More than an Athlete: The Student-Athlete Compensation Debate and Its Potential Tax Consequences on the NCAA

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"The NCAA's business model would be flatly illegal in almost any other industry in America. All of the restaurants in a region cannot come together to cut cooks' wages on the theory that "customers prefer" to eat food from low-paid cooks. Law firms cannot conspire to cabin lawyers' salaries in the name of providing legal services out of a "love of the law." Hospitals cannot agree to cap nurses' income in order to create a "purer" form of helping the sick. News organizations cannot join forces to curtail pay to reporters to preserve a "tradition" of public-minded journalism. Movie studios cannot collude to slash benefits to camera crews to kindle a "spirit of amateurism" in Hollywood. Price-fixing labor is price-fixing labor."[1]

I. INTRODUCTION

In 2017, the National Collegiate Athletic Association (NCAA) reported one billion dollars in revenue for the first time in history.[2] The majority of that revenue is generated by television broadcasting rights and championship tournaments.[3] While earning billions of dollars in annual revenue, the NCAA

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1. NCAA v. Alston, 141 S. Ct. 2141, 2167 (2021) (Kavanaugh, J., concurring).

2. *See* DELOITTE & TOUCHE LLP, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION AND SUBSIDIARIES 5 (2018), https://ncaaorg.s3.amazonaws.com/ncaa/finance/2017-18NCAAFin_NCAAFinancialStatement.pdf [https://perma.cc/Z73N-NZA6] (containing NCAA 2017–2018 financial data); Steve Berkowitz, *NCAA Reports Revenues of More than $1 Billion in 2017*, USA TODAY (Mar. 7, 2018, 7:53 PM), https://www.usatoday.com/story/sports/college/2018/03/07/ncaa-reports-revenues-more-than-1-billion-2017/402486002/ [https://perma.cc/C2TA-DSLN] (describing NCAA's revenue streams). The NCAA approached $1 billion of annual revenue in the years prior, but 2017 was the first time it reported earnings over $1 billion. *See* Berkowitz, *supra*.

3. *See* CROWE LLP, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION CONSOLIDATED FINANCIAL STATEMENTS 4-5 (2019), https://ncaaorg.s3.amazonaws.com/ncaa/finance/2018-19NCAAFin_NCAAFinancials.pdf [https://perma.cc/VA2B-PYEK] (detailing sources of revenue for NCAA in 2019). Broadcasting rights were responsible for approximately $844 million and championship games were about $170 million. *See id.* at 4; *see also* Tim Parker, *How Much Does the NCAA Make off March Madness?*, INVESTOPEDIA (Mar. 9, 2021), https://www.investopedia.com/articles/investing/031516/how-much-does-ncaa-make-march-madness.asp [https://perma.cc/7LQH-SUQD] (explaining majority of revenue comes from March Madness alone); *Where Does the*

also qualifies as a charitable organization under the Internal Revenue Code (IRC) and is exempt from paying federal income tax.[4] Under IRC § 501(c)(3), one way to qualify as a tax-exempt charitable organization is to "foster national or international amateur sports competition."[5] According to the NCAA bylaws, NCAA athletes are only eligible to compete if they are "amateur student-athlete[s]."[6] Thus, the amateur status of college athletes helps protect the NCAA from paying a hefty tax bill.[7]

Some Division I student-athletes receive athletic scholarships to attend their colleges and universities, but historically, they could not receive any other compensation for their athletic participation pursuant to NCAA bylaws.[8] College athletes took legal action against the NCAA, specifically claiming it is a violation of antitrust laws to prohibit a student-athlete from receiving compensation for the use of their name, image, and likeness (NIL).[9] It was not until recently that athletes had major success in the courts, in both *O'Bannon v. NCAA* and *NCAA v. Alston*.[10]

In 2019, California lawmakers enacted a law that makes it illegal for California colleges and universities to prohibit NCAA college athletes from

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Money Go?, NCAA, https://www.ncaa.org/sports/2016/5/13/where-does-the-money-go.aspx [https://perma.cc/Q9B7-6GTW] (explaining NCAA distributions).

4. *See* Kathryn Kisska-Schulze, *This Is Our House!—The Tax Man Comes to College Sports*, 29 MARQ. SPORTS L. REV. 347, 348, 361 (2019) (explaining NCAA tax-exempt status).

5. *See* I.R.C. § 501(c)(3) (stating amateur sports organizations tax-exempt only if activities do not provide athletic facilities or equipment).

6. *See* NCAA, 2020–21 DIVISION I MANUAL at art. 12.01.1 (2020), https://web3.ncaa.org/lsdbi/reports/getReport/90008 [https://perma.cc/G2K9-E2SF] [hereinafter 2020–21 DIVISION I MANUAL] (stating eligibility requirements of intercollegiate athletes).

7. *See* Mike McIntire, *The College Sports Tax Dodge*, N.Y. TIMES: SUNDAY REV. (Dec. 28, 2017), https://www.nytimes.com/2017/12/28/sunday-review/college-sports-tax-dodge.html [https://perma.cc/ZY5A-DEQE] (explaining potential for athletic conference to generate huge tax bill); *National Collegiate Athletic Association*, PROPUBLICA: NONPROFIT EXPLORER, https://projects.propublica.org/nonprofits/organizations/440567264 [https://perma.cc/7WZP-GPDG] (reporting NCAA's tax-exempt status); *see also What Is a 501(c)(3)?*, FOUND. GRP., https://www.501c3.org/what-is-a-501c3/ [https://perma.cc/5W83-434D] (stating federal income tax exemption for 501(c)(3) organizations).

8. *See Scholarships*, NCAA, https://www.ncaa.org/sports/2014/10/6/scholarships.aspx#:~:text=NCAA%20Divisions%20I%20and%20II,scholarships%20to%20compete%20in%20college [https://perma.cc/V3L7-GQQW] (indicating number of NCAA scholarships awarded); 2020–21 DIVISION I MANUAL, *supra* note 6, art. 12.02.10 (stating pay prohibited for participation in athletics).

9. *See* O'Bannon v. NCAA, 802 F.3d 1049, 1052 (9th Cir. 2015) (questioning whether rules prohibiting student-athlete compensation violate antitrust laws). In *O'Bannon*, a former Division I college basketball player sued the NCAA, claiming that prohibiting players from receiving compensation for the use of their NIL violated the Sherman Act. *See id.* at 1055 (explaining player sued for lack of compensation for use of his NIL in video game).

10. *See id.* at 1053 (explaining courts found amateurism rules violated antitrust laws); NCAA v. Alston, 141 S. Ct. 2141, 2166 (2021) (stating student-athletes permitted to earn enhanced education-related benefits); Jon Solomon, *The History Behind the Debate over Paying NCAA Athletes*, ASPEN INST. (Apr. 23, 2018), https://www.aspeninstitute.org/blog-posts/history-behind-debate-paying-ncaa-athletes/ [https://perma.cc/6DND-DWVU] (stating impact of *O'Bannon* decision). Although the *O'Bannon* court decided the antitrust issue in favor of college athletes, the court also rejected the remedy for the violations, which was a win for the NCAA. *See* Solomon, *supra* (noting victories on both sides in *O'Bannon*).

profiting off the use of their NILs.[11] The law, known as the Fair Pay to Play Act (FPTP Act), went into effect in 2021.[12] On June 30, 2021, the NCAA implemented a temporary NIL policy allowing NCAA college athletes to benefit from the use of their NILs.[13] After the new NIL policy, Division I athletes immediately started entering partnerships with companies such as Cameo and Barstool Sports.[14] Even Tom Brady took advantage of the new NIL rule, partnering with college athletes to represent his new clothing line.[15] Allowing college athletes to receive NIL payments will likely affect the amateur status of student-athletes, which could have an effect on the tax-exempt status of the NCAA.[16]

This Note examines the NCAA and its potential tax consequences as a result of a new rule that allows student-athletes to receive compensation for the use of their NILs.[17] This Note covers the history of the NCAA from its origins to its present operations.[18] Part II looks at the definition of amateur and its meaning to the NCAA and IRC.[19] Part II also discusses the *O'Bannon* and *Alston* decisions and concludes with the NCAA's response to the new NIL rules.[20] Part III analyzes whether paying college athletes—particularly Football Bowl Subdivision football (FBS football) and Division I men's and women's basketball players—will void the NCAA's 501(c)(3) status and result in major tax consequences.[21] This Note concludes by suggesting the Internal Revenue

11. *See* Fair Pay to Play Act, ch. 383, 2019 Cal. Stat. 89 (codified at CAL. EDUC. CODE § 67456 (Deering 2020)) (establishing law in California); Jayma Meyer & Andrew Zimbalist, *A Win Win: College Athletes Get Paid for Their Names, Images, and Likenesses and Colleges Maintain the Primacy of Academics*, 11 HARV. J. SPORTS & ENT. L. 247, 247 (2020) (indicating California bill signed into law).

12. *See* Fair Pay to Play Act, CAL. EDUC. CODE § 67456.

13. *See Taking Action: Name, Image and Likeness*, NCAA, https://www.ncaa.org/sports/2021/2/8/about-taking-action.aspx#news [https://perma.cc/2CSD-96CF] (explaining interim NIL policies for NCAA athletes).

14. *See* David Cobb, *As NIL Rules Go into Effect, These NCAA Athletes Moved Quickly to Profit from Name, Image and Likeness*, CBS (July 1, 2021, 4:58 PM), https://www.cbssports.com/college-football/news/as-nil-rules-go-into-effect-these-ncaa-athletes-moved-quickly-to-profit-from-name-image-and-likeness/ [https://perma.cc/4ZFX-225Q] (listing different athletes now profiting off of their NILs); Kalhan Rosenblatt, *Collegiate Athletes Look to Become Influencers After NCAA Rule Change*, NBC NEWS (July 11, 2021, 4:30 AM), https://www.nbcnews.com/pop-culture/pop-culture-news/collegiate-athletes-look-become-influencers-after-ncaa-rule-change-n1273394 [https://perma.cc/N77D-59CT] (explaining college athletes' immediate rush to profit off NIL).

15. *See* Rory Jones, *Tom Brady Signs Up College Athletes to New Apparel Line*, SPORTSPRO (Dec. 17, 2021), https://www.sportspromedia.com/news/tom-brady-brand-nil-ncaa-college-athlete-endorsement-deals-michigan-nfl/ [https://perma.cc/A6WY-JV4C] (explaining Tom Brady's NIL deals with college athletes).

16. *See* Kyle Jahner, *NCAA Tax Status Tied to Athletes' Image Rights Under New Bill*, BLOOMBERG L. (Mar. 14, 2019, 4:38 PM), https://news.bloomberglaw.com/ip-law/ncaa-tax-status-tied-to-athletes-image-rights-under-new-bill [https://perma.cc/67BT-V2MV] (discussing how new bill could change NCAA tax status).

17. *See infra* Sections II.D-E (discussing different potential tax implications for NCAA).

18. *See infra* Section II.A (detailing origins of college athletics).

19. *See infra* Sections II.C-D (defining amateur and its application to NCAA).

20. *See infra* Sections II.B, II.E (discussing relevant cases regarding student-athlete compensation).

21. *See infra* Part III (analyzing possible effects of FPTP Act on NCAA tax status).

Service (IRS) review the tax-exempt status of the NCAA following the recent NIL rule change and the expanding commercial enterprise of college sports.[22]

II. HISTORY

A. The NCAA: A History

1. The Origin of College Sports

Students largely managed early intercollegiate athletics themselves.[23] The first college sporting event was a regatta between Harvard and Yale at Lake Winnipesaukee in 1852.[24] By 1858, college students started creating sports societies for rowing, baseball, and track and field.[25] In 1869, the first college football game took place between Princeton and Rutgers; in 1876, Harvard, Princeton, and Columbia established the Intercollegiate Football Association.[26]

College sports administration quickly became financially demanding and time consuming, forcing a transition from student to faculty oversight by the 1870s.[27] Despite the transition, officials grew concerned about the safety of intercollegiate athletics; in 1905 alone, there were eighteen deaths and hundreds of injuries in college football.[28] In addition to injuries, college presidents also worried about the commercialization of college sports; one opined that "it will soon be fairly a

22. *See infra* Part IV (suggesting change to NCAA tax status).

23. *See* Rodney K. Smith, *The National College Athletic Association's Death Penalty: How Educators Punish Themselves and Others*, 62 IND. L.J. 985, 989 (1987) (stating early intercollegiate sports programs largely student directed).

24. *See* Guy Lewis, *The Beginning of Organized Collegiate Sport*, 22 AM. Q. 222, 224 (1970). Before 1830, educational innovators encouraged organized physical activity programs and built gymnasiums on select university campuses. *See id.* at 223. In the 1840s, formalized training began to take place in different activities, and schools started to establish sports organizations. *See id.* at 223-24.

25. *See id.* at 227-28 (explaining formation of College Rowing Association). Students from Harvard, Brown, Trinity, and Yale organized the College Rowing Association. *See id.* at 227. As the College Rowing Association's annual regatta gained more attention, students began to attribute institutional prestige to rowing victories. *See id.* at 227-28. Princeton started a baseball society in 1859, and there were five other teams by 1861. *See id.* at 228. The first intercollegiate track and field contest took place in 1873. *See id.*

26. *See id.* at 229 (describing first college football game between Princeton and Rutgers). Football became prominent after the Harvard–Yale game in 1875. *See id.* (describing formation of college football organization).

27. *See* Smith, *supra* note 23, at 989 (explaining efforts to control college athletics). The propensity to seek unfair advantages existed early on in college sports. *See id.* During the first Harvard–Yale regatta, Harvard's coxswain was not a student. *See id.* (noting example of unfair advantage at beginning of college sports history). "The commercialization of intercollegiate athletics, including the payment of compensation to the best athletes, was well entrenched by the latter part of the nineteenth century." *Id.*

28. *See id.* at 990 (describing continued need to control excesses of intercollegiate athletics). Although faculty members oversaw college athletics, there were still concerns regarding the regulation of intercollegiate athletics. *See id.* at 989-90 (explaining specific concerns about college football programs). President Theodore Roosevelt invited officials from major college football programs to participate in a White House conference to review the rules of college football. *See id.* at 990. The initial meeting did little to lessen the death and injuries until the Chancellor for New York University pushed for either reforming or abolishing intercollegiate football. *See id.* These meetings led to the formation of a Rules Committee and ultimately, the decision to reform intercollegiate football rules. *See id.* (explaining decision to regulate college athletics).

question whether the letters B.A. in the college degree stand more for Bachelor of Arts or for Bachelor of Athletics."[29] In response to these concerns, President Theodore Roosevelt, White House officials, and officials from major college football programs led a concerted effort to regulate college football rules and formed the Intercollegiate Athletic Association (IAA), which was renamed the NCAA in 1910.[30]

2. The Enforcement Authority of the NCAA

By the 1920s, college sports were an integral aspect of higher education.[31] With the increase in popularity came increasing commercial possibilities and pressures, taking away from the health and wellness benefits of athletics.[32] The Carnegie Foundation for the Advancement of Teaching's 1929 report noted the negative effects of commercialism in college sports.[33] Following the Carnegie Report, the NCAA revised recruiting rules in an effort to restore integrity in college sports.[34]

In 1948, the NCAA developed the Sanity Code, intending to "alleviate the proliferation of exploitative practices in the recruitment of student-athletes."[35] The Sanity Code prohibited schools from giving athletes financial aid based on their athletic ability and expelled schools from the NCAA if they violated the

29. Francis A. Walker, *College Athletics*, HARV. GRADUATES' MAG., Sept. 1893, at 1; *see* Rodney K. Smith, *A Brief History of the National Collegiate Athletic Association's Role in Regulating Intercollegiate Athletics*, 11 MARQ. SPORTS L. REV. 9, 11 (2000) (describing college presidents' concerns). College presidents voiced concerns that college sports were getting out of control and losing their "academic moorings." *See* Smith, *supra* (indicating specific concerns surrounding academics and college sports).

30. *See* Smith, *supra* note 29, at 12 (describing formation of IAA and eventually NCAA). The IAA had sixty-two original members working together to reform intercollegiate football rules. *See id.* The NCAA's original goal was to draft rules that applied to all college sports, not just football. *See id.* (explaining organization's intent).

31. *See* Smith, *supra* note 23, at 991 (explaining increased presence in higher education led to more criticism).

32. *See* HOWARD J. SAVAGE ET AL., CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, AMERICAN COLLEGE ATHLETICS 11 (1929), http://archive.carnegiefoundation.org/publications/pdfs/elibrary/American_College_Athletics.pdf [https://perma.cc/F6XY-VFZC] (explaining commercialism in sports means placing greater emphasis on monetary returns than other nonmonetary benefits).

33. *See id.* at 306 (naming commercialism and neglect for educational opportunities defects in collegiate sports). The Carnegie Report was the product of a study that focused on the relationship of sports in American college life and looking for ways to improve. *See id.* at 3 (explaining study conducted in Carnegie Report). The goal of the Carnegie Foundation for the Advancement of Teaching was to "do and perform all things necessary to encourage, uphold, and dignify the profession of the teacher and the . . . cause of higher education." *See Foundation History*, CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, https://www.carnegiefoundation.org/about-us/foundation-history/#:~:text=The%20Carnegie%20Foundation%20for%20the,the%20cause%20of%20higher%20education.%E2%80%9D [https://perma.cc/6H87-TF79].

34. *See* Smith, *supra* note 23, at 992 (stating NCAA took steps to restructure rules to maintain integrity of college sports).

35. *See* David F. Gaona, Note, *The National Collegiate Athletic Association: Fundamental Fairness and the Enforcement Program*, 23 ARIZ. L. REV. 1065, 1070 (1981) (describing Sanity Code implementation).

rules.[36] Due to the Sanity Code's unreasonable expulsion punishment, new NCAA amateurism rules replaced it after only two years; the new rules allowed schools to provide scholarships to students in exchange for athletic participation.[37] In addition, a new enforcement division within the NCAA—the Committee on Infractions—gained the authority to dole out more proportional penalties to members that violated the rules instead of expelling them.[38]

The NCAA gradually became a powerful governing authority over college sports.[39] In 1985, the Presidents Commission—comprised of college presidents—called a special convention to confront the enforcement authorities within the NCAA and establish their role in ensuring academic integrity in athletic programs.[40] Today, the Board of Governors is the NCAA's highest governing body, consisting of twenty-five members—including the NCAA's President as well as college presidents and chancellors from each division—committed to upholding the NCAA's core values.[41]

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36. *See* James Landry & Thomas A. Baker III, *Change or Be Changed: A Proposal for the NCAA to Combat Corruption and Unfairness by Proactively Reforming Its Regulation of Athlete Publicity Rights*, 9 N.Y.U. J. INTELL. PROP. & ENT. L. 1, 10 (2019) (explaining impact of Sanity Code).

37. *See id.* at 10 (stating new amateurism model replaced Sanity Code). The NCAA repealed the Sanity Code after finding it did not rid college sports of corruption. *See id.* The new amateurism model permitted student-athletes to receive athletic scholarships. *See id.*; *see also* Patrick Bell, *NCAA for Dummies: A Brief History of Intercollege Athletics*, BASEMENT MED. (Feb. 10, 2020), https://www.basementmedicine.org/sports/2020/02/10/ncaa-for-dummies-a-brief-history-of-intercollege-athletics/ [https://perma.cc/PME2-TKUL] (explaining replacement of Sanity Code with Committee on Infractions). The Committee on Infractions still acts as an independent administrative body within the NCAA and deals with cases involving violations of NCAA rules. *See Division I Committee on Infractions*, NCAA, https://www.ncaa.org/sports/2013/11/17/division-i-committee-on-infractions.aspx [https://perma.cc/C8ZS-3CW9] (stating current authority of NCAA Committee on Infractions).

38. *See* Smith, *supra* note 23, at 993 (explaining NCAA enforcement division). The Committee on Infractions decides penalties on a case-by-case basis while considering how to sufficiently deter an institution from breaking the rules again. *See Enforcement Process: Penalties*, NCAA, https://www.ncaa.org/sports/2013/11/27/enforcement-process-penalties.aspx [https://perma.cc/Q3HP-7Y3K] (explaining NCAA penalty process).

39. *See* Smith, *supra* note 23, at 993 (describing new powerful role of NCAA). The NCAA became powerful as an enforcement division because of increased financial support from television contracts. *See id.* at 993-94 (explaining NCAA criticized for turning college athletics into "big business").

40. *See id.* at 997 (describing challenges college presidents faced in confronting NCAA). College presidents believed their increased presence would solve the integrity problem. *See id.* at 997-98.

41. *See Governance*, NCAA, https://www.ncaa.org/sports/2021/2/9/governance.aspx [https://perma.cc/6JQ5-SPYW] (explaining NCAA Board of Governors); *Who Are the NCAA Board of Governors*, NCAA, https://www.ncaa.org/sports/2021/5/26/who-are-the-ncaa-board-of-governors.aspx [https://perma.cc/H6AA-XTVA] (listing current members of NCAA Board of Governors); *see also What Is the NCAA?*, NCAA, https://www.ncaa.org/sports/2021/2/10/about-resources-media-center-ncaa-101-what-ncaa.aspx [https://perma.cc/9YPQ-D62U] (indicating core values of NCAA members). The NCAA claims they are "[p]rioritizing academics, well-being and fairness so college athletes can succeed on the field, in the classroom and for life." *What Is the NCAA?*, *supra*.

3. Television Broadcasting Rights

With the governance of the NCAA sorted, college sports quickly became big business.[42] In the 1950s, the NCAA signed its first television broadcasting contract, valued at over $1 million, to air college football games.[43] Fearing the adverse effects of live television on in-person football attendance, the NCAA developed a plan to limit the number of televised games each season.[44]

In 1979, the College Football Association (CFA) believed that major football programs should have more power in deciding which games were televised and negotiated their own contract with NBC.[45] In response, the NCAA announced that they would take disciplinary actions against any CFA member that complied with the NBC contract.[46] Soon after, the University of Oklahoma and the University of Georgia filed an antitrust action against the NCAA in *NCAA v. Board of Regents*.[47]

Ultimately, the Court upheld the district court's finding that the NCAA television plan violated antitrust laws and forced the NCAA to overturn policies limiting the games broadcasted each season.[48] In its analysis of the college sports industry, the Court stated, "[i]n order to preserve the character and quality of the 'product,' athletes must not be paid."[49] Although *Board of Regents* represented

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42. *See* Kisska-Schulze, *supra* note 4, at 351 (emphasizing big-business status of college football and basketball programs). In 2018, for example, the NCAA earned $857 million from its March Madness broadcasting contract. *See id.* at 352-53 (noting revenue earned from March Madness tournament alone). "Big-time college football and basketball are now multi-billion dollar industries, and to pretend that these student-athletes are amateurs is nonsense." Michael Steele, Comment, O'Bannon v. NCAA*: The Beginning of the End of the Amateurism Justification for the NCAA in Antitrust Litigation*, 99 MARQ. L. REV. 511, 512 (2015).

43. *See* Smith, *supra* note 23, at 993 (describing contract). The commercial success of the NCAA centers on televising Division I college football and men's basketball games. *See* Alexander Lodge, Note, *Who's Afraid of the Big Bad NCAA? . . . The* Ed O'Bannon v. NCAA *Decision's Impact on the NCAA's Amateurism Model*, 41 J. CORP. L. 775, 778 (2016) (describing financial success of FBS football and Division I men's basketball).

44. *See* NCAA v. Bd. of Regents, 468 U.S. 85, 89-90 (1984) (describing NCAA's television plans). In 1951, the NCAA developed the "Television Committee" to report on the effects of television on college football attendance. *See id.* at 89. The committee's plan provided that they would broadcast one game per week. *See id.* at 90 (explaining details of television plan). The committee sent out a questionnaire to NCAA member schools and the NCAA used the responses to formulate a schedule for the season. *See id.* at 90-91.

45. *See id.* at 94-95 (explaining CFA contract with NBC). The CFA–NBC contract would have allowed more CFA appearances and would have increased the CFA member schools' revenue. *See id.* at 95 (detailing benefits of CFA–NBC contract).

46. *See id.* (describing NCAA reaction). The NCAA followed the television plan, intending to reduce the adverse effects on in-person attendance. *See id.* at 91.

47. *See id.* at 88 (explaining complaint against NCAA television policy). The University of Oklahoma and the University of Georgia alleged that the NCAA violated the Sherman Act. *See id.*

48. *See Bd. of Regents*, 468 U.S. at 120 (holding NCAA violated Sherman Act). "Today we hold only that the record supports the District Court's conclusion that by curtailing output and blunting the ability of member institutions to respond to consumer preference, the NCAA has restricted rather than enhanced the place of intercollegiate athletics in the Nation's life." *Id.*

49. *See id.* at 102 (labeling student-athletes "product" in college sports market). In analyzing the NCAA television plan, the Court observed the NCAA's "vital role" in preserving the character of college sports. *See id.* (emphasizing protective function of NCAA).

a win against the NCAA's television policy, Justice Stevens's famous words have since been used against student-athletes in antitrust litigation.[50]

B. Fighting for Their Rights: Student-Athletes' Legal Battles Against the NCAA

1. The Antitrust Argument

Following the universities' success against the NCAA in *Board of Regents*, student-athletes began challenging the restrictive practices of the NCAA under the Sherman Act.[51] The Sherman Act is the United States' antitrust law intended to prevent unreasonable restraints on trade.[52] In NCAA antitrust litigation, courts apply a "rule of reason" analysis to determine if there is an unreasonable restraint on trade in the relevant market—typically defined as the market for athletic services in Division I basketball and FBS football.[53] Courts follow the rule of reason's three-step framework:

> (1) The plaintiff bears the initial burden of showing that the restraint produces significant anticompetitive effects within a relevant market. (2) If the plaintiff meets this burden, the defendant must come forward with evidence of the

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50. *See infra* Section II.B.1 (detailing student-athlete antitrust cases against NCAA). Prior to *Board of Regents*, few antitrust decisions dealt with NCAA regulations. *See* Daniel E. Lazaroff, *The NCAA in Its Second Century: Defender of Amateurism or Antitrust Recidivist?*, 86 OR. L. REV. 329, 340 (2007) (detailing NCAA litigation history).

> *Board of Regents* provided important precedential support for the two-pronged antitrust approach to NCAA regulation. The Supreme Court suggested that while joint economic action by NCAA members on matters not dealing with the regulation of players should be subjected to rule of reason analysis under section 1 of the Sherman Act, regulations governing player eligibility and amateurism might be exempt or at least subject to less stringent antitrust scrutiny.

Id.

51. *See* Meyer & Zimbalist, *supra* note 11, at 267-69 (describing frequency of antitrust litigation against NCAA); *e.g.*, Banks v. NCAA, 977 F.2d 1081, 1082-83 (7th Cir. 1992) (claiming no-draft rules violated antitrust law); McCormack v. NCAA, 845 F.2d 1338, 1343 (5th Cir. 1988) (arguing NCAA eligibility rules violated antitrust law); Gaines v. NCAA, 746 F. Supp. 738, 741 (M.D. Tenn. 1990) (requesting relief from NCAA's exercise of monopoly power).

52. *See* NCAA v. Bd. of Regents, 468 U.S. 85, 98 (1984) (explaining intent of Sherman Act). Under the Sherman Act, "[e]very contract . . . in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal." Sherman Act § 1, 15 U.S.C. § 1.

53. *See* Lodge, *supra* note 43, at 778-80 (stating use of rule of reason analysis); NCAA v. Alston, 141 S. Ct. 2141, 2151-52 (2021) (defining relevant market in antitrust cases brought by student-athletes); *see also* O'Bannon v. NCAA, 802 F.3d 1049, 1056-57 (9th Cir. 2015) (defining college education market). The Ninth Circuit borrowed the lower court's analysis and explained that the market for FBS football and Division I basketball is subject to antitrust laws because "there are no professional (or college) football or basketball leagues capable of supplying a substitute for the bundle of goods and services that FBS football and Division I basketball schools provide." *See O'Bannon*, 802 F.3d at 1057 (quoting O'Bannon v. NCAA, 7 F. Supp. 3d 955, 968 (N.D. Cal. 2014)).

> restraint's procompetitive effects. (3) The plaintiff must then show that any legitimate objectives can be achieved in a substantially less restrictive manner.[54]

In 1988, Southern Methodist University (SMU) filed a lawsuit against the NCAA, claiming the NCAA's restrictions regarding player compensation violated the Sherman Act.[55] In 1990, a college football player sued the NCAA, alleging the NCAA's eligibility rules were unlawful under antitrust laws.[56] In both cases, the courts cited the *Board of Regents* dicta that emphasized the NCAA's purpose of fostering amateur sports competition and held that the NCAA's rules were not an antitrust violation.[57] These cases exemplify the NCAA's history of winning cases against student-athletes challenging the NCAA's amateurism rules.[58]

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54. *See O'Bannon*, 802 F.3d at 1070 (quoting Tanaka v. Univ. of S. Cal., 252 F.3d 1059, 1063 (9th Cir. 2001)) (defining rule of reason analysis).

55. *See McCormack*, 845 F.2d at 1340 (describing college athletic program's allegations against NCAA). SMU's athletic program violated the NCAA rules that limit the compensation student-athletes can receive through scholarships. *See id.* SMU filed suit against the NCAA, claiming the rule constituted illegal price fixing under the Sherman Act. *See id.* (explaining claim against NCAA).

56. *See Gaines*, 746 F. Supp. at 741 (explaining Gaines sought injunctive relief after NCAA prohibited college athletic participation after remaining undrafted). Gaines played college football at Vanderbilt. *See id.* at 740. When Gaines was eligible to participate in the National Football League (NFL) draft, he signed a contract with the NFL renouncing his college football eligibility and went to a scouting combine. *See id.* Ultimately, no NFL team drafted Gaines, and he was ineligible to play his fourth year at Vanderbilt because of the NCAA's "no-draft" rule. *See id.* Gaines claimed the eligibility rules regarding the NFL draft violated the Sherman Act. *See id.* at 741.

57. *See* McCormack v. NCAA, 845 F.2d 1338, 1343-45 (5th Cir. 1988) (using language in *Board of Regents* to dismiss antitrust claims); Gaines v. NCAA, 746 F. Supp. 738, 743, 744-45 (M.D. Tenn. 1990). "The Supreme Court indicated strongly in *Board of Regents* that . . . . '[i]t is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics.'" *McCormack*, 845 F.2d at 1344 (quoting *Bd. of Regents*, 468 U.S. at 117). The *Gaines* court recognized clear differences between the antitrust argument in *Board of Regents* and the NCAA's amateurism justification in this case pertaining to student eligibility rules. *See Gaines*, 746 F. Supp. at 743. Nevertheless, the *Gaines* court relied on the idea that the eligibility rules' overriding purpose was to preserve competition between student-athletes in holding that the rules were not subject to antitrust scrutiny. *See id.* at 744-45 (explaining court's decision favoring NCAA).

58. *See* JOE NOCERA & BEN STRAUSS, INDENTURED: THE INSIDE STORY OF THE REBELLION AGAINST THE NCAA 141 (2016) (discussing outcomes of cases students brought against NCAA). Student-athletes made a strong case against the NCAA in 2006 when Jason White filed an antitrust lawsuit against the NCAA, alleging the grant-in-aid cap in students' financial aid awards harmed competition among major college football and men's basketball programs. *See id.* at 142 (giving historical context of Jason White's case and noting wide range of programs covered); White v. NCAA, No. 06-CV-0999, 2006 WL 8066803, at *1 (C.D. Cal. 2006) (describing antitrust allegations). In cases involving student-athletes, judges have usually found for the NCAA. *See* NOCERA & STRAUSS, *supra*, at 142 (noting historical pattern of favorable holdings). Courts in these cases "often fell back on Justice Stevens's dicta as an important part of their reasoning." *See id.* The *White* case was the first student-athlete lawsuit to achieve class-action status. *See id.* Although the parties settled, people who have studied the case believe it was "the greatest missed opportunity to loosen the NCAA's stranglehold on big-time college sports." *See id.* at 148-49.

2. O'Bannon v. NCAA

In 1995, Ed O'Bannon led the University of California, Los Angeles (UCLA) men's basketball team to a National Championship.[59] Fourteen years later, O'Bannon became the lead plaintiff in an antitrust class action lawsuit against the NCAA.[60] In *O'Bannon v. NCAA*, Judge Claudia Wilken in the United States District Court for the Northern District of California found the NCAA rules that prohibited student-athletes from being compensated for the use of their NILs were an unlawful restraint on trade.[61] According to the Ninth Circuit, this was the first time any federal court held that any aspect of the NCAA amateurism rules violated antitrust law.[62]

On appeal, the NCAA argued that the NCAA amateurism rules are "valid as a matter of law" because of the Supreme Court's holding in *Board of Regents*.[63] Just as Judge Wilken concluded the NCAA could not rely on dicta from *Board of Regents*, the Ninth Circuit explained that the Court in *Board of Regents* did not declare the NCAA's amateurism rules were valid as a matter of law.[64] Although the Court in *Board of Regents* stated NCAA amateurism rules are procompetitive, that does not automatically mean the rules are lawful; they are still subject to antitrust scrutiny.[65]

The Ninth Circuit ultimately upheld that the amateurism rules violated the Sherman Act, but reversed the lower court's decision to require the NCAA to allow schools to pay athletes up to $5,000 more than the cost of attendance in deferred compensation for the use of their NILs because it would be a "quantum

59. *See* NOCERA & STRAUSS, *supra* note 58, at 161 (describing events leading up to *O'Bannon*). Ed O'Bannon was a star basketball player at UCLA. *See id.* O'Bannon decided to contact an attorney after seeing himself portrayed in an EA Sports college basketball video game, and he filed suit in 2009. *See id.*

60. *See id.* (deciding to name O'Bannon lead plaintiff in case). Other former players joined the case, including Bill Russell. *See id.* (naming other notable athletes joining suit).

61. *See* O'Bannon v. NCAA, 7 F. Supp. 3d 955, 988 (N.D. Cal. 2014) (determining NCAA's compensation rules amounted to prohibited price-fixing agreement), *aff'd in part and vacated in part*, 802 F.3d 1049 (9th Cir. 2015); Meyer & Zimbalist, *supra* note 11, at 271 (noting Judge Wilken's ninety-nine-page opinion). Judge Wilken found that the NCAA rules prohibiting student-athletes from profiting off their NILs constituted an anticompetitive restraint. *See* Meyer & Zimbalist, *supra* note 11, at 271.

62. *See O'Bannon*, 802 F.3d at 1053 (observing first time court ruled against NCAA amateurism rule in antitrust case).

63. *See id.* at 1061 (stating NCAA claims on appeal).

64. *See id.* at 1064 (rejecting NCAA argument regarding amateurism rules); *O'Bannon*, 7 F. Supp. 3d at 999. "The Supreme Court's suggestion in *Board of Regents* that, in order to preserve the quality of the NCAA's product, student-athletes 'must not be paid' was not based on any factual findings in the trial record and did not serve to resolve any disputed issue of law." *See O'Bannon*, 7 F. Supp. 3d at 999 (quoting NCAA v. Bd. of Regents, 468 U.S. 85, 102 (1984)).

65. *See Bd. of Regents*, 468 U.S. at 117 (explaining NCAA controls justified and procompetitive to preserve amateurism); *O'Bannon*, 802 F.3d at 1063-64 (stating nothing in *Board of Regents* supports exemption to antitrust scrutiny). It is still necessary to analyze the NCAA amateurism rule to determine if it is invalid under the Sherman Act. *See O'Bannon*, 802 F.3d at 1063-64. The court clearly stated that the amateurism rules' validity under the Sherman Act must be proved and not just presumed. *See id.* at 1064.

leap" for the NCAA.[66] Despite the compromise, Judge Wilken's opinion remains a historic win for college athletes because it opened the door to challenging the NCAA's alleged duty to protect amateurism.[67] Regarding the history of the NCAA's commitment to amateurism, Judge Wilken wrote, "[r]ather than evincing the association's adherence to a set of core principles, this history documents how malleable the NCAA's definition of amateurism has been since its founding."[68]

3. NCAA v. Alston

The most recent antitrust case brought against the NCAA went all the way to the Supreme Court in *NCAA v. Alston*.[69] In *Alston*, current and former Division I basketball players and FBS football players filed a class action lawsuit against the NCAA, alleging the NCAA violated the Sherman Act by limiting the compensation they could receive as student-athletes.[70] The athletes argued that the compensation rules violated antitrust laws because without the rules, they would have opportunities to financially benefit from their athletic services.[71] The NCAA argued because consumers "value amateurism," the rules were procompetitive as they helped preserve the demand for college sports and promoted the integration of student-athletes into their academic communities.[72]

The district court used the rule of reason analysis to determine whether the NCAA compensation limits violated antitrust laws.[73] The court first defined the relevant market as the market for student-athlete athletic services in Division I basketball and FBS football and confirmed that limiting compensation in the relevant market has severe anticompetitive effects.[74] The court found the

66. *See O'Bannon*, 802 F.3d at 1078-79 (summarizing circuit court's holding). "The difference between offering student-athletes education-related compensation and offering them cash sums untethered to educational expenses is not minor." *Id.* at 1078.

67. *See* NOCERA & STRAUSS, *supra* note 58, at 279 (calling Judge Wilken's rejection of NCAA amateurism historic).

68. *See* O'Bannon v. NCAA, 7 F. Supp. 3d 955, 1000 (N.D. Cal. 2014), *aff'd in part and vacated in part*, 802 F.3d 1049 (9th Cir. 2015). The NCAA's attempt to use the amateurism dicta from *Board of Regents* to defend the antitrust claims did not persuade Judge Wilken. *See id.* at 999-1000 (noting failed attempt to defend using language in *Board of Regents*).

69. *See generally* NCAA v. Alston, 141 S. Ct. 2141 (2021).

70. *See In re* NCAA Athletic Grant-In-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1061-62 (N.D. Cal. 2019) (stating NCAA and eleven conferences named defendants in case challenging NCAA rules), *aff'd sub nom.* Alston v. NCAA, 958 F.3d 1239 (9th Cir. 2020), *aff'd*, 141 S. Ct. 2141 (2021).

71. *See id.* at 1062 (explaining basis for antitrust claim).

72. *See id.* (stating NCAA defense against antitrust claim).

73. *See id.* at 1066 (beginning rule of reason analysis); *see also supra* Section II.B.1 (defining rule of reason analysis).

74. *See In re NCAA Athletic Grant-In-Aid Cap Antitrust Litig*., 375 F. Supp. 3d at 1070 (defining relevant market and anticompetitive effects). The athletes in the relevant market could not obtain the same combination of education, television exposure, and opportunities to go professional from anywhere else. *See id.* at 1067. The court found that because the NCAA had "near complete dominance" in the relevant market and the compensation limits fixed the price of the student-athletes' services, the anticompetitive effects were severe, harming class

NCAA's compensation limitations were not justified as a way to promote integration of student-athletes into academic communities.[75] The district court did, however, credit the NCAA's argument that some of the compensation limits preserve consumer demand because they serve as a distinction between college sports and professional sports.[76] The final part of the rule of reason analysis required student-athletes to show that there were "substantially less restrictive alternative rules that would achieve the same procompetitive effect as the challenged set of rules."[77] The Ninth Circuit ultimately agreed with the district court that, following the rule of reason analysis, the NCAA compensation rules violated the Sherman Act and further held that the NCAA could not cap education-related compensation to student-athletes in the relevant market, but could continue to limit compensation paid that was unrelated to education.[78] The Supreme Court upheld the Ninth Circuit's rule of reason analysis, stating "[t]he national debate about amateurism in college sports is important. But our task as appellate judges is not to resolve it."[79]

C. The NCAA's Commitment to Amateurism

1. The NCAA's View of Amateurism

The dictionary definition of an amateur is one "who takes part in a particular activity purely for pleasure or interest rather than as a professional; a person who engages in a pursuit (now esp. a sport) on an unpaid basis."[80] The NCAA defines the principle of amateurism in Article Two of the NCAA bylaws.[81] Further, Article Twelve of the NCAA bylaws is dedicated entirely to amateurism rules

members by depriving them of compensation they would have otherwise received. *See id.* at 1097-98 (explaining NCAA's dominance in college athlete market).

75. *See id.* at 1085-86 (finding justification unpersuasive).

76. *See In re* NCAA Athletic Grant-In-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1101 (N.D. Cal. 2019) (recognizing unlimited cash payment distinction), *aff'd sub nom.* Alston v. NCAA, 958 F.3d 1239 (9th Cir. 2020), *aff'd*, 141 S. Ct. 2141 (2021).

77. *See id.* at 1104 (explaining burden shifts to athletes to show substantially less restrictive alternative).

78. *See* NCAA v. Alston, 958 F.3d 1239, 1257, 1264-65 (9th Cir. 2020) (explaining procompetitive effect of amateurism), *aff'd*, 141 S. Ct. 2141.

79. *See Alston*, 141 S. Ct. at 2166 (quoting *Alston*, 958 F.3d at 1265) (affirming lower court's application of rule of reason analysis). The NCAA argued that the lower courts erred by using the rule of reason, saying instead that the courts should have given the compensation restrictions an "abbreviated deferential review" based on the precedent in *Board of Regents* and because the NCAA and member schools are not commercial enterprises. *See id.* at 2155, 2157-58 (explaining NCAA's argument on appeal).

80. *See Amateur*, OXFORD ENG. DICTIONARY, https://www-oed-com.ezproxysuf.flo.org/view/Entry/6041?print [https://perma.cc/X9L5-FXJ6] (defining "amateur").

81. *See* 2020–21 DIVISION I MANUAL, *supra* note 6, art. 2.9 (entitling Article principle of amateurism for student-athletes). The principle of amateurism, according to the NCAA bylaws, states that a student-athlete's "participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises." *Id.*

and student-athlete eligibility.[82] Article Twelve states that only amateur student-athletes are eligible for intercollegiate athletics participation.[83] Article Twelve includes requirements to obtain amateur status from the NCAA, a comprehensive list of actions that would cause an individual to lose their amateur status, and the definition of a "professional athlete."[84] The inclusion of the definition of professional athlete clearly distinguishes between student-athletes and professionals: One is paid, and the other is not.[85] There are a few exceptions to the NCAA amateurism rules, but the NCAA has consistently banned student-athletes from receiving any form of compensation, directly or indirectly, for their athletic participation.[86]

The NCAA has enforced amateurism for student-athletes since its founding.[87] Nevertheless, the sincerity of the NCAA's commitment to preserving amateurism is questionable.[88] The issue tends to focus on the economic objective of the revenue-generating sports: Division I basketball and FBS football.[89]

82. *See id.* art. 12 (containing NCAA amateurism rules). Article Twelve is titled "Amateurism and Athletics Eligibility" and contains all the requirements for student-athletes to be eligible to participate in a particular sport. *See id.*

83. *See id.* art. 12.01.1 (stating eligibility of student-athletes). A student-athlete is considered an integral part of the student body, which distinguishes college sports from professional sports. *See id.* art. 12.01.2 (defining professional athlete and student-athlete).

84. *See id.* arts. 12.1, 12.1.2, 12.02.11 (stating NCAA amateurism bylaws). The bylaws state that a professional athlete is an athlete "who receives any kind of payment, directly or indirectly, for athletics participation," with exceptions for some NCAA-allowed payments. *See id.* art. 12.02.11.

85. *See* Cody J. McDavis, Comment, *The Value of Amateurism*, 29 MARQ. SPORTS. L. REV. 275, 295 (2018) (noting significance of professional athlete definition). The NCAA has included both definitions since 1909. *See id.* at 294-95. "Taken together, the two definitions produce an important takeaway: Amateurs don't get paid." *Id.* at 295.

86. *See* 2020–21 DIVISION I MANUAL, *supra* note 6, arts. 12.1.2.1, 12.1.2.4 (listing exceptions to amateurism rule). The exceptions include allowing some athletes, like college tennis players earning prize money, to keep the earnings up to a specified threshold amount. *See id.* art. 12.1.2.4. Despite the exceptions, the NCAA consistently bars student-athletes from using their athletic skill for pay in any form. *See id.* art. 12.1.2(a); *see also* Taylor O'Toole, Comment, *Equity and Amateurism: How the NCAA Self-Employment Guidelines Are Justified and Do Not Violate Antitrust Law*, 123 PENN ST. L. REV. 247, 260 (2018) (explaining NCAA consistently bars student-athlete compensation).

87. *See* McDavis, *supra* note 85, at 296 (explaining issue of amateurism in college sports in early days of NCAA). In 1906, President Roosevelt cited amateurism preservation as a basis for calling the meeting that led to the formation of the NCAA. *See id.* at 294 (noting need for definition of student-athlete). In 1916, the NCAA formally defined "amateur" as "one who participates in competitive physical sport only for the pleasure, and the physical, mental, moral, and social benefits derived therefrom." *See id.* at 295. The NCAA did not enforce the amateurism rules until the 1950s, when the NCAA created the Committee on Infractions. *See* O'Toole, *supra* note 86, at 252-53 (noting delay in enforcing amateurism rules).

88. *See* McDavis, *supra* note 85, at 296 (citing Olympics exception to receiving pay for athletic abilities). Some critics of the amateurism model in college sports claim amateurism is a veil that the NCAA hides behind while profiting off of student-athletes. *See id.* (noting critiques of amateurism model). Some find the NCAA's continued insistence that amateurism is a core principle of intercollegiate athletics hypocritical. *See* NOCERA & STRAUSS, *supra* note 58, at 2 (discussing exploitation by NCAA). "The NCAA has consistently refused to acknowledge this hypocrisy; instead, it has held tightly to the centrality of amateurism, even as it has encouraged the commercialization of college sports in every other way imaginable." *Id.* at 3.

89. *See* Kristin R. Muenzen, Comment, *Weakening Its Own Defense? The NCAA's Version of Amateurism*, 13 MARQ. SPORTS L. REV. 257, 262 (2003) (describing economic objective of college sports); McDavis, *supra*

Despite national popularity and multimillion-dollar television broadcasting contracts, student-athletes must retain amateur status and therefore may not receive compensation for their athletic performance.[90] The preservation of amateurism is such a core principle of the NCAA that the NCAA regularly cites its amateurism bylaws in its antitrust litigation defense, arguing that although the rules are anticompetitive in nature, they are justified as a way to preserve amateurism and to enhance consumer demand for college sports.[91] The definition of amateurism in college athletics, however, appears to be whatever the NCAA wants it to be at any given time.[92] For example, college athletes can be paid professionals in one sport, but may still be allowed to compete as an amateur student-athlete in a different sport.[93]

2. Amateurism and the NCAA According to the Courts

The courts' distinct interpretation of "amateurism" impacts the available legal arguments against player compensation.[94] The Court understands that the NCAA rules play a "critical role in the maintenance of a revered tradition of amateurism in college sports."[95] Although Judge Wilken found the NCAA amateurism rules prohibiting student-athletes from receiving payment for their NILs violated antitrust laws, the Ninth Circuit held that the district court erred in allowing college athletes to receive cash compensation from their schools for the use of their NILs.[96] The Ninth Circuit explained that by allowing college athletes to receive up to $5,000 in deferred compensation, the district court ignored the fact that *not* paying student-athletes is "precisely what makes them amateurs."[97] In *Alston*, the Ninth Circuit agreed with the district court and credited the

note 85, at 276 (explaining revenue-generating sports). The commercial aspect of college sports conflicts with the NCAA's goals. *See* Muenzen, *supra*.

90. *See* McDavis, *supra* note 85, at 277-78 (describing source of NCAA profits). The NCAA caps the money a student-athlete can receive at cost of attendance. *See id.* (noting while value of attendance scholarship substantial, NCAA still places cap). If an NCAA athlete, however, is also on an Olympic team, that athlete may keep the prize money earned during the Olympic games, and NCAA tennis players may keep up to $10,000 per year in prize money. *See id.* at 296-97 (critiquing NCAA's amateurism argument by invoking examples of student-athletes earning compensation through other competitions).

91. *See, e.g.*, McCormack v. NCAA, 845 F.2d 1338, 1343-45 (5th Cir. 1988) (discussing justification for eligibility rules); Gaines v. NCAA, 746 F. Supp. 738, 744-746 (M.D. Tenn. 1990) (explaining NCAA's position Gaines's antitrust argument pertains to professional market, not student-athlete).

92. *See* Solomon, *supra* note 10 (describing NCAA's "never-ending" definition of amateurism).

93. *See id.* (stating different exceptions to amateurism rules).

94. *See* McDavis, *supra* note 85, at 284 (explaining courts' stance on amateurism). "The courts have a long history of recognizing amateurism as a justification for NCAA rules that restrict compensation." *Id.*

95. *See* NCAA v. Bd. of Regents, 468 U.S. 85, 120 (1984) (recognizing NCAA's role in preserving amateurism within bounds of Sherman Act). Justice Stevens explained that "the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics." *Id.*

96. *See* O'Bannon v. NCAA, 802 F.3d 1049, 1079 (9th Cir. 2015) (holding district court erred). "The difference between offering student-athletes education-related compensation and offering them cash sums untethered to educational expenses is not minor; it is a quantum leap." *Id.* at 1078.

97. *See id.* at 1076, 1079 (suggesting significant difference between paying and not paying student-athletes).

amateurism justification for restricting cash payments unrelated to education, which confirmed that courts agree compensation directly affects amateur status.[98]

D. The NCAA: A Charitable Organization Fostering Amateur Sports Competition

1. Favorable Tax Treatment of the NCAA

The NCAA has historically received favorable tax treatment from the IRS.[99] The tax-exempt status of the NCAA comes from IRC § 501(a), which states an organization shall be tax-exempt if it falls within § 501(c)(3) and lists tax-exempt organizations including, "corporations . . . organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition."[100] An organization is qualified as tax-exempt under IRC § 501(c)(3) if it passes the organizational and operational tests.[101]

The organizational test requires the organization to limit its purpose to one or more exempt purposes in the articles of organization, and the organization must not expressly empower itself to engage in activities that are not in furtherance of the exempt purpose.[102] Under the operational test, an organization operates exclusively for an exempt purpose "only if it engages primarily in activities which accomplish one or more of such exempt purposes."[103] The organizational test focuses on organizational technicalities, whereas the operational test is a question of fact.[104] A court will revoke an organization's tax-exempt status if it determines that more than an insubstantial part of the organization's activities

98. *See* Alston v. NCAA, 958 F.3d 1239, 1260 (9th Cir. 2020) (holding not paying student-athletes makes them amateurs).

99. *See* Kisska-Schulze, *supra* note 4, at 359 (listing examples of favorable tax treatment including tax exemption for qualified scholarships); *see also* Eric Carlson, Note, *Unsportsmanlike Conduct: Why the NCAA Should Lose Its Tax-Exempt Status if Scholarship Athletes Are Considered Employees of Their Universities*, 66 SYRACUSE L. REV. 157, 165 (2016) (describing treatment of NCAA scholarships). Another example of favorable tax treatment is that athletic scholarships awarded to NCAA athletes are exempt from gross income under IRC § 117. *See* Eric Carlson, *supra*, at 178; I.R.C. § 117(a)–(b) (defining qualified scholarship).

100. *See* I.R.C. § 501(a) (defining tax-exempt organizations); *id.* § 501(c)(3) (listing corporations qualified for tax exemption). For purposes of § 501(c)(3), "educational" relates to "[t]he instruction or training of the individual for the purpose of improving or developing his capabilities; or [t]he instruction of the public on subjects useful to the individual and beneficial to the community." Treas. Reg. § 1.501(c)(3)-1(d)(3) (as amended in 2017).

101. *See* Treas. Reg. § 1.501(c)(3)-1(a)(1) (stating organization not exempt if organizational or operational tests failed).

102. *See id.* § 1.501(c)(3)-(b)(1)(i)(a)–(b) (explaining how to meet organizational test).

103. *See id.* § 1.501(c)(3)-(c)(1) (defining operational test).

104. *See* John D. Colombo, *The NCAA, Tax Exemption, and College Athletics*, 2010 U. ILL. L. REV. 109, 114 (describing organizational and operational tests). When an organization operates for a substantial nonexempt purpose, that fact is significant for determining tax-exempt status and must be reviewed. *See* Orange Cnty. Agric. Soc'y, Inc. v. Comm'r, 893 F.2d 529, 532 (2d Cir. 1990) (explaining how court applied law to facts).

are in furtherance of nonexempt purposes.[105] For example, in *Orange County Agricultural Society, Inc. v. Commissioner*, the Tax Court determined that based on the amount of involvement in the county fair and the resulting revenue raised, the organization failed the operational test because more than an insubstantial amount of its activity did not further a charitable purpose.[106]

Before adding the actual words "amateur sports competition" to the code section, the IRS determined that IRC § 501(c)(3) extended to athletic programs affiliated with tax-exempt colleges and universities.[107] For example, the First Circuit recognized that "for many student-athletes, physical skills are a passport to college admissions and scholarships, allowing them to attend otherwise inaccessible schools."[108] A revenue ruling in 1967 called university athletic programs an "integral part of . . . overall education activities" and thus qualified as tax-exempt under IRC § 501(c)(3).[109] Recent scandals, however, raise questions as to the actual education of revenue-generating-sport athletes; the University of North Carolina (UNC), for example, created a "shadow

105. *See* Treas. Reg. § 1.501(c)(3)-1(a)(1) (stating organizations not exempt if they fail either operational or organizational tests); Partners in Charity, Inc. v. Comm'r, 141 T.C. 151, 151 (2013) (upholding IRS's revocation of tax-exempt status for failing operational test); *Orange Cnty. Agric. Soc'y, Inc.*, 893 F.2d at 532 (determining presence of single nonexempt purpose, substantial in nature, destroys exemption); *see also* Colo. State Chiropractic Soc'y v. Comm'r, 93 T.C. 487, 497-98 (1989) (explaining operational test); Media Sports League, Inc. v. Comm'r, 52 T.C.M. (CCH) 1093, 1096 (1986) (denying tax-exempt status because organization operated substantially for nonexempt purpose).

106. *See Orange Cnty. Agric. Soc'y*, 893 F.2d at 532-33 (affirming Tax Court decision to revoke tax exemption). Orange County Agriculture Society, Inc. (Society) incorporated in 1866 to promote agriculture and horticulture in Orange County, New York. *See id.* at 530. Society sponsored the Orange County Fair and leased the automobile racetrack situated on the fairgrounds to Orange County Fair Speedway, Inc. (OCF). *See id.* at 530-31. A major shareholder in Society owned all OCF stock. *See id.* at 531. Starting in 1975, the IRS audited Society and calculated the percentage of its revenue earned from the races held each year at the fair. *See id.* Applying the operational test, the Tax Court agreed with the IRS that Society's involvement in racing activities was not in furtherance of its stated exempt purpose. *See id.* at 532. The Second Circuit affirmed the Tax Court's finding that Society's "involvement in the automobile racing activities exceeded the benchmark of insubstantiality." *See id.* at 533 (quoting Orange Cnty. Agric. Soc'y, Inc. v. Comm'r, 55 T.C.M. (CCH) 1602, 1604 (1988).

107. *See* Kisska-Schulze, *supra* note 4, at 360 (explaining tax exemption for college athletic programs); Rev. Rul. 67-291, 1967-2 C.B. 184 (stating nonprofit organization furthering athletic program at university qualifies for tax exemption). In addition to the code language and revenue rulings, some case law supports the stance that college athletic programs are an integral part of the education process. *See* Kisska-Schulze, *supra* note 4, at 360 (noting sources supporting college athletic programs' role in education process).

108. *See* Cohen v. Brown Univ., 991 F.2d 888, 891 (1st Cir. 1993) (explaining court's recognition of athletics' educational importance). "For college students, athletics offers an opportunity to exacuate leadership skills, learn teamwork, build self-confidence, and perfect self-discipline." *Id.*; *see, e.g.*, Hutchinson Baseball Enters. v. Comm'r, 696 F.2d 757, 758, 763 (10th Cir. 1982) (concluding organization tax-exempt for advancing amateur baseball).

109. *See* Rev. Rul. 67-291, 1967-2 C.B. 184 (requiring application to qualify for exemption); 2020–21 DIVISION I MANUAL, *supra* note 6, arts. 1.2, 1.3.1 (stating NCAA purposes); *see also National Collegiate Athletic Association: Form 990 for Period Ending August 2018*, PROPUBLICA: NONPROFIT EXPLORER, https://projects.propublica.org/nonprofits/display_990/440567264/08_2019_prefixes_42-45%2F440567264_201808_990_2019080916559133 [https://perma.cc/ZC2X-JXP7] (stating NCAA mission related to education).

curriculum" of fake classes predominantly for men's basketball and football players.[110] Nevertheless, the Tax Reform Act of 1976 added the phrase "or to foster national or international amateur sports competition," making it clear that the furtherance of amateur sports is a tax-exempt purpose.[111]

2. Shifting to Less Favorable Tax Treatment

Determining if the NCAA should be tax-exempt comes down to whether revenue-generating sports are about the higher education of amateur athletes or commercialized entertainment.[112] There are limitations on charitable exemption under IRC § 501(c)(3), specifically the unrelated business income tax (UBIT).[113]

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110. *See* Marc Tracy, *N.C.A.A.: North Carolina Will Not Be Punished for Academic Scandal*, N.Y. TIMES (Oct. 13, 2017), https://www.nytimes.com/2017/10/13/sports/unc-north-carolina-ncaa.html [https://perma.cc/W7AC-PZ25] (describing UNC's fake class scandal designed to help student-athletes maintain academic eligibility); *see also* Sara Ganim, *CNN Analysis: Some College Athletes Play like Adults, Read like 5th Graders*, CNN (Jan. 8, 2014, 1:05 PM), https://www.cnn.com/2014/01/07/us/ncaa-athletes-reading-scores/index.html [https://perma.cc/FAG2-3LVA] (indicating some revenue sport athletes read at elementary school levels); Jasmine Harris, *It's Naïve to Think College Athletes Have Time for School*, CONVERSATION (Oct. 9, 2018, 6:55 AM), https://theconversation.com/its-naive-to-think-college-athletes-have-time-for-school-100942 [https://perma.cc/7KBJ-NAHE] (noting football and men's basketball players graduate at lower rates); *NCAA GOALS: Division I*, NCAA RSCH., https://ncaaorg.s3.amazonaws.com/research/goals/2020D1RES_GOALS2020con.pdf [https://perma.cc/NTR7-BGLS] (reporting FBS football players spend more hours on athletics than academics per year). There is debate over whether the NCAA's student-athlete model is "anything more than a sham." *See* William W. Berry III, *Educating Athletes: Re-envisioning the Student-Athlete Model*, 81 TENN. L. REV. 795, 804 (2014) (detailing three questions regarding NCAA's college athletics model).

111. *See* Tax Reform Act of 1976, Pub. L. No. 94-455, sec. 1313(a), § 501, 90 Stat. 1520, 1730 (codified as amended at I.R.C. § 501) (expanding qualifications for tax-exempt status); Colombo, *supra* note 104, at 118 (explaining 1976 amendment). By passing the amendment, Congress expressly stated that fostering amateur sports competition qualifies as a charitable purpose for tax purposes. *See* Colombo, *supra* note 104, at 118 (noting amendment). In 1987, the IRS released an article further explaining amateur athletic organizations. *See Amateur Athletic Organizations*, IRS, https://www.irs.gov/pub/irs-tege/eotopice87.pdf [https://perma.cc/Y2PV-CG8E] (defining amateur sports competition for § 501(c)(3) purposes). An amateur athletic organization may be considered "educational" because it "teaches sports to youth or is affiliated with an exempt educational organization." *See id.* An amateur athletic organization may be considered "charitable" under § 501(c)(3) on the grounds that it "combats juvenile delinquency." *See id.* An amateur athletic organization may be tax-exempt under IRC § 501(c)(3) on the grounds that it fosters national or international amateur sports competition. *See id.*

112. *See* 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, 1094 (2019) (focusing on how to determine whether college sports fall within universities tax-exempt purposes). It is questionable whether the pursuit of big-time college sports, Division I basketball and FBS football, is within universities' tax-exempt purposes. *See id.* at 1094-95 (questioning whether nonathlete students, by solely attending big-time college sporting events, support tax-exempt purpose).

113. *See* I.R.C. § 511 (imposing tax on unrelated business income); Colombo, *supra* note 104, at 115, 119 (explaining limitations on charitable exemption). Another limitation—known as the commerciality limitation—refers to when charities risk losing their tax-exempt status by running "significant commercial businesses." *See* Colombo, *supra* note 104, at 126. The commerciality limitation withdraws tax-exempt status completely, unlike the UBIT, which only taxes certain commercial activities while allowing the charity to remain tax-exempt. *See id.* at 126-27. The UBIT makes clear that income from business activity unrelated to the charitable purpose is taxable, even if the income is allocated to charitable services. *See id.* at 128; Treas. Reg. § 1.513-1(a) (as amended in 2020) (defining unrelated business taxable income). The objective of the UBIT is to eliminate sources of unfair competition by taxing the unrelated business of tax-exempt organizations the same as similar nonexempt

Under Revenue Ruling 80-295, the IRS excludes revenue from broadcasting rights from UBIT.[114] Nevertheless, in *NCAA v. Commissioner*, the IRS issued the NCAA a notice of deficiency after determining the revenue generated from selling March Madness programs was taxable as unrelated business income.[115] The court cited Treasury Regulation 1.513-1(c) when determining whether the NCAA March Madness advertisements were "regularly carried on business" within the meaning of UBIT.[116] Although the Tax Court agreed with the IRS that the advertisements should be subject to UBIT, the Tenth Circuit reversed the ruling, holding that the NCAA advertisement business was so infrequent it could not be considered regularly carried on.[117] The NCAA ultimately did not owe UBIT.[118]

In 2006, Congressman Bill Thomas from California sent a letter to the NCAA questioning the organization's tax-exempt status.[119] Ultimately, Congressman Thomas's questioning only resulted in confused criticism over the NCAA's tax-

business activity. *See* Treas. Reg. § 1.513-1(b) (explaining objective of UBIT and test to determine if income subject to UBIT).

114. *See* Rev. Rul. 80-295, 1980-2 C.B. 194 (holding sale of broadcasting rights not unrelated to tax-exempt purpose). "The broadcasting of the organization's sponsored, supervised, and regulated athletic events promotes the various amateur sports, fosters widespread public interest in the benefits of its nationwide amateur athletic program, and encourages public participation." *Id.*; *see* Rev. Rul. 80-296, 1980-2 C.B. 195 (stating broadcasting and exhibiting games before live audiences serve substantially similar educational purposes); Erik M. Jensen, *College Athletics and the Tax on Unrelated Business Income: Will "Student Athletes" Still Be Students After the NCAA Changes Its Rules?*, J. TAX'N INVS., Winter 2020, at 59, 67 (explaining IRS concession on broadcasting revenue). In 1982, the NCAA's total revenue from the Men's Division I basketball championship was $18,671,874; the NCAA did not report any of this as unrelated business income on its tax return. *See* NCAA v. Comm'r, 914 F.2d 1417, 1420 (10th Cir. 1990).

115. *See* NCAA v. Comm'r, 914 F.2d at 1420 (stating IRS's action against NCAA). The IRS determined that the revenue from program advertising was unrelated business income. *See id.* at 1425-26 (stating advertising revenue not related to exempt purpose).

116. *See id.* at 1421 (explaining "regularly carried on" test); *see also* Treas. Reg. § 1.513-1(c)(1)–(2) (defining "regularly carried on" within meaning of IRC § 512). "[S]pecific business activities of an exempt organization will ordinarily be deemed to be regularly carried on if they manifest a frequency and continuity, and are pursued in a manner, generally similar to comparable commercial activities of nonexempt organizations." Treas. Reg. § 1.513-1(c)(1). The Treasury Regulations elaborate on different kinds of activities and consider seasonal activities regularly carried on if they occur during a significant portion of the season. *See id.* § 1.513-1(c)(2)(ii); Richard L. Kaplan, *Intercollegiate Athletics and the Unrelated Business Income Tax*, 80 COLUM. L. REV. 1430, 1449 (1980) (arguing college football and basketball basically constitute seasonal activity).

117. *See* NCAA v. Comm'r, 914 F.2d at 1418, 1420, 1425-26 (reversing tax court decision). The court stated that the advertising activity was so infrequent that its possible "commercial nature" was insignificant. *See* Domenique Comacho & John Dunn, Case Comment, NCAA v. Commissioner of I.R.S.*: When Will the Internal Revenue Service Consider an Activity Regularly Carried On?*, 19 J. COLL. & UNIV. L. 39, 43-44 (1992) (explaining Tenth Circuit's determination regarding regularly carried on business).

118. *See* NCAA v. Comm'r, 914 F.2d at 1426 (holding NCAA's advertising business not regularly carried on for purposes of UBIT).

119. *See* John Cochran, *NCAA Challenged over Tax-Exempt Status*, ABC NEWS (Nov. 28, 2006, 6:02 PM), https://abcnews.go.com/Sports/story?id=2685286&page=1 [https://perma.cc/L87P-BUZQ] (reporting congressman's six-page letter to NCAA contained list of questions to verify tax-exempt status). Congressman Bill Thomas stated that it was unclear how the revenue the NCAA earned from college football and basketball programs contributed to student-athletes' academic lives. *See id.* (explaining reason for challenging NCAA exempt status).

free lifestyle.[120] Congress has since made changes to the tax code that directly affect college sports.[121] Provisions of the Tax Cuts and Jobs Act (TCJA) impact individual donations to college athletic programs and excessive college coaches' salaries.[122] These provisions eliminate the incentive for boosters—representatives of an institution's athletic interests—to donate to college and university athletic programs.[123] In 2017, Congress enacted IRC § 4960, which directly targets the excessive salaries of college coaches.[124] These TCJA provisions suggest that Congress may be shifting toward less favorable tax treatment of amateur sport organizations like the NCAA.[125]

E. The FPTP Act and the NCAA Response

In 2019, California lawmakers passed the FPTP Act.[126] California's FPTP Act is the first in the nation to allow NCAA student-athletes to profit from the use of their NILs.[127] The FPTP Act "guarantees college athletes a right to profit

120. *See* Colombo, *supra* note 104, at 110 (explaining NCAA asked to defend tax-exempt status). One criticism involved increased coaches' salaries, but there was little actual knowledge about the applicable law surrounding the NCAA tax exemption. *See id.* at 110-11 (concluding challenge against NCAA exempt status unsupported by law).

121. *See* Kisska-Schulze, *supra* note 4, at 348 (explaining changes possibly resulting in tax burdens on college sport).

122. *See* Tax Cuts and Jobs Act, Pub. L. No. 115-97, §§ 13702, 13704, 131 Stat. 2054, 2168-69 (2017) (codified as amended at I.R.C. §§ 512, 170) (amending tax treatment of tax-exempt organizations); Kisska-Schulze, *supra* note 4, at 348 (stating specific changes to tax code affecting higher education). The changes from the TCJA that will impact major college athletic programs in the future are the excise tax on coaches' salaries and "the loss of charitable deductions available to athletic ticket purchasers." *See* Kisska-Schulze, *supra* note 4, at 369 (naming relevant changes in TCJA). The TCJA repealed IRC § 170(l), which allowed individuals to donate to colleges and universities and deduct 80% of their charitable contribution in exchange for tickets to college athletic events. *See* Tax Cuts and Jobs Act § 13704 (eliminating deduction); Schmalbeck & Zelenak, *supra* note 112, at 1139 (explaining repeal of IRC § 170(l)); Kisska-Schulze, *supra* note 4, at 372 (expanding on TCJA abolishment of 80/20 rule). Further, the TCJA prohibits employers from taking deductions for entertainment expenses, including purchasing college sporting event tickets for entertaining clients or other business purposes. *See* Kisska-Schulze, *supra* note 4, at 372 (stating TCJA amended IRC § 274); Tax Cuts and Jobs Act § 13304 (eliminating deduction of entertainment expenses). Prior to TCJA, employers could deduct 50% of business entertainment expenses. *See* Kisska-Schulze, *supra* note 4, at 372 (explaining former tax benefits).

123. *See* Kisska-Schulze, *supra* note 4, at 373 (explaining effect on athletic departments' efforts to encourage donations); *Role of Boosters*, NCAA, https://www.ncaa.org/sports/2013/11/27/role-of-boosters.aspx [https://perma.cc/Q6TB-E62J] (defining booster).

124. *See* Tax Cuts and Jobs Act § 13602(a) (imposing excise tax on tax-exempt organization executive compensation in excess of $1 million); Kisska-Schulze, *supra* note 4, at 374 (describing how IRC § 4960 directly targets college athletic programs).

125. *See* Kisska-Schulze, *supra* note 4, at 349 (discussing Congress's newfound willingness to tax college sports); Schmalbeck & Zelenak, *supra* note 112, at 1153 (stating TCJA provisions indicate Congress rethinking tax-exempt status of college sports programs).

126. *See* Fair Pay to Play Act, ch. 383, 2019 Cal. Stat. 89 (codified at CAL. EDUC. CODE § 67456 (Deering 2020)); Meyer & Zimbalist, *supra* note 11, at 247 (stating FPTP Act signed into law).

127. *See* Sarah Traynort, Article, *California Says Checkmate: Exploring the Nation's First Fair Pay to Play Act and What It Means for the Future of the NCAA and Female Student-Athletes*, 20 WAKE FOREST J. BUS. & INTELL. PROP. L. 203, 204 (2020) (stating first NIL law presents opportunity to challenge for student-athlete

from their identities."[128] The FPTP Act also allows student-athletes in California to obtain professional representation from an agent and prevents NCAA member colleges and universities in California from revoking or modifying an athletic scholarship due to compensation earned from NIL.[129] For the first time, NCAA student-athletes can financially benefit from their college sports performance.[130]

Immediately after the passage of the FPTP Act, the NCAA expressed concern about the confusion the FPTP Act will create for current and future student-athletes.[131] Since California passed the FPTP Act, other states have introduced bills allowing NIL payments.[132] By May 2021, twenty-eight states passed similar legislation.[133] The NCAA believes it would be impracticable for the student-athlete NIL rules to differ from state to state because it would create unfair recruiting advantages.[134] As a result, the NCAA Board of Governors worked on rule changes that allow student-athletes to receive compensation for

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rights). "A postsecondary educational institution shall not uphold any rule, requirement, standard, or other limitation that prevents a student of that institution participating in intercollegiate athletics from earning compensation as a result of the use of the student's name, image, or likeness." Fair Pay to Play Act § 2.

128. *See* Michael McCann, *What's Next After California Signs Game Changer Fair Pay to Play Act into Law?*, SPORTS ILLUSTRATED (Sept. 30, 2019), https://www.si.com/college/2019/09/30/fair-pay-to-play-act-law-ncaa-california-pac-12 [https://perma.cc/75MT-T8YV] (explaining uses of FPTP Act for college athletes).

129. *See* Traynort, *supra* note 127, at 211 (describing elements of bill). The FPTP Act protects colleges and universities by granting schools the power to bar student-athletes from entering into contracts that conflict with a school's existing endorsements and not requiring schools to pay student-athletes for the school's use of an athlete's NIL. *See id.*

130. *See* Jack Kelly, *Newly Passed California Fair Pay to Play Act Will Allow Student Athletes to Receive Compensation*, FORBES (Oct. 1, 2019, 12:36 PM), https://www.forbes.com/sites/jackkelly/2019/10/01/in-a-revolutionary-change-newly-passed-california-fair-pay-to-play-act-will-allow-student-athletes-to-receive-compensation/#6f7959157d02 [https://perma.cc/8DP6-6DKV] (explaining impact of FPTP Act).

131. *See* Stacey Osburn, *NCAA Statement on Gov. Newsom Signing SB 206*, NCAA (Sept. 30, 2019, 10:44 AM), https://www.ncaa.org/news/2019/9/30/ncaa-statement-on-gov-newsom-signing-sb-206.aspx [https://perma.cc/VY6D-99H4] (expressing concern over different NIL laws enacted in different states). "As more states consider their own specific legislation related to this topic, it is clear that a patchwork of different laws from different states will make unattainable the goal of providing a fair and level playing field for 1,100 campuses and nearly half a million student-athletes nationwide." *Id.* In addition to the NCAA, EA Sports also continues to monitor the state NIL laws. *See* Michael Rothstein, *EA Sports to Do College Football Video Game*, ESPN (Feb. 2, 2021), https://www.espn.com/college-football/story/_/id/30821045/school-plan-ea-sports-do-college-football [https://perma.cc/G3Z2-EUQX] (discussing new college football video game). EA Sports reports it is monitoring the NIL situation to determine if the game will include rosters with players' NILs. *See id.*

132. *See* Meyer & Zimbalist, *supra* note 11, at 249 (naming states introducing NIL bills); *see also* Matt Norlander, *Fair Pay to Play Act: States Bucking NCAA to Let Athletes Be Paid for Name, Image, Likeness*, CBS SPORTS (Oct. 3, 2019, 5:43 PM), https://www.cbssports.com/college-football/news/fair-pay-to-play-act-states-bucking-ncaa-to-let-athletes-be-paid-for-name-image-likeness/ [https://perma.cc/83QU-DMSL] (detailing other states' NIL bills).

133. *See NIL Legislation Tracker*, SAUL EWING ARSTEIN & LEHR LLP, https://www.saul.com/nil-legislation-tracker#2 [https://perma.cc/G3W6-4LDX] (tracking number of states passing NIL legislation).

134. *See* Traynort, *supra* note 127, at 212-13 (explaining NCAA concerns). The NCAA Board of Directors also fears the FPTP Act will "erase the critical distinction between college and professional athletics." *See* Members of the NCAA Board of Governors, *NCAA Responds to California Senate Bill 206*, NCAA (Sept. 11, 2019, 10:08 AM), https://www.ncaa.org/news/2019/9/11/ncaa-responds-to-california-senate-bill-206.aspx [https://perma.cc/SW64-2C9T].

the use of their NILs.[135] On June 30, 2021, the NCAA adopted interim NIL policies allowing athletes to profit from their NILs.[136]

III. ANALYSIS

A. The NCAA Is Not Above Antitrust Laws

In *NCAA v. Alston*, the Supreme Court correctly affirmed the Ninth Circuit's holding that the NCAA's compensation restrictions violate antitrust law, but the Court's analysis did not go far enough.[137] After defining the relevant market and concluding that there are severe anticompetitive effects on the relevant market, the lower court's next step in the rule of reason analysis was to look at the evidence the NCAA offered to justify their anticompetitive rules.[138] The NCAA maintained that the compensation limits are procompetitive because "amateurism is a key part of demand for college sports" and "consumers value amateurism."[139] After listening to expert witnesses, the district court acknowledged that the NCAA could not offer an affirmative definition of "amateurism" and accordingly found there was no link between principles of amateurism and the compensation limits.[140] The NCAA did not provide sufficient evidence to show that actual increases in compensation decrease consumer demand, and although some witnesses testified that consumers enjoy college sports because student-athletes are not professionals, the court found this evidence alone did not establish a connection between consumer demand and compensation restrictions.[141] Yet the Ninth Circuit shockingly accepted the

135. *See* Stacey Osburn, *Board of Governors Moves Toward Allowing Student-Athlete Compensation for Endorsements and Promotions*, NCAA (Apr. 29, 2020, 8:30 AM), https://www.ncaa.org/news/2020/4/29/board-of-governors-moves-toward-allowing-student-athlete-compensation-for-endorsements-and-promotions.aspx [https://perma.cc/H5TT-BFRM] (stating changes NCCA plans on implementing regarding NIL).

136. *See Interim NIL Policy*, NCAA, http://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL_InterimPolicy.pdf [https://perma.cc/GN2G-RV3S] (stating NCAA's interim NIL policy). The NCAA has asked for support from the federal government to create national NIL laws to ensure consistency. *See* Dan Murphy & Adam Rittenberg, *NCAA Delays Vote to Change College Athlete Compensation Rules*, ESPN (Jan. 11, 2021), https://www.espn.com/college-sports/story/_/id/30694073/sources-ncaa-delays-vote-change-college-athlete-compensation-rules [https://perma.cc/J2RE-N7D7] (explaining delay in implementing new rules).

137. *See* 141 S. Ct. 2141, 2166 (2021) (stating some might find relief insufficient for student-athletes affected by NCAA antitrust violation); *id.* at 2167 (Kavanaugh, J., concurring) (finding amateurism justification circular and unpersuasive).

138. *See In re* NCAA Athletic Grant-In-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1070-86 (N.D. Cal. 2019) (analyzing NCAA justifications), *aff'd sub nom.* Alston v. NCAA, 958 F.3d 1239 (9th Cir. 2020), *aff'd*, 141 S. Ct. 2141.

139. *See id.* at 1070 (stating notion of amateurism drives consumer demand).

140. *See id.* at 1098-99 (explaining expert witness testimony unpersuasive). After expert testimony, the evidence did not persuade the court that student-athletes' receipt of permissible compensation exceeding the cost of attendance has reduced consumer demand for college sports. *See id.* at 1099-1100 (describing economic expert's findings).

141. *See id.* at 1100-01 (noting NCAA evidence not persuasive). An NCAA witness testified and admitted that in his over thirty years with the NCAA, the NCAA has never considered a study on consumers before making rules about compensation. *See id.* (rejecting NCCA's reliance on witness testimony).

justification that the NCAA rules restricting unlimited cash payments unrelated to education are procompetitive because distinguishing student-athletes from professionals enhances consumer demand for college sports.[142]

The Supreme Court unanimously agreed with the use of the rule of reason analysis in *Alston*, but Justice Kavanaugh in his concurring opinion expressed skepticism about the justification for restricting compensation unrelated to education.[143] The theory that the NCAA does not have to pay athletes—because the defining characteristic of a college athlete is that they are not paid—is circular and unclear.[144] Student-athletes are the ones generating billions of dollars for the NCAA, and the NCAA has historically been unable to define what an amateur athlete is at any given time.[145] Therefore, although courts agree that it is not their place to resolve the amateurism debate in college sports, acceptance of the NCAA amateurism justification allows the NCAA to continue building a

142. *See* Alston v. NCAA, 958 F.3d 1239, 1258 (9th Cir. 2020) (holding some NCAA rules justified and procompetitive), *aff'd*, 141 S. Ct. 2141. The Ninth Circuit similarly accepted the amateurism defense in *O'Bannon*, vacating and overruling Judge Wilken's decision to allow student-athletes to receive cash compensation for their NILs unrelated to educational expenses. *See* O'Bannon v. NCAA, 802 F.3d 1049, 1076 (9th Cir. 2015) (discussing effectiveness of competing policies regarding promoting amateurism); *see also* Landry & Baker III, *supra* note 36, at 30 (explaining Ninth Circuit's deviation from district court). In *O'Bannon*, Judge Wilken agreed that amateurism had a limited role in increasing consumer demand for FBS football and Division I basketball, but she believed the role did not justify the prohibition on compensating student-athletes for the use of their NILs. *See* O'Bannon v. NCAA, 7 F. Supp. 3d 955, 1001 (N.D. Cal. 2014) (explaining Judge Wilken's stance on amateurism), *aff'd in part and vacated in part*, 802 F.3d 1049 (9th Cir. 2015). Judge Wilken went through the history of the NCAA's rules and concluded that the NCAA's inconsistent definition of amateurism contradicted the procompetitive argument that amateurism is one of their "core principles." *See id.* at 1000 (explaining NCAA's amateurism argument unpersuasive considering rules); *see also O'Bannon*, 802 F.3d at 1058-59 (stating amateurism not primary driver of consumer demand in college sports today). The Ninth Circuit rejected the district court's finding that college athletes can receive up to $5,000 in deferred compensation from their schools for the use of their NILs because "not paying athletes is precisely what makes them amateurs." *See O'Bannon*, 802 F.3d at 1076, 1079 (explaining district court erred in allowing athletes to receive cash compensation). The Ninth Circuit held that, by paying student-athletes up to $5,000 in deferred compensation for the use of their NILs, "the NCAA will have surrendered its amateurism principles entirely and transitioned from its 'particular brand of football' to minor league status." *See id.* at 1078-79 (quoting NCAA v. Bd. of Regents, 468 U.S. 85, 101-02 (1984)) (stating reason for rejecting district court remedy).

143. *See* NCAA v. Alston, 141 S. Ct. 2141, 2155-60 (2021) (upholding rule of reason analysis and remedy lower courts fashioned); *id.* at 2166-67 (Kavanaugh, J., concurring) (explaining concerns about other NCAA compensation restrictions not analyzed in case).

144. *See Alston*, 141 S. Ct. at 2167 (stating NCAA's model illegal in other industries). Justice Kavanaugh expressed concern that since the case only involved education-related benefits, the NCAA's other compensation rules—which also raise antitrust questions—remain unaddressed. *See id.* at 2166-67. The Supreme Court decision was confined to education-related restrictions because the student-athletes did not renew their "across-the-board" challenge to the NCAA's compensation restrictions. *See id.* at 2154 (majority opinion). Justice Kavanaugh opined that the NCAA business model is "flatly illegal" in almost any other industry. *See id.* at 2166 (Kavanaugh, J., concurring).

145. *See In re* NCAA Athletic Grant-In-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1063, 1098-99 (N.D. Cal. 2019) (explaining failure to link principle of amateurism to compensation rules), *aff'd sub nom. Alston*, 958 F.3d 1239, *aff'd*, 141 S. Ct. 2141.

"massive money-raising enterprise on the backs of student athletes who are not fairly compensated."[146]

B. College Athletes Profiting from the Use of Their NILs Are More Professional than Amateur

Fortunately for student-athletes, the *O'Bannon* decision and the FPTP Act forced the NCAA to adopt NIL policies.[147] In *In re NCAA Athletic Grant-In-Aid Cap Antitrust Litigation*, the NCAA argued that amateurism can be defined as "not 'pay for play.'"[148] Allowing student-athletes to profit from the use of their NILs means student-athletes may receive payment for activities related to their athletic performance, including signing autographs, allowing video game companies to use their NILs in college sports video games, selling jerseys and other memorabilia, and sponsoring athletic camps.[149] Allowing players to profit from their NILs allows student-athletes to reap the rewards of their athletic abilities.[150] The change in the NCAA's stance on the use of NILs also eliminates the distinction the *In re NCAA Athletic Grant-In-Aid Cap Antitrust Litigation* court made between professional and college athletes.[151] The NCAA's new NIL policies and the economic realities of college sports mean there is no viable reason to treat college athletes as amateurs—under the current definition, they are not.[152]

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146. *See Alston*, 141 S. Ct. at 2166 (quoting *Alston*, 958 F.3d at 1265); *id.* at 2168-69 (Kavanaugh, J., concurring) (describing NCAA traditions cannot justify continuing unfair enterprises). "Nowhere else in America can businesses get away with agreeing not to pay their workers a fair market rate on the theory that their product is defined by not paying their workers a fair market rate." *See Alston*, 141 S. Ct. at 2169 (Kavanaugh, J., concurring).

147. *See* Jensen, *supra* note 114, at 61 (calling FPTP Act delayed response to *O'Bannon* decision); *Interim NIL Policy*, *supra* note 136 (capitulating on longstanding refusal to allow student-athletes to profit off their NILs). The FPTP Act is the first time the legal victory in *O'Bannon* became a legal right for college athletes. *See* McCann, *supra* note 128 (stating impact of *O'Bannon* on FPTP Act). The passage of the FPTP Act collides with the NCAA's insistence that student-athletes remain amateurs and forced the NCAA to change its bylaws to incorporate NIL rules. *See* Landry & Baker III, *supra* note 36, at 5 (stating NCAA forced to adjust policies).

148. *See In re NCAA Athletic Grant-In-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d at 1099 (noting amateurism not defined in NCAA bylaws). The NCAA, however, allows compensation in different forms, such as, grants-in-aid up to the cost of attendance, compensation earned from performance in the Olympics, or funds for post-graduate programs. *See id.* (listing allowable compensation).

149. *See* Meyer & Zimbalist, *supra* note 11, at 248 (stating ways to profit off NILs); Rothstein, *supra* note 131 (discussing new EA college football video game).

150. *See* Kelly, *supra* note 130 (explaining college athletes can now bypass NCAA ban). One opportunity that comes from the FPTP Act is that student-athletes can make money from acting as company sponsors. *See id.* (outlining methods for monetizing NIL).

151. *See In re* NCAA Athletic Grant-In-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1083 (N.D. Cal. 2019) (stating distinction between college and professional sports), *aff'd sub nom.* Alston v. NCAA, 958 F.3d 1239 (9th Cir. 2020), *aff'd*, 141 S. Ct. 2141 (2021).

152. *See* Steele, *supra* note 42, at 524 (explaining need for change given current reality of student-athletes); O'Bannon v. NCAA, 802 F.3d 1049, 1077 (9th. Cir. 2015) (acknowledging payment to student-athletes destroys amateur status). It is contradictory to say that a student-athlete can get paid from third parties for the use of their NIL, just like a professional athlete, but remain an amateur. *See O'Bannon*, 802 F.3d at 1077 (stating self-evident fact: paying students for their NIL rights destroys amateur status). The NCAA would be forced to amend its

C. The NCAA Should Not Be Tax-Exempt Under IRC § 501(c)(3)

1. The NCAA No Longer Fosters Amateur Sports Competition

If college athletes are no longer amateurs—because they can receive NIL payments—the NCAA cannot be tax-exempt under IRC § 501(c)(3) as an organization that fosters amateur sports competition.[153] Prior to the Tax Reform Act of 1976, the NCAA was tax-exempt under IRC § 501(c)(3) because the IRS considered college sports an integral part of educational activities.[154] The NCAA, however, does not serve an educational purpose because it does not train the athletes or instruct the public in any way.[155] The IRS should reevaluate the tax-exempt status of the NCAA.[156]

For an organization to be tax-exempt under IRC § 501(c)(3), it must meet both the operational and organizational tests.[157] The NCAA meets the organizational test because it states in its bylaws that its basic purpose is to maintain athletics as an integral part of the educational program.[158] On the other hand, for FBS football and Division I basketball, the NCAA does not meet the operational test because education takes a back seat.[159] Following the operational test, the IRS

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bylaws and redefine amateurism to enable student-athletes to be compensated for the use of their NILs. *See* Traynort, *supra* note 127, at 215-16 (stating NCAA amateurism rules must change for NCAA to remain dominant sports authority).

153. *See* I.R.C. § 501(c)(3) (stating fostering amateur sports competition qualifies organizations for tax-exempt status); Carlson, *supra* note 99, at 177-78 (stating NCAA fails organizational test absent amateur athletes).

154. *See* Rev. Rul. 67-291, 1967-2 C.B. 184 (describing educational purpose of athletic programs); Colombo, *supra* note 104, at 118 (explaining Congress explicitly deemed fostering amateur sports competition charitable purpose in 1976).

155. *See* Colombo, *supra* note 104, at 118 (emphasizing NCAA not engaged in educational activities). The IRS defines educational activities as instruction or training for the purposes of improving one's capabilities, or for the instruction of the public on subjects beneficial to the individual or community. *See* Treas. Reg. § 1.501(c)(3)-1(d)(3) (as amended in 2017) (defining "educational" for purposes of IRC § 501(c)(3)).

156. *See* Schmalbeck & Zelenak, *supra* note 112, at 1089 (stating IRS should reconsider preferential treatment of college sports).

157. *See* Treas. Reg. § 1.501(c)(3)-1(a) (stating organization must meet both tests).

158. *See* 2020–21 DIVISION I MANUAL, *supra* note 6, art. 1.3.1 (stating purpose of organization for educational purpose). "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 so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports." *Id.*; *see National Collegiate Athletic Association: Form 990 for Period Ending August 2018*, *supra* note 109 (describing NCAA mission statement). The NCAA claims to equip student-athletes with the skills to succeed by prioritizing academics. *See National Collegiate Athletic Association: Form 990 for Period Ending August 2018*, *supra* note 109.

159. *See* Steele, *supra* note 42, at 525-26 (explaining importance of education for NCAA, not for athletes); Treas. Reg. § 1.501(c)(3)-1(c)(1) (including organizations operating for educational purposes in tax-exempt category); Ganim, *supra* note 110 (citing example of student-athletes unable to read); Harris, *supra* note 110 (explaining time restraints make academics difficult for Division I college basketball and football players).

will revoke an organization's tax-exempt status if more than an insubstantial part of its activities do not further an exempt purpose.[160]

As part of its argument in *Alston*, the NCAA focused on the rule of reason analysis and claimed it was inappropriate because the NCAA and its member schools are not "commercial enterprises," but instead oversee college athletics "as an integral part of the undergraduate experience."[161] In response to this argument, the Court cited the antitrust analysis of the NCAA in *Board of Regents*, where the Court stated "the economic significance of the NCAA's nonprofit character is questionable at best" and that "the NCAA and its member institutions are in fact organized to maximize revenues."[162] Given the NCAA's commercialization and its already questionable charitable character, the Tax Court would likely find that more than an insubstantial amount of the NCAA's activities are unrelated to the furtherance of an educational purpose.[163] When deciding if an organization qualifies for tax exemption under the operational test, the IRS looks at what the organization actually does and not the subjective motive for starting the organization.[164] The NCAA's subjective motive may be educational, but today, the NCAA spends a majority of its efforts facilitating revenue-generating sports whose student-athletes are athletes first, students second.[165]

About 70% of FBS football and Division I men's basketball players believe that college is a stepping stone to a professional sports career.[166] Studies show most schools have revenue sport athletes who read at an elementary level, lower graduation rates for football and men's basketball players, and scandals where

160. *See* Treas. Reg. § 1.501(c)(3)-1(c)(1) (explaining operational test); *see also* Partners in Charity, Inc. v. Comm'r, 141 T.C. 151, 172 (2013) (holding substantial amount of organization's activity did not further exempt purpose).

161. *See* NCAA v. Alston, 141 S. Ct. 2141, 2158 (2021) (explaining NCAA's argument).

162. *See id.* at 2159 (quoting NCAA v. Bd. of Regents, 468 U.S. 85, 100 n.22 (1984)) (questioning NCAA's argument).

163. *See id.* (quoting *Bd. of Regents*, 468 U.S. at 100 n.22) (recognizing NCAA's questionable charitable purpose); *see also* Orange Cnty. Agric. Soc'y, Inc. v. Comm'r, 893 F.2d 529, 533 (2d Cir. 1990) (agreeing with Tax Court finding organization involved in activity not in furtherance of exempt purpose). In *Orange County Agricultural Society, Inc.*, the Tax Court explained the mere fact that racing activities provided Society with substantial income did not make them substantially related to Society's exempt purpose. *See* Orange Cnty. Agric. Soc'y, Inc. v. Comm'r, 55 T.C.M. (CCH) 1602, 1604 (1988) (explaining Tax Court's decision regarding activity unrelated to exempt purpose), *aff'd*, 893 F.2d 529.

164. *See Partners in Charity, Inc.*, 141 T.C. at 163-64 (determining requisite purpose does not consist simply of charitable motive).

165. *See supra* note 3 and accompanying text (explaining NCAA revenue primarily from broadcasting and marketing March Madness alone); 2020–21 DIVISION I MANUAL, *supra* note 6, art. 1.3.1 (stating NCAA purpose in educational system); *see also* Jensen, *supra* note 114, at 63 (stating Division I football and basketball players have significant opportunity to make money from changes); Steele, *supra* note 42, at 530 (stating aim of college sports).

166. *See NCAA GOALS: Division I*, *supra* note 110 (reporting 70%–76% of revenue-generating athletes believe becoming professional athlete somewhat likely).

colleges created fake classes for athletes to meet eligibility requirements.[167] The focus for FBS football and Division I men's basketball players is athletics, not academics.[168]

2. Even if the NCAA Is Still Tax-Exempt, Revenue Earned from FBS Football and Division I Basketball Should Be Subject to UBIT

The recent shift to less favorable tax treatment for college sports might lead to changes in how the IRS treats the college sports industry.[169] Even if the NCAA is still tax-exempt, the IRS should reconsider Revenue Ruling 80-296, which determined that revenue earned from sales of broadcasting rights for intercollegiate sporting events is not subject to UBIT.[170] UBIT is income from a trade or business that is regularly carried on and that is not substantially related to the institution's tax-exempt purposes.[171] When the IRS issued this Revenue Ruling, the NCAA made approximately $20 million from broadcasting the Division I men's basketball tournament; comparatively, the NCAA made over $800 million from broadcasting the tournament in 2019.[172] The IRS should consider revenue earned from Division I men's and women's basketball and FBS football programs UBIT because revenue-generating sports are a trade or business that is regularly carried on—they operate for profit and have set seasons that occur every year.[173]

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167. *See supra* note 110 and accompanying text (explaining criticism of education in big-time college athletics).

168. *See* Harris, *supra* note 110 (reporting education and athletics at schools with Division I programs inherently at odds).

169. *See* Kisska-Schulze, *supra* note 4, at 366 (noting potential tax impact on college sports). "As 'big-time' Division I college sports have steadily transformed amateur athletics into a lucrative commercial industry, President Trump's verbiage may have foreshadowed imminent tax changes coming to the college sports industry." *Id.*

170. *See* Rev. Rul. 80-296, 1980-2 C.B. 195 (stating broadcasting revenue not subject to UBIT).

171. *See* Treas. Reg. § 1.513-1(a) (as amended in 2020) (defining UBIT). Income is included for UBIT calculations if: "(1) It is income from trade or business; (2) such trade or business is regularly carried on by the organization; and (3) the conduct of such trade or business is not substantially related . . . to the organization's performance of its exempt functions." *Id.*

172. *See* NCAA v. Comm'r, 914 F.2d 1417, 1420 (10th Cir. 1990) (stating NCAA revenue from tournament in 1982); *Where Does the Money Go?*, *supra* note 3 (stating $867.5 million earned from Division I men's basketball broadcasting and marketing rights in 2019).

173. *See* Carlson, *supra* note 99, at 168, 181 (stating NCAA football regularly carried on); *see also* I.R.C. § 511 (stating imposition of tax on unrelated business income). Unlike the advertising activity in *NCAA v. Commissioner* that the court held occurred too infrequently, big-time college athletic programs manifest a frequency and continuity, and schools conduct advertisements all year. *See* NCAA v. Comm'r, 914 F.2d at 1424 (holding activity not regularly carried on); Treas. Reg. § 1.513-1(c)(2)(i) (expanding on regularly carried on requirement). Activities that are normally undertaken on a seasonal basis are still considered regularly caried on for UBIT purposes if they occur during a significant portion of a season. *See* Treas. Reg. § 1.513-1(c)(2)(i). College football and basketball undoubtedly take up significant portions of the seasons they participate in—football in the fall and basketball in the winter. *See* Kaplan, *supra* note 116, at 1449 (considering college football and basketball regularly carried on seasonal activity).

The key question in the analysis is whether FBS football and Division I men's and women's basketball are substantially related to the tax-exempt purpose of the NCAA.[174] As discussed above, the NCAA's support of revenue-generating sports is unrelated to fostering amateur sports or educational purposes.[175] If the NCAA acknowledges that athletes are "professionals, with no direct educational connection to the colleges except revenue-raising," the UBIT would apply.[176] Although the FPTP Act and interim changes to NCAA bylaws allow schools to compensate athletes for their NILs, student-athletes are theoretically still just like every other college student in that they can profit off their NILs, and there likely will not be immediate tax changes for the NCAA.[177] Nevertheless, as college athletes continue to fight for fair compensation, the NCAA may someday be subject to UBIT.[178]

IV. CONCLUSION

From its inception, the NCAA has committed itself to reducing corruption and preserving amateurism in college athletics. Over time, the commercialization of college sports, specifically FBS football and Division I basketball, made it disingenuous to continue to call these athletes amateurs. In *O'Bannon* and *Alston*, student-athletes recognized how unfair it was for every student on campus except for NCAA athletes to be able to profit off their NIL. These cases and the FPTP Act forced the NCAA to amend their bylaws, and college athletes can now profit from their NILs and hire agents—just like professional athletes.

Given that Congress recently changed the tax code in a way directly affecting college athletics, it is reasonable to believe the new NIL rules could affect the NCAA's tax-exempt status. Following the operational and organizational tests under IRC § 501(c)(3), the IRS should revoke the NCAA's tax-exempt status. Allowing third parties to directly compensate players for their athletic performance at NCAA member schools makes players more like professionals than amateurs.

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174. *See* Jensen, *supra* note 114, at 65 (explaining tax analysis necessary in determining whether NCAA should remain tax-exempt).

175. *See supra* Section III.C.1 (arguing NCAA does not further educational purposes for revenue-generating sports).

176. *See* Jensen, *supra* note 114, at 68 (criticizing idea attending college sporting events connects student-athletes and educational experience). It is irrelevant that the revenue generated is used for educational purposes. *See id.* at 68-69 (explaining using revenue for educational purposes does not protect from UBIT). IRC § 513(a) defines conduct that is not substantially related to the tax-exempt purpose, without consideration for how the organization uses revenue. *See* I.R.C. § 513(a) (naming exception regarding organizations use of profits).

177. *See* Jensen, *supra* note 114, at 71 (stating unlikeliness new NCAA policy or FPTP Act changes IRS understanding of big-time college sports).

178. *See id.* (predicting potential tax consequences in NCAA's future). "Once the last drip drops, and colleges directly and openly compensate athletes—you know that's coming in the foreseeable future—the application of UBIT to big-time college athletics should be clear—if it [is not] already." *Id.*

If the NCAA continues to broaden its amateurism rules, the separation between student and athlete will continue to grow. Further, if FBS football or Division I basketball players can earn compensation for their athletic services—like a salary—directly from the NCAA or their universities, it is highly likely that the NCAA's revenue earned from broadcasting rights will be subject to UBIT. As such, the NCAA will continue to fight against player compensation—either to preserve historic principles of amateurism or to avoid tax consequences.