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[1] *See e.g.*, Ian R. Rapoport, *Saban Rolls in: Coach Touches Down in T-town*, BIRMINGHAM NEWS, Jan.4, 2007, at 1A.

[2] Kevin McNamara, *Donovan Stays Put in Fla.*, PROVIDENCE J., Apr. 6, 2007, at C-05.

[3] *Id.*

[4] *UH Basketball Coach Salary Capped at $400,000*, HONOLULU ADVERTISER, Mar. 15, 2007, *available at* http://the.honoluluadvertiser.com/article/2007/Mar/15/br/br2645079831.html (last visited Feb. 16, 2008); Lliana Limon, *UNM Men's Basketball: The University of New Mexico's $1 Million Coach*, ALBUQUERQUE TRIBUNE, Sept. 20, 2007, *available at* http://abqtrib.com/news/2007/sep/20/unm-mens-basketball-university-new-mexicos-1-milli/ (last visited Feb. 16, 2008); Jodi Upton & Steve Weiberg, *Contracts for College Coaches Cover More than Salaries*, USA TODAY, Nov. 16, 2007, *available at* http://www.usatoday.com/sports/college/football/2006-11-16-coaches-salaries-cover_x.htm (last visited Feb. 16, 2008); Andrew Heck, *March Madness: College Basketball Coaches Paid for by Your Donations*, CHARITY NAVIGATOR, Mar. 6, 2007, *available at* http://www.charitynavigator.org/index.cfm?bay=content.view&cpid=568 (last visited Feb. 16, 2008); Associated Press, *Stringer's Extension Pays Base Salary of $450,000*, ESPN.COM, Apr. 26, 2007, http://sports.espn.go.com/ncw/news/story?id=2848472 (last visited Feb. 16, 2007).

[5] *Financial Inequality in Higher Education: The Annual Report on the Status of the Profession, American Association of University Professors, 2006-2007*, Mar.-Apr., 2007, *available at* http://www.aaup.org/NR/rdonlyres/B25BFE69-BCE7-4AC9-A644-7E84FF14B883/0/zreport.pdf , (last visited Feb. 17, 2008) (head football coaches at Division I schools make 9.4 times the salaries paid to full professors and 2.4 time more than college presidents). The compensation packages of college coaches compare favorably with the salaries paid to corporate executives. *See Top Executives by Salary*, WASHINGTONPOST.COM, http://projects.washingtonpost.com/post200/2006 /executives-by-salary/ (last visited Feb. 17, 2008). However, they pale in comparison to the total compensation packages of highly paid corporate executives. *Top 100 Executives by Total*

The National Collegiate Athletic Association's ("NCAA's") $6.5 billion television contract for its Men's Basketball Championship Tournament is the substance of coffee breaks, dinner table and classroom conversations.[6] The participating conferences in the Bowl Championship Series will earn at least $18.5 million if at least one team participates and $22.5 million if two teams participate.[7] Costs and revenues have been escalating for years in major college football and men's basketball programs. Women's basketball is also picking up steam.[8]

The large revenue producing sports are highly visible in the media. Consequently, the escalation of cost and revenues in those sports constitutes the most visible evidence that intercollegiate athletics competition is primarily a commercial endeavor rather than an educational one. The hoopla has obscured the reality that intercollegiate athletics is not a profitmaking venture for most colleges and universities and that the escalating costs are rising at a more rapid pace for most institutions than the visible revenues. Although the NCAA indirectly regulated revenues in television revenues in college football until *NCAA v. Board of Regents of the University of Oklahoma*,[9] costs have long been the target of its direct regulatory efforts[10] and the focus of scholars.[11] A panel discussion entitled "What Role Should Congress Play in Curbing the Escalating Economics of Intercollegiate Athletics?" explicitly was directed to examine both components of the economic structure.[12] Any jurisdictional basis for federal intervention to regulate costs or revenues would undoubtedly also provide a basis for regulation of the entire economic structure. The overall economic structure includes that of the industry and that of the individual firms or educational institutions.

Compensation, WASHINGTONPOST.COM, http://projects.washingtonpost.com/post200/2006/executives-by-compensation/ (last visited Feb. 17, 2008).

[6] Chris Purshell, *Slam Dunk; CBS's March Madness, the Richest Postseason Sports Event in TV, is the Embodiment of Multimedia Marketing*, TELEVISION WEEK, Mar. 19, 2007, at 1.

[7] *BCS Explained*, COLLEGEFOOTBALLPRO.COM, http:www.collegefootballpoll.com/bcs_explained.html (last visited Feb. 17, 2007). *But see BCS or Bust: Competitive and Economic Effects of the Bowl Championship Series On and Off the Field: Hearing Before the S. Comm. on the Judiciary*, 108th Cong., *available at* http://judiciary.senate.gov/testimony.cfm?id=973&wit_id=2778 (statement of Harvey S. Perlman, Chancellor of U. of Neb.-Lincoln) (university president arguing that payout individual schools for participation is modest and not a major source of revenue for BCS schools in conferences with automatic berths).

[8] The NCAA has an eleven year $200 million deal with ESPN. *NCAA Reaches Agreement With ESPN, Inc. For Television Rights to 21 Championships*, NCAA NEWS RELEASE, July 5, 2001, *available at* http://www.ncaa.org/releases/miscellaneous/2001/2001070501ms.htm (last visited Feb. 17, 2008).

[9] 468 U.S. 85, 104 (1984).

[10] *See infra* text accompanying notes 150-57.

[11] *See, e.g.*, Rodney K. Smith, *A Brief History of the National Collegiate Athletic Association's Role in Regulating Intercollegiate Athletics*, 11 MARQ. SPORTS L. REV. 9, 21 (2000).

[12] University of Missouri–Kansas City Law Review Symposium: Emerging Legal Issues Affecting Amateur & Professional Sports – What Role Should Congress Play in Curbing the Escalating Economics of Intercollegiate Athletics? (April 13, 2007).

The impetus for the charge to the panel was the correspondence in the fall of 2006 between Representative William Thomas, then Chair of the House Ways and Means Committee, and Dr. Miles Brand, President of the NCAA.[13] Congressman Thomas initiated the exchange in a letter requesting information about the cost and revenue structures of major college men's basketball and football programs in order to determine whether such programs should continue to merit tax exempt status.[14] The underlying thesis of the questions was that college sports have morphed into commerce as Major League Baseball did after *Federal Baseball Club v. National League* held that baseball was not commerce and therefore was exempt from the Sherman Antitrust Act.[15] Congress eventually overrode that conclusion when it enacted the Curt Flood Act of 1998;[16] presumably it would now consider lifting the tax exemption for men's football and basketball since these collegiate sports are now commercial in nature.[17]

Dr. Brand responded, with a spirited defense of intercollegiate athletics as an integral part of the educational programs of its member institutions.[18] Both letters reflect the fundamental proposition that if intercollegiate athletics primarily consist of educational activities, then major college football and men's basketball programs are entitled to the continuing benefits of tax exempt status. There is an implicitly broader premise presented by these contrasting views; that

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[13] Letter from William Thomas to Dr. Myles Brand, President of the NCAA (Oct. 2, 2006) (on file with the author) [hereinafter Letter to Brand].

[14] Letter to Brand, *supra* note 13. The question of whether such programs merited tax exempt status requires some attention to the structure of tax exempt status. The NCAA is a nonprofit organization that regulates intercollegiate athletics. It operates championships in some sports such as basketball and generates revenue therefrom. The tax status of the NCAA is not the subject of this paper. It is comprised of more than 1200 members who enjoy tax exempt status as educational institutions. That status generally covers the revenues and net revenues from all of their operations, including intercollegiate athletic programs. Congressman Thomas may have been suggesting that the level of commercial activities within an institutions athletics programs may transform the charitable nature of the institution into a commercial so that the institution would lose its tax exempt status. The more likely scenario, however, is the nature of the institution's intercollegiate athletics activities would be transformed into commercial ones thereby subjecting the net revenues therefrom to the Unrelated Business Income Tax ("UBIT"). 26 U.S.C. §§ 511-14. Unrelated business income is defined as income that is not substantially related an entity's tax exempt purpose. 26 U.S.C. §§ 512-13. Subjecting revenues from intercollegiate athletics to the UBIT has been proposed before. *See* H.R. 969, 102d Cong., 1st Sess. (1991). *See also* David Williams, *Is the Federal Government Suiting Up to Play in the Reform Game?*, 20 CAP. U. L. REV. 621, 623-26 (1991) (discussing several 1991 initiatives for proposed Congressional intervention in intercollegiate athletics, including amending UBIT provisions to cover broadcast revenues).

[15] 259 U.S. 200 (1922); Toolson v. New York Yankees, 346 U.S. 356, 358 (1953).

[16] Curt Flood Act of 1998, Pub. L. No. 105-297, 112 Stat 2824 (Congress amended the Sherman Act to cover the employment relationship between major league baseball players and teams).

[17] Letter to Brand, *supra* note 13.

[18] Letter from Dr. Myles Brand to The Honorable William Thomas (Nov. 13, 2006) (on file with author) [hereinafter Letter to Thomas].

is, if intercollegiate competition constitutes primarily commercial activity, it may properly be subjected to laws regulating commercial activities.

Representative Thomas did not propose measures to directly regulate the economic structure of intercollegiate athletics.[19] The action his letter portended, the subjection of income from the men's basketball and football programs of major universities to taxation, would have an economic impact on some institutions. The threatened action would not directly regulate those sports. However, the imposition of a tax on such activities would indirectly result in regulation in two ways. First, unless the NCAA and its members reigned in the commercial aspects of those sports, Congress would increase the income taxes imposed on those activities thereby increasing costs, not constraining them. The member universities of the NCAA would have a reduction in after tax revenues due to the imposition of the Unrelated Business Income Tax in the best case scenario.[20] Second, if Congress did remove or limit the tax exemption, universities would have to moderate their participation to minimize the tax costs. While Chairman Thomas did not propose regulation of the financial structure of intercollegiate athletics, the emphasis of the questions is instructive. The tone of the Chairman's questions suggests that federal regulation, if at all, would be based on the commercial aspects of intercollegiate athletics. It is that proposition that I address in this article.

That tone is consistent with the prevailing scholarly view analyzed in numerous law review articles. Scholars have analyzed the commercial and educational character of intercollegiate athletics for more than four decades.[21] They have analyzed numerous judicial decisions in which courts have reached results by applying legal regimes based upon a conclusion of the appropriate characterization of intercollegiate athletics, and they have described or argued for the application of legal rules on the basis of the commercial character of such activity. The scholarly analyses of the fundamental character of intercollegiate athletics have evinced one profound truth. Historically, the educational nexus has served as the basis for deregulation of intercollegiate athletics, the conference of favorable tax benefits on institutions engaged in its production, and deference to those institutions by the courts with respect to their relationship with student athletes. However, the educational nexus may offer a more convenient basis for

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[19] Letter to Brand, *supra* note 13.

[20] Theoretically in some cases, the level of commercial intercollegiate athletics activity may jeopardize the tax exempt status of an institution such that it would be subjected to the corporate income tax on all of its taxable income.

[21] W. Burlette Carter, *The Age of Innocence: The First 25 Years of the National Collegiate Athletic Association, 1906 To 1931*, 8 Vand. J. Ent. & Tech. L. 211, 236 (2006); Alfred Dennis Mathewson, *The Eligibility Paradox*, 7 VILL. SPORTS & ENT. L.J. 83, 89 (2000); Timothy Davis, *Intercollegiate Athletics in the Next Millennium: A Framework For Evaluating Reform Proposals*, 9 MARQ. SPORTS L.J. 253, 253 (1999); Brian L. Porto, *Completing the Revolution: Title IX as Catalyst for an Alternative Model of College Sports*, 8 SETON HALL J. SPORT L. 351, 358 (1998); Timothy Davis, *Intercollegiate Athletics: Competing Models and Conflicting Realities*, 25 RUTGERS L.J. 269, 269 (1994); James V. Koch, *The Economic Realities of Amateur Sports Organization*, 61 IND. L. J. 9, 11 (1986); John C. Weistart, *Legal Accountability and the NCAA*, 10 J.C. & U.L. 167, 177 (1983-84).

the federal regulation of the economic structure. There simply is no commercial legal regime that regulates economic structure outside of regulated industries such as common carriers, financial institutions, and utilities. There are commercial law regimes that govern the legal consequences for engaging in specific types of activities or components of commercial enterprises like labor, workmens' compensation, and securities regulation laws to name a few. Antitrust laws already apply to intercollegiate athletics but regulate the conduct of firms in the marketplace, and perhaps, the consequences of their economic structures, but not economic structure itself. However, the antitrust laws could be amended to permit governing associations such as the NCAA to directly regulate the cost and revenue structures of the intercollegiate athletics programs of member institutions. The commercial side of intercollegiate athletics thus may serve as the basis for strengthening the hand of educational institutions in carrying out the obligation to control economic structure.

Education, on the other hand, is the subject of considerable state, federal and local governmental regulation.[22] More than half of the membership of the NCAA is comprised of public institutions established under state or federal law. Most of the private institutions are subject to regulation by virtue of the receipt of state or federal funding.

Please note that this article is not advocating federal intervention; it is only examining the legal pathway by which such regulation may be imposed. Political solutions rarely provide optimal answers to sports problems and therefore such solutions should be reluctantly embraced. At the state level, there is the fusion of local politics with a proclivity to support home state teams.[23] While federal intervention in the regulation of college athletics negates home state rules, it nevertheless comes with a broader set of political considerations. The 1980 boycott of the Olympic Games serves as a prime example.[24] Political priorities will necessarily take precedence over the needs of sports.

My opposition to federal intervention rests upon philosophical proclivities to treat athletics as leisurely endeavors not warranting significant attention from the legal system. I frequently implore my Sports Law classes to remember: "It's just sports." Every statute and every case regulating sports means that society is taking sport far too seriously. Federal intervention effectuates the highest level of attention, and therefore a significant misallocation of resources.[25]

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[22] *See infra* text accompanying notes 64-76.

[23] *See* Nat'l Collegiate Athletic Ass'n v. Miller, 10 F.3d 633, 636 (9th Cir. 1993) (state responding to Supreme Court ruling that NCAA is not state actor in enforcing its rules and regulations against basketball coach with state law requirements for enforcement of rules within state).

[24] *See* DeFrantz v. U.S. Olympic Comm., 492 F.Supp. 1181, 1182-83 (D.C. Cir. 1980) (American athletes seeking injunction against the United States Olympic Committee which adopted a resolution not to send a U.S. team to the 1980 Olympics in Moscow to protest its invasion of Afghanistan).

[25] I write these words even though in my first law review article on sports law I noted that this attitude created the most serious flaw in the regulation of intercollegiate athletics; the nominal legal rights of student athletes. Alfred Dennis Mathewson, *Intercollegiate Athletics and the Assignment of Legal Rights*, 35 ST. LOUIS U. L.J. 39, 79 (1990).

Notwithstanding any philosophical opposition or reluctance, there is no legal barrier to any such legislation. This article argues that the commercial characterization is not required to subject the economic structure of intercollegiate athletics to federal regulation. It further contends that the regulation thereof may be based on either jurisdictional nexus, but that the educational character provides a stronger jurisdictional basis for the regulation of the economic structure of intercollegiate athletic competition.

Part II of this article examines the argument for using the commercial character of intercollegiate athletics as the jurisdictional basis for federal regulation of the cost and revenue structures of the intercollegiate athletics programs. Part III examines the argument for using the educational aspects of intercollegiate athletics as the basis for the federal regulation of intercollegiate athletics. The article then discusses the role of the educational nexus in federal tax law and describe the limitations of tax law as a means of regulating economic structure. Part IV analyzes the cost and revenue structures of intercollegiate athletics and the structural flaws that need regulation. It argues that any federal regulation must address those flaws and briefly discuss how a regulatory scheme based on commercial rules like amendments to the antitrust laws or educational based rules could do so. Finally, Part V argues that Congress could define educational activity versus commercial activity in the case of intercollegiate athletics in the laws on tax exempt status.

II. WHY USE THE COMMERCE NEXUS TO REGULATE THE ECONOMIC STRUCTURE OF INTERCOLLEGIATE ATHLETICS?

The principal reason to use commerce as the jurisdictional trigger for the regulation of the economic structure of intercollegiate athletics is its goodness of fit. Congress has broad powers under the Commerce Clause and can certainly reach the level of economic activities involved in the marketing of men's basketball and football programs by major colleges and universities. Intercollegiate athletics is an industry consisting of educational institutions engaged in the selling of sports entertainment to purchasers of tickets and broadcast rights to radio, television and cable companies.[26] Legal scholars have examined the structure of the NCAA and concluded that intercollegiate athletics not only involves commercial activities, but that such activities form its primary character.[27] Because university producers of the commodity of intercollegiate athletics appear more influenced by market considerations than educational ones, it makes sense to apply commercial law regimes, especially to determine the rights of participants in intercollegiate athletics. Under that reasoning, scholarship athletes should be treated as employees and enjoy the benefits of

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[26] *See* Davis, *Conflicting Realities*, *supra* note 21, at 279-80 (intercollegiate athletics is "a form of entertainment which derives revenues from gate receipts, radio and television contracts, and alumni contributions").

[27] *Id.*

such status like workers compensation benefits,[28] that recruiting promises made by coaches and universities should be enforceable under contract law principles,[29] and that the antitrust should be applicable to the price fixing of compensation for student athletes.[30] Nevertheless, courts generally have been reluctant to apply commercial law legal regimes to most aspects of intercollegiate athletics, and have continued to apply education based rules to govern the relationship of student athletes to universities and the NCAA, particularly in the case of compensation for student athletes.[31] The Supreme Court has gone so far as to advance the proposition that the key factor distinguishing intercollegiate athletics as the production of education rather than the production of entertainment is the use of unpaid athletes who are students.[32] That dictum has become a shibboleth for the judiciary.[33] Given such deference to educational institutions, a regulatory scheme to govern economic structure derived from education based rules would appear to be a very weak fit.

Courts have subjected some aspects of intercollegiate athletics to commercial rules, most notably, the televising of college football games to the antitrust laws.[34] Although courts tend to apply education based rules to the relationship between universities and students, and in many instances to that between universities and faculty, the relationships of universities to most third parties are typically governed by commerce based rules. For example, the purchase of good and services and construction projects should be treated as standard commercial transactions. In fact, the production of higher education is an industry in its own right and its relationships with academic actors are commercial transactions that may be subject to commerce base rules.[35] This point was underscored in *United States v. Brown University*, in which an agreement on financial aid awards was subjected to scrutiny under the antitrust laws.[36] Staff, faculty and coaches are employees with contractual and other

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[28] Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71, 83-86 (2006).

[29] *See* Fortay v. Univ. of Miami, No. 93-3443, 1994 WL 62319 (D.N.J. Feb. 17, 1994).

[30] *See generally* Matthew J. Mitten, *University Price Competition for Elite Students and Athletes: Illusions and Realities*, 36 S. TEX. L. REV. 59, 83 (1995).

[31] *See* Banks v. Nat'l Collegiate Athletic Ass'n, 977 F.2d 1081 (7th Cir. 1992); Gaines v. Nat'l Collegiate Athletic Ass'n, 746 F.Supp. 738 (M.D. Tenn. 1990); McCormack v. Nat'l Collegiate Athletic Ass'n, 845 F.2d 1338 (5th Cir. 1988).

[32] Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 102 (1984).

[33] Law v. Nat'l Collegiate Athletic Ass'n, 134 F.3d 1010, 1018 (1998); *Banks*, 977 F.2d at 1089; *McCormack*, 845 F.2d at 1344.

[34] *Bd. of Regents of Univ. Okla.*, 468 U.S. at 85.

[35] Taylor v. Wake Forest Univ., 191 S.E.2d 379, 381 (N.C. Ct. App. 1972) (finding that scholarship grant-in-aid is a contract). Some commentators commingle the concepts of commerce and entertainment industry. The production and sale of education is commerce. However, the production and sale education is a different industry from the production and sale of entertainment. It is more accurate to say that the entertainment production considerations outweigh the production of education than to say that commercial motives dictate decisions rather than educational considerations.

[36] 5 F.3d 658 (3d Cir. 1993).

employment rights. The production and delivery of education does not preclude their activities from characterization as commercial activities, a point that has been presented to the courts.[37]

Congress thus has a legal pathway to regulate intercollegiate athletics pursuant to its power under the Commerce Clause. The availability of a pathway does not mandate that the path should be used. Perhaps the most appealing reason for applying commerce based rules to regulate the economic structure of intercollegiate athletics is the public perception of the magnitude of commercial activity involved.[38] The cry for Congressional intervention now occurs because of the failure of existing legal rules to regulate the excesses of the commercial forces within intercollegiate athletics.[39] The application of legal regimes that are deferential to educational activities have shielded those programs from the regulation of market forces in many respects and paved the way for the unfettered influence of commercial forces. The argument that intercollegiate athletics are commercial is not one solely about the appropriate legal rules to apply. The argument is that university producers of the commodity appear more influenced by market considerations than educational ones, at least, in the case of men's basketball and football such that commerce rather than education is the more accurate description of the activities.[40]

The post-*Federal* Baseball arguments that major league baseball constituted commerce rest as much on the magnitude of its economic activities as on the interstate nature of its activities. In *Toolson v. New York Yankees, Inc.*, for example, the Supreme Court identified several aspects of major league baseball that reflected its commercial character, including the size of its capital investments, revenues and expenditures, the degree of interstate commercial transactions, and the utilization radio and television broadcasting of games.[41] The degree of economic activity was crucial to the argument as was the influence of profitmaking motivations.[42] In *Flood v. Kuhn*,[43] the plaintiff made similar arguments for labeling major league baseball as commerce. He argued among other things "that organized baseball represented an investment of colossal wealth; [and] that it was an engagement in moneymaking . . . ."[44] The Court also

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[37] Hennessey v. Nat'l Collegiate Athletic Ass'n, 564 F.2d 1136, 1148-49 (5th Cir. 1977); *Brown Univ.*, 5 F.3d at 664.

[38] One commentator has noted that the actual economic impact of intercollegiate athletics on the national economy is quite small notwithstanding the perception to the contrary. Koch, *supra* note 21, at 9.

[39] See Davis, *Conflicting Realities*, *supra* note 21, at 279; MURRAY SPERBER, COLLEGE SPORTS, INC: THE ATHLETIC DEP. VS. THE UNIVERSITY 1 (1990).

[40] *See Bd. of Regents of Univ. of Okla.*, 468 U.S. at 121-23 (J. White dissenting) (stating that NCAA regulations are designed to prevent universities from giving priority to profitmaking in operating athletics programs and thus transforming intercollegiate athletics into professional sports).

[41] *See* Toolson v. New York Yankees, Inc., 346 U.S. 356, 358 (1953).

[42] *Id.* at 358.

[43] 407 U.S. 258, 269 (1972).

[44] *Id.*

noted the "new factors such as the development of radio and television with their substantial additional revenues to baseball."[45] At stake in these cases was whether baseball should be governed by the antitrust laws. It is well known that the Court subjected other professional sports to such regulation and that baseball's exclusion is an historical anomaly.[46]

Similar analyses of men's intercollegiate football can be found in cases concerning the applicability of the antitrust laws. In *Board of Regents of University of Oklahoma*, the Supreme Court refused to categorize intercollegiate athletics in its entirety as commercial activities.[47] Instead, it analyzed the activities and bifurcated them into commercial and educational activities.[48] Commercial rules, namely the Sherman Antitrust Act, were to be applied to the televising of football games. Educational rules such as requiring the use of students who were not compensated for their participation were not to be subjected to commercial law rules.[49] It thereby distinguished the economic infrastructure of intercollegiate athletics from its educational apparatus. Although the commercial nature of activities like the sale of television rights and the sale of admissions to games and the interstate nature of those activities triggered the application of the Sherman Antitrust Act, the magnitude of the economic transactions were a factor.[50]

Hennessey v. National Collegiate Athletic Ass'n[51] concerned a challenge under the antitrust laws to an NCAA bylaw which had imposed a cap on the number of assistant coaches in basketball and football. Although the NCAA ultimately prevailed, the Fifth Circuit held that sports constituted commerce within the meaning of the Sherman Antitrust Act.[52] The court was influenced by the amount of revenue generated by the men's basketball tournament and that money's distribution, the profits earned by the NCAA, and radio and television broadcasting of events.[53] In *Law v. National Collegiate Athletic Ass'n*, the Tenth Circuit held that NCAA bylaw provisions restricting the earnings of some assistant coaches were invalid under the Sherman Act.[54] In *Banks v. NCAA*, the

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[45] *Id.* at 272.

[46] *See* Mathewson, *supra* note 25, at 48, n.29.

[47] 468 U.S. at 101-02.

[48] *Id.*

[49] Hennessey v. Nat'l Collegiate Athletic Ass'n, 564 F.2d at 1150. There have been unsuccessful challenges in the lower federal courts. These rulings, however are undermined by cases such as *United States v. Brown Univ.*, 5 F.3d 658 (3d Cir. 1993) (ruling that agreement to share information on financial aid and limit awards by group of colleges and universities is subject to the antitrust laws, "The exchange of money for services, even by a nonprofit organization is a quintessential commercial transaction.") and *Massachusetts School of Law at Andover, Inc. v. Amer. Bar Ass'n*, 107 F.3d 1026 (3d Cir. 1997) (holding that the American Bar Association is not immune from liability under the Sherman Act for the enforcement of its standards).

[50] *Bd. of Regents of Univ. of Okla.*, 468 U.S. at 89-93, 111-12.

[51] *Hennessey*, 564 F.2d at 1149.

[52] *Id.* at 1150.

[53] *Id.*

[54] 134 F.3d 1010 (10th Cir. 1998).

dissenting jurist viewed major college football as a profitmaking enterprise with revenues in excess of a billion dollars and accordingly would have invalidated NCAA bylaw provisions that terminated the eligibility of a student athlete who signed with an agent or entered the National Football League draft.[55]

Scholars have also focused on the degree of commerce and the dominance of the economic motives in university decision-making. Professor Davis equates intercollegiate athletics to the entertainment industry and focuses on revenue generation, sales and production by universities engaged in the marketing of a commodity.[56] Professor Sperber maintains that economic considerations override educational objectives.[57] Universities operate their football and basketball programs to maximize revenues without minimizing costs.[58] One of the structural culprits identified by Professor Sperber was the lodging of decision-making responsibility in business people and coaches instead of academics.[59] Accordingly, using commerce as the jurisdictional hook is not a mere legal technicality; commerce is the appropriate label for contemporary intercollegiate athletics and commerce should be reigned in.

The real difficulty with Congressional intervention to regulate economic structure is that although the commercial aspects of intercollegiate athletics cry out for regulation, the application of existing commercial law legal regimes to those practices would not control the growth of costs and revenues. Intercollegiate athletics may be termed as commerce even if it is educational. The question is not whether it is commerce but the proper classification of its industry. If it is the entertainment industry, then profitmaking considerations drive the decisions of individual firms in the industry. If it is the higher education industry, then academic considerations drive the decisions of educational institutions. Commercial law regimes have no specific rules that govern the economic structure of firms engaged in the entertainment industry.

The antitrust laws are the most seemly source of existing rules to regulate such economic structures of entertainment firms. Those laws constrain economic decisions and practices but do not explicitly regulate revenues or costs. The application of the antitrust laws curtails joint agreements that fix the prices and restrict the supply of television broadcasts, and that fix the salaries of coaches but not the compensation of student athletes. A competitive market could result in lower prices but the opposite has occurred in part because the peculiar economic

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[55] Banks v. Nat'l Collegiate Athletic Ass'n, 977 F.2d 1081, 1094-1100 (7th Cir. 1992).

[56] Davis, *Conflicting Realities*, *supra* note 21, at 279.

[57] SPERBER, *supra* note 39, at xi. "I came to one absolute conclusion: intercollegiate athletics has become College Sports, Inc., a huge commercial entertainment conglomerate, with operating methods and objectives totally separate from, and mainly opposed to, the educational aims of the schools that house its franchises." *Id.* at xi. The characterization as a business corporation is more than a metaphor. The essence of the business corporation is its profitmaking orientation and the drive to maximize the wealth of its owners.

[58] *See* SPERBER, *supra* note 39, at 15-16.

[59] *See* SPERBER, *supra* note 39, at 10-11, 18-19.

structure of colleges and universities continues to drive demand.[60] For example, universities continue to be both willing to pay and able to afford coaches' salaries no matter how high they rise. Application of employment and labor laws would also place upward pressure on wage costs. Thus, in order for Congress to weigh in, it would have to promulgate a statute that directly regulated economic structure. Legislative options for a regulatory regime directly governing economic structure on the basis of commercial activities are limited. Congress would have to establish a new agency or amend the antitrust laws to permit collusion among NCAA members to do so. It could indirectly regulate by subjecting intercollegiate athletic profits to the unrelated business income tax. Universities would have to curtail costs and revenues incur higher costs in the form of additional taxes. It would be an example of a luxury tax in intercollegiate athletics. All such regulatory options would raise the costs. Market forces, not laws, would bear the burden of regulation.

Direct regulation of economic structure could be accomplished through industry self-regulation. However, cartels are disfavored under the commerce-based antitrust laws. The NCAA must be distinguished from intercollegiate athletics. It has been analogized to a trade association or cartel engaged in the production of intercollegiate athletics. Although a related question, the nature of the NCAA is not the subject of this article.[61] In *Law* and *Hennessey*, the NCAA had implemented cost-cutting measures that were unsuccessfully challenged. Since *Law*, the NCAA has accepted that it is precluded from promulgating and enforcing such cost-cutting measures.[62] It has considered and rejected the idea of seeking action by Congress to exempt intercollegiate athletics from the antitrust laws.[63] The only alternatives to industry self-regulation are the creation of a federal agency of intercollegiate athletics that would essentially displace the NCAA or some form of soft regulation. The establishment of intercollegiate athletics as a regulated industry is not politically realistic, and soft regulation is no more likely to be efficacious than the existing framework.

III. WHY USE THE EDUCATIONAL NEXUS TO REGULATE THE ECONOMIC STRUCTURE OF INTERCOLLEGIATE ATHLETICS?

There are two reasons for using education as the jurisdictional hook for the federal regulation of the cost and revenue structures of intercollegiate athletic programs. The first is that Congress already has experience in regulating the

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[60] Some commentators would argue that educational institutions engaged in intercollegiate athletics are no different from any other profit-oriented firm. *See e.g.*, Koch, *supra* note 21, at 10.

[61] *See* Mathewson, *supra* note 21, at 91-92 (author maintains that the NCAA is an athletics-oriented organization rather than an educational one).

[62] *The Second Century Imperatives, Presidential Leadership—Institutional Accountability,* A Report from the Presidential Task Force on the Future of Division I Intercollegiate Athletics 21 (2006), *available at* http://www2.ncaa.org/portal/legislation_and_governance/committees/future_task_force/final_report.pdf (last visited Feb. 23, 2008) [hereinafter Presidential Report]; Letter to Thomas, *supra* note 18, at 20.

[63] Presidential Report, *supra* note 62.

higher education industry, including various aspects of intercollegiate athletics. The second is that the excesses of intercollegiate athletics that need regulation are the product of their operation by educational institutions. The latter reason will be addressed in the next section of this article.

Congress has promulgated substantial legislation pursuant to the Tax and Spending Clause to regulate education.[64] Title VI of the 1964 Civil Rights Act,[65] Title IX of the Education Amendments of 1972,[66] Individuals with Disabilities Education Act,[67] the Buckley Amendment,[68] Student Right to Know and Campus Security Act,[69] and the Drug-Free Schools and Communities Act of 1989[70] are classic examples of such legislation. These statutes do not regulate education so much as they regulate certain practices of educational institutions. Some legislation such as tax exemptions and appropriations for research grants and student grant and loan programs have conferred benefits on educational organizations. In addition to the favorable federal subsidies, numerous judicial decisions have resulted in a favorable climate for educational organizations particularly in its relationships with its students.[71] However, what the legislature gives, it can also regulate.

Moreover, Congress has made legislative inroads into the regulation of intercollegiate athletics. These include the Equity in Athletics Disclosure Act,[72] the Americans with Disabilities Act of 1990,[73] the Rehabilitation Act of 1973,[74] Title VI[75] and Title IX of the 1964 Civil Rights Act. All of these statutes are enforced by a federal agency, the Department of Education, and all regulate

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[64] H. Kathryn Merrill, *The Encroachment of the Federal Government into Private Institutions of Higher Education*, 1994 B.Y.U. EDUC. & L.J. 63 (describing legislation regulating graduation rates, civil rights laws).

[65] 42 U.S.C. § 2000d (2000) ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.").

[66] 20 U.S.C. § 1681-88 (2000) ("No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .").

[67] Pub. L. No. 108-446, 118 Stat. 2647 (2004) (codified at 20 U.S.C. §§ 1400-1409 (2000)).

[68] Family Education Right to Privacy Act, 20 U.S.C.A. § 1232g (2000).

[69] Pub. L. No. 101-542, 104 Stat. 2381 (1990) (codifed at 20 U.S.C. 1092 (2000)).

[70] 20 U.S.C. § 1011i (2000).

[71] Mathewson, *supra* note 25, at 49.

[72] 20 U.S.C. §1092 (2000); Equity in Athletics Disclosure Act, Pub. L. No. 103-382, 108 Stat. 3518 (1994).

[73] 42 U.S.C. §§ 12101-12102 (2000); Bowers v. Nat'l Collegiate Athletic Ass'n, 475 F.3d 524 (3d Cir. 2007).

[74] "No otherwise qualified individual with a disability in the United States, as defined in section 7(20), shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service." Pub. L. No. 93-112, 87 Stat. 394 (1973) (codified at 29 U.S.C. §§ 701-718 (2000)).

[75] *See* Cureton v. Nat'l Collegiate Athletic Ass'n, 198 F.3d 107 (3d Cir. 1999).

individual educational institutions rather than the industry as a whole. Of these, only Title IX directly affects the financial or economic structure of intercollegiate athletics programs offered by educational institutions that receive federal funds.[76]

The language of Title IX does not expressly mention intercollegiate athletics. "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ."[77] The legislative history is exceedingly sparse but it is widely acknowledged that intercollegiate athletics was a major rationale for its enactment.[78] The details of its application to intercollegiate athletics come from the regulations[79] and the 1979 Policy Interpretation.[80]

Title IX has had significant implications for the cost structures of intercollegiate athletics program as a whole, but not necessarily for men's basketball and football.[81] At a minimum, Title IX required that public expenditures on athletics within educational institutions be equitably allocated between males and females. Institutions that had prior to then spent the bulk of funds allocated to intercollegiate athletics on sports for males were to increase expenditures on sports for females to equalize expenditures. [82] The statute did not specify whether universities must comply solely by increasing expenditures for women or by a combination of increases in spending for women and decreases in spending on men. The regulations permitted either avenue of compliance.[83] The

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[76] 20 U.S.C. § 1681 (2000).

[77] *Id.*

[78] *But see* Ross A. Jurewitz, *Playing at Even Strength: Reforming Title IX Enforcement in Intercollegiate Athletics*, 8 AM. U. J. GENDER SOC. POL'Y & L. 283, 290-95 (2000) (arguing that legislative history includes history of the proposed Education Amendments in 1971 and the subsequent rejection of the Tower Amendment and adoption of the Javitz Amendment but nevertheless evidencing Congressional intent to regulate intercollegiate athletics under Title IX although author disagrees on the regulatory standard); Robin M. Preussel, *Successful Challenge, Ruling Reversed: Why the Office of Civil Rights' Survey Proposal May Be Well-Intentioned but Misguided*, 13 SPORTS L. J. 79, 85-87 (2006) (stating that the application of Title IX to intercollegiate athletics was ambiguous until debates over Tower and Javtiz Amendments).

[79] 34 C.F.R. §§ 106.1-106.9 (2007).

[80] 44 Fed. Reg. 71,413 (Dec. 11, 1979).

[81] Ronnie Wade Robertson, *Tilting at Windmills: The Relationship between Men's Non-revenue Sports and Women's Sports*, 76 MISS. L. J. 297 (2006); *see* Jonathan M. Orszag & Peter R. Orszag, *The Empirical Effects of Intercollegiate Athletics: An Update, Hypothesis* 7, 7 (2005) (finding some relationship between increases in spending on football and increases in spending on women's sports); Gary R. Roberts, *Evaluating Gender Equity Within the Framework of Intercollegiate Athletics' Conflicting Value Systems*, 77 TUL. L. REV. 997 (2003) (explaining the relationship among (a) the high revenue producing sports of men's football and basketball, (b) low revenue or nonrevenue producing men's sports and Title IX).

[82] The regulations required universities to provide athletic benefits, opportunities and treatment that are equivalent, equal or equal in effect for both genders.

[83] The Tower Amendment that was not adopted fought the inclusion of resources allocated to high revenue producing sports, particularly football, from the equalization requirements. *See* 120 CONG. REC. 15,322-23 (1974).

point is not to debate the merits of the regulations, but only to show the federal intervention into the allocation of resources in intercollegiate athletics. The NCAA opposed the regulations on those grounds. In *National Collegiate Athletic Ass'n v. Califano,*[84] the NCAA argued on behalf of its members that compliance with the regulations would require individual educational institutions to undertake a major reallocation of resources.

> Application of the Regulations to the member institutions of the NCAA requires that they presently make substantial changes in the organization, operation and budgeting of their individual intercollegiate athletic programs, requires that they presently engage in time-consuming and expensive programs of self-evaluation and affirmative action, and requires that their intercollegiate athletic programs and activities be conducted in compliance with arbitrary demands of a Federally-imposed mandate.[85]

The intervention was motivated out of equal protection considerations rather than a desire to control the budgets of intercollegiate athletics programs.

Congress and the states historically have recognized education as an important public good that is produced for sale without regard to profitability. It is considered to be a governmental function, and states fund it and provide various tax exemptions. Congress has conferred substantial benefits on colleges and universities as educational institutions in the form of direct grants and tax exemptions, the most significant of which is the exemption from tax under section 501(c)(3).[86] The laws conferring tax-exempt status are a significant source of laws that regulate at least indirectly the economic structure of educational institutions. Such laws require or presume that the revenues generated in the production of educational activities fund such activities.[87] The regulation of the economic structures of educational institutions is not the objective of such taxing statutes. Congressman Thomas' letter raises the issue of whether Congress should regulate the financial structure of intercollegiate athletics through federal tax law, essentially by subjecting intercollegiate athletics activities to taxation.[88] It would not be the first time that Congress singled out intercollegiate athletics. In 1932, Congress imposed "[a] tax of 1 cent for each 10 cents or fraction thereof of the amount paid for admission to any place . . . to be paid by the person paying such for admission."[89] The statute exempted admissions charged by religious, educational or charitable organizations but explicitly excluded admissions to intercollegiate athletic games other than those charged by the military academies from the exemption.[90] The

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[84] 622 F.2d 1382 (10th Cir. 1980).
[85] *Id.* at 1388.
[86] I.R.C. § 501(c)(3) (2000).
[87] *Id.*
[88] Letter to Brand, *supra* note 13.
[89] Revenue Act of 1926, Pub. L. No. 69-20, 44 Stat. 9, § 500, amended by Revenue Act of 1932, Pub. L. No. 72-154, 47 Stat. 271, § 711.
[90] *Id.*

imposition of the tax was unsuccessfully challenged by the University of Georgia.[91]

The regulation of the cost and revenue structures of intercollegiate athletics programs is not an objective of laws on tax-exempt status. Such laws do require that educational organizations expend their revenues on educational activities. There are no profitability requirements or caps on revenues. Any regulation of costs and revenue structures is indirect at best resulting from the requirement that such programs be operated as educational activities.

That requirement has been the subject of frequent litigation, notwithstanding the stated position of the NCAA that intercollegiate athletic activities constitute integral parts of the educational programs of colleges and universities.[92] That question was on center stage in *Naval Academy Athletic Ass'n v. Comptroller of the Treasury*.[93] At issue was whether the athletic association was required to pay a gross receipts tax on the gate receipts on football and lacrosse games played by Naval Academy teams. Maryland law provided an exemption for expenditures devoted exclusively to educational purposes.[94] The challenge was based on a 1950 Maryland Attorney General Opinion that distinguished between physical education programs and intercollegiate athletics. The court ruled that intercollegiate athletics were a part of the educational program of the Naval Academy, but in doing so recognized that fifty percent of the student body participated in them.[95] The exemption for educational expenditures was a matter of legislative grace.

In *City of Boulder v. Regents of University of Colorado*,[96] a case raising an *Allen v. Georgia* type issue involving a municipal ordinance that imposed an admission tax on public events including athletic contests. The court held that a home rule city lacked the authority under the state constitution to require university officials to collect the tax.[97] In dicta, the court went on to state that a home rule city lacked the authority to tax the purchase of education furnished by the state.[98] The court concluded under that analysis that the purchasers of admission to university events that educated both the general public and the student body could not be subjected to an admission tax by a home rule city.[99] Such events included art exhibits, concerts, dissertations, dramatic performances,

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[91] *See* Allen v. Regents of the Univ. Sys. of Ga., 304 U.S. 439, 58 (1938), *reversing*, Page v. Regents of Univ. Sys. of Ga., 93 F.2d 887 (5th Cir. 1937) (discussing whether football games for which admission is charged a part of the governmental function of education); United States v. First Capital Nat'l Bank, 89 F. 2d 116 (8th Cir. 1937), *reversing*, 13 F. Supp. 380 (D.C. Iowa 1936).

[92] NCAA CONST., art. 1.3.1, *available at* http://www.ncaa.org/library/membership/division_i_manual/2004-05/2004-05_d1_manual.pdf (last visited Feb. 21, 2007).

[93] Miscellaneous No. 93, 1977 WL 1568 (Md. Tax Mar.10, 1977).

[94] *Id.*

[95] *Id.*

[96] 501 P.2d 123 (Colo. 1972).

[97] *Id.* at 127.

[98] *Id.* at 126.

[99] *Id.*

and lectures.[100] The court did not consider intercollegiate football to provide such education and stated that an admission tax on such events would have been valid,[101] although it failed to articulate the basis for its conclusion.

The question has also arisen in cases concerning the eligibility of athletics governing associations for property exemptions.[102] In *National Collegiate Realty Corp. v. Board of County Commissioners*,[103] the court conducted a detailed analysis of the NCAA as to whether it was devoted exclusively to educational purposes. Whether the NCAA's national headquarters was devoted exclusively to exempt educational purposes depended upon whether the NCAA was an educational organization. The activities carried on in the headquarters included enforcement, championship programs, media, publishing and general administrative activities.[104] The court reviewed case law on the question of whether intercollegiate athletics constituted education. It ultimately determined that the NCAA was an educational organization, but notwithstanding its exploration of authorities relying on precedents and tradition. It accepted without much explanation that sports and physical education activities are within the educational programs of colleges, universities and high schools.[105] It recognized that the primary contravening characterization was that of a commercial organization but noted that the strongest arguments for that characterization were the magnitude of the NCAA's commercial operations.[106] Unfortunately, the court shed little light on what aspects of intercollegiate athletics rendered them educational other than their operation by educational organizations. Indeed one basis for holding that the NCAA was an educational organization was propinquity to a high school athletics governing association and was distinguishable from one primarily by the magnitude of the NCAA's revenues and marketing activities.[107]

Similarly, the court in *Big Ten Conference, Inc. v. Department of Revenue*, relied on *National Collegiate Realty Corp.* to rule that an intercollegiate athletics governing association was an educational organization.[108] The question arose in an attempt to subject the organization to property taxes by the State of Illinois.[109]

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[100] *Id.*

[101] *But see* Mobile Arts & Sports Ass'n, Inc. v. United States, 148 F. Supp 311, 316 (D. Ala. 1957) (finding that college football bowl game educates the public).

[102] There is a related question on the eligibility of property used in intercollegiate athletics for state property tax exemptions. Annotation, *Tax Exemption of Educational Institutions as Extending to Athletic Fields or Property Used for Social or Recreation Purposes*, 143 A.L.R. 274 (1943).

[103] 690 P.2d 1366 (Kan. 1984).

[104] *Id.* at 1369.

[105] *Id.* at 1372.

[106] The court labeled the contrary view as philosophical. *Id.* However, it might well have said that the production and sale of undergraduate and graduate study are commercial activities so that the presence of such activities does not transform educational activities into noneducational activities. *See* United States v. Brown Univ., 5 F.3d 658 (3d Cir. 1993).

[107] *Nat'l Collegiate Realty Corp.*, 690 P.2d at 1374.

[108] 726 N.E.2d 114, 117-18 (Ill. Ct. App. 2000).

[109] *Id.*

Despite the inability of the courts to establish a definition of intercollegiate athletics as an educational activity, the inescapable result has been the construing of statutes to prescribe tax benefits on the basis that intercollegiate athletics constitutes educational activities. The state cases have expressed the view that a workable definition of educational activities is ineffable.

The exemption from tax under the federal law is perhaps the most significant tax benefit for institutions engaged in intercollegiate athletics. The benefits conferred on universities for their intercollegiate athletics programs are substantial and are premised on the characterization of those programs as educational. The principle that intercollegiate athletics is an integral part of higher education has been long accepted by Congress[110] and the Internal Revenue Service ("IRS").[111] In fact, the recognition of that characterization under federal tax law extends eligibility for tax exempt status to intercollegiate athletics activities independent of a university. Governing associations, for example, are deemed to be educational organizations,[112] as are companies that operate college football bowl games.[113]

Virtually all revenue generated activities of intercollegiate athletics, including ticket sales, broadcast rights and sponsorships, have been swept under the educational umbrella.[114] Such activities are deemed to be substantially related to the educational purpose of the associated college or university so they neither jeopardize the underlying tax exempt status of a college or university nor subject it to the UBIT.[115] The IRS occasionally has challenged a specific activity within intercollegiate athletics. In 1991, for example, it proposed to treat sponsorship payments to bowl organizers in exchange for naming rights as UBIT. Under pressure from Congress, the IRS reversed its position[116] and Congress subsequently codified the reversal.[117] As a result, colleges and universities enjoy

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[110] H.R. Rep. No. 81-2319. (1950), *as reprinted in* 1950-2 C.B. 380, 409; S. Rep. No. 81-2375 (1950), *as reprinted in* 1950-2 C.B. 483, 505. Under IRC § 501(c)(3), a corporation organized for educational purposes is exempt from taxation. An organization formed for the purpose of providing physical education has qualified as an educational organization under § 501(c)(3).

[111] Rev. Rul. 80-296, 1980-2 C.B. 195; Erin Guruli, *Commerciality of Collegiate Sports: Should the IRS Intercept?*, 12 SPORTS LAW. J. 43, 44 (2005); James L. Musselman, Recent Federal Income Tax Issues Regarding Professional and Amateur Sports, 13 MARQ. SPORTS L. REV. 195, 208 (2003); Rev. Rul. 77-365, 1977-2 C.B. 192; Rev. Rul. 65-2, 1965-1 C.B. 227; Rev. Rul. 64-275, 1964-2 C.B. 142. An association to govern high school interscholastic athletic competition has been recognized as exempt as an educational organization. Rev. Rul. 55-587, 1955-2 C.B. 261.

[112] Nat'l Collegiate Realty Corp. v. Bd. of County Comm'rs, 690 P.2d 1366, 1375 (Kan. 1984).

[113] Mobile Arts & Sports Ass'n, Inc. v. United States, 148 F. Supp 311, 316 (D. Ala. 1957).

[114] I.R.S. Gen. Couns. Mem. 37618 (July 28, 1978) (finding that broadcast rights are substantially related to education).

[115] 26 U.S.C. §511. *See* Musselman, *supra* note 111, at 44; Guruli, *supra* note 111, at 207.

[116] Guruli, *supra* note 111, at 209.

[117] 26 U.S.C. § 513(i) (2000); Taxpayer Relief Act of 1997, Pub. L. No. 105-34, §965(a), 111 Stat. 788, 893-94 (1997).

a substantial tax savings because income generated by those activities is not subject to the UBIT.[118]

A detailed analysis of the taxation of intercollegiate athletics is beyond the scope of this article. The dependency of the tax scheme on the educational nexus, however, provides a framework for some regulation of intercollegiate athletics. The questions posed by Congressman Thomas suggests a dismantling of the presumption of educational character by focusing on the same factors used to support the resemblance of commerce test used to trigger the application of the antitrust laws, namely the magnitude of the monies generated through the live gate, television and radio broadcasting, and licensing.[119] Although income from intercollegiate athletics activities are recognized as substantially related to educational mission under federal tax law, the regulations provide for the use of similar factors in determining whether an activity is substantially related.[120] These factors include the size and extent of, and the degree of income generated by, the activity.[121] The consequence of the lifting of the tax exemption implied in his letter is that intercollegiate athletics in general or some intercollegiate athletics programs would be subjected to the unrelated business income tax or result in the loss of tax exempt status for some organizations. The existing UBIT regime provides for ad hoc determinations of substantial relationship. If Congress were to intervene, it would have the opportunity to delineate the parameters of intercollegiate athletics activities that constitute or fall within educational programs.

Drawing the precise contours of those intercollegiate activities that constitute education, however, would not directly regulate the economic structure of intercollegiate athletics.[122] It would in fact raise the cost by imposing additional tax costs at least on some programs. Colleges and universities could avoid those increased costs by operating programs that remained within the defined parameters. Crafting a definition would be a delicate proposition. A taxing statute would likely be inadequate to address the economic structure problems in intercollegiate athletics, and if Congress ventured to do so, it would transform the Internal Revenue Service into a bureau of intercollegiate athletics.

Nevertheless, the favorable treatment of intercollegiate athletics under current law is based on the educational hook. If Congress desires to directly regulate intercollegiate athletics, the law is clear it may do so through its power to regulate education.

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[118] 26 U.S.C. § 511 (2000).

[119] Letter to Brand, *supra* note 13, at 5-7.

[120] Treas. Reg. §1.513-1(d) (1983).

[121] *Id.*; see Guruli, *supra* note 111, at 51-52.

[122] The court in *National Collegiate Realty Corp. v. Board of County Commissioners* found defining education to be inordinately difficult. 690 P.2d at 1371. However, the case suggests two factors that are relevant in the case of intercollegiate athletics: students, and colleges and universities. *Id.*

IV. WHAT IS THE PROBLEM CONGRESS WOULD BE ASKED TO RESOLVE?

The second reason for using education as the jurisdictional hook is that the excesses of intercollegiate athletics result from their occurrence within the economic structures of educational institutions. The problem of escalating costs and revenues in intercollegiate athletics programs is an educational problem and appropriately addressed as such.[123] Intercollegiate athletics describes an industry, and while costs and revenues are escalating within the industry, the problem requires microeconomic regulation rather than macroeconomic regulation.[124] The key to the economic structure of intercollegiate athletics is the relationship between revenue generation and cost escalation within educational organizations. Such educational institutions are not profit maximizers, nor are they cost minimizers.[125] They necessarily must generate revenue sufficient to cover costs such that costs are constrained primarily by the revenues available to fund them. Consequently, the costs of an institution's ideals are limited only by the revenues it generates to cover them, whether from tuition, public subsidies, private donations or program revenue.[126] The more revenue an institution generates, the more costs it can cover, the more of its ideal it can achieve. An institution may have to choose among ideals and may try to contain costs in one area so that it can achieve its ideals in another. Institutions competing for students and academic reputations are affected by the success of other institutions such that

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[123] *See* American Association of University Professors, *Financial Inequality in Higher Education: The Annual Report on the Status of the Profession*, *available at* http://www.aaup.org/NR/rdonlyres/B25BFE69-BCE7-4AC9-A644-7E84FF14B883/0/zreport.pdf (last visited Feb. 23, 2008) (detailing the increases in salaries for university presidents, faculties and coaches, in the disparities in spending among institutions and the dependence upon endowments to subsidize educational programs); *see* Presidential Report, *supra* note 62, at 24 (Statement of Sidney McPhee) (asserting that economic pressures intercollegiate athletics are no different from those confronting university educational programs in general).

[124] Other scholars have described the commercial cartel nature of the NCAA and its functioning as one. *See, e.g.*, Koch, *supra* note 21. The Presidential Task Force has now adopted a micro economic approach for deregulation of economic structure. The Task Force recommends that each institution accept accountability for its own costs and revenue structure. It also calls for uniformity in accounting of costs and revenues, the transparency of such structures and the sharing of information. The micro-regulatory approach focuses on the external regulation of institutions *a la* Title IX. Title IX imposes antidiscrimination obligations on individual institutions that are enforced by a federal agency as well as through private rights of action. Presidential Report, *supra* note 62.

[125] *See generally* Presidential Report, *supra* note 62, at 8-12; *see also* Roberts, *supra* note 81, at 1007 (discussing efficiency of smaller size football teams).

[126] *See* Presidential Report, *supra* note 62, at 19-22 (describing of financial structure of intercollegiate athletics programs). The reference to revenues presumably refers to program revenues, not including subsidies. Only a handful of universities have generated sufficient program revenues to cover costs. Most continue to rely on ever increasing subsidies. Students' fees, for example, comprise the source of as much as twenty percent of intercollegiate athletic programs. Orszag & Orszag, *supra* note 81, at 4.

their priorities in allocating revenues to cover costs are affected similarly. Successful institutions drive up the costs for other institutions thus creating pressures on other institutions to generate revenues.[127] There is little incentive to control costs as long as there are prospects for revenue to cover them.[128]

Intercollegiate athletics as an integral part of educational programs fits within that economic arrangement. To achieve success in intercollegiate athletics universities must generate the revenues to pay for them. Institutions can have as good an athletic program as they can generate revenue. Educational institutions have at least four principal sources from which they can generate revenue: tuition, program revenues, public subsidies and private donations.[129] It so happens that substantial program revenues can be generated through the commercial side of intercollegiate athletics, especially men's basketball and football programs.[130] Women's basketball is also moving into the revenue generation arena. A university desiring to upgrade its program is confronted with greater pressure to generate substantial revenues than to contain costs. Containing costs limits the upgrades.

The enterprise of intercollegiate athletics is a collaborative one that requires the joint efforts of multiple institutions. As expected, some institutions are capable of generating more revenues than others. The result is that Division I intercollegiate athletics encounter the revenue sharing conundrum similar to that of other professional sports.[131] Universities fall into two economic clusters. One generates high revenues by virtue of tradition, alumni and fan base, television markets, and national following; the other generates considerably lower revenues based on the same factors.[132] Thus, Division I schools face revenue generation

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[127] *See* Roberts, *supra* note 81, at 1004-05 (describing arms race in football); *but see* Orszag & Orszag, *supra* note 81 (finding support for existence of commercial arms race within conferences but limited support for one overall in operating expenses, and stronger support for one in capital expenditures); *see also* Law v. Nat'l Collegiate Athletic Ass'n, 134 F.3d at 1012-13.

[128] *See* Sandra Block, *Rising Costs Make Climb to Higher Education Steeper*, USA TODAY, Jan. 12, 2007, *available at* http://www.usatoday.com/money/perfi/college/2007-01-12-college-tuition-usat_x.htm (last visited Feb. 23, 2008) (reporting on the steepness of increase in tuition costs over past twenty-five years and citing criticism that increase in federal funding will result in concomitant increases in spending by colleges); Jonathan D. Glater, *College Costs Rising at Double the Inflation Rate*, N.Y. TIMES, Oct. 22, 2008, *available at* http://www.nytimes.com/2007/10/22/education/21cnd-tuition.html?ex=1350705600&en=091bcaadd2ee018b&ei=5088&partner=rssnyt&emc=rss (last visited Feb. 23, 2008); College Board, *Trends in College Pricing 2007*, *available at* http://www.careercornerstone.org/pdf/universities/tuition07.pdf (last visited Feb. 23, 2008).

[129] *See supra* note 126 and accompanying text.

[130] *See supra* note 8 and accompanying text.

[131] Vittorio Vella, *Swing and a Foul Tip: What Major League Baseball Needs To Do To Keep Its Small Market Franchises Alive at the Arbitration Plate*, 16 SETON HALL J. SPORTS & ENT. L. 317 (2006) (analysis of large and small market cities and major leagues players market).

[132] Financial Inequality in Higher Education: The Annual Report on the Status of the Profession, American Association of University Professors, *supra* note 5, at 5 (report reflects disparities between institutions with large endowments and institutions with small endowments); *Trends in College Pricing*, *supra* note 128, at 2 (reports show disparities in revenue generation between

and revenue sharing problems. Needless to say, there are differences of opinion on the appropriate revenue sharing arrangement. Schools that generate low revenues argue for greater revenue sharing and schools that generate high revenues seek less revenue sharing. Thus, there are cases like *NCAA v. Board of Regents of the University of Oklahoma*,[133] in which high revenue generating universities resisted NCAA imposed revenue sharing, and *Howard University v. NCAA*,[134] in which a low revenue generating university challenged its exclusion from additional revenues through participation in a post-season playoff.

In *Board of Regents of the University of Oklahoma*, two large revenue universities were challenging the NCAA television agreement that shared television revenues among small and large revenue schools in college football.[135] The tussle between the major college football programs and the NCAA is often glossed over in subsequent discussions of the case. Sixty-four universities upset with the sharing formulas under the NCAA television plan formed the College Football Association and negotiated a contract with NBC providing for a larger payout to its members.[136] Their victory in the Supreme Court eventually led to a shifting of the negotiation of television rights from the NCAA to what are now known as superconferences.[137] The effect has had a substantial change in the egalitarian revenue sharing structure contained in the old NCAA contract.

Small revenue schools nevertheless must compete with high revenue schools for student athletes and coaches.[138] While a university may not pay student athletes more than is authorized by the NCAA, universities may differ in national image, name recognition, facilities, television appearances, and travel arrangements. To enhance their programs, they must try to increase their expenditures. Unless they can generate revenues in their intercollegiate athletics programs—and as small revenue schools they obviously do not—they must obtain the funds to cover those expenditures from other sources.

Universities have addressed the revenue sharing quandary in two ways. Institutions collectively can generate more revenue. To do so, institutions must

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wealthy and less wealthy institutions as well as among institutions in both groups); Presidential Report, *supra* note 62, at 20 (describing economic disparities among different groups of institutions).

[133] 468 U.S. 85 (1984).

[134] 675 F. Supp. 652 (D.D.C. 1987).

[135] 468 U.S. at 85-86.

[136] *Id.* at 95.

[137] *See generally* D. Kent Meyers & Ira Horowitz, *Private Enforcement of the Antitrust Laws Works Occasionally*: Board of Regents of the University of Oklahoma v. NCAA, *A Case in Point*, 48 Okla. L. Rev. 669 (1995) (describing the evolution of college athletic conferences in the aftermath of Bd. of Regents, Univ. Okla. v. NCAA). In addition to the leverage to negotiate more lucrative television contracts, larger conferences were able to generate additional revenue through conference championships. NCAA rules require a minimum of 12 member institutions in order to stage a conference play-off. The Atlantic Conference recently undertook a controversial expansion adding three schools from the Big East Conference. See Gregg L. Katz, Note, *Conflicting Fiduciary Duties Within Collegiate Athletic Conferences: A Prescription for Leniency*, 47 B.C. L. REV. 345, 350-55 (2006) (describing the ACC expansion and its effects).

[138] Roberts, *supra* note 81, at 1004-05; Presidential Report, *supra* note 62, at 24 (Statement of Sidney McPhee).

exploit the commercial nature of intercollegiate athletics. The result has been the proliferation of larger and more modern arenas, sponsorships, and advertising within arenas. The NCAA Division I Men's and Women's Basketball Championships have been expanded to 65 teams.[139] In football, the number of permitted regular season football games has been increased to twelve. There is the lucrative Bowl Championship Series,[140] and in addition, post-season bowl games continue to be frequently increased.[141] Admission into post-season competitions is a valuable source of revenue at all levels of competition within the NCAA. There have been cases brought or threatened over the exclusion of schools based upon the selection processes or eligibility criteria.[142]

The NCAA provides national championship playoffs in divisions for smaller schools.[143] The selection process for the Division I-AA football championship has also been challenged on antitrust grounds because participation generates additional revenue.[144] In Division I, a school must make the playoffs to earn the additional funds. In *Howard University v. NCAA*, a university unsuccessfully sought to enjoin the 1987 Division I-AA playoffs when a team with which it had been tied was selected after the plaintiff university had defeated a stronger opponent.[145] The court denied the injunction but stated that damages may be available.[146] Such lawsuits are understandable, and it may be happenstance that more such actions have not been brought. Universities wanted the opportunity for inclusion in games with greater revenue potential. Inclusion

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[139] *See* Michael Marot, *Coaches Push Expanding NCAA Hoops Tourney,* USA TODAY, June 6, 2006, *available at* http://www.usatoday.com/sports/college/mensbasketball/2006-06-25-tournament-expansion_x.htm (last visited Feb. 23, 2008).

[140] *See supra* note 7 and accompanying text.

[141] Jude D. Schmit, *A Fresh Set of Downs? Why Recent Modifications to the Bowl Championship Series Still Draw a Flag under the Sherman Act,* 14 SPORTS LAW. J. 219 (2007).

[142] The Bowl Championship Series is collaboration between four major football bowls and the University of Notre Dame and major football conferences to produce a national collegiate football champion. Teams earn a berth in the playoffs through a complex selection formula that is weighted in favor of schools from the member conferences. Participation in the playoffs generated a substantial payout for participant schools and their conferences. Schools that do not belong to the member conferences have threatened to challenge the system under the Sherman Antitrust Act. Senators and Congressmen from their states have raised noise in congress about amending the Act to regulate the selection process. Timothy Kober, *Comment, Too Many Men on the Field: Why Congress Should Punt on the Antitrust Debate Overshadowing Collegiate Football and the Bowl Championship Series*, 15 SETON HALL J. SPORTS & ENT. L. 57 (2005); David Scott Morland, *Note, The Antitrust Implications of the Bowl Championship Series: Analysis Through Analogous Reasoning*, 21 GA. ST. U. L. REV. 721 (2005).

[143] *See* 2007 NCAA D-I Football Championship Info, http://collegesportingnews.com/article.asp?articleid=89142 (last visited Feb. 23, 2008).

[144] The NCAA Division 1-AA ended as a label on 11/19/2006, and has been relabeled as NCAA Division I Football Championship Subdivision. I-AA.Org, www.i-aa.org (last visited Feb. 23, 2008).

[145] 675 F.Supp. 652 (D.D.C. 1987) (university sues for exclusion from post-season playoffs on antitrust grounds).

[146] *Id.*

in the games leads to more revenue for an individual institution, but the overall arrangement means more revenues to share and the high revenue generating schools continue to have high revenues.

The second way to solve the revenue sharing quandary is the collective regulation of costs. Successful institutions drive up the costs for other institutions, thus creating pressures on other institutions to generate revenues. Through the promulgation of NCAA rules under the rubric of cost containment, institutions that generated high revenues agreed to keep their costs down so that low revenue schools do not have to incur those costs.[147] To become successful like the high revenue schools, the low revenue schools must spend like the high revenue schools. In effect, the high revenue institutions agree to limit the extent to which they will drive the costs up for low revenue schools. There is an incidental benefit for high revenue schools; they can use the cost savings to achieve other intercollegiate ideals. The problem with cost containment is its legality under the antitrust laws. When cost containment takes the form of restricting wages, it amounts to price fixing as shown in *National Collegiate Athletic Ass'n v. Law*.[148]

The major form of cost containment has come in the amateur restrictions imposed on student athletes, although not discussed as such. The limitations result in part from educational ideals, but there are institutions that would consider higher levels of compensation and some have done so in violation of NCAA rules in the past. Perhaps the reason amateur limitations continue to exist is because institutions fear that the market for student athlete services will substantially increase the costs that must be covered by revenues, and universities will therefore be able to achieve fewer of its academic ideals even within its intercollegiate athletics programs. This form of cost containment is the subject of more and more challenges under the antitrust laws, all of which have been unsuccessful thus far.[149] The NCAA also has placed limits on the number of scholarships an institution may award. Unlike limits on the compensation paid to assistant coaches, these restrictions are apparently permissible under the antitrust laws.[150] The cost containment initiatives came to an end with the loss in *Law v.*

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[147] For a discussion of the history of cost containment in the NCAA, see Law v. Nat'l Collegiate Athletic Ass'n, 134 F.3d 1010, 1023; Rodney K. Smith, *Increasing Presidential Accountability in Big-Time Intercollegiate Athletics*, 10 VILL. SPORTS & ENT. L.J. 297, 306-07 (2003); W. Burlette Carter, *The Age of Innocence: The First 25 Years of the National Collegiate Athletic Association, 1906 To 1931*, 8 VAND. J. ENT. & TECH. L. 211, 236 (2006).

[148] 134 F.3d at 1010. *See* Roberts, *supra* note 81, at 1008-09 (for discussion of limitations placed on cost containment measures through the NCAA). Some versions of revenue sharing are also prohibited under the Sherman Act. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Okla., 468 U.S. 85 (1984).

[149] *See In re* Nat'l Collegiate Athletic Ass'n I-A Walk-On Football Players Litigation, 398 F.Supp.2d 1144 (W.D.Wash. 2005) (rules limiting scholarships for football players subject to challenge under antitrust laws as cost containment measure). The court refused to certify a class action. *In re* NCAA I-A Walk-On Football Players Litigation, No. C04-1245C, 2007 WL 951504 (W.D. Wash. Mar. 26, 2007).

[150] 468 U.S. at 123 (White, J., dissenting).

Nat'l Collegiate Athletic Ass'n.[151] Thus, the application of the commerce-based antitrust laws dealing with generic market activities did not provide a suitable framework for addressing the operation of educational programs.

V. WHAT WILL BE THE FORM OF REGULATION?

There are three likely avenues upon which federal intervention may proceed: commerce, education or a combination of the two. The most likely commerce based intervention would be through the antitrust laws in the form of an authorization of the NCAA to regulate. An education based intervention would be in the form of some statutory grant of authority to a federal agency to regulate the economic structure of intercollegiate athletic programs at individual universities. The third option is to indirectly regulate through limitations on tax exempt status. Regardless of the hook, any regulation of economic structure would have to address the peculiar framework of intercollegiate athletics. I am not recommending any specific course of regulation; I am simply outlining the likely paths for such regulation.

A. Congress Could Deregulate by Amending to the Sherman Act to Facilitate NCAA Cost Containment Policies

Congress could use the commercial nexus to deregulate intercollegiate athletics. The idea of an amendment to the Sherman Act clarifying that the agreements among educational institutions or the NCAA and similar governing associations have greater latitude to collaborate on cost containment measures without violating the Sherman Act has been discussed by the NCAA, the Presidential Task Force on the Future of Division I Intercollegiate Athletics, and commentators.[152] Professor Roberts, in fact, has recommended a statutory response or the relaxation of antitrust enforcement policy to immunize NCAA collective action on the cost containment front.[153] Lodging authority in the NCAA would offer the advantage of regulation by an organization with the expertise to develop industry specific regulation.

If Congress were to embrace legislation that would sanction the regulation of cost and revenue structures by the NCAA, there are numerous problems that would have to be addressed. Two of these significant problems are worth mentioning in this article. First, the intercollegiate athletics industry lacks the countervailing forces of labor to protect the interests of student athletes. In professional sports, the profit-seeking forces (including the pressure to minimize costs) are balanced by powerful players' unions. While deregulation would empower the NCAA to constrain coaching salaries—the most visible form of escalating costs—head coaches have bargaining power and the availability of a market. Other participants engaged in intercollegiate athletics, most notably

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[151] 134 F.3d at 1018.

[152] Roberts, *supra* note 81, at 1011.

[153] Roberts, *supra* note 81, at 1010-14.

students, lack the legal structures that protect players in professional sports. Thus, universities are able to transfer wealth that might otherwise go to student athletes, coaches, and the construction of new facilities. Any deregulation on the commerce side to facilitate NCAA regulation, should necessarily include protections for both coaches, especially assistant coaches, and student athletes for different reasons.

Second, an authorized cartel may create even greater upward pressure on the subsidization of intercollegiate athletics from other sources. The overt mechanisms to contain costs coupled with the sharing of economic information and the parallel conduct of industry firms may not contain costs and revenues at all. Such mechanism may, in fact, simply continue to push costs and revenues upward albeit at more predictable rates.

The NCAA appears to have considered but rejected seeking an amendment to the Sherman Act that would exempt its regulation of the economic structure of the intercollegiate athletic programs of its members.[154] Dr. Brand's response twice refers to the holding of *Law v. Nat'l Collegiate Athletic Ass'n*—that the NCAA's rule restricting the earnings of certain assistant coaches was illegal under the Sherman Act.[155] The Presidential Task Force Report acknowledged that, whatever the merits of sanctioning NCAA regulation, the probability of obtaining a special exemption for major college intercollegiate athletics is exceedingly small, but listed other reasons for declining to pursue that approach.[156]

Not only did the Presidential Task Force eschew relief from the antitrust laws, it rejected any national regulatory solution, including one implemented by the NCAA. It concluded that while institutions do confront economic stresses, there is no current crisis or at least one that is severe enough to warrant a national regulatory solution.[157] The Presidential Task Force identified the economic problem confronting intercollegiate athletics programs as one of the financial integrity.[158] It recognized that economic stability in intercollegiate athletics is threatened by the growth of costs which have increased twice as fast as revenues, and that the current income streams cannot withstand the continued escalation of costs.[159] However, it believed that the solution was best solved at the local level and rejected a national policy solution because a national solution would result in the ceding of too much control to a centralized NCAA.[160] The Presidential Task Force recommended measures to improve the financial management of

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[154] *See* Presidential Report, *supra* note 62, at 21; Letter to Thomas, *supra* note 18, at 20.

[155] Letter to Thomas, *supra* note 18, at 20, 24.

[156] *See* Presidential Report, *supra* note 62, at 21.

[157] *Id.*

[158] *Id.*

[159] *See* Presidential Report, *supra* note 62, at 10-11.

[160] *See* Presidential Report, *supra* note 62, at 21. The concern about the degree of control required and the concomitant loss of institutional autonomy perhaps reflects an intuitive acknowledgment of the lack of countervailing legal and market structures sufficient to provide checks and balances on NCAA regulatory power. *Id.*

intercollegiate athletic programs by member institutions.[161] It articulated a financial management objective, i.e., the matching of costs and revenues, accountability, uniform accounting measures and greater transparency.[162] While these measures are less than the full regulation of economic structure, they may nevertheless raise antitrust concerns.[163]

B. Congress Could Directly Regulate Intercollegiate Based on the Receipt of Federal Funds

Education-based federal intervention would offer at least two advantages. First, the legislative scheme could be designed to craft a regulatory scheme geared to the particular contours of intercollegiate athletics as educational programs. The scheme would regulate individual institutions in the same manner as the NCAA would if it were authorized to regulate cost and revenue structures. Although colleges and universities are subject to Title IX,[164] the NCAA itself is not.[165] The receipt of federal funds would subject an institution to regulation, but the authorizing legislation would need a standard to guide the regulation. While Title IX has an antidiscrimination standard, an act to regulate cost and revenue structures would need to provide the standard to govern those structures.

Delineating the appropriate standard presents considerable difficulty, as a general directive to regulate the economic or cost and revenue structure of intercollegiate athletics would confer too much discretion upon an administrative agency, and perhaps be constitutionally defective. However, crafting an appropriate specific standard will not be easy to find, and may not sufficiently limit agency discretion. For example, the abandoned cost containment program utilized by the NCAA incorporated a pragmatic if not arbitrary standard to reduce costs. The Cost Reduction Committee formed in 1989 by the NCAA was charged with devising a strategy for "reducing the costs of intercollegiate athletics 'without disturbing the competitive balance' among NCAA member institutions." [166] Those measures suppressed some areas of costs but did not

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[161] *Id.*

[162] *See* Presidential Report, *supra* note 62, at 22-27.

[163] The mechanisms for transparency and information sharing may also raise potential antitrust issues. The exchange of information by competitors may have procompetitive effects but may facilitate collusion that would violate the antitrust laws. *See generally* Brian R. Henry, *Benchmarking and Antitrust*, 62 ANTITRUST L.J. 483, 487-89 (1994).

[164] Cohen v. Brown Univ., 101 F.3d 155 (1st Cir. 1996).

[165] Nat'l Collegiate Athletic Ass'n v. Smith, 525 U.S. 459 (1999) (finding that NCAA is not subject to Title IX because it does not receive federal funds).

[166] *Law*, 134 F.3d at 1013. After study and deliberation, the Cost Reduction Committee recommended several measures. These included a reduction in the number of coaches in each sport, salary caps on a category of restricted earnings coaches that were the subject of *Law v. NCAA*, the number of coaches who could recruit off-campus, off-campus contacts with prospective student-athletes, visits by prospective student-athletes, printed recruiting materials, the number of practices before the first scheduled game, the number of games and duration of seasons, team travel and training table meals, and financial aid grants to student-athletes. *Id.* at 3d 1015, n.5. The

prevent the escalation of overall costs. In a proposal to resolve conflicts between nonrevenue sports programs and women's programs over the effects of Title IX compliance, Professor Roberts recommended the promulgation of a statute sanctioning the NCAA under the antitrust laws to adopt and implement a cost containment and revenue enhancement policy.[167] His proposal suggested salary caps for head and assistant coaches as well as revenue sharing among institutions of the same size and classification. [168] As noted above, the Presidential Task Force proceeded on a different route. It recommended a tri-prong approach calling for transparency, the matching of costs and revenues and local accountability may provide a framework.[169]

The second advantage of an education-based federal intervention is that it would resolve one of the central structural flaws of the current industry.[170] It offers countervailing forces against the economic power of the institutions, perhaps the most notable of which would be the constitutional protections afforded to student athletes not currently available, except in public institutions on a limited basis.[171] These would include the opportunity for input into agency rulemaking.

This approach offers far more questions than answers at this time. What form would direct regulation take? A Bureau or Office of Intercollegiate Athletics within the Department of Education? What aspects of intercollegiate athletics would it cover? What could it do to regulate the economic structure of intercollegiate athletics that the NCAA and other governing associations cannot? What mechanisms would it use to contain costs and revenues? The advantage of the education regulatory approach is the existing experience with such regulation and the ability to craft the regulation to address the specific needs of educational programs.[172] These factors make such an approach viable and a more appropriate pathway than commerce based regulation.

Committee apparently viewed the compensation paid restricted earnings coaches as more of a problem in the escalation of costs than the salaries of head coaches. *Id.*

[167] Roberts, *supra* note 81, at 1011-12.

[168] *Id.*

[169] *See supra* notes 154-162 and accompanying text.

[170] *See* Michael Lewis, *Serfs of the Turf*, N.Y. TIMES 13 Nov. 11, 2007 (criticizing NCAA sanctioning industry in which all participants except student athletes may be compensated); *See* H.R. 2243, 102d Cong. (1991) (proposed bill to create National Commission on Intercollegiate Athletics intended in part to address gender, racial and other inequities for student athletes); H.R. 2157, 102d Cong. (1991) (proposed bill would have overridden *Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179 (1988), and prescribed due process rights for coaches and student athletes).

[171] Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179 (1988) (finding that NCAA is not a state actor but injunction against state university was permitted to remain in force).

[172] The United States Department of Education now has experience with regulating some aspects of intercollegiate athletics. *See supra* notes 72-76 and accompanying text.

C. Congress Could Indirectly Regulate Through Provisions Governing Tax Exempt Status

The least viable option is the use of tax law to indirectly regulate intercollegiate athletic programs. The taxing power, rather than the receipt of federal funds, would provide the specific jurisdictional hook. Representative Thomas' letter did not propose the direct regulation of major college intercollegiate athletics.[173] Rather, he hinted at an indirect approach based on the demarcation between education and professionalism.[174] The tax exempt status of intercollegiate activities would be based upon controlling revenues and costs in a manner that reflected the predominance of the educational mission in those activities. The key would be the development of a definition of intercollegiate athletics as an educational program. This approach is consistent with cases at the state level on property tax exemptions and classification of revenues and expenditures in intercollegiate athletics. Moreover, the tax exempt status approach has been based upon identifying the true nature of organizations or their activities. The indirect regulation would occur because it would give universities a choice between operating their intercollegiate athletics program as educational programs or as commercial ones. Presumably, the definition of an educational program would be tied to the magnitude of costs and revenues as well as institutional resources devoted to intercollegiate athletics. Those universities that exceeded threshold levels would be subject to the Unrelated Business Income Tax; those that operated their programs within those thresholds would not. The approach may lead to inconsistency in the treatment of programs. However, this approach would wreak havoc on the economic structure of intercollegiate athletics because it will only increase the need for revenue generation. Some institutions would qualify and others would not. It is entirely possible that it would hurt low revenue institutions rather than high revenue institutions.

VI. CONCLUSION

This article does not recommend that Congress intervene in the regulation of intercollegiate athletics. It merely sketches a possible framework for such intervention. Intercollegiate athletics face revenue generation and cost control problems. While the commercial nexus begs the regulation of intercollegiate athletics, it provides a weak basis therefore. It provides a stronger basis for federal deregulation and the facilitation of a collaborative solution by educational institutions. The educational nexus affords a more appropriate basis for the direct and indirect regulation of the economic structure of intercollegiate athletics.

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[173] Letter to Brand, *supra* note 13.
[174] *Id.*