



6-15-2020

The Swelling Tide Of Commercialized Amateur Athletics: How Growing Revenues Have Called Public Attention To The NCAA And Its Member Universities' Tax- Exempt Status

Benjamin Kurrass

Follow this and additional works at: <https://digitalcommons.law.villanova.edu/mslj>



Part of the [Entertainment, Arts, and Sports Law Commons](#)

Recommended Citation

Benjamin Kurrass, *The Swelling Tide Of Commercialized Amateur Athletics: How Growing Revenues Have Called Public Attention To The NCAA And Its Member Universities' Tax- Exempt Status*, 27 Jeffrey S. Moorad Sports L.J. 285 (2020).

Available at: <https://digitalcommons.law.villanova.edu/mslj/vol27/iss2/4>

This Comment is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Jeffrey S. Moorad Sports Law Journal by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.

THE SWELLING TIDE OF COMMERCIALIZED AMATEUR
ATHLETICS: HOW GROWING REVENUES HAVE
CALLED PUBLIC ATTENTION TO THE
NCAA AND ITS MEMBER
UNIVERSITIES' TAX-EXEMPT STATUS

I. AN INTRODUCTION: BALANCING ATHLETES' CONTRIBUTION TO A
TAX-EXEMPT ORGANIZATION

The group of companies earning revenues of at least one billion dollars introduced a new member to their ranks in 2017, when the National Collegiate Athletic Association (“NCAA”) crossed this threshold for the first time in its history.¹ The bulk of the NCAA’s revenue is collected through contractual relationships the organization has with media companies, such as CBS Corporation and Time Warner Inc.’s Turner Sports, to broadcast the annual men’s basketball tournament, March Madness.² As the NCAA’s bank account has grown substantially, many of the NCAA’s member universities have experienced simultaneous monetary growth in their respective athletic programs, particularly in their football and men’s basketball programs.³

The top twenty-five university football programs netted an average of roughly one hundred million dollars in estimated revenue.⁴ This figure includes revenue produced from ticket sales, licensing,

1. See Bloomberg, *The NCAA Raked in Over \$1 Billion Last Year*, FORTUNE (Mar. 7, 2018), <https://fortune.com/2018/03/07/ncaa-billion-dollars/> [<https://perma.cc/N3KK-3KZX?type=image>] (observing NCAA’s growth in revenue during fiscal years from 2016 to present equals over one billion dollars while NCAA’s accumulated profits equate to roughly one million dollars).

2. See *id.* (discussing \$761 million NCAA generated from contractual relationships to broadcast March Madness).

3. See Chris Smith, *College Football’s Most Valuable Teams: Texas A&M Jumps to No. 1*, FORBES (Sept. 11, 2018, 9:52 AM), <https://www.forbes.com/sites/chris-smith/2018/09/11/college-footballs-most-valuable-teams/#73b3a026c647> [<https://perma.cc/TB4F-9ABC>] (highlighting large revenues which university football programs collect); see also David Kenyon, *College Sports Programs With the Highest Revenues*, BLEACHER REP. (Sept. 19, 2018), <https://bleacherreport.com/articles/2795760-college-sports-programs-with-the-highest-revenue> [<https://perma.cc/R3GX-7G7Q>] (describing top ten highest revenue generating football programs); Chris Smith, *The Most-Valuable College Basketball Teams*, FORBES (Mar. 12, 2019, 6:00 AM), <https://www.forbes.com/sites/chris-smith/2019/03/12/the-most-valuable-college-basketball-teams/#58e3411f3225> [<https://perma.cc/5UBB-8MT5>] (discussing top revenue generating men’s college basketball teams).

4. See Smith, *supra* note 3 (reporting revenues for highest twenty-five college football programs collected from annual financial filings).

royalties, television revenue, and contributions from alumni.⁵ Also contributing to revenue are sponsorship agreements with apparel companies such as Nike and Adidas, which supply university football programs with anywhere from approximately three to seven and a half million dollars annually.⁶

Along with collecting exploding revenues, universities have constructed state-of-the-art athletic facilities that go far beyond traditional collegiate athletic accommodations.⁷ Louisiana State University, for example, built a new twenty-eight million dollar locker room, which the athletic department described as “a cross between a first class cabin on an airplane and a space station from a science fiction film.”⁸ Revenue increases have also created a spike in head coaching salaries, specifically for football and men’s basketball coaches.⁹ This is evident through the University of Kentucky’s contract with men’s basketball coach John Calipari and the University of Alabama’s contract with football coach Nick Saban, both of which are worth approximately eight million dollars.¹⁰

5. *See id.* (describing revenue activities of university football programs).

6. *See* Daniel Kleinman, *The Most Valuable College Apparel Deals 2018*, FORBES (Sept. 11, 2018, 9:54 AM), <https://www.forbes.com/sites/danielkleinman/2018/09/11/the-most-valuable-college-apparel-deals-2018/#4b1ca67a4be9> [<https://perma.cc/3EXS-NWDV>] (describing various apparel deals reached by universities such as Clemson University and University of Washington).

7. *See* Will Hobson & Steven Rich, *Colleges Spend Fortunes on Lavish Athletic Facilities*, CHICAGO TRIBUNE (Dec. 23, 2015, 6:40 AM), <https://www.chicagotribune.com/sports/college/ct-athletic-facilities-expenses-20151222-story.html> [<https://perma.cc/HAD6-C5TM>] (highlighting increasing magnitude of spending by universities on athletic facilities).

8. Mack DeGeurin, *Louisiana State University Just Spent \$28 Million on a Football Locker Room, and It’s Made a Lot of Students Unhappy*, INSIDER (July 23, 2019, 3:26 PM), <https://www.insider.com/lsu-spent-28-million-on-a-locker-room-and-students-arent-happy> [<https://perma.cc/28P7-9G7V>] (describing Louisiana State University’s new twenty eight million dollar football locker room features, including sleep pods for players, purple plush chairs, and offices).

9. *See* Jason Belzer, *Making Sense of College Coaching Contracts*, ATHLETICDIRECTORU, <https://athleticdirector.com/articles/making-sense-of-college-coaching-contracts/> [<https://perma.cc/CD2B-A65T>] (discussing increasing amounts of college athletic coaches’ salaries and contracts).

10. *See* *College Football’s 25 Highest-Paid Coaches*, USA TODAY (Oct. 3, 2018, 12:31 PM), <https://www.usatoday.com/picture-gallery/sports/ncaaf/2018/10/03/college-football-highest-paid-coaches/1497065002/> [<https://perma.cc/R65E-SN54>] (listing salaries of college football’s highest paid coaches); *see also* Abigail Hess, *The 10 Highest-Paid NCAA Basketball Coaches*, CNBC (Mar. 10, 2019, 10:00 AM), <https://www.cnbc.com/2019/03/08/the-10-highest-paid-ncaa-basketball-coaches.html> [<https://perma.cc/6PLX-WJAB>] (listing salaries of college basketball’s highest paid coaches).

2020] SWELLING TIDE OF COMMERCIALIZED AMATEUR ATHLETICS 287

While the NCAA and its member universities have prospered, the organization's student-athletes have not shared in the riches.¹¹ In recent years, student-athletes have sought financial incentives from universities as athletic programs have generated massive financial gains.¹² Pointing to the required time commitment and amount of physical labor student-athletes dedicate to athletics over academics, student-athletes are beginning to consider themselves as employees of the universities, rather than students of their respective universities.¹³ Further, for some student-athletes, there is a fear of suffering a serious injury that could limit, or potentially end, any hopes of a professional career and the economic security this could bring.¹⁴ Such potential risk was illustrated in February 2019 during a nationally broadcasted men's basketball game between the Duke University Blue Devils and the University of North Carolina Tar Heels, where Duke forward Zion Williamson's Nike shoe split open after he slipped on the basketball court.¹⁵ The fallout from this incident led Nike's stock to suffer a one percent drop overnight, equaling approximately one billion dollars, and could have cost Williamson millions in unrealized economic potential.¹⁶ Concerns such as these have prompted student-athletes, and outside critics, to call for unionization and fair compensation of student-athletes.¹⁷

11. See Joe Nocera & Ben Strauss, *Fate of the Union: How Northwestern Football Union Nearly Came to Be*, SPORTS ILLUSTRATED (Feb. 24, 2016), <https://www.si.com/college-football/2016/02/24/northwestern-union-case-book-indentured> [<https://perma.cc/W7LD-VNXF>] (finding scholarships for football players who fell short of living costs by more than \$3,000 per year and that "more than 80% of athletes playing football on 'full scholarship' lived below the poverty line").

12. See *id.* (noting growing discontent among student-athletes for lack of compensation in exchange for hours devoted to athletic responsibilities, especially in context of rising revenues of athletic programs).

13. See *id.* (discussing issues facing student-athletes such as failing to meet class requirements, difficulty using stipends to cover all off-campus living spending, and lack of medical care).

14. See *id.* (describing experience of potential NFL player Cleveland Colter suffering severe knee injuries during his collegiate career, which he never recovered from, that ruined his NFL dreams).

15. See Mike Murphy, *Duke's Zion Williamson Blows Out His Shoe, Injures Knee, and Nike Gasps in Horror*, MARKETWATCH (Feb. 21, 2019), <https://www.marketwatch.com/story/zion-williamson-blows-out-his-shoe-injures-knee-and-nike-gasps-in-horror-2019-02-20> [<https://perma.cc/TR9B-LPXN>] (detailing financial fallout of Zion Williamson's Nike-made shoe exploded during national televised college basketball game).

16. See Charlotte Wilder, *U.S. Senator Chris Murphy Hopes to End the Madness and Pay College Athletes*, SPORTS ILLUSTRATED (Mar. 28, 2019), <https://www.si.com/college/2019/03/28/senator-chris-murphy-ncaa-college-sports-pay-athletes-madness-inc-report> [<https://perma.cc/F4TQ-TSSA>] (highlighting close association between Nike valuation and student-athletes' performance).

17. See, e.g., *Nw. Univ.*, 362 N.L.R.B. No. 167 (Aug. 17, 2015) (discussing Northwestern University's scholarship football players' attempt to unionize under

The fear among the NCAA and its member universities is that if student-athletes received a financial incentive for their talents, that would erode the ideals of amateurism, which represents the hallmark of collegiate athletics.¹⁸ However, the concerns cited by many critics of the NCAA and its member universities insist that professionalism is already present in collegiate athletics because the ideals of amateurism have been removed.¹⁹ While the debate on compensating student-athletes has focused on the protection of amateurism in intercollegiate athletics, the compensation of student-athletes would also put the status of the NCAA and its member universities as tax-exempt organizations, under Section 501(c)(3) of the Internal Revenue Code (“the Code”), in jeopardy.²⁰

Section 501(c)(3) provides a tax exemption for corporations that are “organized and operated exclusively for religious, charitable . . . educational purposes, or to foster national or international amateur sports competition.”²¹ This exemption allows the NCAA and its member universities to side-step taxes on various activities, such as revenues derived from radio and broadcasting rights, as well as corporate sponsorship agreements.²² The NCAA qualifies for this exemption through its status as the governing body of collegiate athletics whose organizational purpose is to promote amateur athletics.²³ Meanwhile, legal precedent has enabled university athletic programs to operate under the exemption because col-

the National Labor Relations Act); see also Marc Edelman, *A Prelude to Jenkins v. NCAA: Amateurism, Antitrust Law, and the Role of Consumer Demand in a Proper Rule of Reason Analysis*, 78 LA. L. REV. 227, 228 (2017) (discussing *Jenkins v. Nat’l Collegiate Athletic Ass’n*, No. 14-md-2541 CW (N.D. Cal. Aug. 5, 2016), which seeks to “overturn the NCAA’s amateurism rules that ‘plac[es] a ceiling on the compensation that may be paid to [college] athletics for their services.’”).

18. See William W. Berry III, *Amending Amateurism: Saving Intercollegiate Athletics Through Conference-Athlete Revenue Sharing*, 68 ALA. L. REV. 551, 554 (2016) (“[P]ay-for-play arrangements would transform the intercollegiate sports model into a minor league in which the virtues of college sports, particularly its connection to higher education, would disappear.”).

19. See *id.* at 561 (stating “the reality, though, in revenue sports of men’s football and men’s basketball, is that the entire enterprise has the feel of a professional economic machines”).

20. See John D. Colombo, *The NCAA, Tax Exemption, and Collegiate Athletics*, U. ILL. L. REV. 109, 113 (2010) (describing tax-exempt status universities and NCAA are characterized under section 503(c)(3) of Code).

21. I.R.C. § 501(c)(3) (2018) (stating exemption status of organizations).

22. See Kathryn Kisska-Schulze, *This Is Our House!: – The Tax Man Comes to College Sports*, 29 MARQ. SPORTS L. REV. 347, 348–49 (2019) (discussing IRS’s attempts to impose taxes on NCAA activities and that of athletic departments of universities on broadcasting and sponsorship agreements).

23. See Colombo, *supra* note 20, at 119 (describing NCAA as fostering amateur athletics, not only including football and basketball but track, gymnastics, and wrestling).

2020] SWELLING TIDE OF COMMERCIALIZED AMATEUR ATHLETICS 289

legiate athletics were held to be essential to meeting a university's organizational purpose of providing education.²⁴

Compensating student-athletes for their efforts would threaten the tax-exempt status of the NCAA under Section 501(c)(3) of the Code, as payment to student-athletes would shift the NCAA's organizational purpose from managing amateur student-athletes to managing paid athletes engaging in revenue generating athletic events.²⁵ Similarly, the tax-exempt status of universities' athletic programs under Section 503(c)(3) would also be threatened if student-athletes were to receive compensation.²⁶ At the heart of amateurism in intercollegiate athletics is the idea that students exchange their efforts on the field for academic benefits off the field.²⁷ However, the pressure placed on student-athletes to perform in their sport threatens their ability to pursue a degree or gain a meaningful education.²⁸ By agreeing to compensate student-athletes, universities would distinguish themselves from current legal precedent, which established that athletics are integral for a university to meet its educational organizational purpose.²⁹ This notion that athletic programs are integral to a university's educational purpose would be significantly undermined if student-athletes were

24. See Kisska-Schulze, *supra* note 22, at 360 (discussing decisions found in *Kondos v. West Virginia Board of Regents*, 318 F. Supp. 394 (S.D.W. Va. 1970) and *Cohen v. Brown University*, 991 F.2d 888 (1st Cir. 1993) which both found importance in university sponsored intercollegiate activity for bettering educational goals of universities).

25. See *generally id.* (highlighting importance of amateur status of student-athletes to NCAA's tax-exempt status).

26. See *Berry III*, *supra* note 18, at 562–63 (illustrating growing tension between commercial enterprise of intercollegiate athletics and lack of payment to student-athletes).

27. See *id.* at 563 (“[T]he idea that student-athletes receive academic benefits from their respective institutions lies at the heart of the jurisdiction for denying pay-for-play.”).

28. See *id.* (“Where athletics require a commitment of forty to sixty hours a week, engaging in academic matters in a robust way seems like a difficult proposition.”).

29. See *Greenhill v. Carpenter*, 718 S.W.2d 268, 271 (Tenn. Ct. App. 1986) (“[F]or well over one hundred years athletic programs have been an integral part of the educational process in colleges and universities throughout the country”); see also *Kondos v. West Virginia Board of Regents*, 318 F. Supp. 394, 396 (S.D. W. Va. 1970) (“[Th]e carrying on of an athletic program is an important and necessary element in the educational process, especially at institutions of higher learning.”); *Cohen v. Brown University*, 991 F.2d 888, 891 (1st Cir. 1993) (“For college students, athletics offers an opportunity to exacuate leadership skills, learn teamwork, build self-confidence, and perfect self-discipline. In addition, for many student-athletes, physical skills are a passport to college admissions and scholarships, allowing them to attend otherwise inaccessible schools. These opportunities, and the lessons learned on the playing fields, are invaluable in attaining career and life successes in and out of professional sports.”).

290 JEFFREY S. MOORAD SPORTS LAW JOURNAL [Vol. 27: p. 285]

compensated as student-athletes would no longer be competing in their respective sports for academic benefit, but economic gain.³⁰

The tax-exempt status for both the NCAA and its member universities has been in dispute due to the growing commercialization of intercollegiate athletics, the relationship between the organizations' tax-exempt status, and the lack of compensation for the student-athletes' labor.³¹ Various theories have been proposed to bring a sense of equality to the relationship between the tax-exempt organizations of the NCAA and its member universities, with student-athletes seeking compensation for their time and labor.³² However, each of these theories fall short of providing a beneficial outcome to not only the NCAA and its member universities but the student-athletes seeking fair compensation.³³

This Comment discusses the various strategies that have been proposed to resolve the disparity between the Section 501(c)(3) tax-exempt status of the NCAA and its member universities, as well as the flaws of each of these proposals.³⁴ In order to protect the positive benefits of the NCAA and its member universities' tax-exempt status, while equalizing the financial playing field for student-athletes, Congress should pass the Student-Athlete Equity Act.³⁵

30. See Berry III, *supra* note 18, at 562–63 (discussing efforts of student-athletes in commitment to amateur collegiate athletics, raising doubts on academic benefits student-athletes receive).

31. See generally Erik M. Jansen, *Taxation, the Student Athlete, and the Professionalization of College Athletics*, 1987 UTAH L. REV. 35 (1987) (discussing rationale on allowing tax emptions to universities instead of paying student-athletes).

32. See generally Marc Edelman, *From Student-Athletes to Employee-Athletes: Why a "Pay For Play" Model of College Sports Would Not Necessarily Make Educational Scholarships Taxable*, 58 B.C.L. REV. 1137 (2017) (discussing ramifications of "pay for play" model on universities and the NCAA); see also Colombo, *supra* note 20 (discussing implications of completely removing tax exemption from NCAA and utilizing tax exemption as structuring incentives for universities).

33. See Colombo, *supra* note 20, at 144 (describing issues taxing revenue generated from NCAA and its members universities); see also Marcia Chambers, *COLLEGES; Brand Endorses More Aid to Athletes*, N.Y. TIMES (Sept. 18, 2003), <https://www.nytimes.com/2003/09/18/sports/colleges-brand-endorses-more-aid-to-athletes.html> [<https://perma.cc/TTU7-4V2J>?type=image] (determining certain student-athlete benefits would pale in comparison to revenue generated by NCAA and its members universities).

34. For a further discussion of the various theories to resolve the unequal disparity between Section 501(c)(3) exempted organizations of the NCAA and its member universities with the lack of compensation of student-athletes, see *infra* notes 181–219 and accompanying text.

35. See generally Kyle Jahner, *NCAA Tax Status Tied to Athletes' Image Rights Under New Bill*, BLOOMBERG LAW (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/Q47E-9KH9>] (reporting on new bill proposed in Congress called "The Student-Athlete Equity Act").

2020] SWELLING TIDE OF COMMERCIALIZED AMATEUR ATHLETICS 291

This legislation, currently in the House of Representative's Ways and Means Committee, would preserve the tax-exempt status of the NCAA and its member universities on the contingency of allowing student-athletes to seek opportunities to receive compensation for their name, image, and likeness.³⁶ The Student-Athlete Equity Act would be a compromise for the NCAA, by allowing the organization to maintain its tax-exempt status, in exchange for permitting student-athletes to seek and receive compensation off the playing field.³⁷

Section II of this Comment provides the historical context surrounding the growth of intercollegiate athletics from the beginning stages of "amateurism" to the modern landscape of intercollegiate athletics.³⁸ Section II also discusses how Section 501(c)(3) of the Code came to be applied to universities and the NCAA, as well as an overview of how organizations become tax-exempt under Section 501(c)(3).³⁹ Section III of this Comment discusses the various proposed strategies to resolve the disparity between the 501(c)(3) tax-exempt status of the NCAA and its member universities with the lack of compensation for student-athletes.⁴⁰ Section III not only concludes that these theories fail to adequately resolve the inequitable disparity, but also provides an argument for altering the Code through passage of the Student-Athlete Equity Act as the best solution to resolve this inequality.⁴¹ Ultimately, this Comment argues in favor of the passage of the Student-Equity Act as the most effective means to close the gap between the 501(c)(3) tax-exempt revenue and non-compensation of student-athletes.⁴²

36. *See id.* (discussing Equity Act's effects if passed by Congress).

37. *See id.* (finding alteration of 501(c)(3) would allow flexibility in implementing changes in order for NCAA to become compliant with alteration of tax code).

38. For further discussion of the beginning stages of amateurism and intercollegiate athletics, see *infra* notes 50–71 and accompanying text.

39. For further discussion of the legal history of Section 501(c)(3) and its application to the NCAA and its member universities, see *infra* notes 115–180 and accompanying text.

40. For further discussion of proposed theories to resolve disparity between 501(c)(3) tax-exempt organizations and uncompensated student-athletes, see *infra* notes 181–219 and accompanying text.

41. For further discussion of fallacies of proposed theories, see *infra* notes 220–253 and accompanying text.

42. For further discussion of arguments in favor of Student-Athlete Equity Act, see *infra* notes 254–278 and accompany text.

II. HOW AMATEURISM LED TO A TAX EXEMPTION, REVENUES, AND UNDER-COMPENSATED STUDENT-ATHLETES

The NCAA and its member universities' athletic programs have experienced large and increasing revenue streams through the contributions of uncompensated student-athletes.⁴³ These revenue streams have been largely untaxed, as both the NCAA and universities' athletic programs are tax-exempt organizations under Section 501(c)(3) of the Code.⁴⁴ As revenue has grown, various strategies have emerged to resolve the disparity between the tax-free nature of the revenue with the lack of compensation for the student-athletes who help generate these revenue streams.⁴⁵

To understand how the NCAA and its member universities' athletic programs became capable of generating revenues equating to just above one billion dollars, it is important to first understand the historical context of amateurism in intercollegiate athletics and how the modern landscape came to be.⁴⁶ Further, a background of the legal history and precedent which allowed the NCAA and its member universities to benefit from tax-exempt status under 501(c)(3) of the Code will be analyzed.⁴⁷ Finally, a deeper insight into how 501(c)(3) of the Code applies to organizations potentially seeking tax-exempt status will be examined to demonstrate the mechanics behind 501(c)(3)'s application to the NCAA and its members universities.⁴⁸ Once this historical background and overview of 501(c)(3) has been discussed, proposed strategies will be introduced which seek to repair the inequitable disparity between the NCAA and its members universities' 501(c)(3) tax-exempt reve-

43. See Bloomberg, *supra* note 1 (describing revenue generated by NCAA through events featuring non-compensated student-athletes, including March Madness and college football broadcasts).

44. See Colombo, *supra* note 20, at 115–16 (stating eligibility of NCAA and its member universities as 501(c)(3) tax-exempt organizations).

45. See *id.* (detailing strategy which targets specific taxation on revenue from non-tax-exempt activities of NCAA and its member universities). For further discussion of other strategies to combat the disparity between tax-exemption of the NCAA and its member universities and the lack of compensation of student-athletes, see *infra* notes 172–209 and accompanying text.

46. For further discussion of the history of amateurism and intercollegiate athletic competition in the United States, see *infra* notes 50–102 and accompanying text.

47. For further discussion of the legal history of Section 501(c)(3) and its extension to the NCAA and universities athletic programs, see *infra* notes 103–143 and accompany text.

48. For further discussion of how organizations become tax-exempt under Section 501(c)(3), see *infra* notes 144–180 and accompanying text.

nues and the lack of compensation for the labor and efforts of student-athletes in revenue-generating athletics events.⁴⁹

A. How It All Started: The History of Amateurism in University Athletic Programs

1. *Growth of Intercollegiate Athletics: Amateurism or Professionalism?*

The idea of amateurism in intercollegiate athletics can be traced back to athletic competitions between British universities as early as the beginning of the 1800s.⁵⁰ British amateurism was characterized by deep social class divisions, with upper class gentlemen competing amongst one another for the sake of competition, while working class individuals played for compensation.⁵¹ At the inception of amateur sports within American universities, social class divisions were not as prevalent, as university members of all social classes competed athletically against other university members, spurred on by financial incentives for their respective colleges.⁵² However, during the 1920s, growing concerns about the violent nature of intercollegiate competitions, particularly in intercollegiate football, led to President Theodore Roosevelt calling for the formation of a governing body for intercollegiate athletics.⁵³ The early adoption of the NCAA sought to rectify many of the safety concerns present at the time, and resulted in standardizing the ideals of amateurism among the NCAA member universities.⁵⁴

49. For further discussion introducing the various strategies to combat the disparity between tax-exempt status of the NCAA and its member universities and the lack of compensation for student-athletes, see *infra* notes 181–219 and accompanying text.

50. See Matthew J. Mitten, et al., *Targeted Reform of Commercialized Intercollegiate Athletics*, 47 SAN DIEGO L. REV. 779, 786–87 (2010) (discussing elite British universities holding principles of amateurism in high regard as competing solely for competition is seen as gentlemanly).

51. See Berry III, *supra* note 18, at 557–58 (describing divide in social classes between those athletes competing for compensation and those competing for “the love of the game”).

52. See Mitten et al., *supra* note 50, at 786–87 (highlighting financial incentives that appeared in intercollegiate competition in American universities, such as Harvard rowing team being awarded financially for success).

53. See W. Burlette Carter, *The Age of Innocence: The First 25 Years of the National Collegiate Athletic Association, 1906 to 1932*, 8 VAND. J. ENT. & TECH. L. REV. 211, 215–16 (2006) (describing response of President Theodore Roosevelt to assemble athletic directors from major universities to address concerns of violence in intercollegiate competition, in particular, circumstances which led to death for eighteen young men while competing in intercollegiate football).

54. See *id.* at 222–23 (defining NCAA’s first constitution, which strove to maintain amateurism in intercollegiate competition, through clauses such as, “no student shall represent a College or university in any intercollegiate game or contest

Throughout the 1900s, the growth and popularity of intercollegiate sports led universities to recognize their athletic programs as part of their physical education departments, which allowed universities to have control over the athletic programs and allowed for financial support from the universities' alumni base.⁵⁵ This financial support was important for dealing with expenses associated with the growing athletic enterprises, namely larger stadiums and the hiring of full-time head coaches.⁵⁶ These expenses were followed with explosive revenues, as the popularity of collegiate athletics skyrocketed with the introduction of the first nationally televised intercollegiate football game.⁵⁷

At first, the NCAA controlled and limited television broadcast options.⁵⁸ However, the United States Supreme Court ruled in 1983 that the controlled broadcast of intercollegiate athletics by the NCAA violated antitrust laws.⁵⁹ This opened the opportunity for television broadcast giants, such as CBS and NBC, to enter into the lucrative world of televised intercollegiate athletics.⁶⁰ Television broadcast giants have recently encountered new competition, as athletic conferences and individual universities have started to form their own television networks, such as the University of Texas's Longhorn Network.⁶¹

who has at any time received whether directly or indirectly, money or other consideration").

55. See Mitten et al., *supra* note 50, at 789 (observing growth of intercollegiate athletics and ramifications of this growth in relation to influxes of alumni financial support).

56. See Carter, *supra* note 53, at 236 (describing various infrastructure constructions to athletic programs of various universities, such as Ohio State University's 64,000-seat stadium, Brown University's \$750,000 gymnasium, and new stadiums for Vanderbilt University, University of Michigan, and University of Wisconsin).

57. See Christine Dennie, *He Shoots, He Scores: An Analysis of O'Bannon v. NCAA On Appeal and the Future of Intercollegiate Athletics*, 93 N.C.L. REV. 90, 93–94 (2015) (describing first televised intercollegiate football contest and growth in popularity of intercollegiate athletics with popularization of television aiding growth).

58. See *id.* at 94 (describing extent of control NCAA had over television broadcasts of intercollegiate athletics).

59. See *id.* (noting Supreme Court's decision in *NCAA v. Board of Regents of University of Oklahoma* which removed control of NCAA over broadcasts of intercollegiate football, due to violations of federal antitrust laws).

60. See *id.* (stating extent of involvement of television broadcast companies into intercollegiate sports after Supreme Court's decision in *NCAA v. Board of Regent of University of Oklahoma*).

61. See *id.* at 94–95 (noting various universities entering broadcast market, including University of Texas's \$300 million agreement for ESPN's Longhorn Network); see also Karen Weaver, *The Big Ten Network Was Created By and For Its Fans – And Turned A Profit In Less Than Two Years*, FORBES (Jan. 4, 2020), <https://www.forbes.com/sites/karenweaver/2020/01/04/the-big-ten-network-was-created->

With growing revenues from the college football playoffs and the March Madness basketball tournament, the modern landscape of intercollegiate sports has evolved from an amateur competition between two universities to that of a big business.⁶² This evolution has produced similarities between intercollegiate athletics and professional sports leagues, such as the emphasis on corporate sponsorships and collection of large profits from the efforts of the athletes.⁶³ Two other aspects which reflect this change away from amateurism to a business model can be seen in the expenses of the universities' athletic departments and the revenue stream of the governing body, the NCAA.⁶⁴ Construction of athletic facilities, such as Clemson University's fifty-five million dollar football complex, highlight the growing expenditures of large athletic programs.⁶⁵ Further, the NCAA, through various contractual agreements from television and marketing deals, have generated just over one billion dollars in revenue as a not-for-profit organization.⁶⁶ The revenues and expenditures evoke criticism of the non-

by-and-for-its-fans—and-turned-a-profit-in-less-than-two-years/#2d8375407212 [https://perma.cc/26SZ-EQ6G] (highlighting \$759 million in revenue generated from Big Ten Conference's network in 2018); Kevin Draper, *New Cable Network For A.C.C. Heightens Arms Race in College Sports*, N.Y. TIMES (Aug. 22, 2019), <https://www.nytimes.com/2019/08/22/sports/ncaaf/football/acc-network-espn.html> [https://perma.cc/79FD-XBWF?type=image] (noting expansion of ACC Conference into media agreements with decision to create ACC Network with ESPN).

62. See Kisska-Schulze, *supra* note 22, at 351 (discussing current landscape of intercollegiate athletic); see also Brent Schrottenboer, *College Football Playoff Business is Booming at Halfway Point, But Expansion Looms*, USA Today (Jan. 9, 2020, 9:55 AM), <https://www.usatoday.com/story/sports/ncaaf/2020/01/09/college-football-playoff-financial-success-expansion-future/2838495001/> [https://perma.cc/LBB5-5T3B] (describing \$549 million paid out to conference and universities from New Year's Six bowl games compromising college football's playoff rotation); Mike Ozanian, *March Madness is Most Profitable Postseason TV Deal In Sports*, Forbes (Mar. 19, 2019, 9:24 AM), <https://www.forbes.com/sites/sportsmoney/2019/03/19/march-madness-is-most-profitable-postseason-tv-deal-in-sports/#5c289ada1795> [https://perma.cc/9Z3T-DMJP] (stating ad revenue generated from March Madness equaling \$1.285 billion in 2017 and \$1.32 billion in 2018).

63. See Kisska-Schulze, *supra* note 22, at 351 (stating collegiate athletics departments have raised over one billion dollars in donations, along with vast amounts of revenue from ticket sales, branding, television, radio, and internet broadcasting rights).

64. See *id.* at 351–52 (describing expenses accumulated by university's athletic programs and profitability of NCAA, considered predominately not-for-profit organization).

65. See *id.* at 352 (highlighting Clemson University, after being named 2016–2017 College Football champion, approval to construct new football complex).

66. See *id.* at 352–53 (stating revenue generated by NCAA is over one billion dollars, generated through television and market rights contractual agreements highlighted by \$857 million earned from Turner Broadcasting to air annually NCAA's March Madness basketball tournament in 2018).

profit status of these organizations have maintained through their organizational purpose of promoting amateurism.⁶⁷

Growing revenue streams and expenditures of intercollegiate athletics have led to criticism of the management of intercollegiate athletics, accusing the NCAA and its members universities of shying away from prioritizing academics and focusing primarily on the revenue-generating athletics.⁶⁸ This has called into question not only the tax-exempt status of the NCAA and its members universities, but the non-compensated efforts of student-athletes.⁶⁹ As the emphasis on student-athletes increasingly focuses on athletics instead of academics, many critics question whether student-athletes should no longer be treated solely as students, but employees of the university.⁷⁰ If amateurism is eroded away in intercollegiate athletics, this could lead to large-scale ramifications of the favorable tax treatment that the NCAA and its member universities enjoy.⁷¹

2. *NCAA's Preservation of "Amateurism" in the Face of Growing Professionalization of Intercollegiate Athletics*

The modern definition of amateurism adopted by the NCAA is codified in Section 2.9 of the NCAA Manual.⁷² Under Section 2.9, “[s]tudent-[a]thletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived . . . [s]tudent participation in intercollegiate athletics is an avocation, and student-athletes should be protecting from exploitation by professional and commercial enterprises.”⁷³ Per NCAA rules, activities such as professional contracts, receiving financial gain from compe-

67. See Ronald Katz, *Ending the NCAA's Tax Exemption Should Be A Slam Dunk*, THE NATION (Mar. 27, 2019), <https://www.thenation.com/article/archive/march-madness-tax-exemption-inequality/> [<https://perma.cc/KUJ2-RUAJ?type=image>] (describing criticisms against NCAA for tax-exempt status in face of growing revenues in intercollegiate athletics).

68. See Kisska-Schulze, *supra* note 22 (stating escalating salaries of college coaches have reflected prioritization of college athletics for winning and generating revenue through athletic programs rather than focusing on academics).

69. See *id.* (finding existence of criticism to continued legitimacy of maintaining college sports ideal of amateurism).

70. See *id.* (stating disconnect between student-athletes being “workhorses of successful athletic programs” and commercialization of college athletics).

71. See *id.* at 354–55 (finding continued existence of amateurism in intercollegiate athletics primarily for tax benefits garnered by NCAA and its member universities).

72. See Berry III, *supra* note 18, at 559 (determining NCAA holds education as cornerstone of its existence).

73. Nat. Collegiate Athletic Ass'n, *2019–2020 Division I Manual*, Section 2.09, PRINCIPLES OF AMATEURISM (2019), available at <https://web3.ncaa.org/lstdbi/re>

2020] SWELLING TIDE OF COMMERCIALIZED AMATEUR ATHLETICS 297

titions, and agent agreements for representation are all deemed as violations of the amateur classification.⁷⁴ However, if the financial benefit is tied to education, this is deemed an acceptable form of compensation by the NCAA, including scholarships for tuition and cost of attendance for the respective university.⁷⁵

Further, the NCAA allows member universities to utilize the name, image, and likeness of student-athletes for institutional, charitable, educational, or nonprofit promotions.⁷⁶ The use of a student-athletes image and likeness is not just limited to a university's promotional materials, but can be sold through commercial outlets, such as the university's athletic stores, as well as through the NCAA's own commercial outlets and relationships.⁷⁷ While the NCAA and the member universities are allowed to sell the name, image, and likeness of the student-athletes in organizational related commercial outlets, student-athletes do not receive this same unrestricted ability.⁷⁸

In April 2020, the NCAA reversed their long-standing position of refusing to consider the payment of student-athletes, with the NCAA's Board of Governors supporting modifications to the rules disallowing third-party compensation to student-athletes beginning in the 2021–22 academic year.⁷⁹ These modifications would allow student-athletes to appear in advertisements and reference their

ports/getReport/90008 [https://perma.cc/5MEY-W2QJ] (noting student-athletes are to be aware of being exploited “by professional and commercial enterprises”).

74. See Berry III, *supra* note 18, at 560 (listing certain activities which NCAA has determined to be in violation of amateurism).

75. See *id.* (“[F]unds provided in support of education, including scholarships, room, board, and most recently, cost of attendance, all fall within the concept of amateurism because they are expenditures related to education.”).

76. See NAT. COLLEGIATE ATHLETIC ASS'N CONST. art. 12, § 5, cl. 1 (effective Aug. 1, 2019) (stating NCAA member institutions may “use a student-athlete's name, picture or appearance to support its charitable or educational activities or to support activities considered incidental to the student-athlete's participating in intercollegiate athletics”).

77. See NAT. COLLEGIATE ATHLETIC ASS'N CONST. art. 12, §5, cl. 1.1 (effective Aug. 1, 2019) (codifying rules which allows universities and NCAA to use name, image, and likeness of student-athletes to promote activities such as charity events or NCAA events).

78. See generally NAT. COLLEGIATE ATHLETIC ASS'N CONST. art. 12, §5, cl. 2 (effective Aug. 1, 2019) (regulating non-permissible actions that student-athletes cannot take in order to maintain eligibility to participate in intercollegiate athletics).

79. See Michael McCann, *Legal Challenges Await After NCAA Shifts on Athletes' Name, Image and Likeness Rights*, SPORTS ILLUSTRATED (Apr. 29, 2020), <https://www.si.com/college/2020/04/29/ncaa-name-image-likeness-changes-legal-analysis> [https://perma.cc/CQG9-XFJ2] (noting changes agreed to by NCAA Board of Governor for upcoming 2021-22 academic year).

298 JEFFREY S. MOORAD SPORTS LAW JOURNAL [Vol. 27: p. 285

schools.⁸⁰ However, details about the regulations placed on these endorsement opportunities are still undecided and the expectations are the changes will restrict access to these opportunities.⁸¹ The NCAA stated the regulations will seek ways to curb the influence of certain individuals and boosters attempting to tie endorsement money to athletic performance, as well as seek out federal help to impose caps on the value and types of endorsement deals student-athletes may seek.⁸² While these upcoming changes are a large step in the right direction, they fail to adequately protect student-athletes' interests.⁸³ The NCAA would reserve the ability to determine which endorsements are consistent with NCAA's membership values, which is a vague standard, and the NCAA would be able to restrict certain companies from being able to offer endorsement opportunities, such as companies that have been involved in prior recruiting violations.⁸⁴ Further, the NCAA would not allow student-athletes to be compensated for "live broadcasts, rebroadcasts, news accounts or many informational items or pictures" as the NCAA has determined these outlets constitute "pay-for-play."⁸⁵ Rather than offering a free marketplace for student-athletes to seek out the best opportunities, the NCAA would only offer to student-athletes a limited, controlled marketplace favorable to the NCAA and "ideals of amateurism."⁸⁶

80. See Dan Murphy, *NCAA Group Supports Player Endorsement Plan*, ESPN (Apr. 29, 2020), https://www.espn.com/college-sports/story/_/id/29112263/ncaa-group-oks-conditional-player-endorsements [<https://perma.cc/4D78-ZMA3>] (highlighting changes approved by NCAA Board of Governors).

81. See McCann, *supra* note 79 (remarking any future changes to allow student-athletes to seek endorsement opportunities will most likely be restricted which rather than create free market opportunities for student-athletes, would create only limited opportunities).

82. See Murphy, *supra* note 80 (noting certain restrictions which NCAA Board of Governors would seek to install in finalized rules for student-athletes seeking third-party endorsement opportunities).

83. See McCann, *supra* note 79 (detailing recommendations of NCAA Board of Governors which would dictate that universities and athletic conferences restrict the "autonomy of athletes" by disallowing certain value and type of endorsement opportunities).

84. See *id.* (outlining one NCAA "guidance principle" to ensure "clear distinction" between amateur and professional athletics which would be imposed when rules allowed student-athletes to seek third-party endorsement opportunities are established).

85. See *id.* (describing "guardrails" to ensure that pay-for-play is not disguised as payments for student-athletes name, image, or likeness).

86. See Murphy, *supra* note 80 (noting NCAA's recommended policy is more restrictive than any current state laws or proposed state laws, which could not be most appropriate solution compared to unrestricted free market).

2020] SWELLING TIDE OF COMMERCIALIZED AMATEUR ATHLETICS 299

The NCAA has sought to promote amateurism in intercollegiate athletics for the protection of student-athletes against the outside pressures and influences of commercialization.⁸⁷ However, student-athletes have become increasingly critical of how much emphasis is placed on their education in relation to their role as athletes.⁸⁸ This criticism has generated a variety of legal claims by student-athletes against universities for violating the understanding that student-athletes would forfeit their time and efforts to athletics in exchange for a quality education.⁸⁹ One example of this failure is a claim brought by a former basketball player for Creighton University, who was found to possess educational skills below a high school level after his graduation from Creighton.⁹⁰ Another example was brought by a Clemson University student-athlete who was provided poor academic advice which resulted in the student-athlete's inability to meet the NCAA's academic requirements for participation.⁹¹

The most recent example demonstrating the shortfall of the NCAA members universities in providing educational benefits to student-athletes are the allegations against the University of North Carolina.⁹² The University of North Carolina offered a class in the African and Afro-American Studies Department where half of the

87. See Adam Epstein & Paul M. Anderson, *The Relationship Between a Collegiate Student-Athlete and the University: An Historical and Legal Perspective*, 26 MARQUETTE SPORT L. REV. 287, 288 (2016) (discussing fundamental policy of NCAA is to protect amateur status of student-athletes in order bolster academics and student-athlete experiences).

88. See *id.* (discussing failure of universities to provide adequate educational benefit in exchange for student-athletes' labor and time in generating revenues through various athletic events which student-athletes participate in).

89. See *id.* at 288–90 (highlighting various legal claims by student-athletes against universities for failure to provide adequate education, with each claim being rejected by courts due to court's determination that student-athletes do not have right to play intercollegiate sports, as it is just privilege).

90. See *id.* at 288–89 (providing example of legal claims brought by Creighton University former basketball player for failure of Creighton University to provide adequate education during student-athlete's playing days).

91. See *id.* at 289 (providing an example of legal claims for failure to provide adequate education of Clemson University student-athlete who was given false academic advice by Clemson University which caused the student-athlete to fail to meet NCAA's educational standards for participation).

92. See generally B. David Ridpath, *North Carolina Releases NCAA's Third, Yes Third, Notice of Allegations in Academic Fraud Case*, FORBES (Dec. 22, 2016, 4:18 PM), <https://www.forbes.com/sites/bdavidridpath/2016/12/22/north-carolina-releases-ncaas-third-yes-third-notice-of-allegations-in-academic-fraud-case/#72dff6392d24> [<https://perma.cc/N59E-LNHM>] (reporting on false academic classes provided through University of North Carolina to student-athletes).

300 JEFFREY S. MOORAD SPORTS LAW JOURNAL [Vol. 27: p. 285]

students enrolled were student-athletes.⁹³ There was no required class meeting time and no instructor was assigned to the class.⁹⁴ In order to get a passing grade in the class, the students had to submit one paper, which, no matter the quality of the paper, would produce a passing grade.⁹⁵ This course allowed the student-athletes at the University of North Carolina to maintain their athletic eligibility under the NCAA's academic requirements but failed to provide any educational value to the student-athletes.⁹⁶

The NCAA maintains that the purpose of their organization is to “maintain intercollegiate athletics as an integral part of the education program . . . by doing so, retain a clear line of demarcation between intercollegiate athletics and professional sports.”⁹⁷ However, the emphasis on the educational value of the amateur student-athlete has been curtailed by the pressure on student-athletes from the NCAA and its member universities to focus primarily on athletics in order to benefit the organization's commercial gains.⁹⁸ As amateurism in intercollegiate athletics has been supplanted by commercialization, efforts must be taken to bridge the disconnect between the promotion of a tax-exempt billion dollar enterprise and the protection of student-athletes.⁹⁹

B. The Birth of the Hidden Tax-Haven: The History of How the NCAA and University Athletic Programs Became Tax-Exempt

Section 501(c)(3) of the Code allows corporations and institutions to gain tax-exempt status as long as the corporation or institution is organized and operates for one of the specific reasons in the

93. *See id.* (stating class topic which was under investigation for academic fraud at University of North Carolina).

94. *See id.* (detailing characteristics of University of North Carolina class which student-athletes registered for).

95. *See id.* (detailing general requirements of students of University of North Carolina's class to achieve passing grades).

96. *See id.* (stating conclusion of NCAA's investigation, which determined reasoning for the University of North Carolina to offer this class).

97. NAT. COLLEGIATE ATHLETIC ASS'N CONST. art. 1, § 3, cl. 1 (effective Aug. 1, 2019) (stating NCAA's organizational purpose and policy).

98. *See Mitten et al., supra* note 50, at 837 (detailing aspects of “subordination of higher education academic values to the forces of commercialization, and the student-athletes' inability to realize the educational benefits of the bargain for providing playing services” has created problems for student-athletes for which solutions must be found).

99. For further discussion of different solutions to combat commercialization of intercollegiate athletics, see *infra* notes 181–219 and accompanying text.

2020] SWELLING TIDE OF COMMERCIALIZED AMATEUR ATHLETICS 301

Code.¹⁰⁰ Universities have historically met the tax-exempt status because they were created for the purpose of providing educational benefit to the public.¹⁰¹ Under Section 501(c)(3), being organized and operated for the exclusive purpose of education grants universities this tax benefit.¹⁰² However, this tax exemption did not extend to a university's athletic programs, nor the NCAA, until the passage of the Tax Reform Act of 1976.¹⁰³

The Tax Reform Act of 1976 altered Section 501(c)(3) of the Code by adding a new tax exemption to organizations and institutions whose purpose is “to foster national or international amateur sports competition (but only if no part of its activities involve[s] the provision of athletic facilities or equipment).”¹⁰⁴ This language does not entitle any organization which participates in efforts of athletic activities to be eligible for tax exemption.¹⁰⁵ Instead, an organization which participates in organizing amateur sports competition can qualify for the 501(c)(3) exception under three different rationales.¹⁰⁶ First, if the organization provides a youth athletic league or organizes youth athletics, or the organization is affiliated with an exempted educational organization, the organization may qualify for the 501(c)(3) tax exemption, and is allowed to provide facilities and equipment.¹⁰⁷ Second, if the organization “develops, promotes, and regulates a sport for youths” with the goal of shifting the responsibility to organize charitable activities to curb juvenile delinquency away from local governments, it may qualify for the 501(c)(3) exemption.¹⁰⁸ Third, an organization can meet the

100. See generally I.R.C. § 501(c)(3) (2018) (codifying reasons organization must have in order to be considered for tax-exempt status).

101. See Kisska-Schulze, *supra* note 22, at 359 (detailing universities have historically met requirements of tax exemption under Section 501(c)(3)).

102. See *id.* (stating universities meet tax-exempt purpose of education under Section 501(c)(3)).

103. See *Tax-Exempt Status of Amateur Sports Organizations*, 40 WASH. & LEE L. REV. 1705, 1714 (1983) (stating organizations which supported amateur athletics were not tax-exempt until Tax Reform Act of 1976 was passed).

104. Tax Reform Act of 1976 § 1313, I.R.C. § 501 (1976) (creating tax-exempt reason for organizations which foster amateur athletics).

105. See I.R.S. I.R.M. 7.25.26.2 (March 8, 1999) (concluding sports activity alone is not by itself enough to warrant tax exemption under 501(c)(3)).

106. See *id.* (interpreting three rationales whereby organizations participating in sports competition can claim tax-exemption under 501(c)(3)).

107. See I.R.S. I.R.M. 7.25.26.2(1)(a) (March 8, 1999) (determining 501(c)(3) tax-exemption extends to organizations either teaching youths sports or is affiliated with organizations that are already exempted).

108. See I.R.S. I.R.M. 7.25.26.2(1)(b) (March 8, 1999) (extending 501(c)(3) tax-exempt status to organizations created for charitable purposes which provide athletic programs, such as organizations which organize athletics programs to combat juvenile delinquency or lessen social burdens of government).

302 JEFFREY S. MOORAD SPORTS LAW JOURNAL [Vol. 27: p. 285

501(c)(3) tax exemption if it is organized and operated to “foster national or international amateur sports competition and no part of its activities involve the provision of athletic facilities or equipment.”¹⁰⁹

To conceptualize the Internal Revenue Service’s (“IRS”) interpretation of the language of the Tax Reform Act of 1976, a variety of legal precedent was decided to assist with the interpretation of the new language, as well as extend its applicability to the NCAA.¹¹⁰ For universities’ athletic programs, the language of Section 501(c)(3) extended to their activities through a precedential determination that athletics programs are a vital part of the educational experience which universities provide.¹¹¹

1. *History of Tax Exemption of Section 501(c)(3) for Universities*

A university’s athletic program qualifies for Section 501(c)(3) tax-exempt status through the athletic program’s affiliation with an already tax-exempt organization—the educational arm of the university.¹¹² Further, the IRS has interpreted that university athletic programs serve a complimentary role to the clear Section 501(c)(3) tax-exempt educational purpose of the university.¹¹³ Activities such as bettering the physical development of student-athletes and providing necessary services to both student-athletes and coaches, allows an athletic program to be considered an “integral part of [a university’s] overall educational activities.”¹¹⁴ The IRS has further determined that the commercial aspects of contractual broadcast rights and the revenue earned through intercollegiate competition are related to the Section 501(c)(3) tax-exempted educational pur-

109. I.R.S. I.R.M. 7.25.26.2(1)(c) (March 8, 1999) (granting 501(c)(3) tax-exempt status to organizations which foster national or international amateur athletic competition so long as no facilities or equipment are provided).

110. *See* Rev. Rule. 67–291, 1967–2 C.B. 184 (concluding universities’ athletic programs engage in activities which make athletic programs vital parts of universities’ tax-exempted educational purpose).

111. *See* *Greenhill v. Carpenter*, 718 S.W.2d 268, 271 (Tenn. Ct. App. 1986) (concluding universities affiliated athletic programs provide are integral to universities’ tax-exempted educational purposes).

112. *See* *Kisska-Schulze*, *supra* note 22, at 360 (determining athletic programs of universities are affiliated with Section 501(c)(3)’s educational exempted purpose of universities).

113. *See id.* (discussing two IRS rulings which found universities’ athletic programs are tax-exempt due to beneficial relationship between athletic programs and tax-exempt universities).

114. Rev. Rule. 67–291, 1967–2 C.B. 184 (concluding universities’ athletic programs engage in activities which makes athletic programs vital to universities’ tax-exempted educational purpose).

2020] SWELLING TIDE OF COMMERCIALIZED AMATEUR ATHLETICS 303

pose of the university.¹¹⁵ The rationale for the IRS's decision was reached by determining that since athletic events are related to the operation of athletic programs, and athletic programs are related to the educational purpose of universities, the income derived from athletic events can be linked to the Section 501(c)(3) tax-exempted educational purpose of universities.¹¹⁶ Therefore, revenue collected through intercollegiate athletic competition and broadcast rights is given tax-exempt treatment under Section 501(c)(3).¹¹⁷

The IRS's determination of the relationship between university athletic programs and the tax-exempt educational purpose of universities has been supported by legal precedent.¹¹⁸ In 1986, the Tennessee Court of Appeals ruled that athletic programs are a significant aspect of the educational experience of universities through the programs' emphasis on teamwork and sportsmanship placed on the student-athletes.¹¹⁹ The Court found this true, "notwithstanding the fact that in recent years big-time college athletics have at time[s] taken on a tinge of commercialism."¹²⁰ This emphasis on the importance that athletic programs have on the tax-exempted educational purpose of universities was reinforced in a 1993 decision in the United States First Circuit Court of Appeals.¹²¹ In that instance, the court found athletic programs are important towards the educational purpose of their affiliated universities because they offer an avenue to college admissions for those individuals who otherwise could not attend these universities.¹²² This

115. See Rev. Rul. 80-296, 1980-2 C.B. 195 (concluding broadcast rights and revenues from intercollegiate athletic competitions are considered related to tax-exempted educational purposes of universities and therefore, these revenues are tax-exempt under 501(c)(3)).

116. See *id.* (stating IRS's interpretation of why revenue from broadcast rights from intercollegiate athletic events should be considered tax-exempt).

117. See *id.* (holding athletic events are related to universities' tax-exempted educational purpose under Section 501(c)(3)).

118. For further discussion of relevant case law which supports IRS rulings that universities' athletic programs are related to universities' tax-exempted purpose and as such, tax-exempt under 501(c)(3), see *infra* notes 122-125 and accompanying text.

119. See *Greenhill v. Carpenter*, 718 S.W.2d 268, 271 (Tenn. Ct. App. 1986) (concluding athletic programs provide integral aspect to universities' tax-exempted educational purposes).

120. *Id.* (contrasting current wave of commercialization seen in college athletics with facts of athletic programs providing educational benefit to their affiliated universities remains true).

121. See *generally* *Cohen v. Brown Univ.*, 991 F.2d 888 (1st Cir. 1996) (concluding importance athletic programs affiliated with educational institutions have towards tax-exempted educational purposes of universities).

122. See *id.* at 891 (stating vital role which athletic programs affiliated with universities provide to better tax-exempted educational purposes of universities).

304 JEFFREY S. MOORAD SPORTS LAW JOURNAL [Vol. 27: p. 285]

decision highlighted the importance of athletic programs in opening doors for student-athletes to have the opportunity to pursuing a career and financial success through educational opportunities provided by these universities.¹²³

2. *Legal History of Tax Exemption of 501(c)(3) for NCAA*

Under the NCAA's Constitution, the organization's basic purpose 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 . . . retain a clear line of demarcation between intercollegiate athletics and professional sports."¹²⁴ Under this expression of purpose, the NCAA can maintain its tax-exempt status for fostering amateur sports competition.¹²⁵ However, questions have arisen regarding whether the NCAA is no longer solely focused on fostering amateur athletic competition.¹²⁶ If it is determined that the NCAA is not operating solely for their intended purpose, the organization could be disqualified from its current tax-exempt status.¹²⁷

The NCAA has defended its Section 501(c)(3) tax-exempt status against criticism from both Congress and the Supreme Court.¹²⁸ In *NCAA v. Board of Regents of the University of Oklahoma*,¹²⁹ the United States Supreme Court was called upon to decide whether

123. *See id.* (describing importance of opportunity to attend university through participation in affiliated athletic programs provides for betterment of universities' tax-exempted educational purpose).

124. NAT. COLLEGIATE ATHLETIC ASS'N CONST. art. 1, § 3, cl. 1 (effective Aug. 1, 2019) (codifying NCAA's basic purpose through NCAA's mission statement).

125. *See* I.R.C. § 501(c)(3) (2018) (expressing exempt purposes of organizations which foster national or international amateur sports competition as granting organizations tax-exempt status).

126. *See* Kisska-Schulze, *supra* note 22, at 365 (stating criticisms of whether NCAA continues to operate solely for its expressed reason to foster amateur athletic competition as NCAA has engaged in billion-dollar contractual agreements and sought to install politically correct standards of tolerance on its member universities).

127. *See id.* (stating criticism of NCAA for not being classified under for-profit organizations and as such, should be disqualified from tax-exempt status of 501(c)(3)).

128. *See, e.g.,* *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984) (detailing NCAA's argument for continuing to enjoy tax-exempt status under Section 501(c)(3)); *see also* Elia Powers, *The NCAA Responds*, INSIDE HIGHER ED (Nov. 16, 2006), <http://www.insidehighered.com/news/2006/11/16/ncaa-responds> [<https://perma.cc/HW6F-94AE>] (detailing arguments provided to members of Congress about NCAA's continued treatment as tax-exempt under Section 501(c)(3)). For further discussion of the criticism of NCAA's tax-exempt status and NCAA's response in defense of continuing to maintain its tax-exempt status under 501(c)(3), *see infra* notes 139–143 and accompanying text.

129. 468 U.S. 85 (1984).

2020] SWELLING TIDE OF COMMERCIALIZED AMATEUR ATHLETICS 305

the NCAA could dictate the television rights of its member universities.¹³⁰ The Court determined during the case that “the economic significance of the NCAA’s nonprofit character is questionable at best.”¹³¹ The NCAA previously defended its position as a Section 501(c)(3) tax-exempt organization in the United States District Court for the Western District of Oklahoma.¹³² There, the NCAA attempted to protect their ability to control the television rights of the University of Oklahoma.¹³³ The District Court commented that the focus of the NCAA may have shifted away from the promotion of amateurism towards a business seeking the maximization of revenue.¹³⁴ However, while the District Court, and later on the Tenth Circuit Court of Appeals, and eventually the Supreme Court, determined the NCAA violated antitrust laws by restricting access to college football television rights, the District Court refused to redefine the purpose of the NCAA.¹³⁵

In more recent years, Congress has revisited the discussion of whether the NCAA should maintain its tax-exempt status under Section 501(c)(3) by demanding the NCAA justify its position as a nonprofit organization.¹³⁶ In responding to Congress, the NCAA’s attempt to justify its Section 501(c)(3) tax-exempt status was met with criticisms, especially towards some of the parallels the NCAA drew

130. *See generally id.* (providing background of legal dispute for Supreme Court).

131. *Id.* at 100 n.22 (noting likelihood that NCAA’s focus has shifted from fostering amateur athletic competition to become more business-oriented focus of maximizing revenue).

132. *See Bd. of Regents v. NCAA*, 546 F. Supp. 1276 (W.D. Okla. 1982) (documenting instances whereby NCAA appeared in front of District Court to argue ability to control television agreements of intercollegiate athletics).

133. *See id.* at 1286 (stating circumstances for which matter was brought to court, where universities and their respective athletic conferences challenged NCAA’s ability to control ability to negotiate all intercollegiate athletic television agreements).

134. *See id.* at 1288–89 (concluding NCAA and its associate member universities are seeking revenue maximization similar to any business).

135. *See id.* at 1329 (“NCAA has strayed far from the purposes for which it was organized. The Court does not know and need not determine whether the NCAA administration, in formulating the controls at issue, was motivated by genuine concern for NCAA members, by a lust for power, or by rank greed. What is clear is that NCAA has violated the antitrust laws, and that the Court’s duty is to restore competition to this monopolized industry.”).

136. *See Kathryn Kisska-Schulze & Adam Epstein, The Claim Game: Analyzing the Tax Implications of Student-Athlete Insurance Policy Payouts*, 25 JEFFREY S. MOORAD SPORTS L.J. 231, 256 (2018) (detailing actions undertaken by Congress in 2006 to demand NCAA to justify reasons they should continue to maintain their 501(c)(3) tax-exempt status provided for non-profit organizations).

306 JEFFREY S. MOORAD SPORTS LAW JOURNAL [Vol. 27: p. 285]

to defend its status as a non-profit organization.¹³⁷ In particular, critics flagged the parallel that the NCAA's efforts of organizing and sponsoring athletic programs for student-athletes provide benefits similar to theatrical or musical performances provide for actors and musicians, teaching educational lessons in a practical manner.¹³⁸ While the NCAA defended itself by continuing to take the stance that it is akin to higher education by providing similar educational opportunities, the NCAA did not irrefutably disarm criticisms against their activities enjoying Section 501(c)(3) tax-exempt status.¹³⁹ These criticism leaves open the possibility of future challenges arising as public opinion aligns with the call of student-athletes to receive equitable compensation for their efforts in the NCAA's billion dollar enterprise.¹⁴⁰

C. Qualifications and Requirements of 501(c)(3) Organizations

Section 501(c)(3) of the Code grants tax-exempt status for "corporations . . . organized and operated exclusively for religious, charitable . . . or educational purposes, or to foster national or international amateur sports competition . . ." ¹⁴¹ Within Section 501(c)(3), two tests exist that must be independently satisfied in order for an organization to be considered tax-exempt under Section 501(c)(3), the "organizational test" and the "operational test."¹⁴²

1. *The Organizational Test*

Under Section 501(c)(3) of the Code, two requirements are necessary for an organization to meet the organizational test under

137. See Powers, *supra* note 128 (detailing contents of written correspondence between NCAA and Congress which sought to justify NCAA's continuation of being classified as non-profit organization under Section 501(c)(3)).

138. See *id.* (quoting NCAA's justification letter to Congress which stated, "athletic contests are the laboratory for lessons taught in practice in the same way theatrical or musical performances provide practical application of the lessons taught in rehearsals").

139. See *id.* (stating NCAA's justification for its tax-exempt status is that it "operates in the same sphere as the rest of higher education").

140. See *id.* (characterizing NCAA's justification letter as being defensive and not in line with various "empirical research and facts").

141. I.R.C. § 501(c)(3) (2018) (codifying tax-exempt status of certain organizations).

142. See Mitten et al., *supra* note 50, at 805 (describing two tests which organizations must meet independently in order to be considered for tax-exemption status under Section 501(c)(3)).

2020] SWELLING TIDE OF COMMERCIALIZED AMATEUR ATHLETICS 307

Section 501(c)(3) of the Code.¹⁴³ First, the organization must be created for a limited purpose which meets one of the exempted purposes as defined and listed in Section 501(c)(3).¹⁴⁴ Second, the organization must not itself participate, or allow participation, in activities which do not further one or more of the exempted purposes listed in 501(c)(3) of the Code.¹⁴⁵

Educational organizations are required to meet both requirements of the organizational test to qualify for tax-exempt status under Section 501(c)(3) of the Code.¹⁴⁶ The definition of “educational” in the context of Section 501(c)(3) of the Code, encompasses both instruction for the improvement of an individual’s capabilities and instructing an individual for the benefit of the community.¹⁴⁷ Further, regulations released by the Treasury Department provide a variety of examples of educational organizations which fall within the purview of protection under Section 501(c)(3) of the Code.¹⁴⁸

Under the organizational test of Section 501(c)(3) of the Code, universities meet both requirements.¹⁴⁹ The reason being that universities, as a part of their express purpose, are organized for educational purposes.¹⁵⁰ Similarly, athletic programs of the universities are considered part of the organization of a university, and thus, meet the organizational test.¹⁵¹ Challenges to the concept

143. See 26 C.F.R. § 1.501(c)(3)-1(b)(1)(i) (2017) (setting forth two factor-test required for organizations to meet in order to be considered 501(c)(3) tax-exempt eligible under the organizational test).

144. See 26 C.F.R. § 1.501(c)(3)-1(b)(1)(i)(a) (2017) (stating first requirement of organizational test of 501(c)(3)).

145. See 26 C.F.R. § 1.501(c)(3)-1(b)(1)(i)(b) (2017) (stating second requirement of organizational test of 501(c)(3)).

146. See Erika K. Lunder, *501(c)(3) Organizations: What Qualifies as “Educational”*, CONG. RESEARCH SERV. (Aug. 21, 2012), available at <https://fas.org/sgp/crs/misc/R42673.pdf> [<https://perma.cc/Q5J2-UZFM>] (concluding educational organizations meet definition of educational as exempt purpose under Section 501(c)(3)).

147. See 26 C.F.R. 1.501(c)(3)-1(d)(3) (2017) (stating definition of educational to encompass (1) individual instruction “for the purpose of improving or developing his capabilities; or (2) the instruction of the public on subjects useful to the individual and beneficial to the community”).

148. See 26 C.F.R. § 1.501(c)(3)-1(d)(3)(ii) (providing examples of educational organizations, including primary or secondary schools, colleges, or professional or trade school, that have regularly scheduled curriculum and enrolled students at location where educational activities take place).

149. See *id.* at 806 (finding universities and colleges meet 501(c)(3)’s organizational test).

150. See Mitten et al., *supra* note 50, at 806 (stating reasons why universities and colleges meet 501(c)(3)’s organizational test).

151. See *id.* (finding universities’ athletic programs, as being part of universities’ organizations, will meet 501(c)(3)’s organizational test).

308 JEFFREY S. MOORAD SPORTS LAW JOURNAL [Vol. 27: p. 285]

that athletic programs are part of the university's educational purpose have been unsuccessful as the IRS ruled that athletic programs conduct vital functions in relation to the university's exempted purpose.¹⁵²

The NCAA meets both requirements of the organizational test of Section 501(c)(3) as the NCAA's primary purpose is "maintain[ing] intercollegiate athletics as an integral part of the educational process" and protecting a student-athlete's ability to gain a meaningful education.¹⁵³ Further, the Code grants special requirements to specific tax-exempt organization, such as the NCAA.¹⁵⁴ Under Section 501(j)(2) of the Code, "qualified amateur sports organizations" are defined as organizations which are established and operate to foster amateur sports competition.¹⁵⁵ The organizational goal of the NCAA is to maintain the distinction between intercollegiate athletics and professional athletics.¹⁵⁶ By maintaining this distinction, the NCAA meets one of the exempt purposes of Section 501(c)(3) of the Code, as well as qualify for special rules under Section 501(j)(2) of the Code.¹⁵⁷

2. *The Operational Test*

Under Section 501(c)(3) of the Code, for an organization to be considered tax-exempt, it must operate solely for one of the exempted purposes defined in Section 501(c)(3).¹⁵⁸ This test allows for an organization to operate a business or trade, however, the

152. See Rev. Rule. 67-291, 1967-2 C.B. 184 (concluding universities' athletic programs engage in activities which make athletic programs vital parts of universities' tax-exempted educational purpose).

153. *Id.* ("The NCAA's primary organizational purpose is to 'maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral party of the student body.'").

154. See I.R.C. § 501(j)(2) (2018) (codifying special rules for amateur sports organizations).

155. I.R.C. § 501(j)(2) (2018) ("[A]ny organization organized and operated exclusively to foster national or international amateur sports competition if such organization is also organized and operated primarily to conduct national or international competition in sports or to support and develop amateur athletes for national and international competition.").

156. See Rev. Rule. 67-291, 1967-2 C.B. 184 ("Another of the NCAA's purposes is to 'retain a clear line of demarcation between intercollegiate athletics and professional sports.'").

157. See *id.* (finding NCAA meets requirements of Section 501(c)(3) tax-exemption as NCAA's organizational purpose is to foster national or international amateur sports competition).

158. See 26 C.F.R. § 1.501(c)(3)-1(c)(1) (2017) ("An organization will be regarded as operated exclusively for one or more exempt purposes only if it engages primarily in activities which accomplish one or more of such exempt purposes specified in section 501(c)(3).").

2020] SWELLING TIDE OF COMMERCIALIZED AMATEUR ATHLETICS 309

operation of the business or trade must enrich or further the exempted purpose of the organization.¹⁵⁹ To determine whether an organization furthers its primary purpose, “all the circumstances must be considered, includ[ing] the size and the extent of the trade or business and the size and extent of the activities which are in furtherance of one or more exempt purposes.”¹⁶⁰ Further, to be engaged in a business or trade, “the taxpayer must be involved in the activity with continuity and regularity and [] the taxpayer’s primary purpose for engaging in the activity must be for income or profit.”¹⁶¹

An example the IRS uses to illustrate this principle would be an art museum whose primary purpose is to exhibit local artists’ works, where each piece of art displayed is offered for sale for a set price by the artist.¹⁶² The artist would receive ninety percent of the proceeds of the sale with the art gallery retaining the other ten percent to cover costs associated with displaying the artwork.¹⁶³ Even though the art museum collected a share of the sale, the art museum would meet the organizational test of Section 501(c)(3) because the sole purpose of the art museum is to display the works of local artists, not to sell pieces of art.¹⁶⁴ However, the art museum would fail the operational test of Section 501(c)(3) since the art museum gives a substantial portion of the benefit, the ninety percent, of its sole activity, displaying of art, to the artists.¹⁶⁵ Under these circumstances, the artists’ receipt of direct benefits is considered too large for the art museum to be deemed operating solely for the art museum’s exempted purpose.¹⁶⁶ Instead, the art museum would be considered as operating for the benefit of the art-

159. See 26 C.F.R. § 1.501(c)(3)-1(e)(1) (2017) (stating requirements necessary for exempt organizations to carry on “a trade or business”).

160. 26 C.F.R. § 1.501(c)(3)-1(e)(1) (2017) (codifying ways to determine whether exempt organizations under Section 501(c)(3) are taking necessary steps for furtherance of their primary exempted purposes).

161. Mitten et al., *supra* note 50, at 807 (quoting decision reached by United States Supreme Court of what it means to be engaged in “a business or trade”) (citing *Commissioner v. Groetzinger*, 480 U.S. 23, 35 (1987)).

162. See 26 C.F.R. § 1.501(c)(3)-1(d)(1)(iii) (2017) (stating example of art museum in meeting Section 501(c)(3)’s operational test to determine tax-exempt status).

163. See *id.* (describing payment structure of artists within example of operational test under 501(c)(3)).

164. See *id.* (stating example of art museum being organized for exempted purpose as illustrated in Section 501(c)(3)).

165. See *id.* (finding insufficient circumstances to meet Section 501(c)(3)’s operational test).

166. See *id.* (determining artists had received too large of benefit as to assume art museum’s sole purpose was to display local artists pieces of artwork).

310 JEFFREY S. MOORAD SPORTS LAW JOURNAL [Vol. 27: p. 285

ists, and the art museum would fail the operational test of Section 501(c)(3) of the Code.¹⁶⁷

There is a general consensus that a university's athletic program is engaged in a trade or business, as the program seeks to make a profit.¹⁶⁸ As such, the question is whether a university's athletic program, operating a trade or business, contributes to the furtherance of the organizational goal of education.¹⁶⁹ Since 1950, Congress has maintained that a university's athletic program is substantially related to the educational purpose of the universities.¹⁷⁰ Further, the IRS has continued to back this Congressional position, stating in a 1980 ruling that athletic activities further the educational purposes of universities.¹⁷¹ Therefore, universities meet the operational test under Section 501(c)(3) of the Code.¹⁷²

To determine if the NCAA meets the operational test under Section 501(c)(3) of the Code requires a similar analysis to that of universities.¹⁷³ The NCAA's primary purpose is to "maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body."¹⁷⁴ The entirety of the NCAA's activities are focused on intercollegiate athletics.¹⁷⁵ Events such as sponsoring an intercollegiate basketball tournament, while seen as conducting a business or trade, is in fur-

167. *See id.* (concluding art museum fails to meet operational test requirements as to grant it tax-exempt status under Section 501(c)(3)).

168. *See* Mitten et al., *supra* note 50, at 807 ("[I]t is generally assumed by many commentators that many [athletic] programs constitute a trade or business because they seek profit.").

169. *See id.* (determining that once athletic programs are characterized as profit seeking organizations, determinations must be reached as to whether athletic programs benefit universities' tax-exempted educational purpose under Section 501(c)(3)).

170. *See id.* at 807–808 ("Congress stated in 1950 that 'athletic activities of schools are substantially related to [the] educational functions' of the institutions").

171. *See id.* at 808 ("In a 1980 revenue ruling, the IRS stated that 'an athletic program is considered to be an integral part of the educational process of the university, and activities providing necessary services to student athletes and coaches further the educational purposes of the university.'").

172. *See id.* (finding lack of arguments which state that athletic programs are not substantially related to universities' tax-exempted educational purposes).

173. *See* 26 C.F.R. § 1.501(c)(3)-1(a)(1) (2017) (codifying that in order for 501(c)(3) tax-exempt status to be granted, one's organization must be both organized and operated exclusively for one or more exempted purposes found in 501(c)(3)).

174. Mitten et al., *supra* note 50, at 809 (citing NCAA's mission statement).

175. *See id.* (finding no activities which NCAA engages in which could be considered not related to intercollegiate athletics).

2020] SWELLING TIDE OF COMMERCIALIZED AMATEUR ATHLETICS 311

therance of maintaining an athletic program.¹⁷⁶ Congress and the IRS have maintained the conclusion that intercollegiate athletics are linked to the furtherance of a university's educational purpose, meaning all NCAA activities would meet the operational test.¹⁷⁷

D. Strategies to Resolve Disparity Between NCAA and its
Member Universities' Tax Exemption and the Lack of
Compensation for Student-Athletes

1. *Unrelated Business Income Tax*

In 1950, Congress enacted a new provision of the Code to protect both government revenue generated from corporate tax and prohibit unfair competition between corporations and tax-exempt organizations operating as businesses in the general marketplace.¹⁷⁸ This provision, called the Unrelated Business Income Tax ("UBIT"), permits the IRS to tax specific portions of a Section 501(c)(3) organization's activities, if the specific activities satisfy certain conditions.¹⁷⁹ Activities which produce income from a trade or business which is regularly carried on, but not substantially related to, the institution's exempt purposes is capable of being taxed under the UBIT.¹⁸⁰ To determine whether an activity is substantially related to the organization's exempted purpose, a circumstantial test is utilized, which looks at factors such as the prevalence of the activity within the organization and the level of profits the activity makes for the organization.¹⁸¹

176. *See id.* (pointing to example of "March Madness," NCAA's annual men's basketball tournament, which although generates large profits, has stated purpose of furthering organization of intercollegiate athletics).

177. *See id.* (concluding NCAA does meet Section 501(c)(3)'s operational test).

178. *See Colombo, supra* note 20, at 115–16 (discussing enactment of Revenue Act of 1950 and purpose of provision establishing UBIT).

179. *See id.* at 116 (stating effects of UBIT on businesses which are considered tax-exempt under Section 501(c)(3)).

180. *See Tax on Unrelated Business Income of Exempt Organizations*, I.R.S. Pub. No. 598, Cat. No. 46598X (Feb. 26, 2019), available at <https://www.irs.gov/pub/irs-pdf/p598.pdf> [<https://perma.cc/5A9T-CDTU>] (stating definition of UBIT and activities of Section 501(c)(3) tax-exempt businesses which could be subjected to taxation through UBIT).

181. *See Erik M. Jensen, Taking the Student Out of Student Athlete: College Sports and the Unrelated Business Income Tax*, 31 J. TAX'N INV. 29, 38 (2014) (stating facts and circumstances which analyze three significant factors: (1) how much profit does potential UBIT activity generates, (2) proportionality of scope of any unrelated activities in comparison to exempted purpose of tax-exempted organizations, and (3) whether activities of organizations are inherently part of tax-exempted purpose of organizations).

An example of the application of UBIT outside the context of intercollegiate athletics would be that of a health club program organized by a Section 501(c)(3) exempted organization.¹⁸² The charitable organization is created to provide activities for contributing to the “physical, social, mental, and spiritual health of young people,” which grants the organization tax-exempt status under Section 501(c)(3) of the Code.¹⁸³ However, the organization also runs a health club program and charges an annual fee for the program.¹⁸⁴ Since the health club program is an addition to the tax-exempt purpose of the “general physical fitness program of the organization,” the operation of the health care program would not further the accomplishment of the organization’s exempt purpose.¹⁸⁵ As such, the annual fee for the health club program is considered unrelated business income if the organization intends to make a profit from the annual fees, which can be taxed through the UBIT.¹⁸⁶

Under the UBIT, the IRS has the ability to tax a university’s athletic department, in particular, the high revenue sports of football and men’s basketball.¹⁸⁷ These programs clearly meet two of the three requirements to impose the UBIT, as athletic programs such as football and men’s basketball are conducted regularly for the production of income.¹⁸⁸ A similar reasoning for two of the three requirements for the UBIT can be applied to the NCAA, as the management and organization of intercollegiate athletics is reg-

182. See I.R.S. Pub. No. 598, *supra* note 180 (depicting example of health club program maintained by 501(c)(3) exempt organization).

183. *Id.* (illustrating purpose of 501(c)(3) exempt organization within example of health care program being classified as unrelated business income).

184. See *id.* (describing health club program run by 501(c)(3) exempted organization in addition to general physical fitness program).

185. See *id.* (explaining absence of connection between accomplishment of 501(c)(3) exempted purpose of organization and annual fees collected from health care program).

186. See *id.* (concluding application of UBIT to 501(c)(3) exempted organization if annual fees collected through health care program were intended to incur profit).

187. See Colombo, *supra* note 20, at 135 (stating IRS’s ability to tax universities’ athletic programs by fragmenting income generated from universities’ athletic programs, specifically men’s football and men’s basketball, away from normal operation of universities allows IRS to tax income of athletic programs).

188. See *id.* at 135–36 (finding two of three requirements required of UBIT, first being that income was derived from “a trade or business” and second, that activity is regularly carried on, can be met when analyzing universities’ athletic programs).

2020] SWELLING TIDE OF COMMERCIALIZED AMATEUR ATHLETICS 313

ularly done for the purpose of generating an income.¹⁸⁹ The last requirement, which is ambiguous in nature, is to determine whether intercollegiate athletic revenue is substantially related to the organization's exempted purpose.¹⁹⁰ However, legal precedent and the NCAA's maintenance that student-athletes cannot be compensated, and as such are considered amateurs, allows both institutions to avoid the UBIT by establishing substantial relation between revenue generated by intercollegiate athletics and an organization's Section 501(c)(3) exempted purposes.¹⁹¹

2. *Conditional Antitrust Immunity for the NCAA Through the Myles-Brand Act*

Another proposed strategy to solve the inequitable relationship between the revenue streams generated from intercollegiate athletics and the uncompensated labor of student-athletes is to pass legislation granting immunity from Section 1 of the Sherman Act to the NCAA and its member universities.¹⁹² Professor Matthew Mitten posited this could be accomplished through passage of a hypothetical legislation, called the Myles Brand Act, which would allow the NCAA, once exempted from Section 1 of the Sherman Act, to impose financial restrictions on a university's athletic programs.¹⁹³

The imposition of federal antitrust regulations on the NCAA and its member universities arose from court decisions applying Section 1 of the Sherman Act to the NCAA and its member universities.¹⁹⁴ One example of this application is found in the Tenth

189. *See id.* at 136 (stating NCAA's characteristics, such as large revenues collected by NCAA and intercollegiate athletics being played throughout calendar year, would permit IRS to utilize UBIT).

190. *See id.* at 138 (determining existence of uncertainty about whether revenue generated from intercollegiate athletics can be considered substantially related to continued operation of organizations' exempted purposes).

191. *See id.* at 139–40 (finding operating revenue of intercollegiate athletics can be considered substantially related to exempted purposes of universities and NCAA through legal precedent and maintenance of amateur status for student-athletes).

192. *See Mitten et al., supra* note 50, at 838 (recommending instituting legislation which would grant immunity from federal antitrust statutes under Section 1 of Sherman Act to NCAA and its member universities and naming this hypothetical legislation Myles Brand Student-Athlete Education and Welfare Act ("Myles Brand Act")).

193. *See id.* (stating purpose of Myles Brand Act in reversing past precedent whereby NCAA was denied ability to dictate such items as limitations on scholarships amounts and installing pay scale caps for intercollegiate athletic coaches in order to curtail rising expense).

194. *See id.* at 829–31 (noting treatment of NCAA and its member universities by federal appellate courts, specifically applying Sherman Act antitrust regulation on various proposed restrictions on NCAA's member universities).

314 JEFFREY S. MOORAD SPORTS LAW JOURNAL [Vol. 27: p. 285]

Circuit's decision in *Law v. NCAA*.¹⁹⁵ In that matter, the court determined that where an agreement makes price restrictions to the competitive market, even if all parties in the market are in favor of the agreement, the agreement is deemed anticompetitive and in violation of antitrust legislation.¹⁹⁶

Under the proposed Myles Brand Act legislation, and in return for a grant of immunity from federal antitrust regulations, the NCAA would have to provide four key benefits to student-athletes.¹⁹⁷ First, the NCAA would guarantee that its member universities provide four-year full scholarships to student athletes, which cover the full cost of attendance of the university.¹⁹⁸ Second, the NCAA and the member universities would provide free medical care or health insurance for any sports-related injury suffered by the student-athletes, including the ability to extend the student's scholarship for anytime the student-athlete is unable to attend class.¹⁹⁹ Third, member universities of the NCAA would have the responsibility of identifying student-athletes who need further academic assistance and provide the required tutoring to these student-athletes.²⁰⁰ Fourth, the NCAA would create a postgraduate scholarship program, funded by the revenues of the most lucrative collegiate athletics, for those student-athletes seeking further education after their intercollegiate careers have ended.²⁰¹

Past legal precedents disallowed the NCAA to impose economic restraints on its member universities, even if the NCAA's purpose was to protect student-athletes' welfare and the amateur-

195. See *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.2d 1010, 1020–21 (10th Cir. 1998) (holding NCAA's proposition of limiting college coach's annual salaries are restraints of trade deemed unlawful under Section 1 of Sherman Act).

196. See *id.* at 1020 (stating rationale against "price-fixing" agreements because of its anticompetitive characteristics, including NCAA's salary limitation).

197. See Mitten et al., *supra* note 50, at 838 (outlining four key components of hypothetical legislation, Myles Brand Act, which would allow NCAA to freely manage their internal affairs, such as dictating caps on coaches' salaries).

198. See *id.* at 838–39 (stating first component of Myles Brand Act, providing four-year scholarships to student-athletes which covers full cost of attendance with possibility of further years in order for student-athletes to complete their bachelor's degree).

199. See *id.* at 840 (stating second component of Myles Brand Act, calling for free medical care or health insurance for student-athletes for any sports-related injury they many suffer while participating in their intercollegiate sport).

200. See *id.* at 840–41 (stating third component of Myles Brand Act, requiring mandatory academic assistance to student-athletes who fall below certain academic standards).

201. See *id.* at 838–41 (stating fourth component of Myles Brand Act, mandating creation of post-graduate scholarship program whereby student-athletes can continue their education post-playing days financed through high revenue sports such as men's college basketball and men's college football).

2020] SWELLING TIDE OF COMMERCIALIZED AMATEUR ATHLETICS 315

ism of intercollegiate athletics.²⁰² Such practices of dictating financial caps on the yearly compensation of university coaches actually promotes competitive balance between the universities.²⁰³ Yet, courts have held that limiting the number of nationally televised athletic events in order to curb the commercialization of amateur athletics, is an antitrust violation under the Sherman Act.²⁰⁴ The courts rejected these practices in order to preserve a competitive marketplace within intercollegiate athletics for consumers.²⁰⁵ By allowing for the exchange of improved student-athlete benefits and the ability to be immune to past legal treatment of university regulations of the NCAA, the Myles Brand Act would seek to align the interests of the NCAA with that of the student-athletes.²⁰⁶

3. *H.R. 1804: Student-Athlete Equity Act*

The Student-Athlete Equity Act is a promising strategy to pursue, as it will protect many of the benefits realized by the tax-exempt status of the NCAA and its member universities, as well as allow an equalizing treatment of student-athletes.²⁰⁷ The proposed legislation, currently in the United States House of Representative's Ways and Means Committee, would preserve the tax-exempt status of the NCAA and its member universities as long as student-athletes are permitted to seek financial opportunities off the field which utilize the student-athlete's name, image, and likeness.²⁰⁸ The Act's

202. *See, e.g.*, *Law v. NCAA*, 134 F.3d 1010 (10th Cir. 1998) (holding NCAA cannot impose economic restraints on member universities); *see also* Mitten et al., *supra* note 50, at 835–36 (finding reluctance by NCAA to enact regulations which would be beneficial for student-athletes' welfare for fear of negative treatment such regulations would receive by courts' interpretations of antitrust policy).

203. *See* Mitten et al., *supra* note 50, at 830–31 (finding that economic restraints disallowed for NCAA to impose provide benefits to member universities).

204. *See, e.g.*, *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984) (finding NCAA violated antitrust laws by imposing restrictions on television broadcasting rights for college football); *Law v. NCAA*, 134 F.2d 1010 (10th Cir. 1998) (determining NCAA cannot impose caps on salaries of coaches as it violates antitrust laws of Sherman Act); *see also* Mitten et al., *supra* note 50, at 830–31 (describing various challenges brought by NCAA in order to impose regulations on universities' athletic programs).

205. *See id.* at 830 (“The primary purpose of the antitrust laws is to preserve a competitive marketplace to ensure that consumers receive the benefits of economic competition.”).

206. *See id.* at 829 (supporting Myles Brand Act as a carrot to entice NCAA to adopt benefits for student-athletes rather than utilize punishments such as imposing taxes on all revenue generating activities).

207. *See generally* Jahner, *supra* note 35 (reporting on new bill proposed in Congress called Student-Athlete Equity Act, which would allow student-athletes to be compensated for their name, image, and likeness).

208. *See id.* (discussing Student-Athlete Equity Act's effects if passed by Congress).

316 JEFFREY S. MOORAD SPORTS LAW JOURNAL [Vol. 27: p. 285]

compromising nature would allow the NCAA to continue to benefit from their Section 501(c)(3) tax exemption, allowing the NCAA to avoid conflicts between their stated purpose of promoting amateur athletics with the increasing size of multi-million dollar broadcast and sponsorship agreements, in exchange for removing the NCAA's past practice of disallowing student-athletes to financially gain from their own name, likeness, and image off the field.²⁰⁹ The NCAA's member universities would also benefit from passage of this legislation, as the Student-Athlete Equity Act would remove the possibility of tax reforms which could focus not solely on the university's athletic programs, but the tax-exempt status of the university as a whole.²¹⁰

With the decision by the NCAA to begin the process of allowing student-athletes to be compensated off the field for their name, image, and likeness, federal legislation, such as the Student-Athlete Equity Act, becomes critically important.²¹¹ While the NCAA seeks to finalize a policy to compensate student-athletes for their name, image, and likeness by 2021, individual states have started to pass legislations to allow the student-athletes of each university within that state the ability to seek off the field business opportunities.²¹² Further, student-athletes might not have complete freedom to accept any opportunity, as the NCAA would only allow student-athletes to be compensated for opportunities that are "consistent with the collegiate model."²¹³

As student-athletes pursue off the field opportunities, the NCAA and its member universities would shift to weaker legal foot-

209. See *id.* (finding alteration of 501(c)(3) would allow flexibility in implementing future NCAA policy changes while also maintaining NCAA's compliance with tax code).

210. See Mitten et al., *supra* note 50, at 828 (finding proposed tax reform solutions to combat inequality between 501(c)(3) exempted revenues of universities and uncompensated student athletes could result in tax punishments which would remove all exemptions granted to universities).

211. See Khristopher J. Brooks, *NCAA Athletes Getting Paid: Thousands Could Be in Their Future*, CBS NEWS (Nov. 1, 2019, 1:38 PM), <https://www.cbsnews.com/news/ncaa-athletes-getting-paid-thousands-could-be-in-their-future/> [<https://perma.cc/65RG-LUF2>] (detailing NCAA's updated policy to allow student-athletes to be compensated for their name, image, and likeness).

212. See Colin Dwyer, *NCAA Plans to Allow College Athletes To Get Paid For Use of Their Name, Images*, NPR (Oct. 29, 2019, 2:59 PM), <https://www.npr.org/2019/10/29/774439078/ncaa-starts-process-to-allow-compensation-for-college-athletes> [<https://perma.cc/E4CZ-4S5U>] (describing efforts which must be undertaken in order to allow student-athletes to take full advantage of NCAA's new policy).

213. Brooks, *supra* note 211 (highlighting specific language of NCAA's announcement which could lead to future ambiguity limiting ability of student-athletes to be compensated for their name, image, or likeness).

2020] SWELLING TIDE OF COMMERCIALIZED AMATEUR ATHLETICS 317

ing attempting to maintain their Section 501(c)(3) tax-exempt status.²¹⁴ With the NCAA's new policy, the IRS could possibly revisit their prior interpretation of whether the NCAA is fostering amateur sports competition or has shifted to fostering athletic competitions which allow student-athletes to build their brand for off the field business opportunities, analogous to professional athletic leagues.²¹⁵ The Student-Athlete Equity Act would be important as it would create a federal standard, instead of fifty different state standards, permitting student-athletes to seek off the field business opportunities while also carving out a section in the Code permitting the NCAA and its member universities to continue to enjoy Section 501(c)(3) tax-exempt status.²¹⁶

III. INTRICACIES OF PREVIOUS PROPOSALS AND WHY A FEDERAL STUDENT-ATHLETE EQUITY ACT HITS THE MARK

As intercollegiate athletics, in particular football and men's basketball, have become major economic powerhouses, tensions from uncompensated student-athletes continues to rise.²¹⁷ However, the ramifications of allowing student-athletes to be compensated beyond their academics creates issues with ability for the NCAA and its member universities to qualify for a tax exemption under Section 501(c)(3) of the Code.²¹⁸ This section first considers and analyzes the various ineffective solutions that have been proposed to rectify the disconnect between the tax-exempt status of the NCAA and its member universities with the uncompensated na-

214. See Michael McCann, *Six Reasons to Be Skeptical of Proposals to Tax College Athletes' Scholarships*, SPORTS ILLUSTRATED (Oct. 30, 2019), <https://www.si.com/college/2019/10/30/ncaa-name-image-likeness-tax-scholarship-richard-burr> [<https://perma.cc/3MYA-73Y7>] (identifying potential issues associated with NCAA's new policy and tax-exempt status of NCAA and its member universities under Section 501(c)(3)).

215. See *id.* (finding that "[i]f college sports competition is linked to taxation for athletes' identities, college sports arguably become more like pro sports. Such a designation would undermine the valuable 501(c)(3) status enjoyed by the NCAA, conferences and colleges").

216. See Jahner, *supra* note 35 (describing goals of Student-Athlete Equity Act and potential benefit associated with having uniform federal standard rather than multiple standards at state level, creating potential for misunderstandings and conflicts).

217. See Kisska-Schulze, *supra* note 22, at 354 (stating disconnect between student-athletes being "workhorses of successful athletic programs" and commercialization of college athletics).

218. See Rev. Rule. 67-291, 1967-2 C.B. 184 (stating one of NCAA's tax-exempt purposes is to retain barriers between intercollegiate athletics and professional sports, where compensation above academic needs would violate that barrier).

318 JEFFREY S. MOORAD SPORTS LAW JOURNAL [Vol. 27: p. 285

ture of student-athlete labor.²¹⁹ Then, this section argues in favor of the Student-Athlete Equity Act as the preferred solution to resolve the inequitable disparity between the uncompensated labor of student-athletes and the tax-free revenues generated by the NCAA and university athletic programs.²²⁰

A. Finding the Right Solution to Resolve the Inequality Between the Uncompensated Labor of Student-Athletes and the Tax-Exempt Status of Billion Dollar Enterprises

As the prevalence of commercialization has dominated intercollegiate athletics, critics have sought solutions to tackle the unequal disparity between the operations of the NCAA and its member universities athletic programs as Section 501(c)(3) tax-exempt entities and the uncompensated labor of the student-athletes.²²¹ These approaches seek to rectify this disparity by finding a common ground between the Section 501(c)(3) tax-exempt status of the organizations and the protection of amateurism in intercollegiate athletics.²²² However, each of these approaches have their flaws as they attempt to stem the advancement of the tide of commercialization in intercollegiate athletics, while not protecting the student-athletes individually from this commercialization.²²³ Therefore, each of the proposed solutions should be rejected in favor of the passage of the Student-Athlete Equity Act, which would provide the most protection to student-athletes by allowing them to seek compensation for their own name, image, and likeness.²²⁴

219. For further discussion of theories to resolve disconnect between tax-exempt organizations and compensation of student-athletes, see *supra* notes 181–219 and accompanying text.

220. For further discussion of the benefits and effects of the passage of the Student-Athlete Equity Act, see *infra* notes 254–278 and accompanying text.

221. For further discussion of the solutions proposed by critics of the commercialization of intercollegiate athletics, see *supra* notes 181–219 and accompanying text.

222. For further discussion of the details of the proposed solutions to combat the commercialization of intercollegiate athletics, see *supra* notes 181–219 and accompanying text.

223. For further discussion of the flaws which accompany each of the proposed solutions and the inefficient means they would produce in protecting the interests of the student-athletes, see *infra* notes 228–253 and accompanying text.

224. For further discussion of the reasoning each of the proposed solutions to combat the commercialization of intercollegiate athletics should be rejected, see *infra* notes 228–253 and accompanying text.

2020] SWELLING TIDE OF COMMERCIALIZED AMATEUR ATHLETICS 319

1. *Issues of UBIT's Application: "The Paper Tiger Problem"*

Under the UBIT approach, the IRS would be allowed to tax activities that are being carried out by Section 501(c)(3) exempt organizations if the activities satisfied certain conditions.²²⁵ The UBIT would apply to activities that produce income from a trade or business of a Section 501(c)(3) exempted organization, that is regularly carried on by the organization, but is not substantially related to the organization's tax-exempted purpose.²²⁶ Applying the UBIT to either the NCAA, its member universities, or both, would require each organization to demonstrate how their revenue generating activities are substantially related to their Section 501(c)(3) exempted purpose.²²⁷

With the exempted purpose of fostering national or international amateur sports competition, and to avoid the UBIT, the NCAA would be required to demonstrate how certain business relationships, such as their broadcasting agreement, substantially relate to their exempted purpose.²²⁸ If these business relationships are being utilized in a similar fashion to those business relationships usually reserved for professional sports leagues, such as exclusive media agreements between a team and a media company, than the NCAA would fail the substantial relation requirement and the UBIT would be applied to the NCAA's revenue.²²⁹ However, if the business relationships are being utilized to promote amateurism in intercollegiate athletics and further the education of the student-

225. See Colombo, *supra* note 20, at 116 (stating definition of UBIT on businesses which are considered tax-exempt under Section 501(c)(3)).

226. See I.R.S. Pub. No. 598, *supra* note 180 (stating definition of UBIT and activities of Section 501(c)(3) tax-exempt businesses which could be subjected to taxation through UBIT).

227. See *id.* (identifying requirements in applying UBIT that one's business activity must be substantially related and contribute importantly to accomplish organizations' tax-exempted purposes under Section 501(c)(3)).

228. See I.R.C. § 501(j)(2) (2018) (codifying qualified amateur sports organizations, under which NCAA falls, which would meet requirements of 501(c)(3) as tax-exempted organizations); see also Colombo, *supra* note 20, at 139 (discussing methods by which NCAA could avoid targeted taxation through UBIT of revenue generated from television contracts).

229. See Colombo, *supra* note 20, at 139 (stating viewpoint that continued use of NCAA's media agreements would be considered within same vein as network agreements of professional sports leagues, and revenue collected from NCAA's media agreements would not be considered to be substantially related to NCAA's exempted purpose).

320 JEFFREY S. MOORAD SPORTS LAW JOURNAL [Vol. 27: p. 285

athletes, the commercial hue of the activities are overlooked and the substantial relation requirement is met.²³⁰

Universities would undergo a similar analysis regarding the characterization of the revenue generated from their athletic programs.²³¹ Proponents of applying the UBIT to revenue generated from athletic programs of universities point to factors such as the treatment that student-athletes receive from the university which can hinder their education.²³² Conversely, there are factors which universities point to that demonstrate the benefits of successful athletic programs such as larger and more frequent contributions from donors to provide high quality educational tools.²³³ However, legal precedents and IRS rulings have characterized the athletic activities of schools as being substantially related to the educational purpose of the university.²³⁴

However, proponents of the UBIT overlook a central flaw of utilizing the UBIT to eradicate the disparity between the large revenues generated from intercollegiate athletics and the uncompensated labor of student-athletes, known as the “Paper Tiger Problem.”²³⁵ The flaw lies with accounting principles, in particular accounting for capital costs and other costs associated with intercollegiate athletics.²³⁶ For the NCAA, after distributions have been

230. *See id.* at 140 (providing counterpoints that promotion of amateur athletics is still being acted upon by NCAA with NCAA’s emphasis on student-athletes’ education even if revenue generating activities are commercial in nature).

231. *See id.* at 139–40 (comparing universities’ abilities to that of NCAA’s abilities to determine whether revenue generated from universities’ athletic programs are constituted as substantially related to further universities’ 501(c)(3) tax-exempt educational purpose).

232. *See id.* (citing to student-athletes being separated from everyday academic activities of normal student, with heavy emphasis on practice within the student-athletes respected sport versus education and comparing rates of graduation among student-athletes to graduation rates of general student body).

233. *See id.* at 140 (citing to increased donor activity with successful athletic programs as well as comparing expensive laboratories benefiting only small number of students who use those facilities with benefits of successful athletic programs providing its own benefits to small subset of students, student-athletes).

234. *See Mitten et al., supra* note 50, at 816 (stating language of IRS’s ruling and legal precedent which has allowed universities to circumvent UBIT in respect to their revenue generated from universities’ athletic programs).

235. *See Colombo, supra* note 20, at 142 (labeling flaws in applying UBIT to revenue generated from intercollegiate athletics where use of cost accounting principles creates situations where either no profit or very minimal profits exists associated with intercollegiate collegiate events for universities, and as such, UBIT could not be applied to tax nothing).

236. *See id.* at 144 (describing “Paper Tiger Problem” whereby using cost accounting principles, there would exist either no profit or very minimal profit associated with operating revenue generating intercollegiate athletic events, and UBIT cannot be applied to tax nothing).

2020] SWELLING TIDE OF COMMERCIALIZED AMATEUR ATHLETICS 321

made to the member universities and the costs associated with the organization have been taken into account, the amount the NCAA would actually pay is minimal.²³⁷ Further, with knowledge of the UBIT, the NCAA could create a successful tax structure to ensure they have no business revenue to be taxed.²³⁸ For the universities, expenditures for the athletic facilities as well as general maintenance costs of running an athletic program effectively removes all profit from these programs.²³⁹ As such, no program would show an actual profit from the athletic program, and applying the UBIT to tax an amount which is nonexistent would not work.²⁴⁰ Therefore, after considering cost accounting and the foresight to create a tax structure to avoid the UBIT, the UBIT would be rendered ineffectual.²⁴¹

2. *Missing the Target: Issues of the Myles Brand Act*

Professor Mitten's hypothetical Myles Brand Act would seek to solve the disparity between the increasing revenues of intercollegiate athletics and the lack of equity for student-athletes by granting immunity from Section 1 of the Sherman Act for the NCAA and its member universities.²⁴² While many of the requirements of the Myles Brand Act would advance some of the best interests of the student-athletes, such as medical insurance and a post-graduation scholarship fund for further education, the focus is still in maintain-

237. *See id.* at 143 (finding after expenses have been deducted from NCAA and its member universities have received their distributions from NCAA, there would exist either very little tax base, if any, for NCAA to pay under UBIT).

238. *See id.* (“[M]inimal tax planning could easily ensure that the NCAA has no net business revenues to tax.”).

239. *See id.* at 144 (finding universities' expenditures on athletic programs would substantially reduce revenues collected from athletic programs as to cause UBIT to tax nonexistent revenue).

240. *See id.* (“What can be said with confidence is that taking account of the imbedded capital costs of athletic facilities would surely reverse any appearance of financial ‘profit’ associated with even the most successful big-time program.” (quoting James Shulman & William Bowen, *The Game of Life: College Sports and Educational Values* (2001))).

241. *See Colombo, supra* note 20, at 145 (concluding application of UBIT would produce results which proponents of UBIT would find lacking beneficial power in order to stem tide of commercialization of intercollegiate athletics).

242. *See Mitten et al., supra* note 50, at 838 (recommending instituting legislation which would grant immunity from federal antitrust statutes under Section 1 of the Sherman Act to NCAA and its member universities and naming this hypothetical legislation Myles Brand Student-Athlete Education and Welfare Act (“Myles Brand Act”)).

322 JEFFREY S. MOORAD SPORTS LAW JOURNAL [Vol. 27: p. 285]

ing control of student-athletes for the NCAA.²⁴³ While certain components enrich the student-athletes, it does not provide an equitable exchange for the physical labor and time commitment student-athletes must sacrifice to generate large revenues of athletics programs and the NCAA.²⁴⁴ Solutions, such as the hypothetical Myles Brand Act, operate under the assumption that amateurism and collegial emphasis are the primary goal of a university's athletic program and the NCAA, instead of the pursuit of maximizing revenue.²⁴⁵ As such, these solutions continue to limit student-athletes from receiving compensation for their physical labor and time commitment and instead be given something similar to employment benefits, which falls short in value compared to the revenues collected by the NCAA and its member universities.²⁴⁶

Solutions, such as the hypothetical Myles Brand Act, reinforce the ideals of amateurism by disallowing payments to student-athletes, but provide increased student-athlete welfare in exchange for antitrust immunity for the NCAA.²⁴⁷ However, these solutions are overlooking the wave of commercialization currently prevalent throughout intercollegiate athletics, characterized by the business-centric approach of the NCAA and its member universities to seek revenue maximization.²⁴⁸ Instead of providing a crutch for amateurism through an increase in student-athlete welfare, a complete overhaul of the incentives of the NCAA and its member universities must be acted upon.²⁴⁹ This can be achieved through passage of

243. See Chambers, *supra* note 33 (quoting Cal. State Senator Kevin Murray's criticism of NCAA's attempt to increase student-athlete welfare as designed to "keep the student under the thumb of the N.C.A.A. for the N.C.A.A.'s profit").

244. See *id.* (discussing unequal exchange student-athletes would receive from creation of welfare requirements in comparison to "the way [money] is distributed based upon who contributes to it").

245. See *id.* (stating viewpoint of "contemporary version of university athletics as a collegial model, one that permits enhanced financial aid but does not allow athletes to be paid salaries").

246. See Mitten et al., *supra* note 50, at 838 (finding best solution to inequality between student-athletes and large revenue streams of NCAA and its member universities is through implementation of student-athlete welfare policies).

247. See *id.* (stating recommendation by article's Authors to institute legislation, hypothetically called Myles Brand Act, which provides increased demands to student-athlete welfare in exchange for antitrust immunity of NCAA and its member universities instead of compensating student-athletes).

248. For further discussion of the growth of the business of the NCAA and its member universities, see *supra* notes 1-6 and accompany text.

249. See Jeremy Sheff, *The Well-Intended But Misguided Student-Athlete Equity Act*, HARV. L. REV. BLOG (Sept. 11, 2019), <https://blog.harvardlawreview.org/the-well-intended-but-misguided-student-athlete-equity-act/> (finding student-athlete tuition and scholarship funds pale in comparison to payments made to athletic staff and collected by revenues of universities' athletic programs and NCAA).

2020] SWELLING TIDE OF COMMERCIALIZED AMATEUR ATHLETICS 323

federal legislation, specifically the Student-Athlete Equity Act, which would provide the opportunity for student-athletes to be compensated for the labor and time commitment off the field from the reputation they build on the field.²⁵⁰

B. Riding the Swelling Tide of Professionalization of
Intercollegiate Athletics: The Benefits and Effects of
Passage of the Student-Athlete Equity Act

Theories to combat the inequitable disparity between tax-exempted revenues collected through the uncompensated labor of student-athletes receive mixed reviews on whether they present an adequate solution.²⁵¹ The solution that provides the most comprehensive protection to student-athletes and protects the tax-exempt status of universities and the NCAA is currently in the United States House of Representative's Ways and Means Committee.²⁵² The Student-Athlete Equity Act would call for an amendment to Section 501(j)(2) of the Code which provides rules for amateur sports organizations applying for 501(c)(3) tax-exempt status.²⁵³ This solution would allow student-athletes to use their name, image, and likeness for commercial gain, essentially allowing student-athletes to be contractors to the NCAA and the universities.²⁵⁴ This would preserve the ability of the NCAA and the universities to continue as 501(c)(3) tax-exempt organizations while allowing student-athletes to be compensated for their labor and time.²⁵⁵

If passed, the Student-Athlete Equity Act would amend Section 501(j)(2) to include a clause which would remove tax-exempt status from organizations which fail to adhere to the amendment.²⁵⁶ The

250. *See id.* (stating Student-Athlete Equity Act provides ability for student-athletes to “profit *off* the field or from the fame they win *on* the field” by allowing student-athletes to be compensated for their likeness and image).

251. For further discussion of the various theories and criticisms against the theories, see *supra* notes 220–253 and accompanying text.

252. *See* U.S. Congress, *H.R.1804 – Student-Athlete Equity Act*, CONGRESS.GOV (Jan. 21, 2020, 8:51 AM), <https://www.congress.gov/bill/116th-congress/house-bill/1804/text?q=%7B%22search%22%3A%5B%22student-athlete+equity+act%22%5D%7D&r=1&s=1> [https://perma.cc/7XJ7-WB2C?type=image] [hereinafter “Student-Athlete Equity Act”] (stating current status of H.R.1804 within Congressional approval process).

253. *See id.* (stating consequences to Code if Student-Athlete Equity Act is passed).

254. *See id.* (stating ramifications to student-athletes under passage of Student-Athlete Equity Act).

255. *See id.* (stating outcome of Student-Athlete Equity Act to universities and NCAA if Act is passed by Congress).

256. *See id.* (describing method by which Student-Athlete Equity Act would alter Section 501(c)(3) by introducing new language).

324 JEFFREY S. MOORAD SPORTS LAW JOURNAL [Vol. 27: p. 285]

amended Section 501(j)(2) exemption would forbid tax exemptions from those Section 501(c)(3) organizations that, “substantially restrict[s] a student athlete from using, or being reasonably compensated for the third party use of, the name, image, or likeness of such student athlete.”²⁵⁷ The new requirements would force the NCAA to choose whether to keep their tax exemption or to alter their definition of amateurism to allow student-athletes to arrange financial agreements for their names, images, and likenesses.²⁵⁸ However, the Student-Athlete Equity Act does not call for universities to compensate their student-athletes, only grant student-athletes the ability to solicit and agree to compensation agreements off the field.²⁵⁹

Similar solutions to the Student-Athlete Equity Act have been reached in states such as California, whose State Legislature passed Senate Bill 206 in September 2019.²⁶⁰ The California Senate Bill would allow student-athletes to use their name, image, or likeness to generate compensation from commercial outlets.²⁶¹ The emphasis of the bill is to lessen the gap between large revenues of college athletics and the lack of compensation afforded to student-athletes.²⁶² Issues that could arise with the passage of this bill is that it directly goes against the current NCAA’s bylaws, making student-athletes who sell their name, likeness, or image ineligible to participate in intercollegiate athletics.²⁶³ Further, the California

257. *Id.* (quoting language of Student-Athlete Equity Act).

258. *See* Sheff, *supra* note 249 (“[The Student-Athlete Equity Act] purports to require the NCAA to choose between its federal tax exemption and those aspects of its amateurism rules that forbid student-athletes from making endorsement deals, entering merchandising contracts, or licensing their names, images, and likenesses to video game companies.”).

259. *See id.* (“What [the Student-Athlete Equity Act] would not do is require (or, indeed, permit) the athletic programs in which these student-athletes compete to compensate them for their labor.”).

260. *See* Melody Gutierrez & Nathan Fenno, *California Would Allow College Athletes to Profit From Endorsements Under Bill Sent to Newsom*, L.A. TIMES (Sept. 12, 2019, 6:00 AM), <https://www.latimes.com/california/story/2019-09-11/california-college-athletes-endorsements-bill> [<https://perma.cc/LU6D-2CWA?type=image>] (reporting California State Senate Bill 206 passed, allowing college athletes to profit from their image and likeness).

261. *See id.* (“The bill would not allow schools to directly pay athletes but would permit students to receive compensation from outside sources – for example, from a video game company or for signing autographs or memorabilia.”).

262. *See id.* (documenting praise California bill has garnered from prominent athletes for allowing student-athletes to gain economically from their labor they supplied to universities and NCAA).

263. *See* Louise Radnofsky & Alejandro Lazo, *California Takes Aim at NCAA Pay Ban*, WALL ST. J. (Sept. 11, 2019, 7:29 PM), <https://www.wsj.com/articles/california-takes-aim-at-ncaa-pay-ban-11568244553> [<https://perma.cc/7SP6-Z2L4?type=image>] (providing statements from universities within California that

2020] SWELLING TIDE OF COMMERCIALIZED AMATEUR ATHLETICS 325

bill would be challenged constitutionally, as it could be attempting to regulate interstate commerce.²⁶⁴ While the bill illustrates the political climate on the issue of student-athlete compensation in the face of commercialized intercollegiate athletics, it was generated in the wrong forum.²⁶⁵

The most effective legal forum to pass a bill or an act similar to California's would be through federal legislation, not a state by state legislative adoption.²⁶⁶ Currently, legislation, such as California's, will be challenged as unduly interfering with interstate commerce in violation of the Commerce Clause of the United States Constitution.²⁶⁷ The NCAA would claim that in order to comply with California's new legal requirements, the organization would be forced to adopt and enforce an updated national rule to other universities across the country.²⁶⁸ This would be a violation of the Commerce Clause, as it effectively allows California to regulate the commercial activity of other States.²⁶⁹

Instead, in order to force the NCAA's hand in overturning their bylaws which disallow student-athletes from being compensated for their name, likeness, or image, federal legislation is re-

noted the bill would encourage student-athletes to expressly violate NCAA bylaws against compensation being provided to student-athletes for their name, likeness, or image, which would result in student-athletes found in violation being ineligible to participate in intercollegiate athletics); *but cf.* Murphy, *supra* note 80 (detailing changes which NCAA intends to implement for 2021–22 academic year allowing student-athletes to seek third-party endorsement opportunities).

264. *See* Radnofsky & Lazo, *supra* note 263 (finding courts will most likely side with NCAA as “the U.S. Constitution generally bars states from enacting laws seeking to regulate interstate commerce”).

265. *See id.* (detailing March 2019 lawsuit in Oakland, California seeking to disallow NCAA limitations on compensation or benefits for student-athletes to just those costs associated with educational needs and cost of attendance).

266. *See* Michael McCann, *California's New Law Worries the NCAA, but a Federal Law is What They Should Fear*, SPORTS ILLUSTRATED (Oct. 4, 2019), <https://www.si.com/college/2019/10/04/ncaa-fair-pay-to-play-act-name-likeness-image-laws> [<https://perma.cc/HQJ6-NKBR>] (describing persuasive argument NCAA could make if more states passed legislation similar to that of California instead of federal regulation being passed).

267. *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/R6HN-ZCJ8>] (stating legal argument NCAA will utilize if states pass similar legislation to California's, with likelihood of NCAA overturning various state's legislation).

268. *See id.* (“If the Fair Pay to Play Act goes into effect, it would . . . force the NCAA to change its national rules so that they match those in California . . . allow California schools to play by different rules or expel California schools.”).

269. *See id.* (stating legal grounds for which NCAA could dismiss or overturn current and future state legislation allowing student-athletes in that particular state to be compensated off field for their names, likeness, or image).

326 JEFFREY S. MOORAD SPORTS LAW JOURNAL [Vol. 27: p. 285]

quired instead of a state-by-state legislative adoption strategy.²⁷⁰ This can be done with an amendment to the Code through the Student-Athlete Equity Act.²⁷¹ Passage of the Student-Athlete Equity Act would circumvent legal arguments which would arise on the part of the NCAA claiming violations of the Commerce Clause.²⁷² Further, the Student-Athlete Equity Act would provide an incentive for the NCAA to maintain tax-exempt revenues, in particular their broadcast agreements, the NCAA would not be able to prohibit a student-athlete from capitalizing on opportunities generated off the field from these broadcast agreements.²⁷³ For example, student-athletes would now have ability to seek fair compensation off the field for their time and efforts within revenue generating athletic events of the NCAA and their respective universities.²⁷⁴ In essence, it would allow student-athletes to profit off the field from their efforts on the field by incentivizing the NCAA's tax exemption.²⁷⁵

IV. REACHING A SOLUTION: PROTECTING BOTH STUDENT-ATHLETES AND NCAA'S TAX-EXEMPT STATUS

Intercollegiate athletics were primarily founded on the principle of amateurism, appealing to the vision that competition should be for the sake of competition.²⁷⁶ However, over the course of the twentieth century, commercialization of intercollegiate athletics has become prevalent due to the availability of broadcasting rights and corporate sponsorship agreements.²⁷⁷ As universities and the NCAA collected more revenue from these agreements, the United

270. *See id.* (finding federal legislation as most effective measure to ensure compensation system similar to that which California passed).

271. *See* Student-Athlete Equity Act, *supra* note 252 (adjusting 501(c)(3) to reflect increased protections to student-athletes, allowing them to be compensated for their likeness, name, or image).

272. *See* McCann, *supra* note 266 (“[T]he NCAA could not credibly argue that multiple states are forcing it into a confused and conflicting set of rules. A federal law would set the rules for all states.”).

273. *See* Sheff, *supra* note 249 (stating Student-Athlete Equity Act would require NCAA to decide whether to maintain their tax-exempt status or loosen their definition of amateurism for student-athletes).

274. *See id.* (describing Student-Athlete Equity Act as allowing student-athletes to be able to sell their name, image, or likeness by removing fear they might lose their athletic eligibility).

275. *See id.* (describing ability of Student-Athlete Equity Act to allow student-athletes to capitalize from successes on-field to fair compensation off-field).

276. For further discussion of the beginnings of intercollegiate athletics with an emphasis on amateurism, see *supra* notes 50–57 and accompanying text.

277. For further discussion of growth of commercialization of intercollegiate athletics, see *supra* notes 58–71 and accompanying text.

2020] SWELLING TIDE OF COMMERCIALIZED AMATEUR ATHLETICS 327

States Tax Code lagged behind in the treatment of these revenues.²⁷⁸ This has allowed the NCAA and its member universities to be given favorable treatment by both the courts and the IRS in preserving their 501(c)(3) tax-exempt status.²⁷⁹

In recent years, critics have questioned whether the NCAA and its member universities' athletic programs are operating solely for the purpose of fostering amateurism or purely to achieve revenue maximization.²⁸⁰ Determination of the purpose of the NCAA and its member universities would have significant effect on the organization's tax-exempt status under 501(c)(3) of the Code.²⁸¹ Further, critics cite the diminishing importance of the academics which student-athletes are subjected to by the NCAA and its member universities.²⁸² Various solutions have been proposed to resolve the inequal disparity between the untaxed revenues of the NCAA and its member universities with the uncompensated labor of student-athletes.²⁸³ However, each solution fails to provide adequate protection to student-athletes.²⁸⁴

The most equitable solution to resolve the disparity of the ever increasing revenue streams and uncompensated labor of student-athletes is passing an amendment to the Code through the Student-

278. For further discussion of tax treatment of the NCAA and its member universities over time, see *supra* notes 103-143 and accompanying text.

279. See Will Hobson, *Happy Tax Day! Here's Why the NFL and NCAA Aren't Sweating It*, WASH. POST (Apr. 15, 2015), <https://www.washingtonpost.com/news/sports/wp/2015/04/15/happy-tax-day-heres-why-the-nfl-and-ncaa-arent-sweating-it/> [<https://perma.cc/DL7C-J5N4?type=image>] (describing similar tax-exempt status NCAA has compared to charities and advocacy groups, such as Amnesty International, Red Cross, and Salvation Army). For further discussion of precedents establishing favorable tax-exempt treatment of the NCAA and its member universities, see *supra* notes 127-143 and accompanying text.

280. For further discussion of criticisms of revenue maximizations habits of the NCAA and its member universities, see *supra* notes 11-17 and accompanying text.

281. For further discussion of eligibility of Section 501(c)(3) tax-exempt organizations, see *supra* notes 144-180 and accompanying text.

282. See, Jonathan R. Cole, *Why Sports and Elite Academics Do Not Mix*, THE ATLANTIC (Mar. 9, 2017), <https://www.theatlantic.com/education/archive/2017/03/the-case-against-student-athletes/518739/> [<https://perma.cc/99XK-A95Q>] (describing "broken higher-education experiences" student-athletes undergo, as seen by not only University of North Carolina scandal but "one-and-done" in men's college basketball and various sexual and inappropriate conduct of collegiate teams). For further discussion of diminishing academic value of student-athletes, see *supra* notes 90-99 and accompanying text.

283. For further discussion of proposed solutions, see *supra* notes 181-219 and accompanying text.

284. For further discussion of criticisms of proposed solutions, see *supra* notes 228-253 and accompanying text.

328 JEFFREY S. MOORAD SPORTS LAW JOURNAL [Vol. 27: p. 285

Athlete Equity Act.²⁸⁵ Recently, various states passed or have sought to pass legislation which would afford similar protections to student-athletes as the Student-Athlete Equity Act.²⁸⁶ However, each of these legislations will be met with intensive legal challenges brought by the NCAA.²⁸⁷ Rather than adopt a state-by-state legislation for student-athletes, the Student-Athlete Equity Act would provide a tax exemption incentive structure across all states that would encourage the NCAA to allow student-athletes to seek fair compensation off the field.²⁸⁸ Amateurism may still be idealized in intercollegiate athletics, however, the reality of commercialization must be faced and protections created for student-athletes.²⁸⁹

*Benjamin Kurrass**

285. For further discussion of the most equitable solution to solve the disparity between large revenues of the NCAA and its member universities with the uncompensated labor of student-athletes, see *supra* notes 254–278 and accompanying text.

286. See Gutierrez & Fenno, *supra* note 260 (detailing latest legislation passed by California State Legislature).

287. See McCann, *supra* note 267 (stating various legal challenges which NCAA will most likely argue in order to overturn state-by-state legislation in favor of allowing student-athletes to sell their names, images, and likenesses).

288. For further discussion on the incentives of the Student-Athlete Equity Act would create, see *supra* notes 259–262 and accompanying text.

289. See McCann, *supra* note 267 (describing agreement among Congressmen to promote legislation to further protect student-athletes from capitalistic treatment of intercollegiate athletics by NCAA and its member universities).

* J.D. Candidate Class of 2021, Villanova University Charles Widger School of Law; B.A. in Economics, Political Science, Bucknell University, 2015.