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## Sidelining Big Business in Intercollegiate Athletics: How the NCAA Can De-Escalate the Arms Race by Implementing a Budgetary Allocation for Athletic Departments

Lora Weurdeman

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ARTICLES

**SIDELINING BIG BUSINESS IN INTERCOLLEGIATE  
ATHLETICS  
HOW THE NCAA CAN DE-ESCALATE THE ARMS RACE  
BY IMPLEMENTING A BUDGETARY ALLOCATION FOR  
ATHLETIC DEPARTMENTS**

LORA WUERDEMAN\*

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## INTRODUCTION

In 2012, the president of Rutgers University was struggling to balance the school's budget.<sup>1</sup> In order to cover the athletic department's \$80 million deficit, the university cut six sports programs, froze faculty salaries, and postponed infrastructure improvements.<sup>2</sup> Despite this, Rutgers was still in serious financial trouble.<sup>3</sup> Why? More than likely, it was the university's decision to spend \$115 million in athletic subsidies between 2006 and 2010, making Rutgers the largest athletic subsidy in the country among BCS schools.<sup>4</sup> Despite the increase in spending on athletics, football attendance dropped from more than 49,000 to less than 44,000 from 2009 to 2011.<sup>5</sup> So, what did Rutgers do when it was faced with surmounting debt and a disgruntled faculty? It accepted an offer to join the Big Ten conference.<sup>6</sup> The only problem is that despite bringing more exposure and money to Rutgers, competing in the Big Ten required even more athletic spending to keep up with the stiffer competition and better-funded teams in the new conference.<sup>7</sup>

Rutgers, like many schools, was merely making moves to try to keep up with the intercollegiate athletic arms race. In the last twelve years, Rutgers' athletic department has lost \$312 million, and in 2014 alone, relied on an allocation of more than \$26 million from the universities' academic budget to cover deficits.<sup>8</sup> The consequence of the academic budget losing this money to athletics was the university being forced to cancel classings.<sup>9</sup> Rutgers recently announced that it was cutting the library's budget by \$500,000; however, within the same week the athletic department announced a \$200,000 raise for its football coach.<sup>10</sup> Coincidental? Rutgers has even gone as far as shelling out "\$6 million in severance payments to fired coaches and athletic directors over the past three years."<sup>11</sup> Is all of this athletic spending really worth the sacrifice of academics? Most who attend

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1. Howard L. Nixon, *The Athletic Trap: How College Sports Corrupted the Academy* 82-83 (2014).

2. *Id.* at 82.

3. *Id.* at 82-83.

4. *Id.* at 82.

5. *Id.*

6. *Id.*

7. *Id.* at 82-83.

8. Hallel Yadin, *Big Spending on Athletics at Rutgers Targeted by In-Depth HBO Report*, NEW BRUNSWICK TODAY (May 4, 2016), <http://newbrunswicktoday.com/article/big-spending-athletics-rutgers-targeted-depth-hbo-report>.

9. *Id.*

10. *Id.*

11. *Id.*

Rutgers, the nation's eighth oldest higher education institution,<sup>12</sup> would say no. Unfortunately, all the money being funneled into the football program has not been the panacea Rutgers had hoped for; in 2016, the Scarlet Knights finished the season 2-10.

In today's world of intercollegiate athletics, revenue sports (men's football and basketball) are thriving. This overwhelming success is due to television contract revenue and an ever-increasing public interest in both college football and men's basketball.<sup>13</sup> With this rise in popularity, universities are treating athletic departments as stand-alone entities with the autonomy to spend every dollar they earn.<sup>14</sup> Athletic departments are rarely prevented from outspending their earnings, and universities are covering the overspending by charging mandatory student fees, cutting non-revenue sports programs, and taking away funds from the academic budget to cover costs.<sup>15</sup> At most Division I schools, roughly eighty percent of an athletic department's budget goes to revenue sports programs (football and men's basketball).<sup>16</sup>

The National Collegiate Athletic Association (NCAA) states that its primary objective is "to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by doing so, retain a clear line of demarcation between intercollegiate athletics and professional sports."<sup>17</sup> However, the popularity of college football and men's basketball has generated an economic reality that is in tension with this objective.<sup>18</sup> The multi-million dollar rewards of winning in revenue sports have created an arms race. The pressure on athletic departments to outspend one another on coaches' salaries and multi-million dollar facilities, all in the hopes of gaining a competitive advantage on the field, is at an all time high.<sup>19</sup>

The wealth and commercialization that surrounds revenue sports in college athletics has sparked criticism of whether the NCAA's amateurism

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12. See, *Rutgers, the State University of New Jersey*, TIMES HIGHER EDUCATION - WORLD UNIVERSITY RANKINGS, <https://www.timeshighereducation.com/world-university-rankings/rutgers-the-state-university-of-new-jersey#ranking-dataset/596947> (last visited Apr. 23, 2017).

13. William W. Berry III, *Playoff Profits for Academic Programs*, MISS. SPORTS. L. REV. 1 (2016), <http://mssportslaw.olemiss.edu/files/2016/05/Berry-Article-Final-Draft-formatted.pdf>.

14. Will Hobson & Steven Rich, *Playing in the Red*, THE WASHINGTON POST (Nov. 23, 2015), <http://www.washingtonpost.com/sf/sports/wp/2015/11/23/running-up-the-bills/>.

15. *Id.*

16. Jonathan Zimmerman, *Blame football, not Title IX*, LOS ANGELES TIMES (Jan. 9, 2014), <http://articles.latimes.com/2014/jan/09/opinion/la-oe-zimmerman-football-title-ix-ncaa-20140109>.

17. 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. 1,2 (2000).

18. *Id.*

19. *Id.*

tenet is still applicable today. Unlike others who argue that the definition of amateurism needs to be changed to coincide with the economic boom of college sports,<sup>20</sup> this Article seeks to provide an alternative to the NCAA that actually reinforces the definition of amateurism and preserves the ideals of student athleticism and education.

Specifically, this Article argues that the NCAA should adopt a budgetary allocation to impose on its member institutions' athletic departments. This budgetary allocation would split funds between revenue and non-revenue sports programs evenly. Revenue sports include football and men's basketball, and non-revenue sports are essentially every other sports program at a university. This Article proposes that an athletic department's budget should be split 50/50 between revenue and non-revenue sports. While an even split might seem drastic, college sports needs a number that will disrupt the status quo of revenue sports reaping nearly all of the rewards. If athletic departments do not stop funneling funds back into revenue sports in order to make football and men's basketball more profitable, non-revenue sports, and the ideal of student athleticism as we know it will become obsolete. By subsidizing non-revenue sports from money that used to go solely to revenue sports, the NCAA's tenet of amateurism is actually being implemented in practice, as opposed to just name. This proposal provides a way for the NCAA to get ahead of the game and preemptively stiff-arm future litigation that seek to prove the NCAA's restrictions are antitrust violations.

Part I of the Article focuses on the intercollegiate athletics arms race. It provides examples of how universities are outspending one another in an effort to remain competitive in recruitment. Part II discusses how difficult it is to chill the arms without violating antitrust law. Part III lays out a budgetary allocation model. The model is this Article's solution to de-escalating the arms race while also providing the NCAA with a way to remain antitrust compliant. Part IV provides reasons why the proposed budgetary allocation will work as a viable method for the NCAA. The section discusses how this Article's proposal (1) reinforces the application of Title IX, (2) is viable under antitrust law, and (3) alleviates the pressure on the arms race.

### THE ARMS RACE PROBLEM

Today, intercollegiate athletics are characterized by an insatiable desire for winning and money. Gone are the days of playing for the "love of the game." The new love is money, and athletic departments are doing every-

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20. See, William W. Berry III, *Amending Amateurism*, 68 ALA. L. REV. 551, 552-53 (2016); Virginia A Fitt, *The NCAA's Lost Cause and the Legal Ease of Redefining Amateurism*, 59 DUKE L.J. 555, 558 (2009).

thing in their power to get their hands on more of it. Over the past eleven years, public schools in NCAA Division I schools have spent \$71.3 billion on their athletic programs (approximately the combined gross domestic product, GDP, of Serbia and Estonia).<sup>21</sup> In 2010 alone, Division I athletic programs were a \$6 billion dollar enterprise.<sup>22</sup> The expenditures in this increased athletic spending are multimillion dollar coaching contracts, state-of-the-art facilities, and increased scholarship commitments needed to counterbalance rising tuitions.<sup>23</sup> This increase in expenditures has created an arms race in the world of intercollegiate athletics. Athletic departments have shifted their focus to erecting lavish facilities in the hopes of gaining five-star recruits, coaches, and a competitive advantage.<sup>24</sup>

In thirty-nine of the fifty states, the highest-paid public employee is either a university's football or men's basketball coach.<sup>25</sup> The average salary paid to a coach at a major university is \$1.81 million.<sup>26</sup> This compensation package has increased more than 90% since 2006.<sup>27</sup> Roger Noll, an economic expert from Stanford, reported that coaching salaries have increased by 500 percent since 1985.<sup>28</sup> The state of Wisconsin provides a strong example of the discrepancy in public employee pay in most states. In 2014, the University of Wisconsin's basketball coach guided the Badgers to the Final Four for the first time in fourteen years.<sup>29</sup> For running a successful basketball program, Coach Bo Ryan, received \$2.9 million.<sup>30</sup> In contrast, the gov-

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21. Erik Bardy, Steve Berkowitz, & Jody Upton, *Can college athletics continue to spend like this?*, USA TODAY (Apr. 23, 2016), <http://www.usatoday.com/story/sports/college/2016/04/17/ncaa-football-basketball-power-five-revenue-expenses/83035862/>.

22. Dona M. Desrochers, *Academic Spending Versus Athletic Spending: Who Wins? Delta Cost Project*, AMERICAN INSTITUTE FOR RESEARCH (Jan. 2013), <http://www.air.org/sites/default/files/downloads/report/Academic-Spending-vs-Athletic-Spending.pdf> (last visited Apr. 23, 2017).

23. *Id.*

24. MITTEN, *supra* note 16, at 2.

25. See, Cork Gaines, *The highest-paid public employee in 39 US states is either a football or men's basketball coach*, BUSINESS INSIDER (Sept. 22, 2016), <http://www.businessinsider.com/us-states-highest-paid-public-employee-college-coach-2016-9/#arizona-sean-miller-495-million-3>.

26. Evan Comen, Thomas C. Frohlich, & Michael B Sauter, *The Highest Paid Public Employee in Every State*, 24/7 WALL ST. (Sept. 20, 2016), <http://247wallst.com/special-report/2016/09/20/the-highest-paid-public-employee-in-every-state/>.

27. *Id.* To determine the highest-paid public employee in each state, 24/7 Wall St considered reports of public salaries based on state government payrolls and public documents. All college football and basketball coach salaries are based on USA Today's consolidated list of NCAA coach salaries, which includes pay for 2015 in the case of football and 2016 in the case of basketball. In the case where a coach received a raise or was recently hired, the more recent available information was used. All data are based on the most recent available information.

28. JOE NOCERA & BEN STRAUSS, *INDENTURED - THE INSIDE STORY OF THE REBELLION AGAINST THE NCAA*, 270 (2016).

29. See Smriti Sinha, *So, How Much is a College Coach Really Worth?*, VICE SPORTS (Oct. 20, 2014), [https://sports.vice.com/en\\_us/article/so-how-much-is-a-college-coach-really-worth](https://sports.vice.com/en_us/article/so-how-much-is-a-college-coach-really-worth).

30. *Id.*

ernor of Wisconsin, Scott Walker, only received \$144,423.<sup>31</sup> When the highest paid public employee in nearly every state is either a basketball or football coach, the message being sent to public employees around the nation is sports are more important than anything else. Regardless of whether you are a chancellor of a university or the governor, winning in sports is more important. The highest paid public employee in 2016 was Coach Jim Harbaugh from the University of Michigan, who received a \$9 million salary.<sup>32</sup> Not only are schools willing to pay exorbitant amounts for coaches to come to their universities, schools are also paying millions of dollars to coaches who have been fired.<sup>33</sup> Last year, a combined \$50 million was paid in severance to fired coaches.<sup>34</sup>

Not only is shelling out millions for a coach important, schools now must have state-of-the-art facilities to remain competitive in recruitment. Because revenue sports programs enjoy lucrative television contracts, merchandise deals, and private donations from fundraising events, athletic departments now have additional funds to help keep up with arms race.<sup>35</sup> This allows millions to be funneled into infrastructure such as stadium renovations, additional seating, jumbo-trons, and training facilities.<sup>36</sup> Recently, more than \$5 billion has been spent on athletics-related things.<sup>37</sup> Schools with state-of-the-art facilities have a better advantage at wooing high school recruits. A quick sampling of the activity from 2005 to 2013 shows: Arizona spent \$72 million on its football stadium, Baylor spent \$250 million on its stadium, Iowa spent \$89 million on football stadium upgrades, and last but certainly not least, Oregon spent \$68 million on a training facility.<sup>38</sup> Unfortunately, this never-ending spending has created an arms race in athletic-related construction. As soon as upgrades are finished on one facility, another school has already done something bigger and better.<sup>39</sup> This constant back and forth leads to the addition of frivolities such as

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31. *Id.*

32. See *The 25 Highest Paid College Coaches of 2017*, THE BEST SCHOOLS, <http://www.thebestschools.org/features/highest-paid-college-coaches/> (last visited Apr. 23, 2017).

33. Dustin Axe, *The College Football Arms Race is Bigger than Ever: What is the True Cost?*, TRUTHOUT (Dec. 12, 2016), <http://www.truth-out.org/news/item/38673-the-college-football-arms-race-is-bigger-than-ever-what-is-the-true-cost>.

34. *Id.*

35. NOCERA, *supra* note 27 at 270 (in discussing the big business college sports had become, Dan Rascher, provided examples by saying that March Madness generated more advertising revenue than any sport event in the country, and eight athletic departments had more revenue than the median NHL team in 2012-13).

36. Axe, *supra* note 32.

37. NOCERA, *supra* note 27 at 270.

38. *Id.* at 194-95.

39. AXE, *supra* note 32; See also Will Hobson & Steven Rich, *The Latest Extravagances in the College Sports Arms Race? Laser Tag and Mini Golf*, THE WASHINGTON POST (Dec. 21, 2015) (Explaining that in 2014, Texas A&M unveiled the largest video board in college football. School officials

Clemson University's facility that includes a barbershop, a bowling alley, and laser tag for the football players.<sup>40</sup>

Despite the fact that athletic departments are generating millions of dollars in revenue thanks to multimillion-dollar media rights contracts and rising ticket sales, schools are still spending more than they make.<sup>41</sup> While total revenue for the 50 public schools in the Power Five Conference<sup>42</sup> rose by \$304 million in 2015, spending rose by \$332 million.<sup>43</sup> According to the NCAA, less than two dozen public universities can actually cover their operating expenses without subsidies from the university, the government, or mandatory student fees.<sup>44</sup> Data from 2011 to 2012 showed that athletic departments across ninety-nine major schools lost an average of \$5 million once revenue generated from mandatory student fees and university subsidies were taken out.<sup>45</sup> From 2010 to 2015, students have paid almost \$90 million in mandatory fees to support athletic departments and intercollegiate athletics.<sup>46</sup> Many of these students are not even aware that the fees that increase their tuition and student debt are going to support the athletics program.<sup>47</sup> In the Football Bowl Subdivision (FBS), student fees cover 7.6 percent of an athletic department's budget, while 10.1 percent comes from institution and state support.<sup>48</sup> In other subdivisions, more than 70 percent of an athletic budget comes from mandatory student fees and institutional and state support.<sup>49</sup> These subsidies "tend to be highest at [universities] where ticket sales and other revenue is the lowest," meaning that the students that

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insisted it was a coincidence that the screen was only slightly bigger than the one rival Texas has that is nicknamed Godzilltron. The College station was home to the largest video board in college football for one year, until Auburn unveiled their 10,830 square foot video board. School officials insisted it was a coincidence their board was bigger than SEC rival, Texas A&M.) [https://www.washingtonpost.com/sports/colleges/for-college-athletic-departments-building-the-best-is-never-ending-task/2015/12/21/e8384dd4-a558-11e5-9c4e-be37f66848bb\\_story.html?utm\\_term=.4742761fd57e](https://www.washingtonpost.com/sports/colleges/for-college-athletic-departments-building-the-best-is-never-ending-task/2015/12/21/e8384dd4-a558-11e5-9c4e-be37f66848bb_story.html?utm_term=.4742761fd57e).

40. AXE, *supra* note 32.

41. BARDY, et al., *supra* note 20.

42. See BARDY, ET AL., *supra* note 20. Power Five schools are those in the Southeastern Conference, Big 12, Big Ten, Pacific 12, and Atlantic Coast Conference.

43. BARDY, ET AL., *supra* note 20. Keep in mind that the 2014-15 fiscal years numbers of the Power Five conferences revenue was artificially inflated from bowl money from the inaugural College Football Playoff and the debut of the SEC Network.

44. See *Id.*

45. Reuben Fischer-Baum, *Infographic: Is Your State's Highest Paid Employee A Coach?, (Probably)*, DEADSPIN (May 9, 2013), <http://deadspin.com/infographic-is-your-states-highest-paid-employee-a-co-489635228>.

46. Mike Reddy, *Sports at Any Cost: How College Students are Bankrolling the Athletics Arms Race*, HUFFINGTON POST (Nov. 15, 2015), <http://projects.huffingtonpost.com/ncaa/sports-at-any-cost>.

47. Will Hobson & Steven Rich, *Why students foot the bill for college sports, and how some are fighting back*, THE WASHINGTON 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?utm\\_term=.7c16167c9c2d](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?utm_term=.7c16167c9c2d).

48. DESROCHERS, *supra* note 21..

49. *Id.*



have the least interest in intercollegiate athletics are paying the most to support them.<sup>50</sup> For example, the University of Virginia generates \$13.2 million in student fees a year, however, Virginia still earned \$17 million less than it spent.<sup>51</sup> Despite this loss, over the past decade Virginia has increased its student fee from \$388 to \$657.<sup>52</sup> These student fees hurt students who do not have the time to go to the football games because they have to work to pay for school. Paige Taul, a nineteen-year-old student who earns \$8.25 working as a cashier in the campus bookstore, works roughly eighty hours just to pay off the mandatory student fee.<sup>53</sup> It is estimated that students across the country borrow nearly \$4 billion per year to pay off athletic fees.<sup>54</sup>

Defenders of the arms race (athletic directors) will quickly point out that most athletic departments use revenue from football and basketball to fund the non-revenue sports.<sup>55</sup> However, once expenses from million dollar coaches' salaries, student aid, recruiting, and game day operations are added in, the revenue from football and basketball are not enough to cover non-revenue sports.<sup>56</sup> This in turn requires athletic departments to make cuts from the non-revenue programs in order to have more money to compete in the arms race.<sup>57</sup>

While athletic spending is ever increasing, the same cannot be said for other areas on campus. Athletic departments spend more per athlete than universities spend educating the average student, which is usually three to six times as much among FBS Institutions.<sup>58</sup> In the universities competing in the top-tier FBS, the median athletic spending per athlete was \$92,000 in 2010, compared with median academic spending per full-time student of less than \$14,000.<sup>59</sup> While some schools have addressed cost issues by eliminating athletic teams or reducing subsidies,<sup>60</sup> most institutions still allow

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50. REDDY, *supra* note 45.

51. HOBSON, *supra* note 46.

52. *Id.*

53. *Id.*

54. *Id.*

55. See, e.g., 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/#1b275ff5563e>.

56. *Id.*

57. *Id.*

58. DESROCHERS, *supra* note 21.

59. *Id.*

60. See Paula Lavigne, *Rich get richer in college sports as poorer schools struggle to keep up*, ESPN (Sep. 6, 2016), [http://www.espn.com/espn/otl/story/\\_/id/17447429/power-5-conference-schools-made-6-billion-last-year-gap-has-nots-grows](http://www.espn.com/espn/otl/story/_/id/17447429/power-5-conference-schools-made-6-billion-last-year-gap-has-nots-grows) ("Not all schools are chasing the Power Five dream, though: This past spring, the University of Idaho became the first school to leave the Football Bowl Subdivision, citing finances as one of the driving factors. The University System of Georgia Board of Regents recently enacted a rule that limits how much money from student fees and tuition can be spent on athletics, and last year the Virginia Legislature made a similar move.").

almost unlimited spending on athletics, even when academic spending “(such as for faculty pay and academic programs)” are stagnant or being cut to subsidize athletics.<sup>61</sup> Comparisons between athletic spending and academic spending lead one to question where universities’ priorities truly lie, with success on the field or success in the classroom.<sup>62</sup>

#### *A. Tension Between the Arms Race and Amateurism*

The principle of amateurism is a notion that emphasizes athletes playing “for the love of the game.”<sup>63</sup> The original purpose of intercollegiate athletics was to provide extracurricular activities for talented students whose top priority was to earn a degree and pursue a career outside of professional sports.<sup>64</sup> However, the structure of intercollegiate athletics today makes it difficult for all college sports to fit neatly within the amateur model championed by the NCAA.<sup>65</sup> The modern definition of amateurism adopted by the NCAA highlights the role of education. Section 2.9 of the NCAA Manual provides:

=XTStudent-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.<sup>66</sup>=FT

The NCAA website expands upon the importance of education by explaining that Amateur competition is a “bedrock principle of college athletics and the NCAA.”<sup>67</sup> Maintaining amateurism is crucial to preserving an academic environment in which acquiring a quality education is the first priority. In the collegiate model of sports, the “young men and women competing on the field or court are students first, athletes second.”<sup>68</sup>

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61. DESROCHERS, *supra* note 21; *see also*, Kerensa E. Barr, *How the “Boys of Fall” Are Failing Title IX*, 82 UMKC L. REV. 181 (2013-14) (“As University of Texas head football coach Mack Brown commented regarding his school leading the country in total athletic department expenditures at more than \$133 million, ‘I think, when we make it, we have the right to spend it. That’s the way America is.’ Meanwhile, the University of Texas cut 200 jobs in administrative and non-academic areas and has plans to eliminate another 400 in the coming years, including 95 teaching positions.”).

62. DESROCHERS, *supra* note 21.

63. *See, e.g.*, INTERNATIONAL OLYMPIC COMM., OLYMPIC CHARTER, 1950, <https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/Olympic-Studies-Centre/List-of-Resources/Official-Publications/Olympic-Charters/EN-1950-Olympic-Charter.pdf> (“You will be a true sportsman as an athlete . . . if you take part in sport for the love of it. . .”).

64. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, 2000-01 NCAA DIVISION I MANUEL, art. 2.9 (2000-01).

65. MITTEN, *supra* note 16, at 2.

66. *See* MITTEN, *supra* note 16, at 1 (citation omitted).

67. *Amateurism*, NCAA, <http://www.ncaa.org/amateurism> (last visited Apr. 20, 2017).

68. *Id.*

If the NCAA is so committed to backing this concept of amateurism, then why does it allow an ever-increasing presence of big business in intercollegiate athletics? The answer to this question is simple: money. The commercialization of intercollegiate sports has created a structure that values winning and money over focusing on education and keeping athletics secondary.<sup>69</sup> This is contradictory to the definition of amateurism provided by the NCAA. While the majority of non-revenue sports such as lacrosse, rowing, wrestling, and tennis do champion and uphold the characterization of amateurism; the same cannot be said for football and basketball programs.<sup>70</sup> The reality is that revenue programs are now being run as economic entities with little to no regard for the educational aspect of an athlete's life. As money and FBS college football rankings become the main priority of an athletic department, the tension between the "big business" side of athletics and the goals of education will continue to grow.<sup>71</sup>

It is hard to believe that athletic departments are committed to putting academics first when there is evidence leading us to believe that the educational experience of student athletes in revenue programs are nothing more than a check in the box to meet eligibility requirements.<sup>72</sup> Faculty who are willing to turn a blind eye to perpetuate academic fraud and clustering in certain majors, are just two examples of how the commercialization of intercollegiate athletics has had a negative impact on the academic integrity of an institution.<sup>73</sup> If there is not a shift in the intercollegiate athletic structure, academics will continue to be secondary to sports, thereby eliminating any value placed on the relationship between amateur athletics and education. The NCAA and its member institutions are aware of this tension, yet the NCAA is hesitant to reinforce its emphasis on education, thereby allowing athletic departments and the demands of the arms race to dictate a university's pocketbook.<sup>74</sup>

### *B. The Arms Race and Gender Equity*

When the University of Texas' (UT) football coach, Mack Brown, was asked about his thoughts on UT leading the country in athletic expenditures (more than \$133 million) he replied, "I think, when we make it, we have the

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69. MITTEN, *supra* note 16, at 3.

70. BERRY, *supra* note 19, at 561.

71. *Id.* at 562.

72. See, e.g., MURRAY SPERBER, BEER AND CIRCUS: HOW BIG-TIME COLLEGE SPORTS HAS CRIPPLED UNDERGRADUATE EDUCATION (2000); Patricia S. Miller & Gretchen Kerr, *The Athletic, Academic, and Social Experiences of Intercollegiate Student-Athletes*, 25 J. SPORT BEHAV. 346 (2002).

73. Bradley David Ridpath, *Can the Faculty Reform Intercollegiate Athletics? A Past, Present, and Future Perspective*, JOURNAL OF ISSUES IN INTERCOLLEGIATE ATHLETICS 11, 13 (2008).

74. Berry III, *supra* note 16, at 566.

right to spend it. That's the way America is."<sup>75</sup> The notion of eat what you kill is very much alive throughout athletic departments, leaving non-revenue programs, especially women's, at a disadvantage.<sup>76</sup> The arms race is not only creating a fiscal problem within universities, it is also contributing to a gender equity problem.<sup>77</sup> All football players in college are male.<sup>78</sup> Because of this, colleges sponsor no comparable sport for women in terms of financial funding or the number of opportunities available.<sup>79</sup> Therefore, in colleges with major football programs, disproportionate shares of funding and athletic opportunities are given to male students over females.<sup>80</sup>

In 1972, Title IX was enacted to prohibit sex discrimination in educational programs or activities that receive federal funding.<sup>81</sup> Almost all public and private colleges receive federal funding.<sup>82</sup> Despite Title IX, its application has had little impact on college football.<sup>83</sup> It is estimated that over ninety percent of all FBS educational institutions still do not comply with Title IX in regards to athletic programs.<sup>84</sup> While it is true that women's athletic programs have grown, because they are significantly smaller and receive less financial assistance than men's programs, they are continually treated as second-class programs.<sup>85</sup> A universities' allegiance still lies with its revenue sports programs.

Although female students comprise 57% of student populations, female athletes are given only 43% of participation opportunities at NCAA member institutions.<sup>86</sup> This represents 63,241 fewer athletic opportunities than male students.<sup>87</sup> "[M]ale athletes still receive 55% of NCAA college athletic scholarship dollars."<sup>88</sup> Women athletes are not the only sacrificial lambs of football and men's basketball, women coaches are as well. Division I schools have a difference of more than \$2 million dollars in salaries paid to

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75. Barr, *supra* note 60, at 181.

76. *Id.* at 183.

77. For more discussion on the tension between intercollegiate athletics and gender equity see Robert C. Farrell, *Title IX or College Football?*, 32 HOUS. L. REV. 993, 994 (1995-96) see also Catherine Pieronek, *A Clash of the Titans: College Football v. Title IX*, 20 J.C. & U.L. 351 (1993-1994); see also BARR, *supra* note 60, at 181.

78. FARRELL, *supra* note 76, at 994.

79. *Id.*

80. *Id.*

81. *Id.*

82. WOMEN'S SPORTS FOUNDATION, *A Title IX Primer*, <https://www.womenssportsfoundation.org/advocate/title-ix-issues/what-is-title-ix/title-ix-primer/> (last visited Apr. 4, 2017).

83. FARRELL, *supra* note 76, at 193.

84. BARR, *supra*, note 60, at 193.

85. FARRELL, *supra*, note 76, at 995.

86. WOMEN'S SPORTS FOUNDATION, *Pay Inequity in Athletics*, <https://www.womenssportsfoundation.org/research/article-and-report/equity-issues/pay-inequity/> (last visited Apr. 4, 2017).

87. *Id.*

88. *Id.*

head coaches of men's teams versus head coaches of women's teams.<sup>89</sup> Another example of the disparity that exists between men's revenue programs and non-revenue programs is the amount of money spent on facilities. Texas A&M recently opened a \$9 million football-only training facility, while other sports programs at Texas A&M must use Netum Steed Laboratory, which opened in 1985.<sup>90</sup> The football program gets its own state-of-the-art facility, yet all eleven female sports programs and seven male non revenue sports programs must use Netum Steed Laboratory.<sup>91</sup> The message could not be any clearer... football is king. The economic gains to be derived from revenue programs continue to foster an environment of gender inequity in intercollegiate athletics where men's revenue programs are given precedence at the expense of women.<sup>92</sup>

The "big time" feel of college sports has pushed the arms race to be in tension with the original notions of student athleticism. The balance between athletics and education is practically non-existent.<sup>93</sup> The disparities in how the funds of an athletic department are distributed are creating a growing tension between full time students and the athletic department, schools in the Power Five with smaller schools, and men's athletic programs with women's athletic programs. If the lavish spending and prioritizing of revenue sports is not minimized, many believe the bubble in the college athletics arms race will pop.<sup>94</sup> Unfortunately, de-escalating the arms race is not easy. Obvious solutions, such as setting a limit on coaches' salaries, are not viable solutions. The reality is that it is difficult to solve the arms race problem without running afoul of antitrust law.

### THE ANTITRUST PROBLEM

Section One of the Sherman Act provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce...is declared to be illegal."<sup>95</sup> The Supreme Court has interpreted section one to apply to all contracts that unreasonably restrain trade.<sup>96</sup> In general, restraints on trade that promote competition are reasonable and restraints on trade that restrict competition are unreasonable and therefore,

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89. *Id.* ("Median head coaches' salaries at NCAA Division I-FBS schools are \$3,430,000 for men's teams and \$1,172,400 for women's teams . . . a difference of \$2,257,600.").

90. BARR, *supra* note 60, at 194.

91. *Id.*

92. FARRELL, *supra* note 76, at 1028-29.

93. Berry, *supra* note 19, at 562.

94. See BERRY, *supra* note 19; see also Virginia A. Fitt, *The NCAA's Lost Cause and the Legal Ease of Redefining Amateurism*, 59 DUKE L.J. 555 (2009).

95. 15 U.S.C. §1 (2013).

96. *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 60 (1911).

an antitrust violation.<sup>97</sup> In order to determine whether a restraint is unreasonable, the court applies one of two levels of review: (1) per se<sup>98</sup> or (2) rule of reason.<sup>99</sup> NCAA antitrust challenges are typically determined using the rule of reason standard because some trade restraints are necessary to maintain the product of intercollegiate athletics.<sup>100</sup> Under this standard, courts evaluate the effect of the behavior on the competitiveness of the market.<sup>101</sup> A court will find an antitrust violation when a restraint's harm to competition outweighs the proffered procompetitive effects.<sup>102</sup> Generally, the rule of reason is evaluated through a three-step analysis to determine if there is an antitrust violation.<sup>103</sup> First, the plaintiff must show that the restraint creates anticompetitive effects in the market.<sup>104</sup> If the plaintiff is successful in the first step, the burden shifts to the defendant who must show that the anti-competitive effects actually create pro-competitive fits.<sup>105</sup> If the defendant is successful, the burden shifts back to the plaintiff.<sup>106</sup> The plaintiff must show that the same pro-competitive benefits could be achieved through less restrictive means.<sup>107</sup>

Traditionally, the NCAA uses its principle of amateurism as a get-out-of-jail-free card when under antitrust scrutiny.<sup>108</sup> In the case of this defense, the NCAA must “‘assert the promotion of amateurism as a procompetitive [effect] justifying the restraint....[and show that the rule]’enhances competition’ or...that it is necessary to produce competitive intercollegiate sports.”<sup>109</sup> Courts have historically granted great deference to the idea that amateurism is a pro-competitive benefit.<sup>110</sup> However, a recent court case ruling has disrupted the traditional judicial deference towards the NCAA's argument that preserving amateurism is a pro-competitive justification for

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97. See FEDERAL TRADE COMMISSION, *The Antitrust Laws*, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws> (last visited Apr. 4, 2017).

98. Kristen R. Muenzen, *Weakening Its Own Defense? The NCAA's Version of Amateurism*, 13 MARQ. SPORTS L. REV. 257, 264 (2003) (explaining that the per se rule holds a practice illegal by its occurrence, including horizontal price fixing).

99. Kemper C. Powell, *A Façade of Amateurism: An Examination of the NCAA Grant-in-Aid System Under the Sherman Act*, 20 SPORTS LAW. J. 241, 249-50 (2013).

100. *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 104 (1984).

101. *Chicago Bd. of Trade v. U.S.*, 246 U.S. 231 (1918).

102. Michael T. Jones, *Real Accountability: The NCAA Can No Longer Evade Antitrust Liability Through Amateurism After O'Bannon v. NCAA*, 56 B.C.L. REV. E. SUPP. 79, 83 (2015).

103. *Id.*

104. *Id.*

105. *Id.*

106. JONES, *supra* note 101, at 83-84.

107. *Id.*

108. *Id.* at 79.

109. MUENZEN, *supra* note 97, at 264.

110. See JONES, *supra* note 101, at 79.

all of its restrictions.<sup>111</sup> Consequently, in future antitrust litigation, it may no longer be sufficient for the NCAA to raise its amateurism principle as a defense.

With the current economic realities of revenue sports, the NCAA's claim that its amateurism principle protects athletics from commercial exploitation falls flat. Because of this, this Article seeks to provide a way for the NCAA to actually be able to use the amateurism principle as a valid pro-competitive justification. If the NCAA wants to be able to justify its restrictions by using the amateurism principle, then it must start to actually enforce the concept of amateurism. It must encourage its member institutions to get back to the objectives of the principle: education and student athleticism. As discussed above, the current landscape of how intercollegiate sports are run do not exemplify the notion that students should prioritize education over athletics. If the NCAA does not do something to de-escalate the arms race and return focus to education and playing for recreation, future litigants are more likely to be successful at piercing the veil of the amateurism defense.

Unfortunately, it is difficult to find a way to de-escalate the arms race without violating the Sherman Act. The easiest solution would be to restrict the way athletic departments are spending revenue by setting a cap on the ever-increasing salaries of coaches. However, this solution is an antitrust violation.<sup>112</sup> This Article uses two cases to show how antitrust law and the arms race are not easily reconciled.

#### *A. NCAA v. Board of Regents*

The *Board of Regents* case from the 1980's is the seminal case in anti-trust litigation involving the NCAA.<sup>113</sup> *Board of Regents* dealt with the NCAA regulating universities through its College Football Association (CFA).<sup>114</sup> Essentially, the CFA set a cap on the number of appearances a member institution could make on television while also prohibiting schools from entering into their own television rights contracts with other networks.<sup>115</sup> The University of Georgia and the University of Oklahoma, both significant football programs at the time, petitioned the NCAA for the right to enter into individual agreements with television networks separate from

111. *O'Bannon v. NCAA*, 7 F. Supp. 3d 955, 973 (N.D. Cal. 2014), *aff'd in part, vacated in part*, 802 F.3d 1049 (9th Cir. 2015).

112. *Bd. of Regents of Univ. of Okla.*, 468 U.S. at 107-08.

113. *Bd. of Regents of Univ. of Okla.*, 468 U.S. 85.

114. *Id.* at 89.

115. Mark Dent, *Television is the ruling body of college sports*, PITTSBURGH POST-GAZETTE (Aug. 26, 2012), <http://www.post-gazette.com/sports/college/2012/08/26/Television-is-the-ruling-body-of-college-sports/stories/201208260123>.

the CFA.<sup>116</sup> The NCAA refused due to its belief that televising more games would threaten the attendance at college football games.<sup>117</sup>

Both Georgia and Oklahoma challenged the restrictions on antitrust grounds, claiming that the NCAA restrictions were an anti-competitive restraint of trade and thus, a violation of the Sherman Act.<sup>118</sup> The Supreme Court applied the “quick look rule of reason”<sup>119</sup> test and found that the NCAA’s restraint was anti-competitive.<sup>120</sup> Despite the NCAA’s effort to offer a pro-competitive justification for the restriction—that the restriction was necessary to protect its product in the marketplace—the Supreme Court disagreed.<sup>121</sup> The Court held that the justification proffered by the NCAA was insufficient because it was “not based on a desire to maintain the integrity of college football as a distinct and attractive product, but rather on a fear that the product will not prove sufficiently attractive to draw live attendance when faced with competition from televised games.”<sup>122</sup>

This case is important because it established that the NCAA might be justified in imposing restraints necessary for the unique product of intercollegiate sports to exist.<sup>123</sup> *Board of Regents* also is important because it established that the rule of reason should be employed in cases questioning the legality of restraints in intercollegiate athletics.<sup>124</sup> Despite the fact that restricting television rights to college football games was technically horizontal price fixing by the NCAA, the Court found that “it would be inappropriate to apply a *per se* rule to this case... [because it] involves an industry in which horizontal restraints on competition are essential if the product is to be available at all.”<sup>125</sup> However, despite allowing the NCAA to offer justifications for its anticompetitive behavior, the Court still concluded that the television plan unreasonably restrained competition. This case highlights why restricting the revenue available to member institutions of the NCAA as a means to de-escalate the arms race is not a viable solution.

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116. *Bd. of Regents of Univ. of Okla.*, 468 U.S. at 88.

117. *See id.* at 89-90.

118. *Id.* at 88 (Sherman Act is the federal antitrust law that prohibits unreasonable restraints of trade.).

119. *See id.* at 109 (This abbreviated rule of reason inquiry applies in cases where *per se* condemnation of a practice is inappropriate, but where elaborate industry inquiry is also inappropriate to reveal the anticompetitive character of an inherently suspect restraint).

120. *Id.* at 120.

121. *Id.* at 116-18.

122. *Id.* at 116.

123. *See generally id.* at 101.

124. *Id.*

125. *Id.* at 100-01.



*B. Law v. NCAA*

*Law* is the case used to illustrate why the arms race cannot be resolved by restricting coaches' salaries.<sup>126</sup> In *Law*, the Tenth Circuit held that the NCAA had violated antitrust law by restricting the salaries of a specific category of basketball coaches by instituting a salary cap of \$16,000 in an effort to combat athletic department deficits.<sup>127</sup> The coaches alleged that the salary cap was in violation of the Sherman Antitrust Act as it was a conspiracy made by the NCAA and its member institutions to set a limit on the maximum compensation available to a certain category of basketball coaches known as "restricted earnings coaches."<sup>128</sup> As established in *Board of Regents*, this case was also analyzed using the rule of reason test.<sup>129</sup> The NCAA advanced three pro-competitive justifications for the restraints on salaries: (1) retaining entry level coaching positions, (2) reducing costs, (3) and maintaining competitive equity.<sup>130</sup> The NCAA was unable to provide sufficient evidence to establish that its salary restriction served any type of pro-competitive interest, and therefore, the Tenth Circuit held that such restrictions were anti-competitive and in violation of the Sherman Act.<sup>131</sup>

Therefore, despite the call by many for the NCAA to cap the salaries of college coaches, it cannot legally be done.<sup>132</sup> This Article provides an alternative to capping salaries that is antitrust compliant and would allow the NCAA to force its member institutions to return to the true objectives of amateurism. This Article proposes not restricting coaches' salaries, but placing a percentage limit on how much an athletic department can spend on revenue sports programs in relation to non-revenue sports programs.

#### THE PROPOSAL: A BUDGETARY ALLOCATION FOR ATHLETIC DEPARTMENTS

This Article proposes that the NCAA institute a budgetary allocation for its member institutions' athletic departments. This allocation focuses on splitting athletic departments' funds between revenue sports (football and men's basketball) and all other non-revenue sports. The idea behind this

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

127. *Id.* at 1012.

128. *Id.* at 1015.

129. *Id.*

130. *Id.* at 1021-24.

131. *Id.* at 1024.

132. LZ Granderson, *Pay Coaches less and lower tuition*, ESPN (Nov. 18, 2011), [http://www.espn.com/espn/Article/story/\\_/id/7252031/cut-college-coaches-salaries-tuition](http://www.espn.com/espn/Article/story/_/id/7252031/cut-college-coaches-salaries-tuition); see also Andrew Zimbalist, *College Coaches' Salaries and Higher Education*, HUFFINGTON POST (Mar. 2, 2015), [http://www.huffingtonpost.com/andrew-zimbalist/college-coaches-salaries-\\_1\\_b\\_6400256.html](http://www.huffingtonpost.com/andrew-zimbalist/college-coaches-salaries-_1_b_6400256.html)

mandated budgetary allocation is to disrupt the current status quo in intercollegiate sports. Revenue sports, which are currently being subsidized by increased cost of tuition and the loss of non-revenue sports programs, will only be allowed to receive a certain percentage of an athletic department's budget. The remaining percentage will be redistributed to non-revenue sports to reinforce the NCAA's stated purpose of supporting education and student athleticism. If an athletic department spends more than its allocated percentage, then a "luxury tax" will be levied against the revenue sports program. The money generated from the luxury tax will then be redistributed to non-revenue teams and the academic budget.

#### *A. The Budgetary Allocation Model*

A budgetary allocation specifies an amount of resources an organization is committing to a department or program.<sup>133</sup> Without allocation limits, a department's expenditures have the potential to exceed revenues and result in financial shortcomings.<sup>134</sup> This Article proposes that the NCAA implement a budgetary allocation model that splits an athletic department's funds 50/50 between revenue sports and non-revenue sports. While this number may seem like a drastic jump from the current 80/20 split, it is this Article's stance that this is needed to disrupt the status quo.<sup>135</sup> The reason college athletics are in this situation in the first place is due to everyone falling in line with the status quo. Everyone knows revenue sports make the most money so they continually allow them to focus on commercial gain and funnel funds back into their own programs. The proposed budgetary allocation is aimed at giving the NCAA a way to disrupt the status quo and make efforts to realign college athletics with its amateurism principle.

If the allocation were not as drastic as the proposed 50/50 split, it would not have the effect of causing actual change. This budgetary model is focused on using athletic funds to make non-profit programs become successful, and in turn, de-escalating the arms race in revenue sports programs. One of the main justifications for the split is the amount of money spent on coaches' salaries. The compensation package for coaches' has increased more than 90% since 2006.<sup>136</sup> If there is enough money in an athletic department to ensure that coaches are the highest paid public employees in most states, there needs to be some change in how sports are

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133. Mark L. Ryckman, *What is a Budgetary Allocation?* CHRONICLE, <http://smallbusiness.chron.com/budgetary-allocation-31340.html> (last visited Apr. 20, 2017).

134. *Id.*

135. ZIMMERMAN, *supra* note 15.

136. COMEN et al., *supra* note 25.

ued.<sup>137</sup> Since coaches' salaries cannot be restricted without violating anti-trust law, this budgetary allocation offers a way to restrict athletic expenditures on revenue programs while remaining compliant with the Sherman Act.

The proposed budgetary allocation takes a stance against the commercialization of revenue sports and encourages the NCAA to reinvest in its principle of amateurism. If the NCAA adopts this budgetary allocation, it can force its member institutions to prioritize education and student athleticism over the success of revenue programs. With more money going to non-revenue sports, more student athletes across all programs are benefited, as opposed to just football and men's basketball players. This Article does not propose that the NCAA decide how to allocate the 50% of the revenue budget between football and men's basketball. It will be up to the individual athletic departments to decide how to divvy up the percentage allocated to revenue sports amongst its own revenue programs. By having the luxury tax, the NCAA is making a statement that the objectives of amateurism should and will be put into practice, by reinvesting in education and amateur athletics. While it is important to have a 50/50 budgetary allocation to disrupt the status quo, this Article also proposes the availability of a safe harbor to provide time for athletic departments to restructure their budgets. The next two sections will explain in detail the luxury tax system and the safe harbor that will be integrated along with the budgetary allocation.

### *B. Luxury Tax System*

The luxury tax piece of this proposal is co-opted from the National Basketball Association (NBA).<sup>138</sup> The luxury tax system in the NBA was implemented to redress competitive imbalance in the league where richer teams were more equipped to procure more expensive and better ent.<sup>139</sup> The way the luxury tax works is that, the system taxes dollar for dollar any amount that exceeds the NBA's specified threshold.<sup>140</sup> The charges that are paid by offending teams are then redistributed to the non tax-paying teams (the ones who did not exceed the proscribed threshold).<sup>141</sup> Additionally, a team that is a repeat offender faces even higher rates, such as two dollars for every dollar spent over the threshold in the second year, three dollars for every dollar over the threshold in the third consecutive year, and so

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137. GRANDERSON, *supra* note 131.

138. The concept of the luxury tax in the NBA was co-opted from Major League Baseball.

139. Jon Gobok, *The NBA soft cap and luxury tax*, THURJ.ORG (Apr. 30, 2011), <http://thurj.org/ss/2011/04/2304/>.

140. *Id.*

141. *Id.*

on and so forth.<sup>142</sup> This system, theoretically, provides a disincentive to teams with more revenue, and encourages them to lessen their expenditures and allow talent to be spread evenly throughout the league.<sup>143</sup> Just like the luxury cap system in Major League Baseball, the NBA spreads the money earned through the tax system to the other teams in the league.<sup>144</sup> So, if a team's payroll exceeds the set threshold percentage then they are levied a tax. The tax revenues are divided by thirty (one for each team in the league), and each non-paying tax team gets their 1/30 share of the payout from the luxury tax.<sup>145</sup> By only letting the teams who did not exceed the set threshold reap in the payout rewards, the NBA is using the tax system not only as a disincentive but also as an incentive for teams to stay under the specified tax threshold.<sup>146</sup> This acts as a double incentive because not only are teams that exceed the threshold forced to pay the tax, they also miss out on their piece of the pie.<sup>147</sup> Any funds that are left over after the payout to non-paying tax teams are used for the league's purposes.<sup>148</sup>

This Article proposes that a luxury tax system be implemented with the budgetary allocation model. If revenue sports programs (football and men's basketball) exceed their 50% threshold, then the revenue program exceeding that amount will be taxed. Following the NBA model, the revenue sports would pay a dollar for every dollar spent above the set threshold. Additionally, if the revenue sports program are repeat offenders, they will face fines that are more punitive. This Article proposes that repeat offenders pay two dollars for every dollar exceeding the threshold in the second consecutive year, three dollars for every dollar over in the third year, and so on and so forth. Bolstering the viability of the luxury tax system is the fact that it does not put a hard cap on what and how much an athletic department can spend within its allocated budget, thereby making it pass antitrust muster.<sup>149</sup> The tax revenues will then be divided by how many non-revenue sports programs there are and distributed evenly among them. Any leftover funds from the tax system will be funneled into the respective universities' academic budget to support education.

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142. Jon Hamm, *NBA Salary Cap 101 - the Cap, the Luxury Tax, the Apron*, NEWSOK (May 9, 2014), <http://newsok.com/article/4747971>.

143. GOBOK, *supra* note 138.

144. *Id.* (This is similar to how the government uses the tariff system in the regulation of imports. A tariff system allows the government to earn more revenue, which can then be redistributed to other economic agents that can be effected by too many imports.)

145. *Id.*

146. *Id.*

147. HAMM, *supra* note 141.

148. GOBOK, *supra* note 138.

149. *LawNCAA*, 134 F. 3d at 1024.

The main idea behind the luxury tax component of this budgetary allocation model is to revitalize and reinvest in the notion of amateurism that the NCAA champions. The NCAA uses its tenet of amateurism as a veil to avoid antitrust challenges, and the NCAA is typically quite successful in its attempts given the great deference the court has given to this plea.<sup>150</sup> However, it is this Article's stance that if the NCAA is going to use amateurism as a way to avoid antitrust liability, it should actually invest in amateurism in action and not just name. The luxury tax system funnels money from revenue sports programs to the non-revenue sports whose student athletes actually fit within the definition of amateurism.

### *C. Safe Harbor*

The implementation of the proposed budgetary allocation should be regulated and enforced in the same way as Title IX.<sup>151</sup> That is, since the proposed allocation of a 50/50 split is such a drastic change from the current 80/20 split, the proposal provides a safe harbor to schools that can provide a showing that their athletic departments are making strides towards the mandated 50/50 split. Like Title IX's second safe harbor, an athletic department will not suffer a penalty tax if it can show that it is engaged in effective and systematic planning to adjust its budgetary allocation to the new standard.<sup>152</sup> So, even if a school is not exactly distributing its athletic department budget 50/50 between revenue sports and non-revenue sports, it will not be found in violation if it is taking legitimate steps towards complying with the new allocation. This safe harbor provision will allow athletic departments time to figure out how to restructure their programs without immediately being hit with the penalty tax. However, this safe harbor provision will not exist indefinitely. Its purpose is to provide time for athletic departments to restructure their budgetary allocations, as opposed to requiring them to be compliant from day one. This Article acknowledges that requiring an athletic department to allocate only 50% to its revenue programs, as opposed to 80% will not be an easy task. Despite this difficulty, it is necessary in order to disrupt the status quo and reinvest in the principle of amateurism.

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150. *Bd. of Regents of Univ. of Okla.*, 468 U.S. at 120. ("The Supreme Court has admonished that we must generally afford the NCAA 'ample latitude' to superintend college athletics."); *see also*, 134 F.3d at 1022 ("[C]ourts should afford the NCAA plenty of room under the antitrust laws to preserve the amateur character of intercollegiate athletics."); *see also Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 614 F.3d 57, 83 (3d Cir.2010) (noting that, generally, "sports-related organizations should have the right to determine for themselves the set of rules that they believe best advance their respective sport").

151. *See WOMEN'S SPORTS FOUNDATION*, *supra* note 81.

152. *Id.*

## WHY THE BUDGETARY ALLOCATION WORKS

The proposed budgetary allocation for athletic departments is a viable alternative that can be adopted by the NCAA to help combat likely imminent antitrust litigation. Instead of focusing on how to continually change the future of college programs and the definitions that have been so integral to the NCAA since the beginning, this Article has provided a way for the NCAA to reinvest in the stated purpose of amateurism. The NCAA's tenet of amateurism is supposed to support academics and student athleticism. This Article provides the following three examples for why this budgetary allocation system solves problems not only theoretically, but also in the real world of commercialized intercollegiate athletics.

*A. Reinforces the Application of Title IX*

One reason the budgetary allocation proposal is so beneficial to the NCAA and its member institution is its relation to Title IX compliance. In 1972, Title IX outlawed sex discrimination in universities that received federal financial assistance.<sup>153</sup> It was after this measure that revenue sports programs began using Title IX as an excuse to cut men's non-revenue programs in order to funnel those funds back into revenue sports.<sup>154</sup> For example, Temple University in Philadelphia cut five men's teams in 2014 in order to remain compliant with Title IX.<sup>155</sup> Interestingly enough Temple University also cut two women's teams (softball and rowing) at the same time, claiming that the programs were "too expensive to sustain."<sup>156</sup> That same year the school spent \$10 million to renovate a practice facility for the football team and contemplated the prospect of building a new on campus stadium for football.<sup>157</sup> Temple University is not the only school using Title IX as an excuse to cut sports programs not generating enough revenue.<sup>158</sup>

Contrary to popular opinion, Title IX does not require that schools spend equal amounts of money on male and female teams.<sup>159</sup> Title IX requires that universities ensure that male and female participation in a school's sports

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153. ZIMMERMAN, *supra* note 15.

154. Pat Forde, *U.S. Olympic Committee 'candidly concerned' non-revenue college sports will be cut*, YAHOO (Apr. 1, 2015), <http://sports.yahoo.com/news/u-s--olympic-committee--candidly-concerned--non-revenue-college-sports-will-be-cut-212917571-ncaab.html>.

155. ZIMMERMAN, *supra* note 15.

156. *See id.*

157. *See id.*

158. *See id.* Robert Morris University cut seven men's and women's teams. The University of Maryland cut seven teams. In 2006, Rutgers slashed six teams.

159. *Id.*

team is proportional to the overall numbers of men and women that make up the university's student body.<sup>160</sup>

In reality, athletic departments are hiding behind complying with Title IX in order to subsidize the football and men's basketball programs. Non-revenue teams, especially male teams, are being sacrificed in the name of Title IX compliance in order for athletic departments to use funds on what really matters, the arms race. Athletic departments are sending a message that if revenue sports are not succeeding, they must be protected even at the expense of non-revenue programs.<sup>161</sup> Consequently, non-revenue programs are pitted against one another to receive the extremely small piece of the pie they are being offered.<sup>162</sup> In order to avoid being in violation of Title IX, men's non-revenue programs are being cut instead of universities adding women's programs.<sup>163</sup> This goes against the policy of Title IX.<sup>164</sup>

This Article's proposal advocates for the exact opposite of what is currently going on in the world of Title IX compliance. The budgetary allocation allows funds that used to go to revenue sports to actually subsidize non-revenue sports, as opposed to cutting non-revenue sports programs to subsidize football and men's basketball. If the NCAA is going to rely on the tenet of amateurism as a way to avoid anti-trust violations, it should actually support amateurism<sup>165</sup> through its policies. By adopting the proposed budgetary allocation, intercollegiate programs of all types are being supported by newly allocated funds from the athletic department. Additionally a percentage of the luxury tax revenue will be divided among non-revenue sports. This proposal helps women's programs grow in order to make them proportional to men's programs under Title IX. It also prevents revenue programs from hiding behind the pretext of being Title IX compliant by cutting men's programs when they are actually using those funds to subsidize their own programs.<sup>166</sup>

### *B. Viable Under Antitrust Law*

Although this Article proposes the NCAA set a percentage threshold on how much of an athletic department's funds can go to revenue sports pro-

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160. *See id.*

161. *Law*, 134 F. 3d at 1024.

162. Ronnie Wade Robertson, *Tilting at Windmills: The Relationship Between Men's Non-Revenue Sports and Women's Sport*, 76 MISS. L.J. 297, 299 (2006).

163. *Id.*

164. WOMEN'S SPORTS FOUNDATION, *supra* note 81.

165. MITTEN, *supra* note 16, at 3. ("Today this concept of an 'amateur' athlete and the student athlete still applies for most sports and most students, especially women's sports and men's non-revenue sports.").

166. ZIMMERMAN, *supra* note 15.

grams, it is still viable under the Sherman Act and would pass the rule of reason test.<sup>167</sup> In contrast to *Board of Regents v. NCAA*<sup>168</sup> and *Law v. NCAA*<sup>169</sup>, the budgetary allocation does not call for horizontal price fixing among the NCAA member institutions to limit competition or impose a hard price cap on how much a coach can make at a university. The advantage of specifying a percentage threshold is that revenue sports programs will still be allowed to spend their budget within that specified percentage (50%) in anyway they choose. So if paying a coach, such as Nick Saban, seven million dollars is deemed essential to a football program's success on the field and in recruitment, then the football program is free to allocate its percentage of the revenue programs' 50% accordingly.<sup>170</sup> Likewise, if Clemson University's athletic department wants to have a miniature golf course<sup>171</sup> designed exclusively for its football team, then it is free to do so as long as those funds do not exceed the threshold.<sup>172</sup>

As discussed above, an athletic department can choose how to divide the percentage between football and men's basketball as they see fit. The proposed budgetary allocation model only cares about revenue sports program as a whole not exceeding 50%, it does not mandate what percentage of the 50% should go to football or basketball. Depending on the school, an athletic department may choose to allocate more to one program than the other. By allowing the revenue sports programs to spend their portion of the budget however they see fit, there is no restriction that is anti-competitive that would violate the Sherman Antitrust Act.<sup>173</sup> The revenue sports programs are free to spend their funds as they choose, but they will no longer enjoy virtually unlimited access to an athletic departments' budget.

### *C. Alleviates the Pressure on the Arms Race*

Under the proposed budgetary allocation and luxury tax system, the NCAA will not be telling the revenue sports programs how much to pay coaches or how they can spend their allocated funds. This antitrust compliant method will effectively chill the arms race in college athletics. Without the wealth of money sitting solely in the revenue sports programs' pockets, there is less pressure and tension to use that money to pay players, build lavish training facilities, and increase coaches' pay.

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167. ROBERTSON, *supra* note 161.

168. *Bd. of Regents of Univ. of Okla.*, 468 U.S. at 86.

169. *Law*, 134 F. 3d at 1017.

170. *NCAA Salaries*, USA TODAY, <http://sports.usatoday.com/ncaa/salaries/> (last visited Apr. 23, 2017).

171. ,HOBSON& ICH, *supra* note 38.

172. *Id.*

173. ROBERTSON, *supra* note 161.



This proposal will actually help with competitive balance in intercollegiate athletics. It will help colleges that are not as wealthy as Division I schools to remain competitive. Schools that are not in the Power Five (Big Ten, SEC, ACC, Big 12 and Pac-12) are currently having immense difficulty in keeping up with the arms race.<sup>174</sup> These schools continue to hemorrhage money to try to keep up, but the reality of the arms race is that these teams will never catch the top-tier programs that have significantly more revenue. Having a budgetary allocation that limits the immense spending power of football and men's basketball programs in the Power Five will actually support the NCAA's mission of supporting college athletes playing for "the love of the game." The way the current system is set up with revenue sports receiving eighty percent of an athletic department's budget has created a huge gap between the big schools and small schools, thus causing small schools to scramble to find money. Using a certain percentage of an athletic department's funds to actually subsidize non-revenue sports will give smaller schools' revenue programs an opportunity to thrive.

#### CONCLUSION

This Article's proposal is something that the NCAA could adopt in order to reinvest in its original purpose of promoting education and student athleticism in all college athletic programs. By adopting the budgetary allocation, the NCAA can insulate itself from imminent litigation regarding pay for play, unionization of players, and paying players for their likeness, all of which will irreparably shatter the illusion that amateurism is still valued by revenue sports. This budgetary allocation will allow the NCAA to become antitrust complaint, to be Title IX complaint without cutting men's non-revenue sports, and will allow smaller athletic programs to remain competitive against the Power Five.

As opposed to falling in line with the views that there should be a shift in the definition of amateurism to reflect the economic realities of college athletics, this paper takes a stance on reinvesting in NCAA's amateurism principle and provides a legally sound method for doing so. This will allow universities to effectively hide behind the NCAA's adopted budgetary allocation to help de-escalate the arms race in college athletics. Without the pressures of the arms race and the keeping up with the Joneses mentality, intercollegiate athletics can finally get back to its roots, playing for the love of the game.

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174. Ken Reed, *Big Five Have Changed College Sports Forever*, THE HUFFINGTON POST (Oct. 27, 2014), [http://www.huffingtonpost.com/ken-reed/big-five-have-changed-col\\_b\\_5725772.html](http://www.huffingtonpost.com/ken-reed/big-five-have-changed-col_b_5725772.html).