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## Using the Internal Revenue Code to Limit Coaching Salaries: A Proposal to Bring Amateurism Back into College Football

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# Using the Internal Revenue Code to Limit Coaching Salaries: A Proposal to Bring Amateurism Back into College Football

BLAIRE MIKESELL\*

*Since formal collegiate athletic competitions began in 1852, they have gained popularity and become a mainstay in American culture. This rise in popularity coupled with increased media coverage allowed college athletics, and particularly college football, to grow into a successful business that generates billions of dollars in revenue each year. Colleges and institutions earn this athletic revenue as tax-free income due to their tax-exempt status under the Internal Revenue Code § 501(c)(3) tax-exemption statute. The basic policy underlying this statute is as follows: colleges and universities provide an important benefit to the public by providing education, and in exchange for that provided benefit, the IRS does not tax educationally related income. Currently, income generated by college athletics is educationally related and thus is earned under the tax-exempt status of the university.*

*Because of the NCAA's current amateurism requirement, colleges cannot use any of that revenue to pay student-athletes, and instead, most of the income generated by college athletics is paid to college coaches or invested in athletic facilities. This has created an "arms race" in which schools compete for athletic talent by hiring the best coaches and building the nicest athletic facilities. This "arms race" has caused coaching salaries to rise exponentially. The salaries coaches currently make are out of line with salaries paid to any other academic personnel employed by a university. This Note argues that this disparity should be regulated by the Internal Revenue Code. Congress should pass a new section of the Code that requires universities and colleges to limit head coaching salaries to an amount more in line with the salary amounts paid to other, similar university personnel if those schools want to retain their tax-exempt status.*

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### INTRODUCTION

College athletics provide benefits to various groups of people: student-athletes receive a scholarship and, in some cases, celebrity; coaches, staff members, and administrators earn a living; universities make money and can market their institutions on a national scale; and fans enjoy entertainment and social connection with other alumni and team supporters. The largest college athletic association, the National Collegiate Athletic Association (NCAA), oversees the majority of college athletics and promulgates rules and regulations that govern what schools, coaches, and (most strictly) players can and cannot do.

The NCAA classifies college athletics as amateur sports,<sup>1</sup> and in doing so, forbids players from being paid to play their sport.<sup>2</sup> This amateur classification is appropriate for most Division I sports and all sports played at the Division II and Division III levels because they do not generate revenue and are not pseudo-professional or professional sports operations.<sup>3</sup> Division I college football played by the Power Five

1. NAT'L COLLEGIATE ATHLETIC ASS'N, NCAA DIVISION I MANUAL, § 2.9 (2020) ("Student-athletes shall be amateurs in an intercollegiate sport.") [hereinafter NCAA MANUAL].

2. *Id.* at § 15.1. The Supreme Court's recent decision in *NCAA v. Alston*, 141 S. Ct 2141 (2021) may alter this amateur status, or at least force the NCAA to rephrase its rulebook. In *Alston*, the Court unanimously affirmed a Ninth Circuit decision holding the NCAA rules restricting certain education-related benefits for student-athletes violate antitrust laws. The Supreme Court majority did not address the NCAA's rules limiting student-athletes compensation unrelated to academics, but Justice Kavanaugh implied such limits would be subject to rule of reason scrutiny if they were challenged in an antitrust suit. *Id.* at 2167–68 ("The NCAA's business model would be flatly illegal in almost any other industry in America. . . . Businesses like the NCAA cannot avoid the consequences of price-fixing labor by incorporating price-fixed labor into the definition of the product."). How the NCAA will respond to *Alston* remains to be seen.

3. *Division II Philosophy Statement*, NCAA, <https://www.ncaa.org/governance/division-ii-philosophy-statement?division=d2> [<https://perma.cc/2DUF-TGKW>] (stating two distinguishing principles of Division II athletics are that "Division II members fund their

conferences (“Power Five”)<sup>4</sup> and Division I men’s basketball, however, do not fit within this amateur sports classification. Student-athletes in these sports generate millions of dollars in revenue for their schools and the NCAA. Despite the professional-level revenue generated by college football and basketball, the NCAA insists college football and basketball are not professional enterprises. Amateurism and the rules that maintain college sports’ amateur status are justified because college athletics are rooted in the educational purpose of the school and thus student-athletes’ “participation [in intercollegiate athletics] should be motivated primarily by education . . . .”<sup>5</sup> The NCAA’s rules forbid players from earning money from their schools, speaking or signing with an agent, or receiving compensation for their name, image, or likeness,<sup>6</sup> all in the name and spirit of amateurism and education.

While the NCAA’s amateurism-based rules restrict the money student-athletes may earn or receive, such compensation limits rooted in amateurism and education do not exist for coaching salaries. The NCAA does not use amateurism to regulate the amount of money earned by college football coaches. Instead, the NCAA allows schools to determine the appropriate level of compensation for their respective coach and his staff.<sup>7</sup> In fact, despite the highly formalized and rule-based nature of the NCAA, there is nothing in place to limit or standardize football coaching salaries and ensure they are in line with the amateur, educational nature of intercollegiate

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athletics programs in a manner that aligns with the institution’s budget and educational mission. This method of funding features a ‘partial scholarship’ model that allows Division II schools to recognize student-athletes for their skills through athletics-based grants, but student-athletes can accept merit-based aid and academic scholarships as well; [and] Division II believes in a balanced approach that integrates athletics into the college experience and allows students to focus on their academic pursuits and participate in other campus and community activities. This ‘Life in the Balance’ emphasis facilitates learning. . . .”); NCAA Research, *15-Year Trends in Division III Athletics Financing*, NCAA (2020), [https://ncaaorg.s3.amazonaws.com/research/Finances/2020RES\\_D3-RevExp\\_Report.pdf](https://ncaaorg.s3.amazonaws.com/research/Finances/2020RES_D3-RevExp_Report.pdf) [<https://perma.cc/H2QN-GLRQ>] (offering data showing net losses between \$420,000 and \$1.16 million for Division III schools in 2019).

4. The Power Five conferences, also called the Autonomy Five Conferences, are the Big Ten Conference, The PAC-12 Conference, the Southeastern Conference (SEC), the Big 12, and the Atlantic Coast Conference (ACC). They generally perform at a higher level athletically than other, smaller conferences and have more financial resources to spend in their athletic departments. For a comparison of the revenues generated by the Autonomy Five compared to Nonautonomy Five Schools, see *Summary: Revenues and Expenses 2019*, NAT’L COLLEGIATE ATHLETIC ASS’N (Sept. 2020), <http://www.ncaa.org/about/resources/research/finances-intercollegiate-athletics-database> [<https://perma.cc/EUL5-NFYH>].

5. NCAA MANUAL, *supra* note 1.

6. At the time of this Note, California passed legislation allowing student-athletes to be paid for their Name, Image, and Likeness (NIL) scheduled to go into effect in January 2023. See S.B. 206, 2019 Leg., Reg. Sess. (Cal. 2019). The NCAA has discussed similar proposals that would change its rules and allow student-athletes who play at the Division I level to earn money from their NIL, but no changes have been officially implemented at the time this Note was written. See *DI Council Introduces Name, Image and Likeness Concepts into Legislative Cycle*, NCAA (Oct. 14, 2020), <http://www.ncaa.org/about/resources/media-center/news/di-council-introduces-name-image-and-likeness-concepts-legislative-cycle> [<https://perma.cc/6GT2-Y7ZC>].

7. NCAA MANUAL, *supra* note 1, § 11.3.1.

athletics.<sup>8</sup> That lack of oversight has allowed salaries to increase exponentially: in 2020, for example, every head college football coach in the Power Five will earn more than \$2.2 million thanks to the revenues generated by their student-athletes' talents.<sup>9</sup> These salaries are not in line with other salaries paid to university staff, faculty, and other employees, and do not seem to support the NCAA's basic purpose:

The competitive athletics programs of member institutions are designed to be a vital part of the educational system. A basic purpose of this Association 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>10</sup>

Because athletic departments are integrated into the university, the revenue earned by a school's athletic department enjoys the same tax-exempt status that other university revenue enjoys.<sup>11</sup> Colleges and universities qualify for tax-exempt status because they provide benefits to the public by offering educational services to students.<sup>12</sup> It is good policy to allow schools to operate as tax-exempt entities because it leaves them with more revenue to reinvest into the public benefits they provide.<sup>13</sup> Athletic department spending does not align with this policy justifying tax exemption. This Note proposes that, when a university uses the tax-exempt revenue earned through intercollegiate athletics to fund ever-increasing football coaches' salaries, while tuition costs continue to increase and academic budgets are cut,<sup>14</sup> the

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8. College basketball at the Division I level presents a similar problem of egregiously high coaching salaries when compared to the zero-dollar salary of the players earning the money. However, the finances of college basketball are structured differently than college football because most of the money a school receives through its basketball team is generated by the March Madness tournament and paid from the NCAA to the school. In contrast, money earned through college football is generally received directly by individual schools or conferences and not through the NCAA as a conduit. Although both sports present similar problems, this Note will focus solely on college football coaching salaries.

9. Steve Berkowitz, Matt Wynn, Sean Dougherty, Emily Johnson, Stephanie Klein & Robert Lattinville, *NCAA Salaries*, USA TODAY (Nov. 17, 2020), <https://sports.usatoday.com/ncaa/salaries/> [https://perma.cc/VSA4-6RA5].

10. NCAA MANUAL, *supra* note 1, § 1.3.1.

11. John D. Colombo, *The NCAA, Tax Exemption and College Athletics*, 2010 U. ILL. L. REV. 109, 117.

12. *Id.*

13. *Id.*; see also *Tax Exemption for Universities and Colleges*, ASS'N AM. UNIVS. (Mar. 2014), <https://www.aau.edu/sites/default/files/AAU%20Files/Key%20Issues/Taxation%20%26%20Finance/Tax-Exempt-Status-of-Universities-FINAL.pdf> [https://perma.cc/R3XM-YSVM].

14. Michael Mitchell, Michael Leachman & Matt Saenz, *State Higher Education Funding Cuts Have Pushed Costs to Students, Worsened Inequality*, CTR. ON BUDGET & POL'Y PRIORITIES (Oct. 24, 2019), <https://www.cbpp.org/research/state-budget-and-tax/state-higher-education-funding-cuts-have-pushed-costs-to-students> [https://perma.cc/JR6N-P9YQ] ("For many colleges, tuition increases compensated for only part of the revenue loss resulting from state funding cuts . . . . During the toughest years after the recession, public colleges and universities cut faculty positions, eliminated course offerings, closed campuses, and reduced

school's educational purpose and academic priorities that allow it to maintain tax-exempt status should be scrutinized.

Schools pay coaches from the revenues earned by the athletic department and money taken from students' tuition.<sup>15</sup> A university's tax-exempt status applies to income generated from any substantially related activity conducted within the university,<sup>16</sup> so all the athletic department's revenues come in untaxed under the assumption that the school will use the money saved by tax exemption to benefit its students and the public. However, athletic departments' tax-exempt revenue is funneled into football coaches' salaries, which does not fit with the general policies underlying tax exemption.

Coaches and athletic directors are not going to voluntarily accept a lower salary,<sup>17</sup> university presidents cannot afford to stand up to the athletic department,<sup>18</sup> and the NCAA is unlikely to enforce any regulation of coaches' salaries because of antitrust concerns<sup>19</sup> and its general reluctance to police its institutions.<sup>20</sup> Therefore, Congress

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student services, among other cuts.”).

15. Merritt Enright, Andrew W. Lehren & Jaime Longoria, *Hidden Figures: College Students May Be Paying Thousands in Athletic Fees and Not Know It*, NBC NEWS (Mar. 8, 2020, 7:01 AM), <https://www.nbcnews.com/news/education/hidden-figures-college-students-may-be-paying-thousands-athletic-fees-n1145171> [<https://perma.cc/4T9X-LZKU>] (“The big issue is that students end up footing much of the bill for athletics . . . [a]nd in many cases students have little to no control over the fees they end up paying.”). The controversy over student fees subsidizing athletics is becoming more relevant as college tuition costs rise and many students take out loans to pay for their college education. *See, e.g.*, 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://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/6DF4-KER7>] (“[S]tudents are being forced to pay for something that they may or may not take advantage of, and then they have to bundle this into student loans they’ll be re-paying for 10 or 20 years.”).

16. Colombo, *supra* note 11, at 116.

17. Matthew Mitten & Stephen F. Ross, *A Regulatory Solution to Better Promote the Educational Values and Economic Sustainability of Intercollegiate Athletics*, 92 OR. L. REV. 837, 857–58 (2014) (“[T]here is just too much money involved in the multibillion-dollar industry that is college athletics to expect the participants to police themselves.”).

18. JEFF BENEDICT & ARMEN KETEVIAN, *THE SYSTEM: THE GLORY AND SCANDAL OF BIG-TIME COLLEGE FOOTBALL* 248 (2013) (“‘We all think this is absolutely absurd,’ Floyd [the Washington State University President] explained. ‘We sign the checks because we have no other alternative. There is not a university president who said, ‘Oh yes, that’s the right thing to do.’”); DEREK BOK, *UNIVERSITIES IN THE MARKETPLACE* 128–29 (2009).

19. *See* *Law v. Nat’l Collegiate Athletic Ass’n*, 134 F.3d 1010, 1012 (10th Cir. 1998) (holding that restrictions imposed by the NCAA limiting assistant college basketball coaches’ salaries unfairly restrained trade and violated the Sherman Act).

20. *See, e.g.*, C. Thomas McMillen, *Accountability on the Quad*, N.Y. TIMES (Aug. 31, 2011), <https://www.nytimes.com/2011/09/01/opinion/how-to-referee-college-sports.html> [<https://perma.cc/A27T-H7GQ>] (“The assumption that the N.C.A.A. can develop safeguards and mete out punishment for those who violate its rules is wishful thinking. The N.C.A.A. is simply not up to the task.”); Billy Witz, *Who’s on Trial in the College Basketball Scandal? Not the Big Names*, N.Y. TIMES (Apr. 23, 2019), <https://www.nytimes.com/2019/04/23/sports/college-basketball-trial-arizona-lsu.html> [<https://perma.cc/WW5J-NSHZ>]

should step in and regulate college football coaches' salaries through the Internal Revenue Code (I.R.C.). Capping college football coaching salaries through the I.R.C. would rein in the unregulated salary market and encourage schools to use excess revenues to benefit student-athletes and general students instead of coaches. It would also help ensure coaches are motivated by the same amateur ideals that the NCAA expects student-athletes to be motivated by, which are "education and . . . the physical, mental, and social benefits to be derived [from college athletics]."<sup>21</sup>

College athletics is fraught with problems that are beyond the scope of this Note.<sup>22</sup> Whether players should be paid is frequently discussed in the media.<sup>23</sup> Problems related to social justice issues are prevalent, especially in college football and college basketball, in which many of the coaches earning high salaries do so by coaching

(reviewing the lack of NCAA enforcement or sanctions against coaches and schools after the NCAA formed a college basketball commission in 2017 to address cheating and illegal bribes). The NCAA's enforcement committee did place Cal Poly San Luis Obispo on two years' probation for "giving athletes too much money—in one case, \$5 over the limit—for books." *Id.*

21. NCAA MANUAL, *supra* note 1, § 2.9.

22. See, e.g., Paul N. Friga, *Will College Athletics Survive? Should They?*, THE CHRON. OF HIGHER EDUC. (June 10, 2020), [https://www.chronicle.com/article/will-college-athletics-survive-should-they?bc\\_nonce=6z9w1zj0tl589avyl8rgo5&cid=reg\\_wall\\_signup](https://www.chronicle.com/article/will-college-athletics-survive-should-they?bc_nonce=6z9w1zj0tl589avyl8rgo5&cid=reg_wall_signup) [<https://perma.cc/66GM-4UA6>] ("[T]he rise of collegiate athletics has been marred by frequent controversy. In fact, some propose that universities have lost their way and that the current model has become too big and corrupt, essentially generating billions of dollars at the expense of the athlete, who only receives a college scholarship and small living allowance."); Michael McCann, *Potential Fallout From the Latest FBI-Investigated College Sports Scandal*, SPORTS ILLUSTRATED (Mar. 12, 2019), <https://www.si.com/college/2019/03/13/admissions-scandal-fbi-investigation-ncaa-violations-felicity-huffman-lori-loughlin-rick-singer> [<https://perma.cc/B4RH-M7UB>] (analyzing the connection between the "Varsity Blues" scandal and college athletics generally); Nick Anderson & Susan Svrluga, *Bribery Scandal Points to the Athletic Factor: A Major Force in College Admissions*, WASH. POST (June 12, 2019), [https://www.washingtonpost.com/local/education/bribery-scandal-points-to-the-athletic-factor-a-major-force-in-college-admissions/2019/06/12/b2fc39dc-7e3a-11e9-8bb7-0fc796cf2ec0\\_story.html](https://www.washingtonpost.com/local/education/bribery-scandal-points-to-the-athletic-factor-a-major-force-in-college-admissions/2019/06/12/b2fc39dc-7e3a-11e9-8bb7-0fc796cf2ec0_story.html) [<https://perma.cc/47V3-6EKP>] (discussing status as a student-athlete as an admission's criterion at many schools).

23. See, e.g., Melissa Quinn, *Supreme Court Takes Up NCAA Antitrust Dispute Over Compensation for College Athletes*, CBS NEWS (Dec. 16, 2020, 11:09 AM), <https://www.cbsnews.com/news/supreme-court-ncaa-case-athlete-compensation/> [<https://perma.cc/975R-3TDE>] (discussing the Supreme Court's decision to hear a case from the Ninth Circuit regarding the NCAA's current rule limiting student-athlete compensation to a full-tuition scholarship); Spencer Bokat-Lindell, *Should College Athletes Be Allowed to Get Paid?*, N.Y. TIMES (Oct. 1, 2019), <https://www.nytimes.com/2019/10/01/opinion/california-student-athletes-paid.html> [<https://perma.cc/UT9Q-H3C3>] ("While the N.C.A.A.'s desire to keep so-called professionalism out of college sports may have made sense before they became such a big business . . . it's clearly an illusion that no longer holds."); Scott A. Burns, *NCAA Must Evolve, or Go Extinct*, AM. INST. FOR ECON. RSCH. (Oct. 7, 2019), <https://www.aier.org/article/ncaa-must-evolve-or-go-extinct/> [<https://perma.cc/VVM5-5DBW>] ("[T]he NCAA prohibition on paying athletes doesn't actually mean no athlete gets paid. It simply shifts this activity to the black market where it cannot be monitored by the NCAA, the IRS, or anyone else.").

teams of predominantly Black players.<sup>24</sup> Scandals frequently occur related to players' academic performance and behavior off the field.<sup>25</sup> This Note is not meant to address the every malady present in the collegiate athletic system. It focuses specifically on college football salaries because of the rapid, unmitigated growth occurring in the current educational, tax-exempt environment. It should be said that the coaches earning high salaries are not necessarily at fault for the money they make. They are earning what they are worth in the current market. The bigger problem is that the current market is artificially inflating salaries to an out-of-control level that is unsustainable, anticompetitive, and out of line with current tax-exempt policy.

This Note is broken into three main parts. Part I briefly discusses college football's history and how it transformed into the multi-million-dollar industry it is today. Part II provides an overview of colleges and universities' tax-exempt status and the conflict currently present between tax-exemption and college football coaches' salaries. It also discusses why that conflict is a problem that should be solved through the I.R.C. Finally, Part III proposes that Congress impose a salary cap and tax penalty system on college football coaches' salaries as a condition of a college or university keeping its tax-exempt status.

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24. See, e.g., Bomani Jones, *College Football Players are Unpaid Stars on the Field and Have No Power Off It*, VANITY FAIR (Aug. 27, 2020), <https://www.vanityfair.com/culture/2020/08/college-football-unpaid-stars-with-no-power> [<https://perma.cc/34GD-JDFZ>] (discussing Black student-athletes' lack of power to enact change when their white coaches use racist language or support racist ideologies); see generally BILLY HAWKINS, *THE NEW PLANTATION* (2010) (providing a broad overview of Black student-athletes' experiences and exploitation at Predominantly White Institutions using an internal colonial model).

25. See, e.g., Taylor Branch, *The Shame of College Sports*, THE ATLANTIC (Oct. 2011), <https://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/> [<https://perma.cc/CJ4E-XYHD>] ("The term *student-athlete* was deliberately ambiguous. College players were not students at play (which might understate their athletic obligations), nor were they just athletes in college (which might imply they were professionals). That they were high-performance athletes meant they could be forgiven for not meeting the academic standards of their peers; that they were students meant they did not have to be compensated, ever, for anything more than the cost of their studies.") (emphasis added); Sean Gregory, *North Carolina Academic Fraud Decision Exposes College Sports Hypocrisy*, TIME (Oct. 13, 2017, 5:52 PM), <https://time.com/4981782/north-carolina-academic-fraud-decision-exposes-college-sports-hypocrisy/> [<https://perma.cc/D424-LSQV>] ("Only in the curious world of college sports would the gears of capitalism, in the form of payments received by college athletes because another party values their services, help spark a criminal investigation, whereas a clear violation of the fundamental premise of college athletics – students will receive an education in lieu of payment – gets a pass."). The abysmal academic performance of student-athletes in the late 1980s and early 1990s drew sharp criticism and emboldened third parties like the Knight Commission on Intercollegiate Athletics to recommend various changes to the NCAA. See CREED C. BLACK, *THE KNIGHT COMM'N ON INTERCOLLEGIATE ATHLETICS, REPORTS OF THE KNIGHT COMMISSION ON INTERCOLLEGIATE ATHLETICS 10–11* (1999). Some of these suggestions were adopted by the NCAA and resulted in meaningful changes, including rewarding academically successful institutions with monetary payments and requiring teams to satisfy a minimum graduation rate to participate in an NCAA championship. *Complete Overview of Impact*, THE KNIGHT COMM'N ON INTERCOLLEGIATE ATHLETICS, <https://www.knightcommission.org/complete-overview-impact/> [<https://perma.cc/V8YE-BZLN>].

## I. AN OVERVIEW OF NCAA DIVISION I COLLEGE FOOTBALL

*A. Early History of the NCAA and College Football*

The first organized intercollegiate sporting event, which occurred in 1852, was a regatta between the rowing clubs at Harvard and Yale.<sup>26</sup> Neither university supported the event, nor was there an external entity providing or enforcing the rules. A local railroad company commercially sponsored the event, but the event was otherwise run by the students participating in the event.<sup>27</sup> As these student-run competitions continued to occur and expanded to include basketball and football, their popularity grew. University administrators were worried about college football and “its growing influence in the academic setting of college campuses.”<sup>28</sup>

Eventually, due to an alarming number of college football-related severe injuries and deaths, the federal government (led by President Theodore Roosevelt) intervened to regulate college sports.<sup>29</sup> President Roosevelt formed a committee of university administrators to develop an oversight organization for college athletics, and that committee generated the Intercollegiate Athletic Association of the United States in 1905, which, in 1910, became the National Collegiate Athletic Association.<sup>30</sup> The NCAA was formed to restore ethical conduct and safety within college sports, particularly within college football, and established that college athletes should be amateur participants. The 1906 NCAA Constitution stated: “An amateur sportsman is one who engages in sports for the physical, mental, or social benefits he derives therefrom, and to whom the sport is an avocation. Any college athlete who takes pay for participation in athletics does not meet this definition of amateurism.”<sup>31</sup>

After the NCAA was founded, college football continued to gain power within universities<sup>32</sup> and popularity nationwide.<sup>33</sup> The press and media took advantage of college football’s national fervor and elevated coaches like Knute Rockne to

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26. See Rodney K. Smith, *The Nat’l Collegiate Athletic Ass’n’s Death Penalty: How Educators Punish Themselves and Others*, 62 IND. L.J. 985, 988–89 (1987); JORDAN R. BASS, CLAIRE C. SCHAEPERKOETTER & KYLE S. BUNDS, *THE FRONT PORCH: EXAMINING THE INCREASING INTERCONNECTION OF UNIVERSITY AND ATHLETIC DEPARTMENT FUNDING* 3 (2015).

27. Rodney K. Smith, *A Brief History of the Nat’l Collegiate Athletic Ass’n’s Role in Regulating Intercollegiate Athletics*, 11 MARQ. SPORTS L. REV. 9, 11 n.5 (2000).

28. BASS ET AL., *supra* note 26.

29. *Id.* at 4.

30. *Id.*

31. *Id.* at 5.

32. *Id.* For example, the head coach at the University of Michigan in 1906 went around the University’s president and convinced the board of regents to remove Michigan from the Big Ten Conference because the Big Ten’s rules would have prohibited him, as a businessman, from coaching. Despite the university president wanting to remain in the Big Ten, the coach and board overruled him, and Michigan left the Big Ten for eleven years. *Id.* at 5–6.

33. JAMES J. DUDERSTADT, *INTERCOLLEGIATE ATHLETICS AND THE AMERICAN UNIVERSITY: A UNIVERSITY PRESIDENT’S PERSPECTIVE* 72 (2000).

celebrity status.<sup>34</sup> Commercial radio in the 1920s started broadcasting games beyond their geographic areas, with the first national radio broadcast occurring in 1927 with the Rose Bowl.<sup>35</sup>

The Carnegie Foundation for the Advancement of Teaching published a report in 1929 following a detailed study of college sports,<sup>36</sup> finding that, in the twenty years following the formation of the NCAA, college athletics' commercialization shaped university policy and was driven primarily by college football.<sup>37</sup> As reported in the Carnegie Report, the early commercialization of college football confirmed university administrators' early fears that football would impact the academic aspects of their schools.<sup>38</sup> After the Carnegie Report was published, the NCAA tried to establish some order by enacting new rules affecting recruiting and educational integrity, but little changed.<sup>39</sup> Following World War II and the rise of in-home television sets, college football became even more popular.

The NCAA took control of football game televising rights to limit the number of games broadcast weekly because it worried that televising games would decrease the number of fans attending games in person.<sup>40</sup> Starting in 1951, the NCAA devised a plan to televise one football game each week, blackout coverage entirely during three of the ten college football weekends, and limit teams to a maximum of two televised games per season.<sup>41</sup> NCAA member institutions eventually filed suit in 1981 against the NCAA alleging antitrust violations, and the Court found that the NCAA's control over schools' television rights violated the Sherman Act.<sup>42</sup> The Court's ruling opened the door for conferences and individual colleges and universities to negotiate their own football-related media contracts and reap those contracts' financial benefits without the NCAA serving as an intermediary. Since *Board of Regents*, four of the five Power Five Conferences have created their own dedicated television networks,<sup>43</sup> and schools have individually contracted with major media outlets like ABC, CBS,

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34. Bob Carter, *Knut Rockne was Notre Dame's Master Motivator*, ESPN CLASSIC, [https://www.espn.com/classic/biography/s/Rockne\\_Knut.html](https://www.espn.com/classic/biography/s/Rockne_Knut.html) [https://perma.cc/RWL2-LZA4].

35. *Id.*

36. HOWARD J. SAVAGE, HAROLD W. BENTLEY, JOHN T. MCGOVERN & DEAN F. SMILEY, *AMERICAN COLLEGE ATHLETICS, THE CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING* (1929).

37. *Id.* at 83.

38. *See* BASS ET AL., *supra* note 26, at 26.

39. Smith, *supra* note 26 at 991–93 (discussing the enactment of the Sanity Code, which tried to limit exploitation and commercialization in college athletics by enforcing academic requirements); *see also* BASS ET AL., *supra* note 26, at 6–7.

40. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 90 (1984).

41. *Id.*

42. *Id.* at 120.

43. The Big 12 had its own dedicated network until 2014 and now has a quasi-network through ESPN. The Big Ten, Pac-12, SEC, and ACC all have their own dedicated networks. *See* Dennis Dodd, *New Rights Deal Gets Big 12 As Close as Possible to Its Own Network with Football Title Games on ESPN*, CBS SPORTS (Apr. 10, 2019, 1:45 PM), <https://www.cbssports.com/college-football/news/new-rights-deal-gets-big-12-as-close-as-possible-to-its-own-network-with-football-title-games-on-espn/> [https://perma.cc/VX3M-VKAJ].

NBC, and Fox to air their teams in primetime,<sup>44</sup> both of which have generated massive amounts of money for institutions in the Power Five.

### B. College Football Today

Largely due to the influx of money available to institutions through their television contracts for the rights to broadcast their football teams after *Board of Regents*, college football today is a billion-dollar industry.<sup>45</sup> Increased media coverage has allowed the sport's popularity to grow, improved accessibility among fans, and caused the revenue generated by college football to grow astronomically.<sup>46</sup> In 2018, most revenue (29% of total revenue) for Division I, Football Bowl Subdivision (FBS) schools<sup>47</sup> came from NCAA and conference distributions, media rights, and post-season football bowl games, totaling just over \$2.5 billion.<sup>48</sup> The next largest revenue sources were donor contributions totaling \$1.7 billion (20%) and ticket sales totaling \$1.4 billion (17%).<sup>49</sup> Overall, the 109 FBS schools included in the Knight Commission's report collectively earned more than \$8.7 billion in revenue in 2018.<sup>50</sup> Of that revenue, \$1.8 billion (22%) was spent on facilities and equipment; \$1.5 billion (18%) was spent on coaches' compensation; \$1.5 billion (18%) was spent on support and administrator compensation with severance; and \$1.1 billion (13%) was spent on athletic student aid.<sup>51</sup> Overall, FBS schools spent more than \$8.5 billion in 2018.<sup>52</sup>

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44. For example, the University of Texas created the Longhorn Network to televise all twenty of Texas's Division I sports teams. See *Longhorn Network Information*, TEX. SPORTS, [https://texassports.com/sports/2013/7/28/GEN\\_0728134519.aspx](https://texassports.com/sports/2013/7/28/GEN_0728134519.aspx) [<https://perma.cc/SD2A-CABM>].

45. Mark Schlabach & Paula Lavigne, *Financial Toll of Coronavirus Could Cost College Football at Least \$4 Billion*, SPORTS ILLUSTRATED (May 21, 2020), [https://www.espn.com/college-sports/story/\\_/id/29198526/college-football-return-key-athletic-departments-deal-financial-wreckage-due-coronavirus-pandemic](https://www.espn.com/college-sports/story/_/id/29198526/college-football-return-key-athletic-departments-deal-financial-wreckage-due-coronavirus-pandemic) [<https://perma.cc/S8ZY-F39R>] (estimating that sixty-five Power Five schools would collectively experience a \$4 billion loss if the 2020 football season were canceled due to COVID-19).

46. *2018-19 Report: Amazing College Football Popularity Highlighted by Impressive Ratings and Attendance Data*, NAT'L FOOTBALL FOUND. (June 11, 2019, 10:00 AM), [https://footballfoundation.org/news/2019/6/11/2018-19\\_Attendance\\_Release.aspx](https://footballfoundation.org/news/2019/6/11/2018-19_Attendance_Release.aspx) [<https://perma.cc/TXG9-J735>].

47. This includes the Power Five and other mid-major conferences that participate in post-season Bowl Games and are eligible to compete in the National Championship game.

48. *College Athletics Financial Information (CAFI) Database*, KNIGHT COMM'N ON INTERCOLLEGIATE ATHLETICS, [http://cafidatabase.knightcommission.org/fbs#!quicktabs-tab-division\\_conferences\\_and\\_institu-0](http://cafidatabase.knightcommission.org/fbs#!quicktabs-tab-division_conferences_and_institu-0) [<https://perma.cc/2JZV-BHR8>].

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

This increased revenue has contributed to the “arms race” that currently exists in college athletics and is particularly present in college football.<sup>53</sup> The basic idea behind the “arms race” is that a school needs to spend money on better facilities and better, more expensive coaches to gain and maintain a competitive advantage, which then causes that school’s competitors to spend money to keep up and remain competitive. Evidence shows “that athletic departments engage in dynamic nonprice competition: athletic department expenditure varies systematically with expenditure by other conference teams.”<sup>54</sup> Even if a school does not have excess revenues, it continues to increase expenditures to keep up with other teams, forcing the university to subsidize the athletic department’s expenses with general university funds.<sup>55</sup> Because the NCAA restrains the amount of financial aid and benefits schools can provide to their student-athletes,<sup>56</sup> schools focus their spending on facilities and coaching salaries to remain competitive in the “arms race.”

For example, after winning the National Championship in 2018, Nick Saban renegotiated his head football coaching contract with the University of Alabama to include a base salary of \$7.9 million per year with salary increases of \$400,000 thousand each year and contract completion payments of \$800,000 through 2021, for a total of at least \$74 million paid to Saban by the University over the eight-year contract term.<sup>57</sup> Then in 2019, after beating Alabama in the National Championship, Clemson University and head football coach Dabo Swinney agreed to a ten-year, \$92 million contract extension, making Swinney the highest-paid coach in Division I football.<sup>58</sup> These contracts illustrate the current upward trend in coaching salaries and provide an example of the “arms race” present in college football. Schools cannot afford to lose winning coaches to other schools, so they entice coaches to stay by paying more than their competitors offer.

College football contracts do not just include general salary payments. Along with his base salary of \$245,000 per year, Nick Saban’s 2013 contract with the University of Alabama includes the following: a \$75,000 bonus for playing in, or a \$125,000 bonus for winning, the SEC Championship game; a bonus of anywhere from \$65,000 to \$400,000 for playing in or winning various postseason bowl games or the National

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53. Christian J. Santesteban & Keith B. Leffler, *Assessing the Efficiency Justifications for the NCAA Player Compensation Restrictions*, 62 ANTITRUST BULL. 91, 93 (2017).

54. Daniel A. Rascher & Andrew D. Schwarz, *The Incremental Benefits and Costs of Football, Bowling, and Rifle at the University of Alabama at Birmingham*, OSKR 8 (2015), [https://a4f2ab21-6c12-408b-b66e-f3e2f4614c34.usrfiles.com/ugd/a4f2ab\\_1983a7a4aceb437e9e375e33ae5069c2.pdf](https://a4f2ab21-6c12-408b-b66e-f3e2f4614c34.usrfiles.com/ugd/a4f2ab_1983a7a4aceb437e9e375e33ae5069c2.pdf) [<https://perma.cc/PWA4-GEL6>].

55. Mitten & Ross, *supra* note 17, at 849.

56. NCAA MANUAL, *supra* note 1, § 15.1. Because of this restraint, universities spend roughly the same amount of money on student-athletic aid regardless of conference or revenue.

57. Kristi Dosh, *Nick Saban Gets Another Pay Raise from Alabama and the Numbers Show He Deserves It*, FORBES (July 28, 2018, 7:08 PM), <https://www.forbes.com/sites/kristidosh/2018/07/28/nick-saban-gets-another-pay-raise-from-alabama-and-the-numbers-show-he-deserves-it/?sh=4414374b5834> [<https://perma.cc/KN83-K9YJ>].

58. Jeffrey Collins, *Dabo Swinney Signs Largest College Football Contract Ever*, AP NEWS (Apr. 26, 2019), <https://apnews.com/article/5115b75eb9fe4a5bb620910097f93725> [<https://perma.cc/3DPU-9ECA>].

Championship game; a \$25,000 bonus if Saban is named SEC Coach of the Year; and a \$50,000 bonus if he is named the National Coach of the Year.<sup>59</sup> He also is entitled to a \$50,000 bonus if his players' graduation rate is within the top half of SEC teams, or a \$100,000 bonus if his team's graduation rate is in the top quarter of SEC teams.<sup>60</sup> Saban is obligated to participate in weekly university-sponsored radio and television programs during the season, and he is obligated to be available for up to fifteen university-engagement events like fundraisers or alumni events. Alabama compensates Saban's participation in those obligations through a personal service fee, which was \$5,121,666 in 2013 and increased by \$100,000 each year of his contract.<sup>61</sup>

His contract also gives him a complimentary box at home football games that seats twenty-two people and an additional twelve complimentary tickets to each football game.<sup>62</sup> Saban also receives a membership to a country club in Tuscaloosa, paid for by the University of Alabama,<sup>63</sup> two full-size, insured automobiles for personal use and payment of all the vehicles' operating expenses,<sup>64</sup> and use of a private plane furnished by the university for up to twenty-five hours for personal, non-business purposes.<sup>65</sup> If the university chooses to terminate Saban without cause, he is entitled to four years payment of his salary and personal service fees.<sup>66</sup> Along with his university compensation, he is explicitly allowed to enter into contracts and earn money for external endorsements and speaking engagements based on his status as Alabama's head coach.<sup>67</sup>

Saban's contract with Alabama is not unique among football coaches—in twenty-eight states, a head college football coach is the highest-paid state employee.<sup>68</sup> Schools are offering coaches higher salaries, more bonus opportunities, and more incentives to help ensure they can secure the best coach possible, create a winning football team, and reap the economic benefits that flow from that success. These salaries are paid within the tax-exempt framework of the university, which gives an athletic department access to more revenue than it would have if it were taxed as a professional sports organization. These high salaries are also paid within the NCAA's "amateur" framework, which does not allow schools to pay the players who draw the media attention that funds these million-dollar contracts, and instead permits schools to funnel excess revenues into facility renovations and coaching

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59. Employment Agreement Between University of Alabama and Nick Saban, art. IV, §§ 4.01, 4.03(b)(1) (June 13, 2007) (on file with author).

60. *Id.* at art. IV, § 4.03(b)(2).

61. *Id.* at art. IV, § 4.04(d)(5)(ii).

62. *Id.* at art. IV, § 4.05(b).

63. *Id.* at art. IV, § 4.05(e).

64. *Id.* at art. IV, § 4.03(a).

65. *Id.* at art. IV, § 4.05(g).

66. *Id.* at art. V, § 5.01(d).

67. *Id.* at art. VI, § 4.04(a)–(b).

68. Charlotte Gibson, *Who's Highest-Paid in Your State?*, ESPN (2019), [https://www.espn.com/espn/feature/story/\\_id/28261213/dabo-swinney-ed-orgeron-highest-paid-state-employees](https://www.espn.com/espn/feature/story/_id/28261213/dabo-swinney-ed-orgeron-highest-paid-state-employees) [<https://perma.cc/33DX-T99W>]. In addition to the twenty-eight states with football coaches as their highest paid employee, twelve states' highest paid employee is a college basketball coach. *Id.*

salaries to keep up with their competitors in the college athletics “arms race.”<sup>69</sup> The policies underlying the tax-exempt and amateur statuses of college football do not support the current level of football coach compensation, and, if athletic departments are going to remain tax-exempt and amateur, something must change.

## II. TAX EXEMPTION OF COLLEGE AND UNIVERSITY ATHLETIC DEPARTMENTS

### A. University Tax Exemption Generally

Tax-exemption allows organizations with purposes that are “fundamental to fostering the productive and civic capacity of [American] citizens” to earn income that is not subject to federal income tax as long as the income is “substantially related to the purpose of an institution’s tax exemption.”<sup>70</sup> Colleges and universities are tax-exempt because they operate for educational purposes, which is listed in I.R.C. § 501(c)(3) and is thus a prima facie tax-exempt purpose.<sup>71</sup> As long as the income earned by a college or university is substantially related to its educational purpose, it is not subject to federal income tax.

Athletic department revenue is tax-exempt under the institution’s tax-exempt status because the department is a fully integrated part of the university.<sup>72</sup> This means athletic departments are not subject to federal income tax on the investment income, charitable contributions, or revenue they earn.<sup>73</sup> Private colleges and universities, and some public colleges and universities, have obtained tax-exempt status under I.R.C. § 501(c)(3).<sup>74</sup> Most public universities are also exempt from federal taxation under the doctrine of intergovernmental tax immunity or under I.R.C. § 115, which exempts income from any state or any state political subdivision derived from the exercise of an essential governmental function.<sup>75</sup>

The majority of NCAA Division I member institutions are formally registered and recognized by the IRS as tax-exempt under I.R.C. § 501(c)(3) to ensure their donors know their contributions to the university are tax-exempt.<sup>76</sup> This tax-exempt status

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69. See *supra* notes 5–16 and accompanying text.

70. *Tax-Exempt Status of Universities and Colleges*, ASS’N OF AM. UNIVS. (Feb. 2019), <https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Taxation-Finance/Tax-Exempt-Status-Universities-post-TCJA.pdf> [<https://perma.cc/TF38-SR2C>].

71. I.R.C. § 501(c)(3) (2020).

72. See Colombo, *supra* note 11, at 117; see also Erik M. Jensen, *Taxation, the Student Athlete, and the Professionalization of College Athletics*, 1 UTAH L. REV. 35, 51 (1987) (“[A]thletic activities [of schools] are substantially related to [their] educational [functions].”).

73. *Tax-Exempt Status of Universities and Colleges*, *supra* note 70.

74. *Id.*

75. There is some dispute as to whether public college and universities are tax-exempt under both the doctrine of intergovernmental immunity and I.R.C. § 115, or just the doctrine of intergovernmental immunity. For a discussion of this dispute, see Ellen P. Aprill, *Congress Fumbles the Ball on Section 4960* (Guest Post by Ellen Aprill), MEDIUM (Dec. 26, 2017), <https://medium.com/whatever-source-derived/congress-fumbles-the-ball-on-section-4960-guest-post-by-ellen-aprill-18a2dbf98c5f> [<https://perma.cc/A5S6-SL8S>]. See also Richard Schmalbeck & Lawrence Zelenak, *The NCAA and the IRS: Life at the Intersection of College Sports and the Federal Income Tax*, 92 S. CAL. L. REV. 1087, 1145–47 (2019).

76. Schmalbeck & Zelenak, *supra* note 75, at 1146.

requires an organization to “be both organized and operated exclusively for one or more of the purposes” listed in § 501(c)(3).<sup>77</sup> In other words, tax-exempt entities must pass both an organizational test and an operational test to qualify for and keep their preferable tax status.

For an entity to pass the organizational test, it must be organized as a charitable organization, limit its activities to charitable ones, and include a provision that its assets will go to other charities or the government if it goes out of business.<sup>78</sup> Colleges and universities satisfy this requirement because they provide citizens with education, a presumptive category of charity under I.R.C. § 501(c)(3).<sup>79</sup> Since entities as a whole, rather than certain activities performed by an entity, are tax-exempt,<sup>80</sup> athletic departments are included in their respective universities’ tax-exempt status as contributing to the school’s educational purpose.<sup>81</sup> Congress confirmed that athletic departments should be included when it made fostering “national or international amateur sports competitions” a *prima facie* charitable purpose under I.R.C. § 501(c)(3).<sup>82</sup>

The operational test requires an organization to engage primarily in charitable activities or activities that qualify it for tax exemption.<sup>83</sup> For a college or university, this means that the school must engage primarily in educational activities to qualify for and remain tax-exempt. Section 501(c)(3) lists specific limits on tax-exempt operations, including a lobbying prohibition and a prohibition against intervening in a political campaign, as well as a prohibition against private inurement, meaning that no part of the organization’s net earnings can be siphoned off—through excessive compensation, for example—to any private shareholder or individual.<sup>84</sup> Additional limitations and regulations from various sources include prohibitions on illegal activities,<sup>85</sup> excessive private benefits,<sup>86</sup> and excessive commercial activity.<sup>87</sup> Suppose an organization fails either the organizational or operational test. In that case, it can be subject to intermediate sanctions under I.R.C. § 4958, which imposes excise taxes on any “insiders” who receive excessive benefits,<sup>88</sup> or it can have its tax-exempt status revoked, although outright revocation is rare.<sup>89</sup>

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77. Treas. Reg. § 1.501(c)(3)–1(a)(1) (2020).

78. *Id.* at § 1.501(c)(3)–1(b); *see also* Colombo, *supra* note 11, at 114.

79. Treas. Reg. § 1.501(c)(3)–1(d)(1)(i)(f) (2020).

80. Colombo, *supra* note 11, at 117.

81. *Id.* at 141.

82. *Id.* at 118; I.R.C. § 501(c)(3).

83. Colombo, *supra* note 11, at 114.

84. I.R.C. § 501(c)(3).

85. *See, e.g.*, *Bob Jones Univ. v. United States*, 461 U.S. 574, 591 (1983); Rev. Rul. 75-384, 1975-2 C.B. 204.

86. John D. Colombo, *In Search of Private Benefit*, 58 FLA. L. REV. 1063, 1064 (2006); *see also* Treas. Reg. § 1.501(c)(3)–1(d)(1)(ii), (iii), Ex. 2. (2020).

87. *B.S.W. Group, Inc. v. Comm’r*, 70 T.C. 352, 358–59 (1978); Rev. Rul. 72-369, 1972-2 C.B. 245.

88. I.R.S. News Release IR-2004-81 (June 22, 2004).

89. Consuelo Lauda Kertz, *Executive Compensation Dilemmas in Tax-Exempt Organizations: Reasonableness, Comparability, and Disclosure*, 71 TUL. L. REV. 819, 828 (1997).

The issue of private inurement and college football coaching salaries is of particular relevance to the analysis of college football and tax exemption. Tax exemption is meant to provide favorable tax treatment to organizations that substantially benefit the public, rather than private individuals.<sup>90</sup> Inurement is present when an individual who is in a position to influence the organization's affairs receives an excessive financial benefit "solely by virtue of the individual's relationship with the organization, and without regard to accomplishing exempt purposes."<sup>91</sup>

As long as compensation is reasonable, meaning it is an amount that "would ordinarily be paid for like services by like enterprises (whether taxable or tax-exempt) under like circumstances,"<sup>92</sup> it is not an excessive financial benefit, and no private inurement is present. In the college football context, coaching salaries are compared to other college football coaches and professional coaches to determine whether they are reasonable. Because college football coaching salaries are generally in line with professional football coaching salaries, they are "reasonable" and do not present a problem that warrants sanctions under I.R.C. § 4958 or outright revocation of the university's tax-exempt status.

Congress tried to limit coaching salaries through I.R.C. § 4960, enacted as part of the Tax Cuts and Jobs Act of 2017, which imposes a 21% excise tax on employees at tax-exempt organizations who earn more than \$1,000,000 per year.<sup>93</sup> However, whether the statute applies to college coaches (who many believe this provision was specifically targeting) is unclear.<sup>94</sup> This statute is not currently being enforced against public colleges and universities, and a new congressional intervention is required to impact high college football coaching salaries across the Power Five conferences.

#### *B. College Football Today Does Not Fit Within Any Policies Underlying Tax Exemption*

College football does not violate the letter of tax-exemption law as it is currently written, but that does not mean it fits within tax-exempt theory from a tax policy perspective. If college football is out of line with current tax policy theories, Congress would be justified in treating college football as an exception to the general rule and could attach special conditions to college football's continued preferable tax treatment.<sup>95</sup> It could impose such conditions to bring college football more in line with the theories justifying tax exemption without altering other core tax principles.<sup>96</sup>

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90. *Id.* at 825.

91. *Id.* at 829.

92. Treas. Reg. § 53.4958-4(b)(1)(ii)(A) (2020).

93. I.R.C. § 4960 (2020); I.R.S. Notice 2019-09, 4.

94. Stephanie Cumings, *Will the Nick Saban Tax Apply to Nick Saban?*, TAX NOTES (Mar. 12, 2018); Fred Stokeld, *Ideas for EO Guidance on New Tax Law Welcomed*, TAX NOTES (Feb. 12, 2018) ("Under the statute, the 21 percent excise tax provision does not necessarily cover all state colleges and universities, said Ramey, who noted that a Joint Committee on Taxation staffer has suggested a technical correction might be needed on the issue.").

95. Colombo, *supra* note 11, at 146.

96. *Id.*

Various theories underlie and justify tax exemption.<sup>97</sup> Some scholars suggest tax exemption is a type of quid pro quo in which the tax-exempt organization provides a societal benefit, and, in return, the government relieves the organization of its tax burden.<sup>98</sup> Other justifications for tax exemption include the community benefit theory, in which a tax-exempt organization provides some benefit that the government would otherwise have to provide;<sup>99</sup> the risk compensation theory, which suggests that tax exemption is an organization's return on an inherently risky product or service provided by the organization to the public;<sup>100</sup> and the theory that altruism is good for society and should be encouraged through tax exemption.<sup>101</sup>

College football does not fit under any theoretical approaches one could use to explain its tax-exempt status. It is difficult to imagine the government providing college football, so neither the quid pro quo theory nor the community benefit theory makes sense to justify college football's exemption. The "goods" provided by college football (the entertainment and spectacle) are not inherently risky; they are offered by professional, non-tax-exempt teams that play in the National Football League and would likely still be offered by the college without their tax-exempt status because of the immense commercial revenue generated by college football. The idea that college football is altruistic does not make sense considering college football operates with commercial goals in mind, is an inherently violent sport, and, in many ways, exploits the athletes who are supposed to benefit from the sport.<sup>102</sup> Simply put, "[t]hese programs do not themselves provide any special good or services that would not be supplied in a taxable environment nor any special ethic or way of doing things that differs substantially from for-profit sports entertainment."<sup>103</sup>

### *C. Why the Discord Between College Football and Tax-Exemption Should Be Remedied*

Currently, college football is experiencing nearly unmitigated revenue growth, and athletic departments earn tax-exempt revenue even though policy does not support college athletics' tax exemption. Most colleges and universities operate under a "use it or lose it" mindset, in which schools approve the budget before the school year starts, so departments have the money approved for them to spend

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97. For an extensive discussion of many of the theories underlying tax exemption, see *id.* at 147–49.

98. John D. Colombo, *Why Is Harvard Tax-Exempt and Other Mysteries of Tax Exemption for Private Educational Institutions*, 35 ARIZ. L. REV. 841, 862 (1993).

99. *Id.* at 865; see also Rob Atkinson, *Altruism in Nonprofit Organizations*, 31 B.C. L. REV. 501, 606–07 (1990).

100. Nina J. Crimm, *An Explanation of the Federal Income Tax Exemption for Charitable Organizations: A Theory of Risk Compensation*, 50 FLA. L. REV. 419, 452–55 (1998).

101. Kertz, *supra* note 89, at 824.

102. See, e.g., George F. Will, *Tax Breaks for Football*, WASH. POST (Oct. 25, 2006), [https://www.washingtonpost.com/wp-dyn/content/article/2006/10/24/AR2006102400911\\_pf.html](https://www.washingtonpost.com/wp-dyn/content/article/2006/10/24/AR2006102400911_pf.html) [https://perma.cc/2V96-G4Y9]

(arguing that football should not have a place in higher education because of the barbaric behavior and nonviolent but lurid behavior associated with many universities' teams).

103. Colombo, *supra* note 11, at 150.

whether they need it or not.<sup>104</sup> In the college football context, “expenses go up because revenues rise and provide more money to spend, rather than the expenses needed to generate those revenues actually rising.”<sup>105</sup> So, in the current environment, a college athletic department will focus on maximizing its tax-free profits, then will spend all of the money it earns, whether it needs that money to functionally operate or not.<sup>106</sup>

This discrepancy in revenue and spending on coach salaries, but not on student-athlete scholarship funding, shows that athletic departments’ priorities are skewed away from the college athletes in today’s current climate. For example, the University of Texas, which earned \$223,879,781 in 2019,<sup>107</sup> spent \$13,085,131 of that revenue on student-athletes’ scholarships but invested \$70,041,740 into coaching salaries and \$64,418,156 into facilities and overhead.<sup>108</sup> Schools with lower revenues spend similar amounts on student aid but spend much less on coaching salaries and facilities. For example, Miami University (Ohio), which plays in the Mid-American Conference, earned \$39,644,248 in 2019.<sup>109</sup> Miami spent \$12,255,912 on student-athletes’ scholarships, \$13,224,709 on coaching salaries, and \$2,362,084 on facilities and overhead.<sup>110</sup> The University of Texas’s athletic department earned almost \$185 million more in revenue than Miami did in 2019 but spent just \$829,219 more on its student-athletes’ financial aid than Miami.<sup>111</sup> Texas’s former head football coach, Tom Herman, earned more than eleven times the salary of Miami’s head coach, Chuck Martin.<sup>112</sup>

Since football is the biggest revenue driver at most schools, money is invested more heavily into football facilities and football coaches’ salaries because it can offer

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104. Rascher & Schwarz, *supra* note 54, at 3.

105. *Id.* at 8.

106. This is the reason the “arms race” has spiraled to its current point. Revenue is spent, whether it is necessary spending or not, because there is no incentive to save excess revenue.

107. Steve Berkowitz et al., *Texas Revenue and Finances*, USA TODAY (Oct. 13, 2021, 3:43 PM), <https://sports.usatoday.com/ncaa/finances/228778> [<https://perma.cc/Q4H9-7FHX>].

108. *Id.*

109. Steve Berkowitz et al., *Miami (Ohio) Revenue and Finances*, USA TODAY (Oct. 13, 2021, 3:43 PM), <https://sports.usatoday.com/ncaa/finances/204024> [<https://perma.cc/PKF8-QFUA>].

110. *Id.*

111. It must be stated that Miami took money from tuition through student fees and university subsidies, and the University of Texas did not. Steve Berkowitz et al., *NCAA Finances: Revenue and Expenses by School*, USA TODAY (Oct. 13, 2021, 3:43 PM), <https://sports.usatoday.com/ncaa/finances> [<https://perma.cc/UJ8X-E9FB>].

112. Herman earned \$5,827,917 in 2020 (after an 8.6% COVID-related reduction of \$516,250 that will be paid back to Herman before his contract expires in 2023). Steve Berkowitz et al., *Texas Football Head Coaches Salaries*, USA TODAY, (Dec. 10, 2019, 12:06 PM), <https://sports.usatoday.com/ncaa/salaries/football/coach/team/131> [<https://perma.cc/47V9-KWSN>]. Texas’s current head coach, Steve Sarkisian, is set to earn \$5,450,000 in 2021. *Id.* Martin at Miami earned \$513,333 in 2020 (after a 10% COVID-related reduction of \$55,000). Steve Berkowitz et al., *Miami (Ohio) Football Head Coaches Salaries*, USA TODAY, (Oct. 14, 2019, 10:09 AM), <https://sports.usatoday.com/ncaa/salaries/football/coach/team/121> [<https://perma.cc/M9DX-SVMP>].

the largest return on investment for the university.<sup>113</sup> Head football coaches are able to leverage their role within the athletic department and the university, and they can demand more money because the school cannot afford to lose the revenue that coaches who lead successful teams bring in. Additionally, because players cannot be paid and no owner takes a share of the revenue like one does in professional sports, college athletic departments can only channel revenue into coaching salaries or facilities.<sup>114</sup> These factors have artificially inflated head football coaching salaries to an unsustainable and anticompetitive level.<sup>115</sup>

The competitive dynamic in college football is unique among nonprofit, tax-exempt organizations and should be analyzed under a different standard than traditional tax-exempt entities. A college football team is successful only if other teams are unsuccessful. Said another way, a team that wins is successful, and that can only occur if another team loses. The need to win coupled with their nonprofit status leads athletic departments to spend any revenue they receive on investments that increase their chances of winning, like hiring a successful coach for a premium

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113. See Richard T. Karcher, *The Coaching Carousel in Big-Time Intercollegiate Athletics: Economic Implications and Legal Considerations*, 20 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 1, 8 (2009); see also Scott Dochterman, *How Much of a Typical FBS Athletics Department Is Funded by Football Revenue?*, *THE ATHLETIC* (July 20, 2020), <https://theathletic.com/1936696/2020/07/20/college-football-revenue-funding-athletic-budget/> [<https://perma.cc/Z7SZ-KRZC>] (“Everything’s relative . . . [t]he boat’s not as big, but all boats sink if you don’t have football. It’s the No. 1 driver of revenue in the department, from tickets to the donations that directly are tied to football to certainly a big part of the television contract. So from a revenue standpoint, I mean, it is everything else all added together and then some.”); Kurtis Quillin, *Inside the Numbers | Why College Football’s Status for 2020 Is so Important*, *KCTN TV* (May 10, 2020, 11:14 PM), <https://www.kcentv.com/article/sports/inside-the-numbers-why-college-footballs-status-for-2020-is-so-important/500-54037858-70d3-4965-9085-53ce05e67956> [<https://perma.cc/U59R-6C3C>] (showing football revenue was the highest at every school within the Big 12); Jonathan Zimmerman, *Blame Football, Not Title IX*, *LA TIMES* (Jan. 9, 2014, 12:00 AM), <https://www.latimes.com/opinion/la-xpm-2014-jan-09-la-oe-zimmerman-football-title-ix-ncaa-20140109-story.html> [<https://perma.cc/CXZ9-5HK9>] (referencing schools that cut male and female sports deemed “too expensive” in the name of Title IX compliance but continue to pay millions in football expenses).

114. See Kevin Blue, *Rising Expenses in College Athletics and the Non-Profit Paradox*, *ATHLETIC DIR. UNIV.*, <https://www.athleticdirector.com/articles/kevin-blue-rising-expenses-in-college-athletics-and-the-non-profit-paradox/> [<https://perma.cc/RDG4-8ZHN>] [hereinafter Blue, *Rising Expenses*].

115. See Kevin Blue, *Why Congress Should Regulate Salaries and Spending in College Athletics*, *ATHLETIC DIR. UNIV.*, [https://athleticdirector.com/articles/why-congress-should-regulate-spending-in-college-athletics/#\\_ftn2](https://athleticdirector.com/articles/why-congress-should-regulate-spending-in-college-athletics/#_ftn2) [<https://perma.cc/7VVK-A4DH>] [hereinafter Blue, *Why Congress Should Regulate*]; see also Mary Pilon, *Can Millionaire College Coaches Defend Their Salaries During Covid-19?*, *THE GUARDIAN* (May 13, 2020, 5:30 AM), <https://www.theguardian.com/sport/2020/may/13/can-millionaire-college-coaches-defend-their-salaries-during-covid-19> [<https://perma.cc/VL44-44KH>] (discussing coaches taking salary cuts to help make up for lost revenue caused by the Covid-19-related cancellation of many sports seasons and noting that these pay cuts do not meaningfully impact the coaches because their base salaries are so high).

salary, instead of striving for profitable operating margins.<sup>116</sup> Other nonprofit, tax-exempt entities, like food banks and hospitals, do not operate in this type of competitive environment. Instead of investing to beat their competitors, they invest in their nonprofit mission to provide more tax-exempt benefits to the public.<sup>117</sup>

This competitive dynamic forces schools to prioritize increasing their revenue over anything else so they can attract more talented (and more expensive) football coaches who recruit more talented players and eventually are in a better position to win financially and athletically.<sup>118</sup> All athletic departments, regardless of their financial status, engage in this revenue seeking behavior specifically related to football because of the potential revenue that a successful football team offers to a university.<sup>119</sup> The power and money are concentrated in the elite programs that sign lucrative television and media rights contracts, and they continue to seek out increased revenue because any additional money earned by those programs makes them more wealthy and powerful.<sup>120</sup> On the other hand, less wealthy schools urgently seek out increasing revenue opportunities to try to keep up with their wealthier competitors.<sup>121</sup>

This financial dynamic forces teams to enter into revenue-generating schemes that are not necessarily done with the student-athletes' best interests in mind. For example, teams travel across the country to play in "guarantee" games, which are out of conference competitions usually between one highly competitive, Power Five conference team and a smaller, mid-major team scheduled early in the season.<sup>122</sup> The less competitive team gets a large payout from the more competitive school in exchange for what is supposed to be a guaranteed win.<sup>123</sup> These games often take place far away from the smaller team's school, taking student-athletes away from the

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116. Blue, *Why Congress Should Regulate*, *supra* note 115.

117. See John D. Colombo, *Commercial Activity and Charitable Tax Exemption*, 44 WM. & MARY L. REV. 487, 534 (2002).

118. See Blue, *Rising Expenses*, *supra* note 114; see also Blue, *Why Congress Should Regulate*, *supra* note 115.

119. See Dochterman, *supra* note 113; see also Blue, *Why Congress Should Regulate*, *supra* note 115.

120. Allie Grasgreen, *Division I Divisiveness*, INSIDE HIGHER ED (Feb. 16, 2012), <https://www.insidehighered.com/news/2012/02/16/ncaa-governance-brink-reform> [<https://perma.cc/RKK2-C2W2>] (discussing the lack of representation of smaller, non-FBS institutions on the NCAA Division I Board of Directors). Under the current NCAA bylaws, the board of directors gives more weight and representation to larger, more lucrative conferences than it does to smaller conferences. NCAA MANUAL, *supra* note 1, § 4.2.1. The board consists of one institutional president or chancellor from each of the ten FBS conferences, five presidents or chancellors in total from the eleven Football Championship Subdivision (FCS) conferences, and five presidents or chancellors from the remaining eleven non-football schools. *Id.* This gives ten voting seats to the ten FBS conferences and ten voting seats to the twenty-two remaining Division I conferences.

121. Blue, *Why Congress Should Regulate*, *supra* note 115.

122. See Kevin Cave, *Guarantee Games in NCAA Football*, SPORTS CONFLICT INST. (2014), <https://sportsconflict.org/guarantee-games-ncaa-football/> [<https://perma.cc/YQ5N-ZLTY>].

123. *Id.*

classroom for a longer time and subjecting the student-athletes at the less competitive school to embarrassment and injury.<sup>124</sup>

Additionally, conference restructuring (which is done primarily for monetary reasons)<sup>125</sup> has increased the geographic area that conferences span, adding travel time and taking student-athletes away from campus for more time than would be needed if they played more regionally based, less lucrative competitors.<sup>126</sup> There are also programs that schedule games based on television airtime availability rather than convenience for players and fans. For example, Pac-12 After Dark specifically schedules Pac-12 games (played in the Pacific or Mountain Standard time zones) late at night to capitalize on primetime television airtime after the games played on Eastern or Central Standard Time are over. This schedule brings in significant revenue for the conference and schools despite the late start time disadvantaging both the student-athletes and the fans.<sup>127</sup>

The COVID-19 pandemic has shed light on the precarious financial position in which nearly all college athletic departments operate and has highlighted the desire to protect football and football coaches' salaries above all other sports. Athletic departments are struggling to make ends meet because of the loss of revenue from shortened or canceled seasons, the cancellation of the March Madness tournament in March 2020, and the inability to sell tickets to in-person athletic events. These budget constraints have led to at least ninety sports programs being cut at more than twenty-six colleges, leaving more than 1500 student-athletes without a sport to compete in at their current school.<sup>128</sup> Athletic departments are making these cuts to save money

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124. See Gregory Clay, *Paralyzed Football Player Shows that Southern University Spirit*, THE UNDEFEATED (June 8, 2016), <https://theundefeated.com/features/paralyzed-football-player-shows-that-southern-university-spirit/> [<https://perma.cc/VN5G-X7CE>] (discussing a football player for Southern University, Devon Gales, who was paralyzed in a guarantee game against the University of Georgia).

125. Robert H. Lattinville & Bennett H. Speyer, *The Modern Athletic Director: Rising Expectations, Risks and Rewards*, 12 VA. SPORTS & ENT. L.J. 232, 235–37 (2013) (“Conference realignment is driven by universities, conferences and media enterprises attempting to capture the most value for bundled and individual broadcast and licensing rights.”).

126. See Ivan Maisel, *Why Now Is the Time to Reconsider College Conference Realignment*, ESPN (Aug. 21, 2020), [https://www.espn.com/college-football/story/\\_/id/29706013/why-now-reconsider-college-conference-realignment](https://www.espn.com/college-football/story/_/id/29706013/why-now-reconsider-college-conference-realignment) [<https://perma.cc/9HM6-MG4R>].

127. Bob Lundeberg, *Larry Scott Defends Pac-12 After Dark, Says Late-Night College Games “Unlock Significant Value”*, OREGONIAN (Jan. 29, 2019), [https://www.oregonlive.com/pac12/2018/09/pac12\\_commissioner\\_larry\\_scott\\_says\\_night\\_games\\_u.html](https://www.oregonlive.com/pac12/2018/09/pac12_commissioner_larry_scott_says_night_games_u.html) [<https://perma.cc/WYQ4-GQPS>] (“It’s clear that for certain fans, that’s a real irritation and it’s a concern for our athletic departments because we do get a significant amount of negative feedback about the start times.”).

128. Matt Marshall, Daniel Arkin & Kanwal Syed, *College Sports Cuts in the Wake of Covid-19 Are Clouding the Future of Olympics Participation*, NBC NEWS (Oct. 17, 2020, 5:00 AM), <https://www.nbcnews.com/news/sports/college-sports-cuts-wake-covid-19-are-clouding-future-certain-n1243803> [<https://perma.cc/7X92-JVAP>].

and balance their budgets.<sup>129</sup> However, schools including Minnesota,<sup>130</sup> Iowa,<sup>131</sup> and Clemson<sup>132</sup> have each cut programs citing budget constraints but can still pay their head football coaches \$4.2 million, \$4.6 million, and \$8.3 million, respectively, this year.<sup>133</sup> These programmatic cuts allow athletic departments to support their football programs' expenses and continue to compete for football revenue but are detrimental to other student-athletes and illustrate the disproportionate emphasis placed on college football.

Finally, using the current "reasonableness" standard<sup>134</sup> to evaluate whether college coaches' salaries are "reasonable" when compared to similar tax-exempt and non-tax-exempt organizations does not make sense in the context of college athletics.<sup>135</sup> The NCAA requires that its member institutions operate under the pretext of amateurism and uses that amateur status to justify its many rules and regulations, including the rule prohibiting paying players.<sup>136</sup> The NCAA also states

129. *See id.*; *see also* Marc Tessier-Lavigne, Persis Drell & Bernard Muir, *An Open Letter to the Stanford Community and the Stanford Athletics Family*, STAN. NEWS (July 8, 2020), <https://news.stanford.edu/2020/07/08/athletics/> [<https://perma.cc/9NGH-Q68F>] (explaining the various financial struggles and factors that went into the decision to cut eleven varsity sports).

130. Karen Weaver, *University of Minnesota, Needing Money for Football, Is Set to Drop Four Sports and 98 Athletes*, FORBES (Oct. 5, 2020, 10:28 PM), <https://www.forbes.com/sites/karenweaver/2020/10/05/minnesota-drops-98-athletes-from-program-while-spending-millions-on-testing-for-football/?sh=7d722a948f5b> [<https://perma.cc/2NCK-2KZ5>] ("The Board of Regents . . . vot[ed] . . . to drop four longstanding men's sports . . . track and field (indoor and outdoor), tennis and gymnastics," resulting in "a savings of around \$1 million in 2021-22.").

131. Chad Leistikow, *University of Iowa Cuts Four Sports in Wake of COVID-19 Pandemic, Loss of Fall Football*, HAWK CENT. (Aug. 21, 2020, 12:27 PM), <https://www.hawkcenral.com/story/sports/college/columnists/chad-leistikow/2020/08/21/iowa-cut-4-sports-coronavirus-swimming-gymnastics-tennis-gary-barta-bruce-harrelld/3409666001/> [<https://perma.cc/8BMF-3XZ3>] ("Men's gymnastics, men's tennis, and men's and women's swimming and diving will be discontinued," which is projected to save \$4.25 million a year.).

132. Allen Devlin, *Clemson Athletes "Crushed" After University Cuts Men's Track and Field, Cross Country*, WYFF4 (Nov. 9, 2020, 6:56 PM), <https://www.wyff4.com/article/clemson-university-athletes-crushed-after-university-cuts-mens-track-and-field-cross-country/34622417> [<https://perma.cc/F3VF-JMVR>] ("[T]he decision to cut the Men's Track and Field and Cross Country programs comes as a result of numerous factors, with the main two aspects being the financial future of the sports department and the future of Title IX compliance.").

133. Berkowitz et al., *supra* note 9. The amounts paid to the coaches reflect pay cuts taken by the head football coaches due to the Coronavirus pandemic. P.J. Fleck at Minnesota took a 10% pay cut this year, Kirk Ferentz at Iowa took a 15% pay cut, and Dabo Swinney at Clemson will forego a \$1.25 million retention bonus set to be paid at the end of 2020. *Id.*

134. *See* Treas. Reg. § 53.4958-4(b)(1)(ii)(A) (2020).

135. *See* Kertz, *supra* note 89, at 856–57 (discussing whether the comparison of tax-exempt compensation with for-profit compensation makes sense given the inherent differences in the benefits available through the different types of work).

136. NCAA MANUAL, *supra* note 1, § 12.1.2 ("An individual loses amateur status and thus shall not be eligible for intercollegiate competition in a particular sport if the individual [u]ses

that the educational nature of its programs clearly differentiates its sports from professional sports.<sup>137</sup> Tax policy aside, justifying a college coach's salary because it is comparable to his professional counterparts' salaries but simultaneously insisting that college football players cannot be paid because they play in a game entirely different from their professional peers is nonsensical. The NCAA's longstanding argument that college and professional sports are inherently different is wholly undermined when coaches' salaries are justified because they are in line with the salaries of similar professional coaches.

### III. PROPOSED SOLUTION: CAPPING HEAD FOOTBALL COACH SALARIES USING THE TAX CODE

Since college football does not fit under existing tax-exempt theories and is thus an exception to general tax policy, Congress can and should impose specific requirements and conditions on universities that they must follow to maintain their tax-exempt status. Congressional intervention limiting head football coaching salaries through the I.R.C. would allow coaching salaries to be restricted to a level comparable to salaries paid to university department heads, which would align college football more closely with the academic and educational purpose of the university. Determining reasonableness by comparing a coach's salary to that paid to his institutional peers instead of that paid to professional coaches would also bring college football more in line with the NCAA's commitment to amateurism and its basic purpose of "maintain[ing] intercollegiate athletics as an integral part of the [school's] educational program . . . ."<sup>138</sup>

#### A. Proposed Solution

Congress should use the I.R.C. to impose a salary cap on Division I coaches that restricts the total salary a university pays its head coach to an amount more in line with the university's overall pay scale. Universities are tax-exempt because they provide an educational benefit to the public, and activities conducted at a university are tax-exempt as long as they are substantially related to that educational purpose.<sup>139</sup> Governmental intervention in education is common,<sup>140</sup> and the favorable tax treatment of athletic departments is based on the educational purpose of college

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his or her athletics skill (directly or indirectly) for pay in any form in that sport.”).

137. NCAA MANUAL, *supra* note 1, § 12.01.2 (“Member institutions’ athletic programs are designed to be an integral part of the educational program. The student-athlete is considered an integral part of the student body, thus maintaining a clear line of demarcation between college athletics and professional sports.”).

138. NCAA MANUAL, *supra* note 1, § 1.3.1.

139. See *supra* notes 71–76 and accompanying text.

140. See Alfred Dennis Mathewson, *By Education or Commerce: The Legal Basis for the Federal Regulation of the Economic Structure of Intercollegiate Athletics*, 76 UKMC L. REV. 597, 607–08 (2008).

sports.<sup>141</sup> Therefore, congressional intervention to regulate intercollegiate athletics is appropriate because Congress has the “power to regulate education.”<sup>142</sup>

Currently, head football coaches’ salaries are completely out of line with other university personnel’s salaries.<sup>143</sup> Many universities pay employees based on career level and job similarities.<sup>144</sup> When you compare a typical athletic department’s organizational structure with the overall structure of a college or university, a head coaching position is like an academic department head. A head coach oversees a staff of assistant coaches like an academic department head oversees a staff of professors. A college coach also reports to an athletic director like an academic department head reports to his or her college’s dean. Despite these similarities, college football coaches make millions of dollars more than their academic counterparts,<sup>145</sup> benefiting from the athletic department’s tax-free revenues earned in the name of education.

Congress can remedy this by adding a provision to the tax code that imposes a salary cap limiting compensation for head coaches to a level in line with academic personnel at their university. This provision should explicitly apply to all nonprofit colleges and universities, regardless of where they derive their tax-exempt status.<sup>146</sup>

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141. *Id.* at 613 (“Despite the inability of the courts to establish a definition of intercollegiate athletic as an educational activity, the inescapable result has been the construing of statutes to prescribe tax benefits on the basis that intercollegiate athletics constitutes educational activities.”).

142. *Id.* at 614.

143. See *Department Head College or University Salary*, ECON. RSCH. INST. (Sept. 17, 2021), <https://www.eri.com/salary/job/department-head-college-or-university/united-states> [<https://perma.cc/2HH5-LDD2>] (listing \$101,741 as the average yearly salary paid to department heads at universities and colleges); see also *Executive-Level Administrator Salaries*, HIGHERED JOBS, <https://www.higheredjobs.com/salary/salaryDisplay.cfm?SurveyID=48> [<https://perma.cc/AG3Q-AQUF>]; Dan Bauman, Julia Piper & Brian O’Leary, *Executive Compensation at Public and Private Colleges*, THE CHRON. OF HIGHER EDUC. (Aug. 31, 2021), [https://www.chronicle.com/article/executive-compensation-at-public-and-private-colleges/#id=table\\_public\\_2019](https://www.chronicle.com/article/executive-compensation-at-public-and-private-colleges/#id=table_public_2019) [<https://perma.cc/2LSV-GZ9S>] (citing the highest paid public university president from 2008–2019 is Mark P. Becker, the president at Georgia State University, who makes \$2.8 million per year). Coaching salaries are also generally out of line with other athletic department personnel. For example, at Indiana University, coaches’ salaries are determined by the market, while other positions are paid based on established levels used consistently throughout the university. *Pay Ranges: Athletic Affairs (AA)*, IND. UNIV. HUM. RES. (July 2021), <https://hr.iu.edu/salary/pay-ranges/aa.html> [<https://perma.cc/6GLW-YWZ4>].

144. See, e.g., *Faculty Review and Compensation at the University of California*, UCOP ACAD. PERS. (July 2014), [https://www.ucop.edu/academic-personnel-programs/\\_files/uc-faculty-comp-summary-jun-2014.pdf](https://www.ucop.edu/academic-personnel-programs/_files/uc-faculty-comp-summary-jun-2014.pdf) [<https://perma.cc/57TY-4T28>]; *Job Framework Redesign Project*, IND. UNIV. HUM. RES. (Feb. 2021), <https://hr.iu.edu/redesign/index.html> [<https://perma.cc/2JNM-RTY7>].

145. Randall S. Thomas & R. Lawrence Van Horn, *Are College Presidents Like Football Coaches? Evidence from Their Employment Contracts*, 58 ARIZ. L. REV. 901, 936 (2016) (stating that college football coaches in the Power Five make, on average, 6.59 times what college presidents make overall).

146. Careful attention should be paid by the drafters of the provision, if it were to be enacted, to avoid the mistakes made in drafting I.R.C. § 4960, which was meant to apply to

Any coach whose total university-paid compensation<sup>147</sup> is more than the university-paid compensation of the highest-paid department head at his respective school would be subject to an 80% tax on the compensation above the set cap. If the excessive salary is not remedied in the tax year following the year the tax is imposed on the coach, then that college or university's tax-exempt status would be revoked. Although an 80% tax on excessive salaries is high and revocation of tax exemption could have negative consequences for many schools, harsh penalties are necessary to disrupt the current status quo and stop the exponential growth of football coaches' salaries.<sup>148</sup> This combination of a high penalty tax and the revocation of the school's tax-exempt status is meant to dissuade both coaches from pressuring administrators to pay them excessive salaries and schools from skirting around the imposed cap by offering excessive nonmonetary compensation.

This proposal's two-tiered approach is logistically similar to the intermediate sanctions available through I.R.C. § 4958 but is different because it would apply directly to college and university football coaches, regardless of their status as "insiders."<sup>149</sup> It also differs from I.R.C. § 4960 because it would explicitly apply to college coaches and would not provide loopholes that allow coaching salaries to remain as high as they currently are.<sup>150</sup>

Because of the NCAA's amateur requirement and supposed focus on education,<sup>151</sup> it is more fitting to evaluate the reasonableness of college coaches' salaries in the context of their respective universities than it is to evaluate a salary's reasonableness compared to professional coaching salaries. By aligning head coaches' salaries with similarly positioned academic personnel's salaries, the athletic department will have more resources to contribute to the overall university's educational purpose and be more in line with the general policies underlying tax exemption.

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all college coaching salaries over \$1 million, but because of a drafting error, only applies to private colleges and universities. *See* April, *supra* note 75; *see also, e.g.*, I.R.C. § 511(a)(2)(B) (2020).

147. Special consideration should be taken to ensure the entire compensatory amount of a coach's contract is limited. For example, the entire value of Nick Saban's contract, *see supra* notes 59–66, should be limited to be in line with the salary of a University of Alabama academic department head. The limit would not just apply to his base salary amount.

148. Lora Wuerdeman, Note, *Sidelineing Big Business in Intercollegiate Athletics: How the NCAA Can De-Escalate the Arms Race by Implementing a Budgetary Allocation for Athletic Departments*, 39 N.C. CENT. L. REV. 85, 101 (2017).

149. Whether the IRS would consider coaches as "insiders" who are capable of receiving private inurement is unclear. *See* Bertrand M. Harding & Edgar D. McClellan, *Unreasonable Compensation: The Hidden Issue in the IRS College and University Examination Guidelines*, 20 J. COLL. & U.L. 111, 118 (1993) ("[Private inurement] could arise in the college and university context where a prominent staff member, athletic coach or institution official is in a position to control or influence directly, or indirectly, an institution's finances, enrollment, or academic prestige.").

150. *See supra* notes 92–93.

151. NCAA MANUAL, *supra* note 1, § 2.5 ("Intercollegiate athletic programs shall be maintained as a vital component of the educational program, and student-athletes shall be an integral part of the student body. The admission, academic standing and academic progress of student-athletes shall be consistent with the policies and standards adopted by the institution for the student body in general."); *see also supra* text accompanying note 21.

For this proposal to make a difference, Congress must work with the NCAA and individual institutions to specifically enumerate ways in which the money saved by this provision can be spent within the athletic departments. For example, football revenue could be used to increase coaching salaries for all sports.<sup>152</sup> It could also be used to fund each athlete's scholarship fully so that all Power Five athletes would be on a full grant-in-aid scholarship.<sup>153</sup> Money could be used to fund more academic tutors and specialists, hire athletic-specific mental health counselors on campus, or increase funding for non-revenue sports. It could also be put away in a savings account to help athletic departments remain active and retain all of their varsity sports in times of economic stress.<sup>154</sup> Regardless of what is done with the money, capping salaries through the I.R.C. will help limit the current college football "arms race" and allow schools to focus on and fund sports other than football.

### *B. Potential Counterarguments*

Capping coaching salaries is almost guaranteed to upset some current college coaches and fans. A potential argument against the salary cap and excise tax proposal is that it will drive current coaches away from collegiate football and into coaching at the professional level, or it will divert potentially successful coaches away from college football entirely.<sup>155</sup> However, if money is the only thing motivating a coach to pursue a career or keeping a coach in the college football sphere, he is likely out of touch with the amateur ideals promoted by the NCAA and could be a better fit on a professional team's staff.

Another potential counterargument is that prior attempts to curb executive compensation in both the tax-exempt and non-tax-exempt sectors have failed, so attempting to curb coaches' compensation will likely fail too. The previous attempt to curb for-profit executive compensation through I.R.C. § 162(m), which prevents companies from deducting compensation over \$1 million, offers various

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152. See, e.g., Lauren Fox, *There's a \$1.5M Difference Between Average Head Coaching Salaries for Men's, Women's Teams at KU, Report Shows*, KUSPORTS.COM (Oct. 28, 2019), <http://m.kusports.com/news/2019/oct/28/theres-15m-difference-between-average-head-coachin/> [<https://perma.cc/V4B8-N68K>] ("The average annual institutional salary for head coaches of the men's teams at KU, of which there are five, is \$1,711,827. For the head coaches of female teams, of which there are nine, the average annual salary is \$195,164.")

153. Currently, only 57% of student-athletes at the Division I level receive athletics aid. NCAA, *Our Three Divisions*, <http://www.ncaa.org/about/resources/media-center/ncaa-101/our-three-divisions> [<https://perma.cc/B3M6-T737>].

154. See Barry Svrluga, *Don't Drop Nonrevenue College Sports in Hard Times. Cut Football Coaches' Salaries*, WASH. POST (Apr. 17, 2020), <https://www.washingtonpost.com/sports/2020/04/17/dont-drop-non-revenue-college-sports-hard-times-cut-football-coaches-salaries/> [<https://perma.cc/MPZ2-PZDH>]; see also Bill Whitaker, *Some Colleges Axing "Secondary Sports" like Gymnastics and Tennis as Pandemic Continues*, CBS NEWS (Dec. 6, 2020), <https://www.cbsnews.com/news/college-sports-cuts-gymnastics-swimming-pandemic-60-minutes-2020-12-06/> [<https://perma.cc/59ZP-CFD9>].

155. See Connor O'Gara, *A Salary Cap on Coaches Might Sound like a Good Idea in Theory, but It'll Never Happen*, SATURDAY DOWN S. (2017), <https://www.saturdaydownsouth.com/sec-football/salary-cap-coaches-good-idea-theory-never-happen-2018/> [<https://perma.cc/PBG6-BY8E>].

loopholes.<sup>156</sup> For example, any amount of performance-based compensation can be deducted, allowing companies to classify any salary amount as performance-based.<sup>157</sup> Companies also transitioned from regulating monetary payments to other forms of compensation that are excluded from the deductible limit.<sup>158</sup> These loopholes essentially rendered the tax provision null and void.

Previous attempts to limit or deter excessive compensation in the tax-exempt sector include I.R.C. § 4960, which imposed a 21% excise tax on salaries over \$1 million and was meant to apply to college coaches but does not because of a drafting error.<sup>159</sup> Because the provision does not apply as it was intended,<sup>160</sup> it is hard to measure its success. These previous failures do not mean that any attempt to curb excessive compensation will fail. A targeted reform of coaching salaries that do not fit with current tax-exempt policy or with the salary ranges for any other university employees could be specifically written to apply to coaches. It could be tailored to align salaries with the unique issues presented by the NCAA's amateurism requirements.

An additional counterargument is that capping a coach's compensation limits what the coaches can earn based on their worth in the free market. However, college football is not a traditional free market because the athletes who create the product (college football) are not compensated, but the coaches are, and because the players do not earn their fair share of the revenue they create, more money is available to compensate the coaches.<sup>161</sup> This market artificially inflates head football coaches' salaries beyond what they would earn if college football indeed were a "free market." The players would receive their share of the compensation based on their talent,<sup>162</sup> and coaching salaries would better reflect their worth in their program. Because coaches are the only people who can be paid on a college football roster, they receive higher compensation than if they shared the revenues with the players.<sup>163</sup> Therefore,

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156. Treas. Reg. § 1.162-27(a).

157. Treas. Reg. § 1.162-27(e).

158. Kertz, *supra* note 89, at 838 (specifically discussing what is included when evaluating "reasonable compensation" in the nonprofit sector); *see also* Ryan Miske, Note, *Can't Cap Corporate Greed: Unintended Consequences of Trying to Control Executive Compensation Through the Tax Code*, 88 MINN. L. REV. 1673, 1688–89 (2004); Gregg D. Polsky, *Controlling Executive Compensation Through the Tax Code*, 64 WASH. & LEE L. REV. 877, 907–08 (2007).

159. *See supra* note 146.

160. Schmalbeck & Zelenak, *supra* note 75, at 1146–47; Allyson Versprille, *Nonprofit Executive Pay Glitch Needs Fix: Joint Tax Counsel*, BLOOMBERG L. (Jan. 25, 2018, 6:54 PM), <https://news.bloomberglaw.com/employee-benefits/nonprofit-executive-pay-glitch-needs-fix-joint-tax-counsel> [<https://perma.cc/ST7Z-RVVZ>].

161. David A. Grenardo, *The Blue Devil's in the Details: How a Free Market Approach to Compensating College Athletes Would Work*, 46 PEPP. L. REV. 203, 209–10 (2019); Gary R. Roberts, *Evaluating Equity Within the Framework of Intercollegiate Athletics' Conflicting Value Systems*, 77 TUL. L. REV. 997, 1013 n.28 (2003).

162. Estimations predict that the top 10% of college football players would earn \$400,000 a year if they were paid according to the revenue they produce through their talents. *College Athletes in America May Be Allowed to Profit from Their Talent*, THE ECONOMIST (Sept. 28, 2019), <https://www.economist.com/united-states/2019/09/28/college-athletes-in-america-may-be-allowed-to-profit-from-their-talent> [<https://perma.cc/DF7R-4X5A>].

163. Blue, *Why Congress Should Regulate*, *supra* note 115.

the amount a coach currently earns is not based on a traditional “free market,” so capping a coach’s salary would not violate traditional, free market principles.

#### CONCLUSION

Colleges and universities are tax-exempt because they serve an educational purpose and provide educational services to the public. Income generated by an activity that is sufficiently related to the college or university’s educational purpose is not subject to federal income tax because of its tax-exempt status. This includes income generated by the athletic department because college athletics are sufficiently related to a school’s educational purpose. However, when a university pays a football coach millions of dollars more than it pays its academic faculty, staff, and administrators, it raises questions about a school’s priorities and seems to elevate athletics above academics.

Therefore, Congress should step in to regulate college football coaches’ salaries through a salary cap and excise tax as an intermediate sanction before revoking a university’s tax-exempt status. Although the high compensation paid to college football coaches within the Power Five does not technically violate current tax exemption laws, it violates the underlying NCAA idea of amateurism and does not make sense under any tax policy theories. The current Coronavirus pandemic has also highlighted the tenuous financial situations of even the wealthiest schools and has demonstrated that something must change.

This proposal would help bring college football more in line with the university under which it and the general athletic department operate. It would also free up revenue to help fund non-revenue generating sports and increase the overall level of competition between the Power Five and the rest of the FBS. It would allow schools to stop chasing marginal revenue because it would diminish the importance of offering a coach a higher salary, and in turn, would slow the current “arms race” driving up expenses in college football. Without congressional intervention, exorbitant compensation will continue to occur and increase in amount, and eventually, only financially elite schools will be able to afford to compete. Football coaching salaries need to be brought back to a reasonable level to allow all college sports play to continue.