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ESSAY

SPORTS, DOPING, AND THE REGULATORY “TIPPING POINT”

DIONNE L. KOLLER*

ABSTRACT

This Essay seeks to explore whether there is a regulatory tipping point for sports—the point at which the government will take action to address a perceived problem in sports—and if so, what the circumstances are that generate such a moment. Such an issue is particularly important now. Troubling stories about athletes’ health and well-being and the consequences of our most beloved games are nothing new. Reports of the effects of sports concussions, exploitation of college athletes, and other examples of the harms wrought by the “win at all costs” mentality dominate sports headlines and prompt calls for meaningful change. Many have lost faith in sports regulators to take the necessary steps. This begs the question of whether the government will take action to address these issues. That is, will the steady drum beat of examples, many of which have been presented in detail to Congress, lead to a public policy tipping point that prompts government intervention? For these or other important sports issues, will the government step in and take meaningful action to rein in the so-called excesses of sport?

In general, the answer is no. Using the example of doping in sports, this Essay explains that it takes more than shocking media reports and allegations of harm to athletes. Instead, as the anti-doping example illustrates, what makes the difference and brings us to the intervention tipping point is harm to the games themselves. In such a circumstance, the government has found a motivation to act and has proven well equipped to check the abuses in sports. In this way, the fight against doping in sports provides important insight into possible future sports reforms.

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I. INTRODUCTION

This summer, millions watched the Women's World Cup soccer tournament and saw American player Morgan Brian violently collide with German player Alexandra Popp during the semi-final game.¹ Brian remained on the turf for several minutes, appearing dazed. Media and fan outrage ensued after Brian was quickly assessed and put back into the game. We watched with unease and the "don't ask, don't tell" mentality that the American sports public was raised on during the doping era. Unlike the doping era, however, the concussion issue has prompted high-profile litigation and demands for reform, including government action. At all levels of sport, fans, parents, and athletes are seeking to change the culture of sport that leads to concussions, playing while hurt, and athletes suffering the consequences. Similarly, the National Collegiate Athletic Association (NCAA) and its member institutions have been under ever-increasing fire for the way in which athletes are treated,² as the media regularly chronicles instances of what is characterized as athlete exploitation.³ Lawsuits have been filed, Congress has held hearings, and sports governing bodies have promised change. We might be at a tipping point where the federal government steps in and initiates policy solutions that could change the culture of some of our most beloved sports.

This Essay looks at the notion of a regulatory tipping point in sports through the example of the anti-doping movement. Using the lessons from the United States government's efforts to clean up Olympic sports, this Essay asserts that the successful fight against doping provides an important blueprint for instances where government action can effectively curb the win-at-all-costs incentives that might harm athletes, as well as the games. However, in doing so, this Essay makes the point that the regulatory tipping point, or central motivation for

1. *Brian, Popp Suffer Head-to-Head Collision During USA-Germany*, SPORTS ILLUSTRATED (June 30, 2015), <http://www.si.com/planet-futbol/2015/06/30/usa-germany-world-cup-morgan-brian-alexandra-popp-collision>.

2. *Promoting the Well-Being and Academic Success of College Athletes: Hearing Before the Senate Committee on Commerce, Sci., & Transp.* (2014) (statement of Senator Dean Heller), http://www.commerce.senate.gov/public/index.cfm/hearings?id=48F489FD-720F-44D7-8A68-53EFAECF8139&Statement_id=1411473F-4EAE-483B-99B2-A963CCCBEC20 (stating that "with so much money coming in, the NCAA has now been accused of making money off these players and exploiting them.").

3. *See generally* David Berri, *Exploitation Is Everywhere in Men's College Basketball*, TIME (Nov. 14, 2014), <http://time.com/3586037/exploitation-is-everywhere-in-mens-college-basketball/>; Linda Chavez, *How Colleges Exploit Athletes*, N.Y. POST (Mar. 28, 2014), <http://ny-post.com/2014/03/28/how-colleges-exploit-athletes/>; Kareem Abdul-Jabbar in *Magazine Article: College Athletes Are Exploited*, SPORTS ILLUSTRATED (Nov. 12, 2014), <http://www.si.com/college-basketball/2014/11/12/kareem-abdul-jabbar-college-athletes-exploited-ncaa>.

government intervention, is to protect the games themselves, not athletes.

II. OVERVIEW—THE GOVERNMENT STAYS OUT OF SPORTS (SORT OF)

Professor Jeffrey Standen argues that we should "take sports seriously," not just because sport is a billion-dollar industry, but because sports are part of the fabric of American life.⁴ Standen's comment suggests that taking sports seriously would entail more than just passionate fan interest, which of course is already the case, but serious treatment of sports in the law.⁵ However, an analysis of the legal treatment of sports shows that the government does, in fact, take sports seriously. Instead, what we generally do not take seriously are athletes.

In the United States, there is a core belief in individual liberty and freedom from government regulation.⁶ As a result, the belief in minimal government intervention keeps many issues off the government's agenda.⁷ Sport, by and large, is one of them. Senator John McCain summed up the approach well when asked by Dan Patrick how much the government should be involved in sports. McCain answered, "as little as possible."⁸ The only exception McCain allowed for was in the case of performance-enhancing drugs, which McCain stated presents a unique situation for government involvement to ensure fairness and protect children.⁹

The sentiment expressed by Senator McCain and that is frequently reflected in policy discussions—that the government should not be involved in sports—is somewhat misleading. It is certainly true that the United States does not have a sports ministry or similar government agency to promote or regulate sports.¹⁰ However, government involvement is often welcomed by sports

4. JEFFREY STANDEN, *TAKING SPORTS LAW SERIOUSLY: LAW AND SPORTS IN CONTEMPORARY AMERICAN CULTURE* xvi (2009).

5. *Id.* (stating that "Ultimately, our dismissive attitude toward modern sports leads to inattention, and inattention allows those who are paying attention, those who are taking sports seriously, to have their way with sports with but slight hindrance. Taking sports seriously is a necessary response to the importance of sports in the modern world. Taking sports seriously is the cure, not the illness.").

6. Christopher J. Bosso, *The Contextual Bases of Problem Definition*, in *THE POLITICS OF PROBLEM DEFINITION* 184 (1994).

7. *Id.*

8. *The Dan Patrick Show* (May 2, 2014), <http://www.danpatrick.com/2014/05/02/john-mccain/>.

9. *Id.*

10. See Dionne L. Koller, *Frozen in Time: The State Action Doctrine's Application to Amateur Sports*, 82 ST. JOHN'S L. REV. 183, 196 (2008); see also Bruce Kelley & Carl Carchia, "Hey Data Data—Swing!," ESPN (July 16, 2013), http://espn.go.com/espn/story/_/id/9469252/hidden-demographics-youth-sports-espn-magazine (explaining that "no one agency or organization monitors youth sports either as a central part of American childhood or as an industry.").

leagues and regulators and provides a backbone for American sports to thrive.¹¹ This includes government support of sports through funding, such as in the case of stadium financing and sports in public schools and universities.¹² Indeed, the United States is unique in having a substantial number of sports opportunities provided by educational institutions.¹³ Also welcomed is targeted government involvement that does not seek to regulate the leagues or games themselves, but, instead, promotes sport as an industry, such as baseball's antitrust exemption, gambling and player agent restrictions, and the antitrust exemption permitting the creation of the NFL and pooling of broadcast rights.

In contrast, the kind of government involvement that is unwelcomed by both sports leagues and administrators, and most policymakers, is the type that would use law to regulate the purpose, content, or management of sports programs. Such regulation would range from, for instance, the purpose of sports in schools; the way in which public high schools, colleges, and universities structure, manage, and pay for their sports programs and regulate their athletes; and even the rules of play.¹⁴ As I have previously asserted, a more precise formulation of our current understanding with respect to the government's relationship to sports is that it is desirable for the government to financially support and use law to privilege sports leagues and regulators, but that law should not be used to directly regulate the content and conduct of sports leagues and programs, especially as they manage athletes.¹⁵ In short, the history of the government and sport in the United States reveals that, in general, the government will intervene to address the needs of sports leagues, not athletes.

11. Critics have argued that, "Our government policies have helped develop and maintain an elite sports structure of significant support for the Olympic Games, professional sports monopolies, tax breaks for mega-stadiums, and antitrust exemptions for pro teams. In contrast, our government is doing next to nothing for the masses." *Oversight Hearing on the Amateur Sports Act of 1978: Hearing Before the Commerce Sub-Committee on Consumer Affairs, Foreign Commerce and Tourism* (1995) (written testimony of Thomas McMillen, Co-Chair, President's Council on Physical Fitness and Sports).

12. For instance, Mark Emmert, the president of the NCAA, testified before Congress about the "collegiate model" for athletics and its importance in American culture, stating: "This is a uniquely American phenomenon. There is no model elsewhere in the world where athletics are tied so directly to colleges and universities as an extension of the educational process." *Promoting the Well-Being and Academic Success of College Athletes*, *supra* note 2 (written testimony of Dr. Mark A. Emmert, President of the National Collegiate Athletic Association), http://www.commerce.senate.gov/public/_cache/files/90f902cf-ae2f-449b-ba8a-9da481c9bd50/FEB47F09BDAC6B2E01A129B8DAC21F24.emmert.pdf.

13. Amanda Ripley, *The Case Against High School Sports*, ATLANTIC (Oct. 2013), <http://www.theatlantic.com/magazine/archive/2013/10/the-case-against-high-school-sports/309447/> (stating that "sports are embedded in American schools in a way they are not almost anywhere else.").

14. Dionne L. Koller, *Putting Public Law into "Private" Sport*, 43 PEPP. L. REV. (forthcoming 2016).

15. *Id.*

III. THE REGULATORY TIPPING POINT: LESSONS FROM THE ANTI-DOPING MOVEMENT

Malcolm Gladwell, in his bestselling book *The Tipping Point*, states that a tipping point captures that "one dramatic moment . . . when everything can change all at once."¹⁶ In policy theory, a tipping point arises when social conditions become defined as problems that the government should solve.¹⁷ The process of translating conditions into problems that the government should address depends on both individual and collective perceptions.¹⁸ In general, and certainly with respect to sports, "[c]itizens abide by prevailing arrangements without much thought."¹⁹ Serious conditions, such as suffering a concussion during a game and being put back into play, may be perceived by the public as normal, and individuals who find a condition untenable privately may not mobilize to change it because they wish to conform to the community view.²⁰ Thus, "norms and expectations develop" that tie individual behavior to the perceived beliefs of society.²¹ At some point, however, policy scholars have pinpointed a threshold at which individuals will update their thinking and bring their private beliefs public.²² The result is a change in our collective understandings that can lead to government action.²³

In American politics generally, and in American sports specifically, reaching such a tipping point that results in government action is difficult. To begin, it is important to distinguish between an actual government action tipping point and special-interest lobbying that produces results. Sports law is filled with examples of government action. However, such intervention is usually achieved at the request and for the benefit of sports leagues and governing bodies. Thus, government intervention in sports is usually aimed at facilitating

16. MALCOLM GLADWELL, *THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE* (2002).

17. FRANK R. BAUMGARTNER & BRYAN D. JONES, *AGENDAS AND INSTABILITY IN AMERICAN POLITICS* (2009).

18. B. Dan Wood & Alesha Doan, *The Politics of Problem Definition: Applying and Testing Threshold Models*, 47 AM. J. POL. SCI. 640, 641 (2003).

19. *Id.*

20. *Id.* at 641–42.

21. *Id.* at 641. Doan and Wood explain that "[e]ven those individuals predisposed toward nonacceptance [of the condition] will accept the condition due to the social costs of opposing the majority." *Id.*; see also Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2032 (1996) (explaining that "a person's behavior often depends on expectations about behavior by other people. Behavior and choice are a product . . . of the perceived judgments of other people, and those judgments . . . constitute [] social norms.").

22. Wood & Doan, *supra* note 18, at 642.

23. *Id.*

the growth of sports leagues and is generally welcomed.²⁴ For example, there is baseball's antitrust exemption²⁵ and, more recently, the Curt Flood Act.²⁶ Similarly, federal statutes allowing for pooling of broadcasting rights and the merger of the National Football League (NFL) and American Football League (AFL)²⁷ were also aimed at facilitating the growth and protecting the integrity of professional sports, as are statutes that prohibit sports gambling²⁸ and regulate boxing.²⁹ On the state level, statutes aimed at specific sports—such as statutes regulating sports agents, boxing and mixed martial arts, and providing stadium financing—all go to supporting the professional sports industry and represent welcomed involvement by the government.

More recently, state statutes meant to address the issue of concussions in youth sports are another example of regulation on behalf of sports leagues. All fifty states and the District of Columbia now have laws aimed at managing youth sports concussions. These laws were primarily the product of the NFL's lobbying activities.³⁰ Similarly, state and federal initiatives that would permit sports medicine physicians to travel with their professional or intercollegiate sports teams and provide treatment even in states where the physician is not licensed represent intervention to benefit sports leagues.³¹ These examples,

24. See STEPHEN R. LOWE, *KID ON THE SANDLOT: CONGRESS AND PROFESSIONAL SPORTS, 1910–1992* 81 (1995) (explaining that regulation can give a sport a place of “legitimacy and importance” in American life). See also *Oversight Hearing on the Amateur Sports Act of 1978: Hearing Before the Commerce Sub-Committee on Consumer Affairs, Foreign Commerce and Tourism* (1995) (written testimony of Thomas McMillen, Co-Chair, President's Council on Physical Fitness and Sports) (stating that “our government policies have helped develop and maintain an elite sports structure of significant support for the Olympic Games, professional sports monopolies, tax breaks for mega-stadiums, and antitrust exemptions for pro teams.”).

25. See *Flood v. Kuhn*, 407 U.S. 258, 282–85 (1972) (holding baseball is interstate commerce but antitrust exemption stands as a matter of stare decisis and that the remedy is through Congress, not courts); *Toolson v. N.Y. Yankees, Inc.* 346 U.S. 356, 357 (1953) (holding baseball is exempt from antitrust laws); *Fed. Baseball Club of Balt. v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200, 208 (1922) (holding that baseball games are not interstate commerce and, therefore, are not subject to the antitrust laws). See also LOWE, *supra* note 4, at 17–24 (explaining that Congress chose not to take action against baseball's monopolistic practices after holding hearings in 1951).

26. See Curt Flood Act, 15 U.S.C.A. § 26(b) (West 2014).

27. See Sports Broadcasting Act of 1961, 15 U.S.C. § 1291 (West 2014).

28. See Unlawful Sports Gambling, 28 U.S.C.A. § 3702 (West 2014). See also Professional & Amateur Sports Protection, 28 U.S.C.A. § 3701–3704 (West 2014).

29. See Professional Boxing Safety Act, 15 U.S.C. § 6302 (West 2014).

30. Hosea H. Harvey, *Refereeing the Public Health*, 14 YALE J. HEALTH POL'Y, L., & ETHICS 66, 103 (2014) (explaining that “it seems more likely than not that the NFL's message and influencing served as one key motivation for the adoption of youth sports [traumatic brain injury] laws.”).

31. See, e.g., CAL. BUS. & PROF. § 2076 (2014); S.C. CODE ANN. § 40-47-30(B)(1)(c) (2014); VA. CODE ANN. § 54.1-2901(A)(30) (West 2014).

therefore, are not instances of regulatory tipping points, where the government seeks to solve a perceived problem in sports, as much as they represent the familiar notion that powerful lobbies (as sports leagues are) can get things done. Thus, government intervention in sport that is not for the benefit or at the request of sports leagues is rare.

In fact, before the government's intervention to fight doping in sports, the only thing close to a regulatory tipping point in sports that prompted government action was Title IX. However, it is well known that Title IX did not originally surface on the policy agenda to prohibit sex discrimination in athletics, but instead was meant to address sex discrimination in education generally.³² Title IX was enacted by Congress in 1972 to prohibit discrimination on the basis of gender in all education programs receiving federal financial assistance.³³ The purpose of the statute is to guarantee that all students have equitable opportunities to participate in an educational program.³⁴ As written, Title IX neither targets nor mentions athletics programs, and the issue of discrimination against women in education-based athletics programs was only a brief part of the congressional debates on Title IX.³⁵ The changing culture surrounding women's participation in sports, combined with the conflict among interest groups after Title IX was passed, helped create the tipping point that re-focused attention over Title IX and education programs generally to education-based athletics programs.³⁶ This shift in emphasis to focus on equality in education-based athletics programs has been explained as more of an unintended consequence³⁷ and less of a determined effort by the government to solve a perceived problem with sports. Indeed, Title IX advocates have worked for decades to define the issue of gender equity in sports as a problem the government should solve,³⁸ and the lack of a clear tipping point and consistent commitment to such action is reflected in the fact that the

32. Amanda Ross Edwards, *Why Sport? The Development of Sport as a Policy Issue in Title IX of the Education Amendments of 1972*, 22 J. POL'Y HIST. 300, 300 (2010).

33. Gayle I. Horwitz, *Athletics*, 5 GEO. J. GENDER & L. 311, 312 (2004).

34. Letter from Norma V. Cantú, Assistant Sec'y for C.R., Dep't of Educ., to Nancy S. Footer, Gen. Couns., Bowling Green St. Univ. (July 23, 1998), <http://www2.ed.gov/about/offices/list/ocr/docs/bowlgrn.html>.

35. *McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 286 (2d Cir. 2004) (citing 117 Cong. Rec. 30, 407 (1971) (statement of Sen. Birch Bayh)); 118 Cong. Rec. 5807 (1972) (statement of Sen. Birch Bayh).

36. Edwards, *supra* note 32, at 307 (stating that "focus turned to athletics primarily because of those groups fighting against Title IX.").

37. *Id.* at 302.

38. See generally Dionne L. Koller, *The Obese and the Elite: Using Law to Reclaim School Sports*, 67 OKLA. L. REV. 383 (2015).

government's enforcement of Title IX has not always been strong.³⁹ Moreover, despite its critics' rhetoric, Title IX's level of intervention in sports is relatively modest. While it is true that the message sent by Title IX has had an enormous impact on changing norms for sports participation, the law merely prohibits discrimination. It does not regulate the actual content of sports programs, require preferential treatment for women, or otherwise have anything to say about who can compete or what teams an institution can field. Thus, even when fully enforced, it only guarantees that women have equivalent access to the model for sports provided to men.⁴⁰ For these reasons, the government's intervention to combat doping warrants discussion, as it stands out as a legitimate "tipping point" that prompted government intervention in sports to solve a longstanding, seemingly intractable problem.

More than fifteen years after Congress worked to create the World Anti-Doping Agency (WADA) and the United States Anti-Doping Agency (USADA), doping in United States sport is a problem that rarely generates headlines. Both WADA and USADA, and many national anti-doping entities around the world, have made great strides in cleaning up sports. While the impulse to cheat by using banned, performance-enhancing substances is certainly not gone and such cheating undoubtedly takes place,⁴¹ doping is no longer the threat to the legitimacy of American Olympic sports that it once was. In general, from the perspective of doping, the games are perceived as clean.⁴²

This was not always the case. The usual deferential approach taken to sports allowed a culture of doping to develop within the American Olympic

39. Charles L. Kennedy, *A New Frontier for Women's Sports (Beyond Title IX)*, 27 GENDER ISSUES 78, 80 (2010) (explaining that "the lack of enforcement of the laws and regulations, however, has been one of the major problems with the current Title IX regulations.").

40. Koller, *supra* note 14.

41. In fact, other countries who allegedly have not embraced a legitimate, robust testing and sanctions regime are facing potential consequences such as competition bans. Piers Edwards, *WADA to Consider Banning Countries for Doping Offenses*, CNN (Aug. 18, 2015), <http://edition.cnn.com/2015/08/18/sport/athletics-reddie-blanket-ban-doping/>. Moreover, sports such as track and field still face a cloud of suspicion. Juliet Macur, *What's Real in Track? It's Hard to Know*, N.Y. TIMES (Aug. 30, 2015), http://www.nytimes.com/2015/08/31/sports/whats-real-in-track-its-hard-to-know.html?_r=0.

42. This is certainly not the case throughout the international sports world. Serious questions about doping in track and field, and by athletes from certain countries, show that the fight against doping in international sports remains. Christopher Clarey, *Atop Medal Table at Worlds, Kenya Is Also Under a Cloud*, N.Y. TIMES (Aug. 24, 2015), <http://www.nytimes.com/2015/08/25/sports/kenyan-runners-find-their-success-is-no-longer-free-of-scrutiny.html>; Steven Howard, *Doping Allegations Keep Coming, Highlighting a Serious Lack of Resources—IAAF*, CELEBCAFE (Aug. 24, 2015), <http://celebcafe.org/doping-allegations-keep-coming-highlighting-a-serious-lack-of-resources-iaaf-8405/>.

movement. I previously have written that doping in American Olympic sports flourished as part of the win-at-all-costs sports paradigm that operated with the tacit approval of the government.⁴³ The focus for the United States, it seemed, was not punishing performance-enhancing drug use, but matching the former Soviet Bloc's success in Olympic Movement competition.

This approach was possible because of the structure of the American Olympic Movement that was established by the Amateur Sports Act. Without any specific mention in the Act, and consistent with the Government's emphasis on the free market to develop world-class athletes, the effort to control doping by Olympic Movement athletes was left, as is much sports regulation, to the private sector. The United States Olympic Committee (USOC) administered drug testing through each sport's National Governing Body (NGB), which also was charged with prosecuting athletes for doping violations under the NGB's own administrative procedures.⁴⁴ Accordingly, the USOC and NGBs, which were charged with selecting athletes for Olympic and international competition, also administered drug testing and determined the sanctions.⁴⁵ This arrangement prompted critics to argue that the USOC and NGBs had an inherent conflict of interest that prevented them from administering a credible drug testing and sanctioning program.⁴⁶

The pressures on athletes to dope, and the conflict of interest inherent in the testing and sanctioning regime administered by the USOC, caught the attention of Congress. As early as 1973, even before the Amateur Sports Act was passed, Congress held hearings on doping in sports.⁴⁷ At that hearing, Congress heard testimony from, among others, Phil Shinnick, a decorated athlete and former Olympian. Although Shinnick had never used anabolic steroids or other substances to enhance his own athletic performance, he was well aware that the American Olympic Movement was awash in drugs. Indeed, decades before anyone seriously considered a government response to doping, Shinnick and others testified before Congress in great detail on drug use in

43. Dionne L. Koller, *From Medals to Morality: Sportive Nationalism and the Problem of Doping in Sports*, 19 MARQ. SPORTS L. REV. 91, 107–10 (2008).

44. Travis T. Tygart, *Winners Never Dope and Finally, Dopers Never Win: USADA Takes over Drug Testing of United States Olympic Athletes*, 1 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 124, 126 (2003).

45. 36 U.S.C. § 220503(4) (2006). The USOC is directed "to obtain. . . the most competent amateur representation possible in each event of the Olympic Games." *Id.*

46. Tygart, *supra* note 44.

47. See generally *Proper and Improper Use of Drugs by Athletes: Hearing Before the Sen. Subcommittee to Investigate Juv. Delinquency, Committee on the Judiciary*, 93rd Congress (1973) (statement of Phil Shinnick, Director of Athletics, Livingston C., Rutgers Univ.), <http://files.eric.ed.gov/fulltext/ED086919.pdf>.

sports and what might be done about it.⁴⁸ Shinnick asserted that Congress should examine the structure of elite athletics that creates the culture of doping in sports.⁴⁹ Shinnick stated that:

[D]rugs shouldn't be a part of amateur athletics, the process should be just as important as the product, and athletics should be an extension of human expression, and athletics should be defined by the individual, but unfortunately in American sports and in our society, there seems to be a structure that has a high emphasis on winning.⁵⁰

Shinnick also explained the way the drive for national prestige through international athletic success and gender conformity supported the culture of doping. Shinnick stated that, "there seem to be political pressures on athletes especially during these times to win . . . for the country,"⁵¹ and that "winning and performing is very much equated to improving your manhood."⁵² Shinnick offered a solution to counter these pressures: out-of-competition, unannounced drug testing.⁵³ Finally, Shinnick raised, decades before it captured media and policymakers' attention, the issue of drug use and concussions in sports. Shinnick testified that while he was competing for the University of Washington, he observed athletes taking painkillers to deal with the effects of "spear tackling," as "a lot of the football players had gotten headaches."⁵⁴

The doping problem, of course, was not limited to the Olympic Movement, but had been a significant problem in professional sports as well.⁵⁵ This, too, was well known to Congress. In 1973, Congress heard testimony that there was

48. *Id.* at 143–45.

49. *Id.* at 134, 151 (explaining that the structure of American sports "has a high emphasis on winning.").

50. *Id.* at 139.

51. *Id.*

52. *Id.* at 141.

53. *Id.* at 143. This is, in fact, a key part of USADA's strategy for fighting performance-enhancing drug use in sports. USADA 2014 ANNUAL REPORT 23 (2014), <http://www.usada.org/wp-content/uploads/2014-annual-report.pdf> (stating that 66%, or 6,292 tests, were out-of-competition).

54. *Proper and Improper Use of Drugs by Athletes*, *supra* note 47, at 136.

55. See generally Paul A. Fortenberry & Brian E. Hoffman, *Illegal Muscle, A Comparative Analysis of Proposed Steroid Legislation and the Policies in Professional Sports CBAs That Led to the Steroid Controversy*, 5 VA. SPORTS & ENT. L. J. 121 (2006); David K. Osei, *Doping, Juicing and Executive Bypass Oversight: A Case Study for Major League Baseball's Steroid Scandal*, 4 VA. SPORTS & ENT. L. J. 155 (2004); Scott B. Shapiro, *Who Decides: Institutional Choice in Determining a Performance Enhancing Drug Policy for the NFL*, 7 WYO. L. REV. 183 (2007).

a culture of doping in professional football and baseball.⁵⁶ Nevertheless, despite ample evidence, Congress did not respond to the problem.⁵⁷ The incentive at the time was to simply do nothing and allow the private American Olympic Movement and professional sports leagues to regulate themselves.

However, in the late 1990s, the issue of doping in sports reached a regulatory tipping point. While the USOC's leadership produced athletes who were winning, the wins no longer translated into significant national prestige because of the cloud of doping.⁵⁸ Enough was enough, and the Office of National Drug Control Policy (ONDCP) and Congress made fighting drug use in Olympic Movement and professional sports a top priority. The primary goal was to help restore the "honor and integrity" of United States sport.⁵⁹ Policymakers also wanted to address the problem of children and young adults doping to achieve sports success.⁶⁰

To achieve this, ONDCP announced its national strategy to combat drug use and doping in sports.⁶¹ ONDCP proposed the creation of an entity dedicated to tackling the problem, although in doing so, the ONDCP stated that, "we have to be very respectful of the notion of amateur sports and the independence of amateur sports from federal intervention."⁶² The ONDCP strategy also involved significant international efforts to develop WADA,⁶³ which was established and began operating in 1999.⁶⁴ In August 2000, President Clinton, through an Executive Order, facilitated the United States government's role in WADA.⁶⁵ In addition to its efforts to establish WADA, the United States government was a leader in drafting the World Anti-Doping Code (WADC), which was initially adopted in 2003.⁶⁶

56. *Proper and Improper Use of Drugs by Athletes*, *supra* note 47, at 141–43.

57. Paul Haagen, *The Players Have Lost That Argument: Doping, Drug Testing and Collective Bargaining*, 40 *NEW ENG. L. REV.* 831, 840 (2006).

58. Koller, *supra* note 43, at 112.

59. *Id.* at 113.

60. Executive Order No. 13165 (2006), <http://www.gpo.gov/fdsys/pkg/FR-2000-08-14/pdf/00-20670.pdf>.

61. *Effects of Performance Enhancing Drugs on the Health of Athletes and Athletic Competition: Hearing Before the S. Comm. on Commerce, Sci., and Transp.*, 106th Cong. 18–23 (1999) (statement of Barry McCaffrey, Director, Office of Nat'l Drug Control Pol'y), <http://www.gpo.gov/fdsys/pkg/CHRG-106shrg75594/pdf/CHRG-106shrg75594.pdf>.

62. *Id.* at 12.

63. Edward H. Jurith & Mark W. Beddoes, *The United States' and International Response to the Problem of Doping in Sports*, 12 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 461, 481–82 (2002).

64. World Anti-Doping Agency, *Who We Are*, www.wada-ama.org (last visited Oct. 25, 2015).

65. Exec. Order No. 12,165, 3 *C.F.R.* 288 (2001), *reprinted in* 21 *U.S.C.* § 1701 (2003).

66. Koller, *supra* note 43, at 114.

While the United States government worked on the international level to create WADA, it also worked domestically to establish USADA.⁶⁷ Both ONDCP and Congress directly influenced how USADA would be structured and what its mission would be.⁶⁸ USADA was established and began operations in October, 2000,⁶⁹ as a private, not-for-profit corporation.⁷⁰ Through legislation, Congress has continued to refine USADA's mission, most recently stating that:

The United States Anti-Doping Agency shall—

(1) serve as the independent anti-doping organization for the amateur athletic competitions recognized by the United States Olympic Committee and be recognized worldwide as the independent national anti-doping organization for the United States;

(2) ensure that athletes participating in amateur athletic activities recognized by the United States Olympic Committee are prevented from using performance-enhancing drugs or prohibited performance-enhancing methods adopted by the Agency;

(3) implement anti-doping education, research, testing, and adjudication programs to prevent United States Amateur Athletes participating in any activity recognized by the United States Olympic Committee from using performance-enhancing drugs or prohibited performance-enhancing methods adopted by the Agency;

(4) serve as the United States representative responsible for coordination with other anti-doping organizations coordinating amateur athletic competitions recognized by the United States Olympic Committee to ensure the integrity of athletic competition, the health of the athletes, and the prevention of use by United States amateur athletes of performance-enhancing drugs or prohibited

67. Jurith & Beddoes, *supra* note 63, at 475 (stating that “the formation of USADA as an independent testing and prosecuting body for Olympic and international competition is intended to restore credibility” to the United States).

68. See Koller, *supra* note 43, at 114 (citing testimony of Jim Scherr, Chief Executive Officer, USOC) (noting that the committee “had a hand in creating” the USADA).

69. USADA, *Independence & History*, <http://www.usada.org> (last visited Oct. 25, 2015).

70. *Id.*

performance-enhancing methods adopted by the Agency.⁷¹

USADA must also submit annual reports to Congress,⁷² and to enable USADA to fulfill its mission, the federal government provides the majority of its funding.⁷³

Today, USADA operates as a respected, important feature of the American Olympic Movement. It has shown that it truly is independent by investigating and issuing sanctions against some of the biggest and most accomplished names in American sports, from Marion Jones to Lance Armstrong.⁷⁴ Moreover, the combination of WADA and USADA and the World Anti-Doping Code that each enforces have created important new norms in sport. For instance, at the outset, the anti-doping movement faced criticism about the unfairness of punishing athletes for doping violations where prohibited substances are found in the athlete's body, but the athlete claimed it was not his or her fault. This type of "strict liability" was new to sports, and it has successfully fostered a climate of personal responsibility and reinforced the notion that sports participation is a privilege and not a right.

The success of the anti-doping movement also demonstrated that government action to moderate the win-at-all-costs culture can enhance, not inhibit, the strength of sports. The legitimacy brought with a vigorous anti-doping regime has even influenced the way professional sports handles performance enhancing drug use.⁷⁵ Indeed, when I wrote about the early efforts of WADA, USADA, and the anti-doping movement, I wrote that a changing political climate and high-profile athletes being sanctioned might weaken the resolve to continue the fight, and ultimately undermine the effort to clean up sport.⁷⁶ Instead, the normative changes brought about by the success of the

71. 21 U.S.C.A. § 2001(b), 128 Stat. 3020 (2014).

72. 21 U.S.C.A. § 2002(b), 120 Stat. 3534 (2014).

73. USADA 2014 ANNUAL REPORT, *supra* note 53, at 40 (listing \$8,750,000 in federal grants out of a total budget of \$14,966,778.00). Going forward, Congress has appropriated amounts increasing to over \$14 million through fiscal year 2020.

74. *Id.* at 29. Indeed, in its most recent Annual Report, USADA lists several high-profile athletes and coaches who have been sanctioned, such as Jon Drummond, Tyson Gay, and Johan Bruyneel. *Id.*

75. Though no league has yet agreed to be bound by the World Anti-Doping Code or submit to USADA testing and results management.

76. As I stated, "because the international political climate is susceptible to change, it may be that the anti-doping effort is not continued with as much force as it is today." This could be the case if several nations which purport to adopt the World Anti-Doping Code do not follow through, and suspicions of athlete doping from countries such as China and Russia predominate. It might also happen if the cost in terms of medals lost is seen as too great. Scholars have noted that because there is an "instrumental" view of elite international sport, the commitment to fighting doping in sport might not

anti-doping movement have helped give the effort staying power. It also makes the anti-doping example a useful one for predicting future “tipping points” for government intervention in sports.

IV. LESSONS FOR SPORTS LAW AND POLICY

Senator McCain’s comments, that the government’s response to doping in sports is a unique situation and therefore, very much an exception, should not preclude an examination of the ways in which such a tipping point was achieved, and the lessons that can be drawn for sports law and policy. Such an examination reveals two key features of the anti-doping issue that provide important guidance for the future. First, the doping-in-sports issue demonstrated that curbing the win-at-all-costs incentives that predominate in sports culture will not harm the games. In fact, the anti-doping example illustrated that checking such impulses protects both the games and athletes. Today, more than a decade after anti-doping initiatives became a fixture of the American Olympic Movement, Olympic sport is just as popular as it ever was. Sport and athletes’ performances are perceived as more legitimate, and the pressure for athletes to use banned substances to achieve elite status is diminished. American athletes who do dope to win are held accountable,⁷⁷ and the games are stronger for it.

Second, the anti-doping example illustrated that when the incentives to win at all costs harm the games, as well as athletes, the government can productively intervene to curb the excesses. Important to creating the tipping point in the anti-doping fight was that the relevant sports regulator—the USOC—was plainly not able to resolve its inherent conflict of interest to both field an internationally successful Olympic team and sanction some of the very successful athletes who made up that team. It could not both produce and punish winners. When self-regulation was proven to be unworkable, if not impossible, and the legitimacy of the games were at stake, Congress and the Executive Branch provided much-needed leadership and an effective solution.

Such a lesson is important, because it is frequently assumed that government intervention in sports is not only illegitimate as a general matter of liberty and private sector autonomy, but also because the government is thought to not be in the best position to regulate sports. Sports regulators and administrators are assumed to know best.⁷⁸ While it may be true that sports

remain as strong as it appears to be now because “the perceived utility of international sport” might diminish or the cost, in the form of lowering the current levels of athletic success, might be seen as too great. Koller, *supra* note 43, at 117.

77. See generally USADA 2014 ANNUAL REPORT, *supra* note 53.

78. *Promoting the Well-Being and Academic Success of College Athletes*, *supra* note 2 (statement

leagues, regulators, and administrators have the best claim to understanding the substantive aspects of their games and producing a competitive environment, the anti-doping example demonstrates that the government can establish important parameters within which the games may take place. That is, with the anti-doping intervention, the government did not attempt to manage the content of the games themselves, but instead helped establish the rules within which the games would operate—specifically, with clean athletes. In this way, the government intervention remained focused on areas that can effectively be regulated through the political process, i.e., what non-athletic reasons will disqualify an athlete from competing for the United States. The intervention stayed away from the kind of areas less suited for regulation by the political system, such as how best to develop track and field athletes or what type of talents should be rewarded in figure skating. In short, the anti-doping example demonstrated that sports policy adopted with strong government influence can be both warranted and effective.

One might argue that the lessons from the anti-doping movement may not as easily apply in other sports contexts because of the unique relationship between the USOC and the federal government and the importance of our Olympic team to our national and international identity. It is true that the modern American Olympic Movement was established by Congress to serve important national objectives. In an effort to better compete in international sports against our Cold War enemies, President Ford established a Commission on Olympic Sports that recommended legal reforms to encourage individual athletic achievement and Olympic success through the free market and not federal regulation (in contrast with Communist regimes).⁷⁹ The result was Congress established the modern USOC through what is now known as the Ted Stevens Olympic and Amateur Sports Act.⁸⁰ Congress created the USOC as a federally-chartered, non-profit patriotic corporation⁸¹ and not a federal agency. The purposes of the USOC include, among other things, coordinating and developing amateur athletic activities related to international amateur athletic competition and obtaining for the United States the best amateur athletes for

of John R. Thune) http://www.commerce.senate.gov/public/index.cfm/hearings?Id=48F489FD-720F-44D7-8A68-53EFAECF8139&Statement_id=F9D7E388-B54A-4323-8DE1-AB10AB84EC36 (stating that, "it is my hope that the NCAA, its member institutions, the student-athletes themselves, and other stakeholders will seek solutions" and that "[t]his is an area where Congress can provide a forum—but the solutions are most likely to come from those most directly involved in the education and development of student-athletes.").

79. THE PRESIDENT'S COMMISSION ON OLYMPIC SPORT, THE FINAL REPORT OF THE PRESIDENT'S COMMISSION ON OLYMPIC SPORTS 1975-1977 29 (1977).

80. 36 U.S.C. § 220501-220529 (2000).

81. 36 U.S.C. § 220507.

participation in the Olympic Games.⁸² Congress through the Act also granted the USOC the exclusive right to use the Olympic trademarks, which carry substantial economic benefit, to ensure the USOC could adequately fund its activities without government support.⁸³

However, the federal government's relationship with the USOC and the importance of Olympic sports to our national identity is not so different from Congress's relationship with our professional sports leagues and the NCAA. Professional sports leagues and the NCAA are frequently called to answer to Congress, and the ability of Congress to legislate in areas involving professional and intercollegiate sports means that the government has the ability to use similar leverage over professional and intercollegiate sports as it can over the Olympic Movement. In addition, professional and intercollegiate sports today are as important to our national identity, if not more so, than Olympic sports.⁸⁴ As a result, the example of the regulatory tipping point presented by the issue of doping in sports is as instructive for professional and intercollegiate sports as it is for the Olympic Movement.

V. CONCLUSION

Twenty years ago, the issue that dominated sports was doping. While the problem has not been eliminated, performance-enhancing substance use in American sports is in check and effectively policed. The USADA is a vibrant fixture of the American Olympic Movement and is fulfilling its mission. In short, government intervention to address doping in American sport worked.

Given that the anti-doping movement demonstrates that government intervention in sports can be warranted and effective, it begs the question whether more intervention might be used to address current issues in sports. Concussions and the safety of athletes at all levels, as well as the treatment of college athletes (among other issues), are, like doping was, problematic features of sports that many argue leagues and regulators have not and cannot solve. Might we be at a regulatory tipping point? Likely not. Unlike doping in sports, athlete safety and exploitation, while prompting lawsuits and consistent media outrage, have not yet affected the legitimacy and entertainment value of the

82. 36 U.S.C. § 220503 (2000).

83. See *S.F. Arts & Athletics v. U.S. Olympic Comm.*, 483 U.S. 522, 526-27 (1987).

84. See *Promoting the Well-Being and Academic Success of College Athletes*, *supra* note 2 (written testimony of Dr. Mark A. Emmert), http://www.commerce.senate.gov/public/_cache/files/90f902cf-ae2f-449b-ba8a-9da481c9bd50/FEB47F09BDAC6B2E01A129B8DAC21F24.emmert.pdf.

games (though youth football may no longer be as popular as it once was).⁸⁵ While concussions make some sports, such as the women's World Cup semi-final, momentarily harder to watch, the legitimacy of the games is not (yet) at stake. We still tune in.

For this reason, perhaps the greatest lesson from the government's efforts to fight doping in sports is that the central motivation for the intervention, the "tipping point," was not harm to athletes. Sports reform advocates and regulators alike would therefore do well to keep in mind that it is the legitimacy of American sport that provides the greatest incentive for the government to intervene. However, rather than adopt a knee-jerk, no-intervention position on using government action to address problems in sports, policymakers should consider the legacy of the anti-doping movement, and the necessity and effectiveness of the government involvement that made it possible.

85. Kathy Stewart, *Is Fear of Concussions Keeping Kids off the Gridiron?*, WTOP (Aug. 21, 2015) <http://wtop.com/health/2015/08/fear-concussions-keeping-kids-off-gridiron/> (stating that "[f]orty-four percent of parents surveyed say they are worried about concussions and the long-term effects" and that the National Federation of State High School Association's statistics show a "slight decline" in football participation statistics).