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Enhancing “Education”: Rebalancing the Relationship Between Athletics and the University

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Enhancing “Education”: Rebalancing the Relationship Between Athletics and the University

*William W. Berry III**

This symposium Article argues for a rebalancing of the relationship between athletics and the university. Specifically, it challenges college presidents to leverage the economic growth of intercollegiate athletics to enhance the academic side of the university for all students. The university ought to utilize athletics to improve the institution, not sacrifice its core mission to serve the athletics department. To be clear, this rebalancing would be consistent with the core ideals that both the university presidents and the NCAA have been verbalizing for decades.

In Part I, the Article describes the shift from a symbiotic relationship to a more parasitic relationship, with athletics exerting dominance over the university at many institutions. Part II argues for a rebalancing—outlining a relational shift consistent with the values of the NCAA and the practices at some institutions. Finally, Part III addresses the practical obstacles to such a shift and provides a road map for universities to enhance the student-athlete educational model that the NCAA champions.

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INTRODUCTION

"I will turn your face to alabaster / Then you'll find your servant is your master."¹ —Sting

By many standards, the economic success of intercollegiate athletics has reached a pinnacle.² The college football playoff yields payouts to universities in excess of \$600 million per year,³ and the National Collegiate Athletic Association ("NCAA") enjoys roughly \$900 million in revenue from the NCAA men's basketball tournament each March.⁴ For universities in conferences with their own television networks, contracts can yield tens of millions of dollars a year for universities.⁵

And yet, most athletics departments lose money annually.⁶ At many universities, the revenue sports of football and basketball—occasionally baseball and women's basketball as well⁷—subsidize all of the other sports

1. THE POLICE, *Wrapped Around Your Finger*, on SYNCHRONICITY (A&M Records 1983).

2. Will Hobson & Steven Rich, *Playing in the Red*, WASH. POST (Nov. 23, 2015), <http://www.washingtonpost.com/sf/sports/wp/2015/11/23/running-up-the-bills/> ("Big-time college sports departments are making more money than ever before.") [<https://perma.cc/SF5B-BHV5>].

3. Kristi Dosh, *College Football Playoff Payouts By Conference For 2016-17*, FORBES (Dec. 31, 2016), <http://www.forbes.com/sites/kristidosh/2016/12/31/college-football-playoff-payouts-by-conference-for-2016-17/#7229e24e5da5> [<https://perma.cc/R84R-GYHC>].

4. Jonathan Berr, *March Madness: Follow the Money*, CBS NEWS (Mar. 20, 2015), <http://www.cbsnews.com/news/march-madness-follow-the-money/> [<https://perma.cc/W769-LVSB>].

5. See, e.g., Kristi Dosh, *A Comparison: Conference Television Deals*, ESPN (Mar. 19, 2013), http://www.espn.com/blog/playbook/dollars/post/_id/3163/a-comparison-conference-televisiondeals [<https://perma.cc/9KS6-C275>].

6. Steve Berkowitz, Jodi Upton & Erik Brady, *Most NCAA Division I athletic departments take subsidies*, USA TODAY (July 1, 2013), <http://www.usatoday.com/story/sports/college/2013/05/07/ncaa-finances-subsidies/2142443/> [<https://perma.cc/AL6M-G5S6>]; Shane Shifflett & Ben Hallman, *The Subsidy Gap*, HUFF. POST (Nov. 25, 2015, 9:50 AM), <http://projects.huffingtonpost.com/projects/ncaa/subsidy-gap> [<https://perma.cc/8WLN-2V7L>].

7. Steve Berkowitz et al., *NCAA Finances 2015-2016*, USA TODAY, <http://sports.usatoday.com/ncaa/finances/> (last visited July 27, 2017) [<https://perma.cc/H36H-2MUL>]; Brad Wolverton et al., *The 10-Billion Sports Tab*, THE CHRON. OF HIGHER EDUC. (Nov. 15, 2015), http://www.chronicle.com/interactives/ncaa-subsidies-main#id=table_2014 [<https://perma.cc/S94X-SLLW>];

at the university, including coaches' salaries, recruiting costs, scholarships, facilities, uniforms, and travel costs.⁸ Even worse, many athletics departments use student fees to subsidize their athletics programs, particularly the football programs.⁹ In non-Power Five conference programs, student tuition and fees usually account for half, if not more, of the athletics department's budget.¹⁰

The financial crisis in athletics departments, however, is a more recent development¹¹ that ironically has corresponded with the ballooning revenues generated by postseason games and television contracts.¹² The two primary culprits for the increased athletics department costs lurk in the wild increase in coaches' salaries in revenue sports, including assistant coaches,¹³ and the facility arms race¹⁴ among athletics programs—used

Kristi Dosh, *Does Football Fund Other Sports At College Level?*, FORBES (May 5, 2011), <http://www.forbes.com/sites/sportsmoney/2011/05/05/does-football-fund-other-sports-at-college-level/#7a9c82a0563e> [<https://perma.cc/6UH6-PECJ>].

8. Paula Lavigne, *College Sports Thrive Amid Downturn*, ESPN (May 1, 2014), http://www.espn.com/espn/otl/story/_id/10851446/sports-programs-nation-top-public-colleges-thrived-economic-downturn-earning-record-revenues [<https://perma.cc/X6E3-5GVT>].

9. Berkowitz et al., *supra* note 7; Wolverton et al., *supra* note 7; *see also* William W. Berry III, *Educating Athletes*, 81 TENN. L. REV. 795, 798–99 (2014) (citation omitted).

10. Berkowitz et al., *supra* note 7; Wolverton et al., *supra* note 7. The Power Five conferences are the SEC, Big 10, ACC, Big 12, and Pac-12. Shifflett & Hallman, *supra* note 6. For instance, Morehead State University subsidized 86% of its athletics department budget in 2014, with student fees and tuition covering \$9.3 million of a \$10.8 million budget. Wolverton et al., *supra* note 7.

11. Hobson & Rich, *supra* note 2; Brian Burnsed, *Athletics Departments That Make More Than They Spend Still a Minority*, NCAA (Sept. 18, 2015), <http://www.ncaa.org/about/resources/media-center/news/athletics-departments-make-more-they-spend-still-minority> [<https://perma.cc/698X-YWAW>].

12. Hobson & Rich, *supra* note 2 (“Big-time college sports departments are making more money than ever before, thanks to skyrocketing television contracts, endorsement and licensing deals, and big-spending donors.”).

13. Andrew Zimbalist, *College Coaches' Salaries and Higher Education*, HUFF. POST, http://www.huffingtonpost.com/andrew-zimbalist/college-coaches-salaries-_1_b_6400256.html (last updated Mar. 2, 2015) (noting that between 2005 and 2012, the average salary of head football coaches at the top 25 football schools increased over 60%) [<https://perma.cc/9365-SPFS>].

14. With the increase in television money, universities consistently have sought to improve their facilities in recent years and make them better than peer institutions, leading to an “arms race” of sorts. The University of Oregon is one obvious example of the facility arms race. *See* Peter Berkes, *Incredible Photos*

both as a recruiting tool and an additional source of revenue.¹⁵ Despite these developments, the financial situation is not desperate for schools in the Power Five conferences,¹⁶ as economic revenues continue to grow with few signs of over-saturation in the marketplace, at least for a few years.¹⁷

The increased commercialization in college sports, however, continues to fuel the ongoing debate concerning whether athletes in revenue sports should receive compensation, otherwise known as pay-for-play.¹⁸ In addition to pointing out the current budgetary limits of many schools, opponents of pay-for-play ("traditionalists") often argue that the university provides the platform for the product.¹⁹ In other words, traditionalists posit that fans typically attend sporting events because of their loyalty and admiration for the institution, rather than to watch a particular athlete.²⁰ The traditionalists similarly argue that the unique product of intercollegiate athletics has value

and Video of Oregon's New Football Facility, SBNATION (July 31, 2013), <http://www.sbnation.com/college-football/2013/7/31/4574556/oregon-football-building-new>. [https://perma.cc/NBE7-6LXV].

15. Sam Brody, *Meet the Big-Money Boosters Behind College Football's Top 25 Teams*, MOTHER JONES (Sept. 5, 2014, 10:05 AM), <http://www.motherjones.com/media/2014/09/college-football-boosters-top-25> [https://perma.cc/7ZZC-H3LP].

16. See Shifflett & Hallman, *supra* note 6.

17. Paula Lavigne, *Rich Get Richer in College Sports As Poorer Schools Struggle to Keep Up*, ESPN (Sept. 6, 2016), http://www.espn.com/espn/otl/story/_/id/17447429/power-5-conference-schools-made-6-billion-last-year-gap-haves-nots-grows ("The nation's richest athletic departments—those in the Power Five conferences—pulled in a record \$6 billion last year, nearly \$4 billion more than all other schools combined . . . The gulf between college sports' haves and have-nots has never been greater.") [https://perma.cc/FQB9-8CCR].

18. See, e.g., Joe Nocera, *Let's Start Paying College Athletes*, N.Y. TIMES MAG. (Dec. 30, 2011), <http://www.nytimes.com/2012/01/01/magazine/lets-start-paying-college-athletes.html> [https://perma.cc/39EJ-EVAW]; Taylor Branch, *The Shame of College Sports*, ATLANTIC (Oct. 2011), <https://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/> [https://perma.cc/9XN2-HRUS].

19. See, e.g., Scoop Jackson, *Pay for play isn't answer for college athletics*, ESPN (Sept. 12, 2013), http://www.espn.com/college-sports/story/_/id/9666004/pay-play-answer-college-athletics [https://perma.cc/F72T-CVZ5].

20. See, e.g., Rodney Fort & Jason Winfree, *Why the Arguments Against NCAA Pay-For-Play Suck*, DEADSPIN (Dec. 12, 2013), <https://deadspin.com/why-the-arguments-against-ncaa-pay-for-play-suck-1481854847> ("Some have argued that in fact the athletes really are not worth very much. The argument goes that college sports fans are very loyal and will spend money regardless of who is on the field—that is, they root for uniforms.") [https://perma.cc/Z837-D43G].

because the athletes are students at the university—and amateurs—distinguishing the enterprise entirely from professional sports leagues.²¹

Pursuing this line of argument further, one can infer that the universities provide the platform and deserve the credit for the financial success of the entire enterprise of intercollegiate athletics. If this inference is true, it begs the question of what benefits the university accrues from having an athletics program.²² Put another way, the question is whether the university-athletics relationship is symbiotic—benefitting both mutually—or parasitic—with one thriving by taking advantage of the other.²³

Traditionally, the assumption has been that the relationship remains a symbiotic one, both on an institutional and individual level.²⁴ This notion certainly remains at the center of the NCAA's stated vision of intercollegiate athletics.²⁵ Indeed, the NCAA characterizes athletics as a form of education, as one part of the institution's ultimate goal of providing quality higher education to its students.²⁶ The NCAA Manual explains:

Student-athletes shall be amateurs in an intercollegiate sport, and their participation *should be motivated primarily by education* and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises.²⁷

21. See Ekow N. Yankah, *Why N.C.A.A. Athletes Shouldn't Be Paid*, NEW YORKER (Oct. 14, 2015), <http://www.newyorker.com/news/sporting-scene/why-ncaa-athletes-shouldnt-be-paid> [<https://perma.cc/UVH2-SMYQ>].

22. See, e.g., KRISTI DOSH, SATURDAY MILLIONAIRES: HOW WINNING FOOTBALL BUILDS WINNING COLLEGES (2013); Devin G. Pope & Jaren C. Pope, *The Impact of College Sports Success on the Quantity and Quality of Student Applications*, 75 SOUTH. ECON. J. 750, 776 (2009).

23. Sudhakaran Prabhakaran, *To Be Parasitic or Symbiotic?*, SCIENCE SIGNALING (Dec. 15, 2015), <http://stke.sciencemag.org/content/8/407/ec371> [<https://perma.cc/N5UW-MQSP>].

24. See Jason Keene, *Who's Really Winning? An In-Depth Look at Intercollegiate Athletics and Their Impact on Undergraduate Education 5* (Social Impact Research Experience, Working Paper No. 5, 2011) (“[A] symbiotic relationship exists between athletics and academics.”).

25. NCAA Core Values emphasize the role of “[t]he collegiate model of athletics” in “balancing [students’] academic, social and athletics experiences.” *NCAA Core Values*, NAT’L COLLEGIATE ATHLETIC ASS’N, <http://ncaa.org/about/ncaa-core-values> (last visited July 27, 2017) [<https://perma.cc/9D4F-QE7S>].

26. NAT’L COLLEGIATE ATHLETIC ASS’N ACADEMIC AND MEMBERSHIP AFFAIRS STAFF, NCAA 2016-2017 DIVISION I MANUAL art. 2.9 (2016).

27. *Id.* (emphasis added).

Commercialized college athletics certainly add significant value to the university in terms of advertising, promotion, and goodwill.²⁸ One metaphor for this relationship describes the athletics department as the "front porch" of the institution—the method by which the university attracts visitors, students, and the community at large while also providing a point for alumni and donors to connect with the institution.²⁹ Indeed, athletics success often translates to improvements in the quantity and quality of the student body.³⁰

Even so, the pendulum has shifted toward a commercialized version of athletics that increasingly depends upon the university for its economic support.³¹ As Laura Pappano explained, "Since [the 1960s], athletic departments have kicked the roof off their budgets, looking more like independent franchises than university departments. It is that point—'this

28. Robert J. Sternberg, *College Athletics: Necessary, Not Just Nice to Have*, NAT'L ASS'N OF COLL. AND UNIV. BUS. OFFICERS, http://www.nacubo.org/Business_Officer_Magazine/Business_Officer_Plus/Bonus_Material/College_Athletics_Necessary_Not_Just_Nice_to_Have.html (last visited July 9, 2017) (reporting that an administrator at a Division I school cites branding benefits as one reason "that college athletics provide great value on the field and off") [<https://perma.cc/E7B3-HRVS>].

29. Jeré Longman, *As Costs of Sports Rise, Students Balk at Fees*, N.Y. TIMES, May 29, 2009, at A1 (quoting Utah State Athletics Director Scott Barnes, who said, "[college] athletics are the front porch of the university. It's not the most important room in the house, but it is the most visible."); see also Jason Belzer, *The Priorities of University Presidents: Where Do College Athletics Fit In?*, FORBES (Nov. 23, 2015), <https://www.forbes.com/sites/jasonbelzer/2015/11/23/the-priorities-of-university-presidents-where-do-college-athletics-fit-in/#623f322a5ab3> [<https://perma.cc/CS3T-24DU>].

30. See, e.g., DOSH, *supra* note 22. Duke and TCU provide examples of this phenomenon. See Joe Drape, *Alabama is Rolling in Cash with Tide Lifting All Boats*, N.Y. TIMES (Nov. 5, 2015), <https://www.nytimes.com/2015/11/07/sports/naaa-football/alabama-crimson-tide-football-marketing.html> [<https://perma.cc/Q9N8-DTUM>]; see also Robert Taylor Baker, *Does College Football Success Impact Academic Rankings and the Overall Academic Quality of Incoming Students for Private Universities?* (May 2, 2014) (unpublished thesis, Texas Christian University), https://repository.tcu.edu/bitstream/handle/116099117/7348/Thesis_FINAL_Copy_Taylor_Baker_May_5.pdf?sequence=1 [<https://perma.cc/CT7H-JZZB>].

31. Will Hobson & Steven Rich, *Why Students Foot the Bill for College Sports, and How Some Are Fighting Back*, WASH. POST (Nov. 30, 2015), https://www.washingtonpost.com/sports/why-students-foot-the-bill-for-college-sports-and-how-some-are-fighting-back/2015/11/30/7ca47476-8d3e-11e5-ae1f-af46b7df8483_story.html [<https://perma.cc/65QA-2AB2>].

commercial thing' in the middle of academia . . . that some believe has thrown the system out of kilter."³²

At many schools, 50% or more of the monies used in the athletics budget consists of tuition dollars.³³ In most cases, universities help to fund the athletics department despite a significant percentage of donors electing to give to athletics instead of academics.³⁴

With coaches' salaries escalating at a rate far beyond those of administrators and faculty and improvements to athletics facilities often prioritized over improvements to academic buildings, one wonders whether the balance between education and athletics has shifted too far in favor of athletics.³⁵ The NCAA's purported emphasis on amateurism and education underscores this point, as the commercialization of sports appears to compromise these aims.³⁶

The current status quo of intercollegiate athletics, however, contains a number of impediments to change. Antitrust law prohibits any systemic restrictions on coaches' salaries or facility improvements.³⁷ The pressure to win games and participate in postseason contests likewise drives up the costs of recruiting, the need for facility improvements, and the willingness to absorb multi-million dollar buyouts for coaches who win—but not enough.³⁸ Despite increasing saturation of college sports, economic

32. Laura Pappano, *How Big-Time Sports Ate College Life*, N.Y. TIMES, Jan. 22, 2012, at ED22.

33. See Shifflett & Hallman, *supra* note 6.

34. See Allie Grasgreen, *Winning Boosts (Athletic) Giving*, INSIDE HIGHER EDUC. (Apr. 27, 2012) <http://www.insidehighered.com/news/2012/04/27/athletic-giving-crowds-out-academic-donations-research-finds> (reporting data on the relationship between athletics donations, academic donations, and success of university athletics) [<https://perma.cc/M6D7-UXRZ>].

35. See, e.g., Zimbalist, *supra* note 13 (showing the large increase in coach remuneration); Patrick Rishe, *College Football Coaching Salaries Grows Astronomically Due to Escalating Media Rights Deals*, FORBES (Nov. 20, 2012, 6:40 AM), <http://www.forbes.com/sites/prishe/2012/11/20/college-football-coaching-salaries-grow-astronomically-due-to-escalating-media-rights-deals/#2e5adc735e56> (questioning the wisdom of the growth of salaries) [<https://perma.cc/LN9B-PXPG>].

36. See NCAA 2016-2017 DIVISION I MANUAL, *supra* note 26.

37. *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010, 1024 (10th Cir. 1998) (holding that NCAA restrictions on restricted earnings basketball coaches violated the Sherman Act).

38. See, e.g., Nick Martin, *College Football Coaches are Getting Insane Buyout Clauses*, DEADSPIN (Oct. 26, 2016, 3:05 PM), <http://deadspin.com/college-football-coaches-are-getting-insane-buyout-clau-1788246837> [<https://perma.cc/N25N-XC6Y>]; Brent Schrottenboer, Steve Berkowitz & Christopher Schnaars, *Hiring a College Football Coach is Expensive. Firing One is, Too.*, USA TODAY

growth continues as cable and satellite television depend increasingly on live events for its survival in a world of Netflix, Amazon, Apple TV, and other providers of streaming content.³⁹

This Article argues for a rebalancing of the relationship between athletics and the university. Specifically, it challenges college presidents to exploit the student-athlete concept to improve the *academic* side of the university for all students. The university should be utilizing athletics to improve the institution, not sacrificing its core mission to serve the athletics department. This rebalancing would be consistent with the core ideals that both the presidents and the NCAA have been verbalizing for decades.

In Part I, the Article describes the shift from a symbiotic relationship to a more parasitic relationship in recent years, with athletics exerting dominance over the university at many institutions. Part II argues for a rebalancing—outlining a relational shift consistent with the values of the NCAA. Finally, Part III addresses the practical obstacles to such a shift and provides a road map for universities to enhance the “education” model that the NCAA champions.

I. ATHLETICS DOMINANCE OF UNIVERSITIES

Historically, athletics were an extra-curricular activity undertaken as an avocation while students pursued a university degree.⁴⁰ Over time, public interest in intercollegiate sports competitions have grown,

(Oct. 27, 2016, 9:28 AM), <https://www.usatoday.com/story/sports/ncaaf/2016/10/26/college-football-coach-salary-database-buyouts-kirk-ferentz-iowa-charlie-strong-texas/92417648/> [<https://perma.cc/U3FU-VHRF>]; Stephanie Riegel, *Buyout of Les Miles' Contract to Cost \$9M-Plus Over Six Years*, GREATER BATON ROUGE BUS. REP. (Sept. 26, 2016), <https://www.businessreport.com/article/buyout-les-miles-contract-cost-9m-plus-six-years> (reporting a recent example of this phenomenon concerning Les Miles, who had a \$12.9 million buyout and a 70% winning percentage) [<https://perma.cc/U9Y8-WKR5>].

39. Jeff Clement, *How Live Sports are Saving Cable TV (and Why Advertisers Should Care)*, DIRECT RESPONSE ADVERT. NEWS & BLOG (Nov. 30, 2015, 4:26 PM), <https://www.marketingarchitects.com/blog/how-live-sports-are-saving-cable-networks-and-why-advertisers-should-care> [<https://perma.cc/3YJX-KKX2>]; Derek Thompson, *Sports Could Save the TV Business—or Destroy It*, ATLANTIC (July 17, 2013), <https://www.theatlantic.com/business/archive/2013/07/sports-could-save-the-tv-business-or-destroy-it/277808/> [<https://perma.cc/3LTM-E3MU>].

40. D. Siegel, *The Union of Athletics With Educational Institutions*, CLARK SCIENCE CTR., <http://www.science.smith.edu/exersci/ESS200/Ed/Athletic.htm> (last visited Sept. 1, 2017) (stating that college athletics were “philosophically thought to be a peripheral and extracurricular activity”) [<https://perma.cc/64KQ-7S74>].

particularly for football and men's basketball competitions.⁴¹ In the past four decades, though, athletics grew exponentially.⁴² Even as college sports have approached or, in some cases, exceeded the commercial nature of professional sports, the NCAA has held firm to its vision of amateurism.⁴³ To be fair, college athletes garner an increased amount of revenue, including broader meal benefits for athletes and cost of attendance, but these economic benefits apparently do not compromise the amateurism ideal that the NCAA espouses because they are "education-related."⁴⁴

A. The Platform of "Education"

The NCAA concept of student-athlete casts college sports simply as part of higher education.⁴⁵ The NCAA's purpose is not to pursue institutional financial remuneration but instead to provide an opportunity to "play the game" as part of a student-athlete's education.⁴⁶ Protecting the amateur character of the student-athlete thus shields the university from

41. See generally RONALD SMITH, *SPORTS AND FREEDOM: THE RISE OF BIG-TIME COLLEGE ATHLETICS* (1988); John Henderson, *College Game Has Never Been More Popular*, DENVER POST (Sept. 3, 2007, 4:27 PM), <http://www.denverpost.com/2007/09/03/college-game-has-never-been-more-popular/> [<https://perma.cc/7D9M-HQ2G>].

42. See Pappano, *supra* note 32.

43. Ben Cohen, *Big-Time College Athletes Ask, 'Who's the Amateur?'*, WALL ST. J. (Oct. 29, 2011), <http://www.wsj.com/articles/SB10001424052970203554104577003912924175878> [<https://perma.cc/79RE-MFVU>].

44. See *Nw. Univ. and Coll. Athletes Players Ass'n*, 2014–2015 N.L.R.B. Dec. ¶ (CCH) 15781, at *1 (Mar. 26, 2014), dismissed on other grounds, 362 N.L.R.B. No. 167 (2015); *O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015).

45. See, e.g., Daniel E. Lazaroff, *The NCAA in its Second Century: Defender of Amateurism or Antitrust Recidivist?*, 86 OR. L. REV. 329 (2007); Matthew J. Mitten, *Applying Antitrust Law to NCAA Regulation of "Big Time" College Athletics: The Need to Shift from Nostalgic 19th and 20th Century Ideals of Amateurism to the Economic Realities of the 21st Century*, 11 MARQ. SPORTS L. REV. 1 (2000); Horace Mitchell, *Students Are Not Professional Athletes*, U.S. NEWS (Jan. 6, 2014, 8:00 AM), <http://www.usnews.com/opinion/articles/2014/01/06/ncaa-athletes-should-not-be-paid> [<https://perma.cc/6H4M-CNGR>].

46. The NCAA Manual states that "Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional commercial enterprises." See NCAA 2016-2017 DIVISION I MANUAL, *supra* note 26, art. 9.

diminishing its core mission: education.⁴⁷ The NCAA's rhetoric concerning "education" makes this clear.

From the perspective of the NCAA, this "education" provided by intercollegiate sports should not serve as a platform to prepare athletes for a professional sports career; rather, the "education" involved in the student-athlete experience trains the student-athlete to "go pro in something else."⁴⁸ As such, the entire justification for the concept of amateurism that the NCAA so aggressively protects rests in "education."⁴⁹ Allowing pay-for-play would compromise this pursuit of "education" because the purpose of participating in athletics would shift from educational development to economic gain through participation in intercollegiate athletics.⁵⁰

Indeed, the NCAA and its member institutions view any introduction of remuneration as a step down a slippery slope toward commercialization of student-athlete participation.⁵¹ To allow any compensation above what an individual needs to achieve educational success would be akin to adding poison to the current status quo—even a small amount would create disastrous outcomes.⁵²

B. Athletics as the Front Porch of the University

Before exploring why the current model has lost its efficacy, at least as currently constituted, it is important to highlight the virtues of robust athletics

47. *See id.*

48. *NCAA Commercial: The Beginning*, NCAA TV Sport (2012), <https://www.ispot.tv/ad/77fi/ncaa-the-beginning> [<https://perma.cc/6LF6-K8YJ>].

49. *See* NCAA 2016-2017 DIVISION I MANUAL, *supra* note 26, art. 9.

50. *See generally* Stanton Wheeler, *Rethinking Amateurism and the NCAA*, 15 STAN. L. & POL'Y REV. 213 (2004); Virginia A. Fitt, *The NCAA's Lost Cause and the Legal Ease of Redefining Amateurism*, 59 DUKE L.J. 555 (2009).

51. *See* O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1078–79 (9th Cir. 2015) (describing this argument). Judge Bybee explained:

The difference between offering student-athletes education-related compensation and offering them cash sums untethered to educational expenses is not minor; it is a quantum leap. Once that line is crossed, we see no basis for returning to a rule of amateurism and no defined stopping point; we have little doubt that plaintiffs will continue to challenge the arbitrary limit imposed by the district court until they have captured the full value of their NIL. At that point the NCAA will have surrendered its amateurism principles entirely and transitioned from its "particular brand of football" to minor league status.

Id. at 1078.

52. *Id.*

programs on university campuses. As the “front porch” of the institution, a successful athletics program invites many outside stakeholders—alumni, corporate sponsors, fans—into the university to celebrate its successes and suffer through its defeats.⁵³ The idea of being part of a larger sports community, the “nation,” gives individuals and institutions a connection to the university and a passion for the university that would be hard to manufacture in other ways, particularly on the scale it achieves. Indeed, it is difficult to imagine 100,000 people regularly coming on campus to celebrate or engage in an academic conference or other non-athletics event.

And athletics success attracts to campuses strong students who want to join the community surrounding the athletics program.⁵⁴ The widespread exposure of football and basketball also serves as an ongoing commercial for the participating institutions.⁵⁵ When the athletics teams of a university succeed, the university often enjoys direct benefits by attracting stronger students, increasing enrollment, and receiving increased donations to academic departments—not just the athletics department.⁵⁶ The benefits also often extend to the university town, spurring economic growth directly attributable to athletics.⁵⁷

53. See, e.g., Jason Belzer, *The Priorities of University Presidents: Where Do College Athletics Fit In?*, FORBES (Nov. 23, 2015), <http://www.forbes.com/sites/jasonbelzer/2015/11/23/the-priorities-of-university-presidents-where-do-college-athletics-fit-in/#71386e1d31b9> [https://perma.cc/3Z9Y-QA2Q].

54. Sean Silverthorne, *The Flutie Effect: How Athletic Success Boosts College Applications*, FORBES (Apr. 29, 2013), <http://www.forbes.com/sites/hbsworkingknowledge/2013/04/29/the-flutie-effect-how-athletic-success-boosts-college-applications/#17edc3616ac9> (explaining that both high SAT and low SAT students seem influenced equally by athletics success, which may be a sign that marketing works) [https://perma.cc/ASD2-BAV9]; Eamonn Brennan, *Study: Hoops Success Helps Enrollment*, ESPN (Apr. 27, 2012), http://www.espn.com/blog/collegebasketballnation/post/_id/63340/study-hoops-success-begets-more-students (identifying a similar result) [https://perma.cc/SST8-8M6L]; Pope & Pope, *supra* note 22 (same).

55. See Silverthorne, *supra* note 54.

56. See DOSH, *supra* note 22 (explaining the benefits of athletics to the university).

57. See, e.g., Drape, *supra* note 30; Scott Beyer, *Are Winning College Football Teams a Catalyst for Urban Growth?*, FORBES (Jan. 7, 2016), <https://www.forbes.com/sites/scottbeyer/2016/01/07/are-winning-college-football-teams-a-catalyst-for-urban-growth/#44efa63e7cf1> [https://perma.cc/5BYQ-H7X4]; Robert A. Baade, Robert Baumann & Victor A. Matheson, *Down, Set, Hike: The Economic Impact of College Football Games on Local Economies* (Int'l Assoc. of Sports Economics, Working Paper No. 07-01, 2007), <http://college.holycross.edu>

These benefits are not hypothetical—they are tangible and real. Particularly for large, public state universities, the athletics programs provide a consistent boost to the strength of the university.⁵⁸ With state appropriations comprising a smaller and smaller percentage of university revenue, public universities increasingly rely on tuition income and alumni giving to fund their operations; athletics success aids both of these revenue streams.⁵⁹ The enrollment at large, public state universities has exploded over the past decade, and the culture of intercollegiate athletics and the university brand it creates attracts students on a national scope.⁶⁰ Likewise, capital campaigns continue to grow at many universities despite the effects of the Great Recession on donor capacity.⁶¹

C. The Costs of the Explosion of Athletics

Despite the proliferation of benefits for the university resulting from athletics, a series of costs—economic and social—have arisen from the commercialization of intercollegiate sports. Given the increase in revenue from intercollegiate athletics, one might expect that athletics would, in some way, help with the subsidization of academic programs at the university.

/RePEc/spe/BaadeBaumannMatheson_CollegeFootball.pdf [https://perma.cc/5TLF-AQLV].

58. See discussion *supra* Part.I.B.

59. Michael Mitchell, Michael Leachman & Kathleen Masterson, *Funding Down, Tuition Up: State Cuts to Higher Education Threaten Quality and Affordability at Public Colleges*, CTR. ON BUDGET AND POL'Y PRIORITIES, <https://www.cbpp.org/sites/default/files/atoms/files/5-19-16sfp.pdf> (last updated Aug. 15, 2016) [https://perma.cc/ZW9H-8HM4]; *Federal and State Funding of Higher Education: A Changing Landscape*, PEW CHARITABLE TRUSTS (June 11, 2015), http://www.pewtrusts.org/~media/assets/2015/06/federal_state_funding_higher_education_final.pdf [https://perma.cc/6GGS-CYX6]; Bill Chappell, *Student Tuition Now Outweighs State Funding at Public Colleges*, NPR (Jan. 5, 2015), <http://www.npr.org/sections/thetwo-way/2015/01/05/375222288/student-tuition-now-outweighs-state-funding-at-public-colleges> [https://perma.cc/G56L-XLH9].

60. See DOSH, *supra* note 22; Pope & Pope, *supra* note 22; Silverthorne, *supra* note 54; Brennan, *supra* note 54.

61. *Major Campaigns Show Public Universities' Rising Ambitions*, THE CHRON. OF PHILANTHROPY (Nov. 13, 2015), <https://www.philanthropy.com/article/Major-Campaigns-Show-Public/234196> [https://perma.cc/Z59Y-57PE]; Sacha Pfeiffer, *Capital Campaigns Grow in Frequency and Duration*, BOS. GLOBE (Feb. 13, 2015), <https://www.bostonglobe.com/business/2015/02/12/the-perpetual-capital-campaign-once-rare-fund-raising-events-have-become-common-risking-donor-fatigue/mMB443sxx7RSgCbYIwEBoM/story.html> [https://perma.cc/956Z-B2JB].

Although athletics departments have subsidized academic programs in a few cases, more often universities help subsidize the athletics programs.⁶²

At many universities, for instance, student fees help subsidize the institution's football program.⁶³ On one level, this practice may be defensible, particularly given the benefits that athletics can bring the university. In light of the NCAA's rhetoric about education being the central purpose of amateurism, though, it seems less justified, particularly when such contributions constitute 50% or more of the athletics budget.⁶⁴

Pushing deeper, the increase in athletics spending—and consequential budgetary shortfall for many schools—relates directly to expenditures related to coaching and recruiting in revenue sports. In the past decade, coaches' salaries have exploded—even assistant coaches earn significantly more than any university employee other than senior administrators and head coaches.⁶⁵

Further complicating this issue of coach costs are the buyouts associated with firing coaches. The fan bases at many Power Five conference schools demand annual success in football and/or basketball. If a coach fails to achieve the expected level of short-term success, institutions and athletics directors face stiff pressures to find a new coach that can win at the desired level.⁶⁶ As such, universities often terminate coaches prior to the completion of their contracts.⁶⁷ Accordingly, many coaches negotiate buy-outs, often requiring the university to pay the full amount of the remaining balance on their contracts upon termination, and sometimes more.⁶⁸ The university

62. Shifflett & Hallman, *supra* note 6.

63. *Id.*; Berkowitz, Upton & Brady, *supra* note 6.

64. Shifflett & Hallman, *supra* note 6.

65. See, e.g., Steve Berkowitz & Jodi Upton, *College Football Assistants Seeing Salaries Surge*, USA TODAY (Dec. 18, 2012), <https://www.usatoday.com/story/sports/ncaaf/2012/12/18/assistant-coaches-salaries-bowl-subdivision/1777719/> [<https://perma.cc/2SUA-A3TX>].

66. Barrett Sallee, *What Makes a College Athletic Director Successful?*, BLEACHER REPORT (Apr. 16, 2013), <http://bleacherreport.com/articles/1605115-what-makes-a-college-athletic-director-successful> [<https://perma.cc/9VJ9-7AS7>]; Jason Belzer, *The Dynamic Role of the Modern Day Athletics Director*, FORBES (Feb. 19, 2015), <https://www.forbes.com/sites/jasonbelzer/2015/02/19/the-dynamic-role-of-the-modern-day-college-athletics-director/#7ef4b4f96076> [<https://perma.cc/B8TT-N52N>].

67. See, e.g., Jeré Longman, *Firing a Coach, at a Price, With Little Evidence the Move Pays Off*, N.Y. TIMES (Nov. 28, 2012), <http://www.nytimes.com/2012/11/29/sports/ncaaf/football/time-runs-out-but-not-the-money-in-college-football-coaches-firings.html> [<https://perma.cc/H6GG-BEFM>].

68. *Id.*; Daniel Kalish, *When a College Football Coach Gets Fired: The Sizable Cost of Saying Goodbye*, NCAA D1 FOOTBALL COACHING CONTRACTS (Dec.

thus must pay the terminated coach a multi-million dollar severance package while also finding funds necessary to pay the multi-million dollar annual salary of the replacement coach.⁶⁹

To recruit the best athletes, though, an institution needs more than just the best coaches. Institutions need outstanding facilities. In the past decade, the quality of university athletics facilities has improved significantly.⁷⁰ To be fair, some of these improvements generate revenue to more than cover their expense—boxes in football stadiums being the obvious example. Even then, those additional revenues stay with the athletics department and typically do not end up in academic departments.

The result of these expenditures has been an arms race of sorts. Universities continue to spend and create a new, higher standard for athletics facilities. Most large football programs, for instance, sport magnificent indoor practice facilities, state-of-the-art training equipment, and nutrition management programs.⁷¹ For athletics programs that benefit from having a conference television network, like those in the SEC or Big Ten, the funds exist to compete in this arms race. For smaller schools, though, the cost of keeping up has become increasingly difficult to the point that some universities have considered abandoning their football programs for economic reasons.⁷² Having first-rate facilities is essential to

17, 2015), <https://hkm.com/football/when-a-college-football-coach-gets-fired-the-sizable-cost-of-saying-goodbye/> [<https://perma.cc/5222-BXY5>]. This phenomenon has extended to assistant coaches, who may take the fall for an unsuccessful season. Paul Myerberg, Christopher Schnaars & Steve Berkowitz, *Assistant Coaching: Tough Job, But Many Want to Do It*, USA TODAY (Dec. 11, 2013), <https://www.usatoday.com/story/sports/ncaaf/2013/12/11/sports-special-report-college-football-itinerant-assistant-coaches-pay/3987289/> [<https://perma.cc/53Y3-WTAV>].

69. Schrottenboer, Berkowitz & Schnaars, *supra* note 38; Steve Berkowitz, *What You Find in a College Football Coach's Contract Buyout*, USA TODAY (Oct. 26, 2016), <https://www.usatoday.com/story/sports/ncaaf/2016/10/26/college-football-coach-salary-database-contract-buyout-language/92712348/> [<https://perma.cc/78YU-4KUZ>].

70. At one point, Oregon's facility best exemplified this kind of upgrade, thanks to the investment of Phil Knight of Nike. See Peter Berkes, *Incredible Photos and Video of Oregon's New Football Facility*, SBNATION (July 31, 2013), <https://www.sbnation.com/college-football/2013/7/31/4574556/oregon-football-building-new> [<https://perma.cc/6MFR-E797>].

71. See, e.g., Rose Dellenger, *LSU to build \$12 million nutrition center for its athletes*, ADVOCATE (Dec. 13, 2014, 9:57 AM), http://www.theadvocate.com/baton_rouge/sports/lsu/article_fc64040f-3d40-5dc2-8ba0-86ff30d7677a.html [<https://perma.cc/89CU-DYYZ>].

72. The University of Alabama-Birmingham ("UAB") made the decision to shut down its football program as a result of the economic pressure it created, but

recruiting top athletes, and in many cases, to being competitive on the field.

It is one thing to have wealthy donors contribute to make the athletics facilities outstanding and to fund the largesse of coaches' salaries. Increasingly, however, this burden falls on current students, particularly at institutions outside the Power Five Conferences.⁷³ With college tuition significantly increasing annually, it seems troubling that part of that increase serves solely to fund athletics facilities and/or coaches' salaries.⁷⁴ This concern is particularly true at universities where other facilities on campus need updating. Rather than provide adequate air conditioning in a campus building used for classes daily, for instance, a university might elect to provide additional amenities for the football locker room.⁷⁵

At some schools, the picture is a metaphorical house with a beautiful façade and front porch—the athletics facilities—masking a dilapidated structure in need of repair—the rest of the university. If one continues to invest in the façade instead of the foundation, the building might, at some point, collapse upon itself.

If the NCAA and college presidents truly value education and if the student-athlete ideal has a legitimate academic component, these leaders must insist that the commercialization of college athletics does not compromise the identity of the university at large. For decades, the degree to which the education of intercollegiate athletes in revenue sports is dubious has remained a question that plagues athletics departments. Although many universities spend significant resources to make the

reversed its decision after strong opposition from its alumni to the initial decision. Alex Scarborough, *UAB Reinstates Football for 2016*, ESPN (June 2, 2015), http://www.espn.com/college-football/story/_/id/12991674/uab-blazers-football-return [<https://perma.cc/V6CG-NB6L>].

73. See Erik Brady, *Most NCAA Division I athletic departments take subsidies*, USA TODAY, <https://www.usatoday.com/story/sports/college/2013/05/07/ncaa-finances-subsidies/2142443/> (last updated July 1, 2013, 12:48 PM) (“Just 23 of 228 athletics departments at NCAA Division I public schools generated enough money on their own to cover their expenses in 2012.”) [<https://perma.cc/S4LM-CA8Y>].

74. See, e.g., *Trends in Higher Education*, COLLEGEBOARD, <https://trends.collegeboard.org/college-pricing/figures-tables/tuition-fees-room-and-board-over-time> (last visited Oct. 22, 2017) (showing recent tuition increases) [<https://perma.cc/C45D-YVQ5>].

75. See, e.g., Adam Sparks, *Exclusive: Vanderbilt in Talks for New Football Stadium*, TENNESSEAN (Sept. 16, 2016), <http://www.tennessean.com/story/sports/college/vanderbilt/2016/09/16/exclusive-vanderbilt-talks-new-football-stadium/90126742/> (detailing costs of recent renovations of SEC football stadiums) [<https://perma.cc/CHA2-YUBA>].

education of athletes legitimate and robust, a number of examples show that this ideal remains a farce.⁷⁶

The question becomes whether the university is compliant in the use of athletes for its own economic ends, denying them payment for services under the guise of “amateurism,” or whether the university instead provides a valuable education that garners lifelong benefits in exchange for athletics participation.

The universities and the NCAA itself seem to give the game away, though, when the commercialization goes further than simply to ensure a robust academic experience for student-athletes and starts to undermine the academic goals of the university as a whole.⁷⁷ If non-athlete students must subsidize coaches’ salaries and athletics facilities as part of their cost of education, the athletics program starts to become the central purpose of the institution’s existence—instead of the education of students. Perhaps viewing the student subsidy of athletics as such a significant step towards shifting the balance of power is premature; it is the same kind of slippery slope argument, however, that the NCAA continues to advance concerning compensating athletes in revenue sports.

II. ENHANCING “EDUCATION”

Given the shifting status quo and the growth of intercollegiate athletics in the past decade, university presidents need to think critically and collectively about how to use athletics to help the university and prevent the university from being subsumed into athletics. Part of this approach requires university presidents to exert greater control over the NCAA, and part of it requires presidents to exert greater control over athletics departments. Specifically, this Article argues for the following four-part approach: (1) address the arms race; (2) reduce or, in many cases, eliminate university subsidy of education; (3) mandate an athletics subsidy of education; and (4) reform the NCAA.

A. Addressing the Arms Race

The driver for the financial issues in many athletics departments remains the arms race between universities to provide better facilities for

76. See, e.g., Jake New, *An ‘Epidemic’ of Academic Fraud*, INSIDE HIGHER EDUC. (July 8, 2016), <https://www.insidehighered.com/news/2016/07/08/more-dozen-athletic-programs-have-committed-academic-fraud-last-decade-more-likely> (listing a number of examples of academic fraud involving student-athletes) [<https://perma.cc/96NU-DS7A>].

77. Branch, *supra* note 18.

their football and basketball teams and the lucrative contracts paid to the coaches of those teams. Presidents and their universities must find some way to halt, or at least slow down, this progression. Recently, the arms race between the Power Five conferences received an injection of capital from the adoption of the college football playoff and the development of conference television networks.⁷⁸

With respect to coaches' salaries, restricting payouts collectively would be difficult because of antitrust law. Despite the desire of college presidents to do so, adoption of a coach "salary cap" or other limit upon coaches' salaries would violate the Sherman Act. Indeed, the United States Court of Appeals for the Tenth Circuit struck down such a measure in *Law v. NCAA*, finding that the NCAA's limit on salary for restricted earnings for basketball coaches violated antitrust law.⁷⁹

One possible, albeit unlikely, way that administrators could restrict the salaries of college coaches unilaterally is by convincing the coaches to unionize. Given the value of the free market in driving up salaries, the incentive for coaches to unionize seems non-existent. Were a union-management relationship in place, however, such a salary cap could be part of a collective bargaining agreement, making it exempt from antitrust scrutiny.⁸⁰

The perception that college coaches add significant value to the outcome and success of teams continues to drive the market. In addition, the perception among fans that each win is significant—that is, treating an 8-4 record as vastly preferable to a 7-5 record—also creates the appearance that the right coach is worth the university paying millions of dollars in coaches' salaries.

Likewise, any limits on the universities' ability to upgrade their facilities seem difficult to impose and impossible to enforce. Antitrust law, again, likely would limit the ability of the NCAA or the conferences to place significant restrictions on the commercial activity of universities, particularly public ones.

78. Jason Alsher, *5 College Conferences that Bring in Over \$250 Million*, CHEATSHEET (Feb. 15, 2017), <https://www.cheatsheet.com/sports/the-5-most-valuable-conferences-in-college-sports.html/?a=viewall> [<https://perma.cc/9ZJ6-QRFV>].

79. *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010, 1024 (10th Cir. 1998).

80. The courts have settled conflicts between labor law, which encourages collective action, and antitrust law, which prohibits collective action that impedes competition, by developing a non-statutory labor exemption to antitrust law that applies in certain situations. *See, e.g.*, *Mackey v. Nat'l Football League*, 543 F.2d 606 (8th Cir. 1976). Specifically, collectively bargained agreements concerning mandatory subjects of collective bargaining (such as wages, hours, and working conditions) are exempt from antitrust scrutiny. 29 U.S.C. §§ 151–169 (2017).

The way, then, to slow the arms race between universities is to reduce the amount of capital available to pay coaches and upgrade facilities. The NCAA and/or the conferences could play a vital role in this context. The volume of revenue that flows out of television telecasts and postseason competitions remains significant. In fact, the NCAA's organizational income comes largely from the NCAA basketball tournament held each March, which reportedly generates over \$1 billion.⁸¹

The NCAA determines how payouts of this revenue occur to the conferences. By diverting some of that revenue to academic departments and/or placing conditions on receipt of that revenue, the NCAA could help shift the culture away from financial profit for athletics departments and toward subsidization of the university at large. The NCAA already regulates postseason eligibility based on academic performance with its Academic Progress Rate ("APR") system.⁸² Taking the additional step of diverting funds to academic units, or requiring presidents to do so, could help curb the arms race and reduce the growth of athletics building projects in lieu of academic expenditures.⁸³

Similarly, conferences could elect to divert profits from revenue sports into universities as a whole. To demonstrate their seriousness about the academic pursuits of their universities, college presidents could allocate funds through the entity of the conference toward academic endeavors. The Southeastern Conference ("SEC") has taken baby steps in this direction through its SEC-U program, as has the Big Ten through its annual academic consortium.⁸⁴ On the whole, though, these programs seem more like lip service paid to the value of education rather than significant economic contributions to improve academic facilities, faculty salaries, and research programs.

81. In 2011–2012, for instance, 81% of the NCAA's revenue came from the basketball tournament. *Revenue*, NAT'L COLLEGIATE ATHLETICS ASS'N, <http://www.ncaa.org/about/resources/finances/revenue> (last visited Aug. 20, 2017) [<https://perma.cc/49VG-8RJ4>].

82. The APR calculates a rolling number based largely on athlete graduation rate, with schools falling below the required level losing opportunities to participate in postseason contests. *Academic Progress Rate Explained*, NAT'L COLLEGIATE ATHLETICS ASS'N, <http://www.ncaa.org/aboutresources/research/academic-progress-rate-explained> [<https://perma.cc/4KL8-Y7ZM>].

83. For a detailed proposal on how this additional step might work, see William W. Berry III, *Playoff Profits for Academic Programs*, 5 MISS. SPORTS L. REV. 1 (2016).

84. See, e.g., SEC-U, <https://www.theseecu.com/> (last visited Oct. 2, 2017) [<https://perma.cc/6GZG-66YU>]; BIG 10 ACADEMIC ALLIANCE, <https://www.btaa.org/home> (last visited Oct. 2, 2017) [<https://perma.cc/Q5ZR-VHF5>].

B. Eliminating University Subsidy of Athletics

At minimum, colleges and universities should reduce and, where possible, eliminate subsidy of athletics by current students. Student tuition and fees should not support athletics; the funds primarily should support the academic programs of the institution.

The reality of the arms race, however, means that university leaders often feel as if they have no alternative. Football, in particular, requires significant expenditures not only for coaches' salaries and facilities but also for recruiting expenditures.⁸⁵ For non-Power Five conference schools, this expectation becomes increasingly difficult to meet, especially when the college or university location is in an area that is less likely to produce star athletes.

One option, in theory, is to abandon the football program altogether. The recent experience at the University of Alabama-Birmingham ("UAB"), however, counsels against such a move unless as a last resort.⁸⁶ UAB announced that funding issues were causing the university to abandon its football program.⁸⁷ The alumni responded by pressuring the university into reversing its decision with the promise of significant fundraising.⁸⁸

In many cases, one cannot overstate the passion that university alumni hold for the football program. A quick comparison between university fundraising generally and athletics fundraising in particular bears this out.⁸⁹ Although it may be important to the university to keep such programs alive, placing the economic burden on the students undermines the concept of amateurism and the purported educational focus of the student-athlete model.

When universities allow student tuition and/or fees to subsidize the football program, the institutions prioritize athletics over academics both symbolically and practically. The purpose of the universities is not to

85. See discussion *supra* Part I.C.

86. Dan Wolken, *Football never really died at UAB, even after it was killed, and now Blazers are back*, USA TODAY (June 28, 2017), <https://www.usatoday.com/story/sports/ncaaf/cusa/2017/06/28/football-returns-uab-blazers/437009001/> [<https://perma.cc/3ZVM-UKNW>].

87. *Id.*

88. *Id.*

89. See, e.g., Brad Wolverton & Sandhya Kambhampati, *Colleges Raised 1.2 Billion for in Donations for Sports in 2015*, THE CHRON. OF HIGHER EDUC. (Jan. 27, 2016), <http://www.chronicle.com/article/Colleges-Raised-12-Billion/235058> (showing that alumni contribute significantly to athletics, not just the university itself) [<https://perma.cc/73WR-Z3FP>].

support athletics; rather, the athletics program exists to benefit the university.

C. Mandating Athletics Subsidy of Education

University chancellors and presidents should not stop at banning the use of student tuition and fees to subsidize athletics. Instead, they should mandate that athletics help, at least in a small way, to subsidize education of the student-athletes at a minimum, and benefit the academic programs at the university as well. This is particularly true at Power Five schools that currently reap tens of millions of dollars annually from college sports. These subsidies should require the expenditure of monies beyond what athletics pays to cover the tuition of athletes.

Some universities have done this in the past; the University of Georgia, the University of Florida, and Louisiana State University are examples of institutions where such subsidies have taken place.⁹⁰ Conferences also increasingly sponsor programs that support research or other educational ventures.⁹¹

Nonetheless, athletics revenue can play an increasingly valuable role in the university, particularly if universities start to curb the arms race for coaches' salaries and athletics facilities. State universities, for instance, face increasing economic challenges as states continue to reduce higher education subsidies.⁹² Athletics revenue from lucrative television contracts could provide a partial hedge against state budget cuts in higher education.

As explored below, challenges exist to such an approach—the incentive remains for athletics programs to win at all costs. Collective action between universities likewise is not an option given antitrust restrictions. Institutional

90. See, e.g., Leighton Rowell, *Football Revenue Bolsters Academics*, RED & BLACK (Apr. 14, 2016), http://www.redandblack.com/uganews/football-revenue-bolsters-athletics-academics/article_706019cc-01dd-11e6-8b16-0ba043051140.html [https://perma.cc/B5YX-Z938]; Scott Rabalais, *LSU Athletic Department Transfers \$10.2 million to the university's academic fund, nearly \$3 million more than required*, ADVOCATE (July 30, 2015), http://www.theadvocate.com/baton_rouge/sports/lisu/article_edfb8b30-060d-5d93-949c-6878e5ec3d44.html [https://perma.cc/LS6R-58XF]; Ben Mangrum, *Is College Football Profitable for Universities?*, ETHOS (Mar. 27, 2014), <http://www.ethosreview.org/intellectual-spaces/is-college-football-profitable/> [https://perma.cc/XZC7-VUVE].

91. See Wolken, *supra* note 86.

92. See PHIL OLIFF ET AL., *CTR. ON BUDGET AND POL'Y PRIORITIES, RECENT DEEP STATE HIGHER EDUCATION CUTS MAY HARM STUDENT AND THE ECONOMY FOR YEARS TO COME 1* (Mar. 19, 2013).

change, however, at the conference and NCAA levels may offer a panacea to such difficulties.

D. Reforming the NCAA

The current focus of NCAA resources, at least with respect to its Committee on Infractions (“COI”), is the preservation of amateurism.⁹³ Ensuring that student-athletes do not receive any impermissible financial benefits remains the priority.⁹⁴ Given the overwhelming commercialization of intercollegiate revenue sports, such efforts seem silly at best and completely myopic at worst.

A return to the rationale behind the concept of amateurism, as construed by the NCAA, is instructive here.⁹⁵ According to the NCAA, the primary reason that student-athletes should not receive remuneration for participation in intercollegiate athletics relates to the larger purpose of education. As noted above, the NCAA Manual provides:

Student-athletes shall be amateurs in an intercollegiate sport, and *their participation should be motivated primarily by education* and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises.⁹⁶

Significantly, the NCAA is not an external governing power that imposes its own preferences and ideologies upon higher educational institutions. Rather, college and university presidents participate as voting members to shape the NCAA’s rules, policies, and actions.⁹⁷ To the degree that the NCAA acts incongruent with the wishes of university leaders, universities easily can leave the NCAA and form their own structure based on the strong conference affiliations that currently exist. Indeed, in recent years several conference commissioners have threatened as much.⁹⁸ The

93. See, e.g., *Amateurism*, NAT’L COLLEGIATE ATHLETIC ASS’N, <http://www.ncaa.org/amateurism> (last visited Aug. 20, 2017) [<https://perma.cc/D8FW-J6F4>].

94. *Id.*

95. See generally William W. Berry III, *Amending Amateurism*, 68 ALA. L. REV. 551 (2016) (describing this rationale)

96. NCAA 2016-2017 DIVISION I MANUAL, *supra* note 26, art. 2.9 (2017) (emphasis added).

97. See generally *id.*

98. See, e.g., Brian Porto et al., *The ‘Big Five’ Power Grab: the Real Threat to College Sports*, THE CHRON. OF HIGHER EDUC. (June 19, 2014), <http://www>

NCAA then can provide a tool by which presidents rebalance the relationship between athletics and the university.

III. MAPPING THE FUTURE OF THE UNIVERSITY-ATHLETICS RELATIONSHIP

In light of the complexity of the issues raised above, this Article concludes by offering an initial sketch of possible reforms. To frame the discussion, the first section below describes some of the obstacles to reform.

A. *Obstacles to Reform*

The resistance to reform in intercollegiate athletics consists of four obstacles: (1) the inertia of the status quo; (2) the unfamiliarity of college presidents with athletics; (3) the popularity and visibility of the broader endeavor; and (4) the academic disinclination of some students. Each is discussed in turn.

1. *Status Quo Inertia*

For many stakeholders, the current dominance of athletics could not be more ideal. At the universities in the Big Five conferences, the athletics departments have unprecedented funds to improve facilities and compete for coaches.⁹⁹ The increased budgets and opportunities make changes unlikely, especially as the arms race among big-time programs continues. The universities themselves, at least the athletics departments, enjoy significant windfall in terms of revenue from competitions and television.¹⁰⁰

Likewise, for many of the external stakeholders, the current status quo remains lucrative. Sponsors, in particular, can saturate fans with their advertising and marketing.¹⁰¹ The television networks thrive as well, for

.chronicle.com/article/The-Big-Five-Power-Grab-/235172 [https://perma.cc/2MK4-LUA7].

99. See, e.g., Steve Berkowitz & Christopher Schnaars, *Colleges Are Spending More on their Athletes Because They Can*, USA TODAY (July 6, 2017), <https://www.usatoday.com/story/sports/college/2017/07/06/colleges-spending-more-their-athletes-because-they-can/449433001/> [https://perma.cc/M6PA-G44J].

100. See *supra* notes 3–4 and accompanying text.

101. See, e.g., *Sponsorship Spending on College Athletics Totals \$1.1 Billion in 2014/15 Season*, SPONSORSHIP (Aug. 31, 2015), [http://www.sponsorship.com/iegsr/2015/08/31/Sponsorship-Spending-On-College-Athletics-Totals-\\$.aspx](http://www.sponsorship.com/iegsr/2015/08/31/Sponsorship-Spending-On-College-Athletics-Totals-$.aspx) [https://per

the time being, as a result of the status quo. Indeed, the demand for live broadcasts of sports competitions remains one of the two shrinking bulwarks protecting the television network, news being the other.¹⁰² Football games have expanded beyond the Saturday schedule to include games on almost every night of the week excluding Sunday and Monday, which remain the domain of the National Football League (“NFL”).

The coaches likewise enjoy significant benefits from the current largesse. Athletics directors also have the benefits of both larger budgets and the ability to engage in large construction and renovation projects, including building stadiums and upgrading facilities.

The fans also enjoy the current status quo because of an increased focus on the “fan experience” at the games. This includes increased access to the athletics programs, both through television and personal experience. The pomp and circumstance surrounding games has never been higher, and the level of interest has made otherwise meaningless games take on a deep personal significance for fans.

Given the stakeholders currently profiting, the power of the status quo remains a significant barrier to change. Any revised model will need to consider how to maintain the benefit for these stakeholders or else face significant resistance.

2. *Unfamiliarity of Presidents with Athletics*

A second barrier to change lies in the unfamiliarity of many college and university presidents with the nuances of intercollegiate athletics, both structurally and as a business model. Many presidents reach their positions by serving as professors first, then as deans and senior administrators.¹⁰³

ma.cc/GSB3-FA57]; David Broughton, *College Fans Taking Note of NCAA Sponsors*, SPORTSBUSINESSDAILY (May 2, 2016), <http://www.sportsbusinessdaily.com/Journal/Issues/2016/05/02/Research-and-Ratings/NCAA-Sponsor-Loyalty.aspx> [<https://perma.cc/SKK7-2UA8>].

102. Streaming content threatens the future of sports on network television. See Ira Boudway & Max Chafkin, *ESPN Has Seen the Future of TV and They're Not Really Into It*, BLOOMBERG (Mar. 30, 2017), <https://www.bloomberg.com/news/features/2017-03-30/espn-has-seen-the-future-of-tv-and-they-re-not-really-into-it> [<https://perma.cc/RK4S-YJL8>].

103. See, e.g., *President Stuart R. Bell*, UNIV. OF ALA., <https://president.ua.edu/biography> (last visited Oct. 23, 2017) (discussing Dr. Bell's previous positions as Executive Vice President and Provost at Louisiana State University before becoming President at the University of Alabama) [<https://perma.cc/KF46-ZX8P>]; *President Eli Capilouto*, UNIV. OF KY., <https://www.uky.edu/president/about/president-eli-capilouto> (last visited Oct. 23, 2017) (discussing Dr. Capilouto's former position as Provost of the University of Alabama-Birmingham

As such, the intercollegiate athletics model and the inner workings of the student-athlete model may be unfamiliar to presidents. Many presidents choose to keep the status quo unless the status quo creates a negative consequence for the larger university.

Even in such situations, presidents and senior administrators may turn a blind eye to issues in the athletics department. The Pennsylvania State scandal provides the most obvious example of a president's ignorance of an athletics department's issues, but similar improprieties have occurred in other universities as well.¹⁰⁴ Likewise, the number of academic scandals at otherwise reputable institutions suggests that universities need to properly oversee the academic progress of their athletes.¹⁰⁵ Presidents have a responsibility to become engaged with their athletics programs, not just to keep the university out of trouble but, as argued here, to find ways to use athletics to benefit the university as a whole.¹⁰⁶

3. *Popularity and Visibility of Athletics*

A similar impediment to changing the status quo rests in the widespread popularity and visibility of athletics. Even small changes become fodder for call-in radio shows, and the growth of sports media and television channels makes overblown coverage of changes not just possible, but likely.

Given the popularity of college sports, there exists a strong sentiment in preserving the status quo. Many fans oppose compensation of college athletes based on the principle of amateurism, despite the admission of

and Dean of the UAB School of Public Health before becoming President of the University of Kentucky) [<https://perma.cc/HYG3-64PJ>].

104. *Penn State Scandal Fast Facts*, CNN, <http://www.cnn.com/2013/10/28/us/penn-state-scandal-fast-facts/index.html> (last updated June 4, 2017, 1:11 PM) [<https://perma.cc/LQM7-PVZ3>]; see also Ravi Lulla, *The 10 Worst Scandals in NCAA History*, BLEACHER REPORT (Sept. 28, 2011), <http://bleacherreport.com/articles/869007-10-worst-scandals-in-ncaa-history> (describing some of the many examples of malfeasance) [<https://perma.cc/AX8X-82AK>].

105. See, e.g., Phillip Miller, *Are amateurism rules corrupting college athletes?*, WASH. POST (Mar. 16, 2016), https://www.washingtonpost.com/news/in-theory/wp/2016/03/16/are-amateurism-rules-corrupting-college-athletes/?utm_term=.278c42069eeb (discussing various scandals affecting multiple athletics programs) [<https://perma.cc/B3MA-XCJP>].

106. There are, of course, obvious exceptions. Mark Emmert was the President of the University of Washington and LSU prior to becoming the President of the NCAA. See *NCAA President Mark Emmert*, NAT'L COLLEGIATE ATHLETIC ASS'N, <http://www.ncaa.org/about/who-we-are/office-president/ncaa-president-mark-emmert> (last visited Oct. 22, 2017) [<https://perma.cc/B7PP-U7MZ>].

many fans that violating that principle would not diminish their interest in the competitions themselves.¹⁰⁷

The level of interest and engagement likewise leads, in some cases, to a sense of fan entitlement such that fans believe they know more about the sport than those actually managing and participating in it. This level of interest creates a possibility, or at least a fear of the possibility, of a decrease in interest resulting from a significant change to the status quo. This concern likewise contributes to the inertia inherent in the status quo.

4. Academic Gaps for Some Athletes

A final barrier to altering the status quo is the disinclination of some athletes toward education. Despite the reality that only a small percentage of athletes make professional teams, the focus of some athletes in attending a university purely is to participate in intercollegiate athletics.¹⁰⁸ The academic requirements serve only as a prerequisite to eligibility, and at some institutions, the level of academic rigor is minimal for the athletes.¹⁰⁹

Along with academic disinterestedness, a second problem is the lack of college preparedness of some athletes. Requiring athletes who are not college-prepared to perform in the academic curriculum while participating in the full-time job of being a member of an intercollegiate sports team creates a need to give academics short shrift in some situations.¹¹⁰

One proposal is to minimize the academic requirements for student-athletes during the season, such that they are essentially half-time students for four years.¹¹¹ The student-athletes then could devote complete attention to academics for two years after using their eligibility and failing to make a

107. See Alex Prewitt, *Large majority opposes paying NCAA athletes, Washington Post-ABC News poll finds*, WASH. POST (Mar. 23, 2014), https://www.washingtonpost.com/sports/colleges/large-majority-opposes-paying-ncaa-athletes-washington-post-abc-news-poll-finds/2014/03/22/c411a32e-b130-11e3-95e8-39bef8e9a48b_story.html?utm_term=.80f6c2e34055 [<https://perma.cc/TMY9-72AX>]; Travis Waldron, *Most College Sports Fans Won't Stop Watching If Athletes Are Paid, Poll Finds*, HUFF. POST (Oct. 28, 2015, 3:19 PM).

108. See, e.g., Nw. Univ. and Coll. Athletes Players Ass'n, 2014-15 N.L.R.B. Dec. ¶ 15781 (CCH), at *1 (2014), *dismissed on other grounds*, 362 NLRB No. 167 (2015) (finding that the primary purpose of the football players on campus was to play football, not get an education).

109. Sarah Ganim, *CNN Analysis: Some Athletes Play Like Adults, Read Like 5th Graders*, CNN (Jan. 18, 2014), <http://edition.cnn.com/2014/01/07/us/ncaa-athletes-reading-scores/index.html> [<https://perma.cc/BJV6-S28J>].

110. The case of Kevin Ross provides an egregious example of such educational malfeasance. See *Ross v. Creighton*, 957 F.2d 410 (1992).

111. See Berry, *supra* note 9.

professional team. Opponents of this view argue that such athletes would not choose to complete their education.

The movement toward a more serious application of the student-athlete paradigm, then, also must overcome this pressure to maintain the status quo and perhaps even minimize the academic requirements themselves.

B. A Roadmap for Readjustment

This Article concludes by introducing preliminary ideas for how presidents might readjust the relationship between the university and the athletics department to promote an institutional symbiosis by strengthening education.

1. Restructure the NCAA: Emphasize Education, not Amateurism

The NCAA's focus is to prevent paying athletes, down to restricting infinitesimal benefits, such as car rides and other *de minimis* forms of aid. The NCAA's pursuit of large capital contributions to athletes, such as the case of Reggie Bush, is understandable, but trying to police every small benefit seems both to be unnecessary and a poor use of resources.¹¹²

This notion is particularly true when the education available to athletes becomes compromised in many situations. From egregious examples like the University of North Carolina to the more benign issue of major clustering, the NCAA's focus should be to ensure that the *academic* product provided to athletes is both legitimate and robust.

This transposition involves several shifts in focus and policy, but the changes all make sense in light of the NCAA's stated mission. First, the NCAA should police the time that teams spend on athletics in a more robust way, drawing sharper limits on practice time and, in particular, off-season time. For the student-athlete model to be realistic, athletics cannot be a full-time job for the athletes.¹¹³ The NCAA similarly should punish academic malfeasance more seriously than it punishes the providing of economic benefits to athletes.

112. See Nakia Hogan, *Reggie Bush investigation results in major sanctions for Southern Cal*, NOLA (June 11, 2010), http://www.nola.com/saints/index.ssf/2010/06/reggie_bush_investigation_resu.html [<https://perma.cc/E6XC-MEEV>].

113. See, e.g., Nw. Univ. and Coll. Athletes Players Ass'n., 2014-15 N.L.R.B. Dec. ¶ 15781 (CCH), at *1 (2014), *dismissed on other grounds*, 362 N.L.R.B. No. 167 (2015) (finding that the requirements of the football program for athletes constituted a full-time job and made athletes employees of the university).

The guiding value should be “student”—not “amateur.” The former rests at the core of the institutional purpose; the latter lacks significant justification in many ways. If the NCAA is serious in promoting the “professional prospects” of its athletes in areas other than sports, it should make every effort to create campus balance between academics and athletics. This academic focus should extend far beyond the barometer of graduation and assess the quality of education provided to athletes.

Ironically, the experiences of the Committee on Infractions members typically will align much better with an educational focus anyway, as many of the members are faculty and administrators. A restructuring of the COI and the NCAA more generally to align with this concern will legitimize the rhetoric of the NCAA concerning student-athletes. Certainly such an approach would be more in line with Myles Brand’s vision for the NCAA.¹¹⁴

2. Grow Athletics, but Leverage Economic Gains Through Conferences

Universities should continue to grow athletics and the economic largesse that accompanies such growth, but use the conferences to reallocate these gains to academics. On the one hand, if the result of continued growth remains limited to increases in coaches’ salaries and improved facilities, the benefits to the university as a whole will be tangential only. On the other hand, if conferences could siphon off a percentage of earnings and allocate these funds to the academic departments of the universities, athletics and academics would operate in a more symbiotic manner.

Leaving the allocation up to the current presidents has the practical consequence of limiting athletics department support of academics, particularly outside of the Power Five conferences. If, however, conference commissioners allocated money to academics and policed those allocations, then they could help restore the balance between academics and athletics.

3. Reduce Coach Firings and Buyouts

Another major economic drain in the athletics department results from coach firings and buyouts. When there is a multi-million dollar cost to firing a coach, the athletics department typically wastes resources in the name of a

114. Katherine Rust, *Remembering NCAA President Myles Brand*, ATLANTIC (Sept. 18, 2009), <https://www.theatlantic.com/national/archive/2009/09/remembering-ncaa-president-myles-brand/348096/> (explaining the former NCAA President’s vision of having athletes be students first, and balancing the goal of education with athletics success) [<https://perma.cc/YF5H-8K5Y>].

few wins. Administrators should fight market pressures to grant such buyouts and, alternatively, choose not to fire coaches prematurely. The value of a win or two does not alter the economic balance in a significant way for most athletics departments.¹¹⁵ In addition, with conference revenue sharing, the universities receive a degree of insulation from the roller coaster of good and bad seasons.

Indeed, the amount of revenue loss based on a poor season or two does not justify the cost of the buyouts in many cases.¹¹⁶ With college presidents exercising a greater degree of financial oversight of athletics, the willingness to enter into such contracts and fire coaches prematurely might diminish.

CONCLUSION

In sum, this Article challenges college presidents to engage with the current intercollegiate athletics status quo in a more aggressive way to restore the balance between sports and academics. Specifically, the Article argues for the leveraging of economic growth in athletics to benefit the academic side of the university.

In doing so, the Article describes the shift from a symbiotic relationship to a more parasitic relationship, with athletics exerting dominance over the university at many institutions. It further argues for a rebalancing—outlining a relational shift consistent with the values of the NCAA and the practices at some institutions. Finally, the Article concludes by addressing the practical obstacles to such a shift and providing a road map for universities to enhance the student-athlete educational model championed by the NCAA.

115. According to one study, wins average a value of \$1 million for less prestigious Power Five schools and \$3 million for more prestigious Power Five schools. See Roberta Holland, *Just How Much Is One Win Worth in College Football and Basketball?*, FORBES (Oct. 26, 2015), <https://www.forbes.com/sites/hbsworkingknowledge/2015/10/26/just-how-much-is-one-win-worth-in-college-football-and-basketball/#ff7769855528> [<https://perma.cc/D3EF-RCFM>]. Although a significant amount of money, it is a small amount for schools with athletics budgets over \$100 million. See Shifflett & Hallman, *supra* note 6.

116. Will Hobson & Stephen Rich, *College Sports' Fastest Rising Expense: Paying Coaches Not to Work*, CHI. TRIBUNE (Dec. 13, 2015), <http://www.chicago.tribune.com/sports/college/ct-college-sports-expenses-paying-coaches-severance-20151212-story.html> (suggesting that the costs of buyouts often outweigh the short term financial benefit of better performance) [<https://perma.cc/YTN2-6TBH>].