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A TRAIL OF TEARS: THE EXPLOITATION OF THE COLLEGE ATHLETE

*Robert A. McCormick**
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I. INTRODUCTION

The title of this symposium—“Exploitation of the Student-Athlete? Evaluating *Bloom, Oliver, O'Bannon* and *Keller*”—indicates its main focus is on recent, significant litigation involving the use of athletes’ images by commercial video game enterprises and the infringement of athletes’ right of publicity.¹ This problem has exploded of late because of advances in technology that allow video games to replicate identifiable facial features of college athletes and because of the vast amount of money the sales of such games generate. So the question has become: can video game makers profit from the images of current and former college athletes, or do athletes have some property right in their names and images?

This is a fascinating problem that has intensified in recent years. The tension in these cases implicates legal questions in intellectual property, antitrust, publicity rights, and other legal areas. Naturally, our sympathies go to the athlete whose identity may be taken by another for profit, but is that athlete entitled to compensation every time his picture or likeness is used, say for example, in *Sports Illustrated*? In our view, as fascinating as this problem is, it is only one part of an overall system of rules resulting in the exploitation of the so-called *student-athlete*. Our purpose in writing this Article is to show how the path of our schol-

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¹ In these cases, current and former college athletes have sued video game makers, such as EA Sports, and the NCAA for, among other things, profiting from athletes’ likenesses. The symposium was held April 16, 2010, at Florida Coastal School of Law.

arship has led us to the unavoidable conclusion that many college athletes are, indeed, very much exploited.

At the outset, we wish to make it clear that the persons we discuss in this Article are National Collegiate Athletic Association (NCAA) football and men's basketball players. We limit our inquiry to those young men because they are the most obviously exploited. It is their labor, after all, that generates virtually all of the enormous revenue in college athletics—revenue that is reserved exclusively for the universities themselves.² While athletes in other sports have their own considerable burdens, it is the athlete in the revenue-generating sport who most plainly experiences the exploitative nature of major college sports.

This Article traces the various forms of exploitation of college athletes that we have identified over the course of many years of considering their plight. Part II describes the amateur and professional league rules which together effectively present college-age athletes with the choice of either leaving the country to earn a living, or attending an NCAA institution where they are required to provide their valuable services to enrich others.³ Part III describes the legal definition of an employee and argues that college athletes meet this definition and should be accorded that status, along with the legal rights it entails.⁴ In applying the facts surrounding the lives of college athletes to the legal definition of an employee, we highlight many of the ways these young men are exploited. In Part IV, we show that despite the ever-increasingly commercial nature of the college sports industry, various legal regimes treat it as an amateur enterprise, effectively exempting it from regulation.⁵ As a result, the managers of major college athletics—coaches, athletic directors, conference and NCAA officials, to name a few—reap fantastic economic rewards, while the players receive none of the legal protections that would otherwise apply to them. Finally, in Part V, we point out that the various NCAA rules designed to establish college sports as an amateur activity apply only to athletes, many of whom come from impoverished backgrounds and most of whom are African

² See *infra* Part IV.

³ See *infra* Part II.

⁴ See *infra* Part III.

⁵ See *infra* Part IV.

American.⁶ By contrast, these amateurism rules do not apply to the managers of college sports, who generally earn lucrative salaries and who are overwhelmingly disproportionately of European-American descent.⁷ In this manner, we demonstrate that the NCAA's amateurism regime has an adverse disparate impact on African Americans and furthers the racial exploitation of the college athlete, thus leaving a shameful legacy in its wake.⁸

II. MATRIX OF NCAA AND PROFESSIONAL LEAGUE RULES

In many ways, the NCAA rules we examine in this Article apply in conjunction with another set of rules that operate at the professional level in the National Football League (NFL) and the National Basketball Association (NBA). The NFL's draft eligibility rule renders any young man ineligible until three years have elapsed since graduating from high school,⁹ while the NBA requires one year to have elapsed and the candidate to be nineteen years old for draft eligibility.¹⁰ One effect

⁶ See *infra* Part V.

⁷ See *infra* Part V.

⁸ See *infra* Part V.

⁹ NFL/NFLPA, NFL COLLECTIVE BARGAINING AGREEMENT 2006-2012: COLLECTIVE BARGAINING AGREEMENT BETWEEN THE NFL MANAGEMENT COUNCIL AND THE NFL PLAYERS ASSOCIATION, Mar. 8, 2006, art. XVI, § 2(b), at 46, available at <http://images.nflplayers.com/mediaResources/files/PDFs/General/NFL%20COLLECTIVE%20BARGAINING%20AGREEMENT%202006%20-%202012.pdf> [hereinafter NFL COLLECTIVE BARGAINING AGREEMENT].

No player shall be permitted to apply for special eligibility for selection in the Draft, or otherwise be eligible for the Draft, until three NFL regular seasons have begun and ended following either his graduation from high school or graduation of the class with which he entered high school, whichever is earlier. For example, if a player graduated from high school in December 2006, he would not be permitted to apply for special eligibility, and would not otherwise be eligible for selection, until the 2010 Draft.

Id.

¹⁰ NBA/NBPA, NBA COLLECTIVE BARGAINING AGREEMENT, July 2005, art. X, § 1(b), at 225, available at <http://www.nbpa.org/cba/2005> [hereinafter NBA COLLECTIVE BARGAINING AGREEMENT].

A player shall be eligible for selection in the first NBA Draft with respect to which he has satisfied all applicable requirements of Section 1(b)(i) below:

(i) The player (A) is or will be at least 19 years of age during the calendar year in which the Draft is held, and (B) with respect to

of these rules is that even the finest young athletes¹¹ must choose between attending an NCAA institution to compete without adequate compensation¹² and moving to a foreign country to make a living.¹³ Together with these professional league rules, the NCAA amateurism requirements relegate college football and men's basketball players to a period of servitude, where they must provide their valuable labor to their universities without personal profit.¹⁴

In 1984 Professor Robert A. McCormick co-authored an *Emory Law Journal* article entitled *Professional Football's Draft Eligibility Rule: The Labor Exemption and the Antitrust Laws*.¹⁵ That article centered on the experience of Herschel Walker, who won the Heisman Trophy after his junior year at the University of Georgia, but who was ineligible for the NFL draft by virtue of the league's draft eligibility

a player who is not an international player (defined below), at least one (1) NBA Season has elapsed since the player's graduation from high school (or, if the player did not graduate from high school, since the graduation of the class with which the player would have graduated had he graduated from high school). . . .

Id. NBA Commissioner David Stern has expressed a desire to raise the minimum eligibility age to twenty. See Chris Sheridan, *Hunter Still Opposed to Raising NBA Age Limit*, USA TODAY, May 12, 2005, http://www.usatoday.com/sports/basketball/nba/2005-05-12-hunter-age-limit_x.htm.

¹¹ It is noteworthy that many of the best NBA players, including LeBron James, Kobe Bryant, and Tracy McGrady, could not have entered the league at the ages they did under the NBA's current draft eligibility rule. See NBA, *Players*, <http://www.nba.com/players> (last visited July 18, 2010).

¹² See NCAA, 2009-10 NCAA Division I Manual arts. 15.01.6, 15.02.2 (2009), available at <http://www.ncaapublications.com/p-3934-2009-2010-ncaa-division-i-manual.aspx> [hereinafter *DIV. I MANUAL*]. Athlete compensation, denoted *financial aid* under NCAA rules, is limited to the cost of attending a university, defined as "the total cost of tuition and fees, room and board, books and supplies, transportation, and other expenses related to attendance at the institution." *Id.* Moreover, an athlete is not permitted under NCAA rules to earn any other compensation for his athletic services including pay for the value of his athletic skill or fame, the only things that could likely bring him real value. *Id.* arts. 12.01.1, 12.1.2, 12.4.1.1.

¹³ See Frank Deford, *American Exchange Rate Dwindles in Sports, Too*, SPORTS ILLUSTRATED, Nov. 12, 2008, http://sportsillustrated.cnn.com/2008/writers/frank_deford/11/12/exchange-rate/index.html.

¹⁴ See *DIV. I. MANUAL*, *supra* note 12, arts. 12.01.1, 12.1.2, 12.4.1.1.

¹⁵ Robert A. McCormick & Matthew C. McKinnon, *Professional Football's Draft Eligibility Rule: The Labor Exemption and the Antitrust Laws*, 33 EMORY L.J. 375 (1984).

rule.¹⁶ In 2003 Maurice Clarett, an underclassman at The Ohio State University, challenged the NFL's version of the draft eligibility rule as violating antitrust law.¹⁷ Although this challenge was successful at the district court level,¹⁸ the United States Court of Appeals for the Second Circuit reversed that court and held the rule exempt from the antitrust laws by virtue of the nonstatutory labor exemption to the antitrust laws.¹⁹ As a consequence, the NFL draft eligibility rule remains intact and continues to exclude otherwise capable young men from earning a living by plying their trade.²⁰

With the possibility of professional employment foreclosed even for the most talented and commercially valuable of these young athletes, each experiences a Hobson's choice: either to leave the United States to find professional employment in foreign leagues or to play at NCAA institutions without adequate compensation.²¹ Of course, the vast majority of these young men opt to play NCAA sports and become the so-called *student-athlete* as envisioned in the title to this symposium.

¹⁶ *Id.* at 375-80.

¹⁷ *Clarett v. NFL*, 306 F. Supp. 2d 379, 382 (S.D.N.Y. 2004). Professor Robert A. McCormick served as co-counsel for the plaintiff in that case. *Id.*

¹⁸ *Id.*

¹⁹ *Clarett v. NFL*, 369 F.3d 124, 125 (2d Cir. 2004).

²⁰ See NFL COLLECTIVE BARGAINING AGREEMENT, *supra* note 9, art. XVI, § 2(b), at 46.

²¹ See DIV. I MANUAL, *supra* note 12; Deford, *supra* note 13. It should be noted that because compensation is restricted under NCAA rules to the cost of attending a university (essentially to tuition, room, board, and books), see DIV. I MANUAL, *supra* note 12, art. 15.02.4, the athlete is forced to spend his artificially limited wages only at the *company store*—the university itself. The classic company store form of worker exploitation required employees, as a condition of employment, to live in company-owned housing and to purchase goods from company-owned stores at grossly inflated prices. See THOMAS R. BROOKS, TOIL AND TROUBLE: A HISTORY OF AMERICAN LABOR 92-93 (2d ed. 1971). Workers were often paid with “scrip or draft redeemable only at the company outlets” rather than with U.S. currency. GEORGE S. MCGOVERN & LEONARD F. GUTTRIDGE, THE GREAT COALFIELD WAR 23 (1972). Similarly, by limiting athletes' remuneration to tuition, room, board, and books, NCAA rules cause universities essentially to pay the athlete a form of scrip redeemable only at the university itself and which cannot be used to meet athletes' other real financial needs or those of their families. See DIV. I MANUAL, *supra* note 12, art. 15.02.4.

III. COLLEGE ATHLETE AS EMPLOYEE

While watching the NCAA men's basketball tournament a few years ago, we began to take note of the NCAA's own advertisements—the ones, for example, where a swimmer emerges from a swimming pool and metamorphoses into a commercial airline pilot—where the message is that most of the athletes will be “go[ing] pro in something other than sports.”²² Why, we wondered, would the NCAA repeat this message over and over again? If nothing else, it was either spending a great deal of money or foregoing significant advertising revenue to support this idea. And then it occurred to us that perhaps the NCAA was protesting too much,²³ and that, in fact, some of these athletes might not be student-athletes at all. Perhaps the NCAA's dogged insistence on denoting them as student-athletes was to mask their true status as something other than student-athletes.

Our research soon informed us that the NCAA actually invented the term *student-athlete* in direct response to a 1953 Colorado Supreme Court decision that found an injured football player was an *employee* and consequently entitled to workers' compensation for his injuries.²⁴ As former NCAA Commissioner Walter Byers would later write:

[The] threat [from *Nemeth*] was the dreaded notion that NCAA athletes could be identified as *employees* by state industrial commissions and the courts.

[To address that threat, w]e crafted the term *student-athlete*, and soon it was embedded in all NCAA

²² NCAA, *NCAA Launches Latest Public Service Announcements, Introduces New Student-Focused Website*, Mar. 13, 2007, http://www.ncaa.org/wps/portal/ncaahome?WCM_GLOBAL_CONTEXT=/ncaa/NCAA/Media+and+Events/Press+Room/News+Release+Archive/2007/Announcements/NCAA+Launches+Latest+Public+Service+Announcements+Introduces+New+Student-Focused+Website; see also *NCAA Public Service Announcement* (CBS television broadcast Mar. 2005); *NCAAstudent.org*, Watch TV Spots, <http://www.ncaastudent.org/> (last visited July 18, 2010).

²³ Cf. WILLIAM SHAKESPEARE, *THE TRAGEDY OF HAMLET, PRINCE OF DENMARK* act 3, sc. 2 (“The lady doth protest too much, methinks.”).

²⁴ See *Univ. of Denver v. Nemeth*, 257 P.2d 423, 429-30 (Colo. 1953).

rules and interpretations as a mandated substitute for such words as players and athletes.²⁵

Naturally, the NCAA was alarmed at a judicial determination that could categorize athletes as employees. Not only might such a ruling make NCAA universities liable for workers' compensation for injured athletes, it could also make them liable for wages and other rights accorded employees under a panoply of other federal and state laws. NCAA members, after all, had long agreed among themselves to limit these athletes' compensation to the level of tuition, room, board, and books,²⁶ and had thereby enabled themselves to reap pecuniary and other benefits from the athletes' talents, time, and energy—that is, from their labor—while severely limiting the cost of such labor. By creating and maintaining the idea of the *student-athlete* and its corollary, that college sports are *amateur*, the NCAA and its member universities attempted to diminish the status of an athlete as an employee by emphasizing his seemingly contrary identity as a mere student. As a result, like no other association of institutions or businesses in this country, NCAA universities are able to obtain the benefits of valuable labor—in this case the labor of the players that is central to the athletic enterprise—without paying a competitive wage for it.

Although the NCAA asserts college sports are amateur and uses this argument to justify not paying its players, college sports have become a highly commercial enterprise. The television network, CBS, for example, has agreed to pay the NCAA \$6 billion for the rights to televise March Madness for eleven years, amounting on average to \$545 million each year.²⁷ Coaches' salaries have been skyrocketing²⁸ even in

²⁵ WALTER BYERS WITH CHARLES HAMMER, UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES 69 (1995) (emphasis in original).

²⁶ DIV. I MANUAL, *supra* note 12, arts. 15.1, 15.02.2.

²⁷ CBS Renews NCAA B'ball, CNNMONEY, Nov. 18, 1999, <http://money.cnn.com/1999/11/18/news/ncaa/>.

²⁸ See, e.g., Richard T. Karcher, *The Coaching Carousel in Big-Time Intercollegiate Athletics: Economic Implications and Legal Considerations*, 20 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1, 11-23 (2009) (documenting numerous recent examples of coaches' exorbitant salaries); Sean Braswell, *How A Tiny Russian Nesting Doll Affects UT's Greater Mission*, AUSTIN AM.-STATESMAN, Jan. 22, 2010, <http://www.statesman.com/opinion/braswell-how-a-tiny-russian-nesting-doll-affects-191672.html> (describing University of Texas football coach Mack Brown's recent salary increase to

the face of a generalized global economic downturn.²⁹ Indeed, some college coaches now earn more than their professional counterparts³⁰ and are generally the highest paid public employees in their states.³¹ College sports, it turns out, is a \$60 billion growth industry.³²

If the NCAA advertisements were indeed propaganda, as they appeared to be, then we wondered, what is an *employee*, and are these young men actually employees? At common law, the so-called “right

\$5 million a year despite severe budgetary constraints in the university’s core programs); Erik Spanberg, *Meet the Millionaire Next Door: Coach*, CHRISTIAN SCI. MONITOR, Jan. 26, 2007, <http://www.csmonitor.com/2007/0126/p11s01-alsp.html> (describing the \$32 million, eight-year contract offered to University of Alabama football coach Nick Saban in 2007); Andrew Zimbalist, *Keeping Score; Looks Like a Business; Should Be Taxed Like One*, N.Y. TIMES, Jan. 7, 2007, <http://query.nytimes.com/gst/fullpage.html?res=9C05E7DD1530F934A35752C0A9619C8B63> (discussing further Saban’s eight-year contract with the University of Alabama that provides him \$4 million annually plus an additional \$800,000 a year in bowl-game bonuses).

²⁹ Cf. Stephen J. Dubner, *Questions for Sports Economist Andrew Zimbalist*, N.Y. TIMES, Jan. 9, 2009, <http://freakonomics.blogs.nytimes.com/2009/01/09/questions-for-sports-economist-andrew-zimbalist/> (describing coaching salaries in professional sports in the context of the economic downturn).

³⁰ Compare Kevin Goheen, *It’s Lewis*, CINCINNATI POST, Jan. 15, 2003, available at 2003 WLNR 6543721 (noting Marvin Lewis turned down a position as the head football coach at Michigan State University in 2002 to coach the Cincinnati Bengals for a \$1.5 million annual salary), with Jack Ebling, *Smith’s Deal at \$9.75 M*, LANSING ST. J., Dec. 24, 2002, at C1, available at 2002 WLNR 14952625 (noting Michigan State University agreed to pay John L. Smith \$1.625 million a year to coach the football team).

³¹ Fred Grimm, *‘Charity’ Helps Foot Big Bill for College Coaches*, MIAMI HERALD, Jan. 4, 2005, available at 2005 WLNR 23038025 (statement by Richard Lapchick, Director for the National Consortium for Academics and Sport at the University of Central Florida); see also Carol Ann Alaimo, *Coaches’ Salaries*, ARIZ. DAILY STAR, Jan. 13, 2001, available at 2001 WLNR 4732142 (stating that University of Arizona basketball coach was the highest-paid public employee in the state); *Football Coach Gets Biggest Check on Public Payroll*, FRESNO BEE, Jan. 15, 1992, available at 1992 WLNR 1389116 (noting same phenomenon among football coaches and most universities with big-time college football programs); Mathew Futterman, *Rutgers’ New Coach Will Join Top-Paid in the Big East*, STAR-LEDGER, Nov. 14, 2000, available at 2000 WLNR 8755226 (describing same phenomenon among publicly employed football coaches).

³² *News Hour: Dollars, Dunks and Diplomas* (PBS television broadcast July 9, 2001), available at http://www.pbs.org/newshour/bb/education/july-dec01/ncaa_07-09.html.

of control” standard is the template against which to measure whether an individual is an *employee*.³³ This standard considers the degree to which the putative employer controls the lives of the putative employees, including the manner in which they carry out their work.³⁴ In this regard, the National Labor Relations Board (NLRB or the Board) has written, “an employee is a person who performs services for another under a contract of hire, subject to the other’s control or right of control, and in return for payment.”³⁵ At times, the NLRB has also considered the economic realities of the relationship—that is, the degree to which the putative employee is economically dependent upon the employer.³⁶

The NLRB and the courts have uniformly employed this common law “right of control” standard for determining employee status.³⁷

³³ See, e.g., *NLRB v. Phoenix Mut. Life Ins. Co.*, 167 F.2d 983, 986 (7th Cir. 1948) (“[T]he employer–employee relationship exists when the person for whom the work is done has the right to control and direct the work, not only as to the result accomplished by the work, but also as to the details and means by which that result is accomplished, and that it is the right and not the exercise of control which is the determining element.”); *Teamsters Nat’l Auto. Transp. Indus. Negotiating Comm.*, 335 N.L.R.B. 830, 832 (2001) (“[T]he contracting employer must have the power to give the employees the work in question—the so-called ‘right of control’ test.”) (footnote omitted); *Local 636, United Ass’n of Journeymen & Apprentices of the Plumbing & Pipe Fitting Indus. of the U.S. and Can.*, 177 N.L.R.B. 189, 190 (1969) (describing the “right to control” test as “the most readily available analytical tool”); *United Ins. Co. of Am.*, 162 N.L.R.B. 439, 455-56 (1966) (“[A]n employer–employee relationship has been found where the person for whom the work is to be done . . . retains control over, or the right to control, the significant portions of the details and means by which the desired result is to be accomplished.”).

³⁴ See *Phoenix Mut. Life Ins. Co.*, 167 F.2d at 986; *Teamsters Nat’l*, 335 N.L.R.B. at 832; *Local 636*, 177 N.L.R.B. at 190; *United Ins. Co.*, 162 N.L.R.B. at 455-56.

³⁵ *Brown Univ.*, 342 N.L.R.B. 483, 490 n.27 (2004) (citing *NLRB v. Town & Country Elec.*, 516 U.S. 85, 94 (1995)).

³⁶ See, e.g., *Comedy Store*, 265 N.L.R.B. 1422, 1441-42 (1982) (considering the economic realities of comedic performers’ relationships with a comedy club in stating the economic realities of the relationship, alone, cannot be dispositive of the question of employee status); *Drukker Commc’ns, Inc.*, 258 N.L.R.B. 734, 744 (1981) (noting the right of control “test is not mechanically applied, and is applied in the light of the economic realities of the situation”); *A. Paladini, Inc.*, 168 N.L.R.B. 952, 952 (1967) (applying right of control test “in light of the economic realities”); ROBERT A. GORMAN, *BASIC TEXT ON LABOR LAW UNIONIZATION AND COLLECTIVE BARGAINING* 30 (1976).

³⁷ GORMAN, *supra* note 36.

In addition, the NLRB has visited and revisited the issue of whether graduate student assistants are employees under the National Labor Relations Act, and in the process, has created an additional test to consider when assessing whether individuals enrolled as students should be accorded employee status.³⁸ And inasmuch as graduate assistants and college athletes share the attribute of being students, the Board's reasoning in this area, we decided, would likely shed light on our emerging theory that NCAA athletes in the revenue-generating sports are, in fact, employees and entitled to the legal protections afforded such persons.

In 2000 the NLRB held in *New York University* that graduate students are employees and have the right to organize into unions and to bargain collectively.³⁹ In its 2004 decision in *Brown University*, however, the NLRB reversed its *New York University* ruling and returned to earlier precedent,⁴⁰ holding that graduate students were not employees because they "perform[ed] services at a university in connection with their studies, [and had] a predominately academic, rather than economic, relationship with their school."⁴¹ "Graduate student assistants," the Board wrote, "are primarily students and have a primarily educational, not economic, relationship with their university."⁴²

To test our developing thesis that college athletes are actually employees under the law, we investigated the reality of the lives of major college football and men's basketball players.⁴³ We were confident that their athletic grant-in-aid was a "contract of hire" by which the athletes agreed to provide athletic services in return for payment.⁴⁴ And by examining how they actually live, we concluded, we could learn

³⁸ See *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 680-81 (1980) (stating that attempting to force the student-university relationship into the traditional employer-employee framework is problematic and that "principles developed for use in the industrial setting cannot be 'imposed blindly on the academic world'") (quoting *Syracuse Univ.*, 204 N.L.R.B. 641, 643 (1973)).

³⁹ *N.Y. Univ.*, 332 N.L.R.B. 1205, 1209 (2000).

⁴⁰ *Brown Univ.*, 342 N.L.R.B. at 483 (describing the Board's earlier precedent set forth in *Leland Stanford Junior Univ.*, 214 N.L.R.B. 621 (1974)).

⁴¹ *Id.*

⁴² *Id.* at 487.

⁴³ See Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71, 96-155 (2006).

⁴⁴ See *id.* at 108-17.

whether they serve under the control of their coaches and athletic departments⁴⁵ and whether they are economically dependent upon their universities,⁴⁶ thereby determining whether they meet the common law standard. Such an examination would also reveal whether the athletes are primarily students with a “primarily educational, not economic, relationship with their university,” or instead, whether they are employees under the *Brown University* standard despite also being enrolled as students.⁴⁷

To conduct this examination, we interviewed several current and former NCAA football and men’s basketball players, and their stories bore remarkable similarity. In the process, we learned that not only are players’ football and basketball duties closely monitored, virtually every detail of their lives is carefully controlled by coaches and athletic staff, not only during the season but year around.⁴⁸ During the season, a conservative estimate of a football player’s time commitment to football is more than fifty hours per week.⁴⁹ At the same time, he is required by NCAA rules to take twelve credit hours each term.⁵⁰ As a practical matter, however, he may not enroll in classes that conflict with practice, thereby essentially eliminating afternoon classes.⁵¹ In the off-season, the lives of major college athletes remain under the close control of

⁴⁵ See *id.* at 97-117.

⁴⁶ See *id.* at 117-19.

⁴⁷ See *id.* at 130-55.

⁴⁸ See *id.* at 97-117.

⁴⁹ See *id.* at 99 & n.127.

⁵⁰ DIV. I MANUAL, *supra* note 12, art. 14.1.8.2.

⁵¹ See BYERS, *supra* note 25, at 103 (noting that only in the area of college sports do universities require students to skip classes or risk losing their financial aid); McCormick & McCormick, *supra* note 43, at 142 (describing how each athlete we interviewed confirmed that athletes are not allowed to enroll in courses that conflict with practice time); Welch Suggs, *How Gears Turn at a Sports Factory*, CHRON. HIGHER EDUC., NOV. 29, 2002, available at <http://chronicle.com/article/How-Gears-Turn-at-a-Sports-/14514> (describing star tailback Robert Smith’s experience of having to quit The Ohio State University football team to be able to attend his chemistry class, because the class conflicted with morning practice); *AM 870 SportsTalk with Earle Robinson* (WKAR public radio broadcast Sept. 29, 2003) (university professor calling in and reporting that an athlete requested permission to miss half of his scheduled classes and that his coach had suggested he change his major because the classes conflicted with practice).

their coaches.⁵² Indeed, even in the summer athletes are required to remain on campus during the week and may leave only with the advance permission of the coach.⁵³ And the fact that NCAA rules forbid scholarships from extending beyond one year,⁵⁴ while coaches alone may decide not to renew a player's scholarship for any reason or no reason (and can even terminate the scholarship mid-term for cause),⁵⁵ only cements the coach's control.

In addition, the individual athletes' depictions of their dependence upon their universities were also surprisingly similar and poignant.⁵⁶ Many football and men's basketball players come from families with very limited economic resources.⁵⁷ Moreover, NCAA rules limit the gifts athletes may receive⁵⁸ and prohibit them from profiting from their reputation as athletes, from the sale of the jerseys they make famous, and from their video game likenesses.⁵⁹ The reality is that many of these athletes live below the poverty line.⁶⁰

In the end, we concluded these young men are under the pervasive control of their coaches and athletic departments—in fact, greater control than that experienced by any other employee at those universi-

⁵² See McCormick & McCormick, *supra* note 43, at 101-03, 108.

⁵³ See *id.* at 102.

⁵⁴ DIV. I MANUAL, *supra* note 12, art. 15.3.3.1.

⁵⁵ See McCormick & McCormick, *supra* note 43, at 114-16 & nn.179-88.

⁵⁶ See *id.* at 117-19 & nn.195-202; see also *60 Minutes: Here's Ours?* (CBS television broadcast Jan. 6, 2002), transcript at 16 (describing suspension of former UCLA football player Donnie Edwards for accepting food).

⁵⁷ Irvin Muchnick, *Welcome to Plantation Football: The Financial Rewards for a Winning College Program Have Never Been Greater, Yet Most of the Athletes Who Make it Happen are Living in Grinding Poverty. How Fair is That?*, L.A. TIMES, Aug. 31, 2003, at I14 (Magazine), available at 2003 WLNR 15177404. Athletes regularly describe lacking basic necessities. *Id.* "There are days . . . when training table is the only thing I eat all day." *Id.* (quoting James Bethea, a U.C. Berkeley football player). "Athletes don't have the money to live the normal life of a student They don't have the money to buy toothpaste . . . [or] toilet paper." *Id.* (quoting Kevin Murray, California state senator).

⁵⁸ See DIV. I MANUAL, *supra* note 12, arts. 12.1.1, 15.01.2, 15.1, 15.2.6, 15.2.6.1.

⁵⁹ See *id.* arts. 12.1.2, 12.4.1.1.

⁶⁰ See *60 Minutes*, *supra* note 56, transcript at 15 (former football player Ramogi Huma asserting "the vast majority [of players] live under the poverty line"); *id.*, transcript at 16 (discussing the NCAA concession "that a scholarship falls \$2,000 a year short of what it really costs to get by").

ties.⁶¹ In addition, many, if not most, athletes are wholly economically dependent upon their universities, even for food and shelter.⁶²

This did not end our inquiry, however, because the standard set forth in *Brown University* imposes a requirement in addition to the common law standard for cases involving the determination of whether students are employees. Under *Brown University*, in assessing a student's employee status, the Board also considers whether the individual is primarily a student at his university or whether, instead, his relationship with his university is primarily commercial.⁶³ By this measure, the answer to our inquiry became apparent. The weight of the evidence shows that although some of these athletes earn a degree, the majority are not *primarily* students. On the contrary, many, if not most, of them are inadequately prepared for academic inquiry⁶⁴ and, once enrolled, face enormous obstacles to experiencing the intellectual aspect of university life fully.⁶⁵

Under NCAA rules, a high school senior who answers every question on the Scholastic Aptitude Test (SAT) incorrectly, but who has a high school grade point average (GPA) of 3.55, may be admitted to an NCAA member school where he will be eligible (and expected) to compete as a freshman in intercollegiate athletics.⁶⁶ Thus, the NCAA requires no demonstration of any objective academic ability whatsoever

⁶¹ McCormick & McCormick, *supra* note 43, at 108.

⁶² *Id.* at 117.

⁶³ See *Brown Univ.*, 342 N.L.R.B. 483 (2004).

⁶⁴ See McCormick & McCormick, *supra* note 43, at 137-40 (illustrating how special admissions practices and NCAA admissions policies allow enrollment of athletes who do not have the potential to be bona fide students), 146 (describing many athletes' substandard academic performance), 148-55 (delineating factors contributing to appallingly low graduation rates among athletes, and documenting especially low graduation rates among the teams with the most athletic success).

⁶⁵ See *id.* at 140-46 (describing the rule making freshmen eligible to compete, demanding playing schedules, and the creation of sham curricula for athletes), 147-48 (detailing situations where athletic department personnel sometimes complete athletes' academic assignments).

⁶⁶ DIV. I MANUAL, *supra* note 12, art. 14.3.1.1.2 (allowing an athlete to be eligible to compete as a freshman if his combined verbal and math SAT score is 400, provided that his core high school GPA is 3.55 or higher). An SAT score of 400 is the result if an applicant answers every question on the math and verbal sections incorrectly. See Tom Farrey, *It's All Academic Now*, ESPN.COM, Oct. 31, 2002, <http://espn.go.com/>

to become eligible to compete in major college sports. And while the 3.55 GPA may appear academically demanding, grades have notoriously been subject to manipulation by high school teachers and administrators.⁶⁷ Moreover, special, and sometimes sham, high schools have begun to proliferate, enabling athletes to obtain the requisite grades to render them eligible for NCAA competition.⁶⁸

Once these young men arrive on campus, extensive practice and playing schedules monopolize their lives, leaving little time for academic pursuits.⁶⁹ “Weak curricula also characterize many athletes’ college experiences.”⁷⁰ Universities regularly devise academic majors with minimal academic rigor to “enable athletes to devote maximum time to their sports.”⁷¹ “Athletes report passing classes they rarely attended[.]”⁷² having tutors sometimes do their work for them,⁷³ being

columns/farrey_tom/1453693.html; College Board, Understanding Your Scores, <http://sat.collegeboard.com/scores/understanding-sat-scores> (last visited July 18, 2010).

⁶⁷ See BYERS, *supra* note 25, at 159. In many disadvantaged communities, sports are considered to be the only ticket out of poverty, and teachers inflate grades to enable athletes to obtain the GPAs needed to help make them eligible to play sports at NCAA colleges. See Christopher L. Chin, Comment, *Illegal Procedures: The NCAA’s Unlawful Restraint of the Student-Athlete*, 26 LOY. L.A. L. REV. 1213, 1240 n.226 (1993) (“Admiring teachers and principals often ‘help’ star high school athletes by lowering their grading standards for those individuals.”).

⁶⁸ Farrey, *supra* note 66; see also Pete Thamel & Duff Wilson, *Poor Grades Aside, Top Athletes Get to College on \$399 Diploma*, N.Y. TIMES, Nov. 27, 2005, at 1 (describing an unaccredited correspondence school in Florida that *polished* at least twenty-eight athletes’ high school grades in a two-year period enabling many of them to compete in Division I football programs).

⁶⁹ McCormick & McCormick, *supra* note 43, at 141-43.

⁷⁰ *Id.* at 143.

⁷¹ *Id.*; see also MURRAY SPERBER, COLLEGE SPORTS INC.: THE ATHLETIC DEPARTMENT VS. THE UNIVERSITY 283-84 (1990); Tanyon T. Lynch, *Quid Pro Quo: Restoring Educational Primacy to College Basketball*, 12 MARQ. SPORTS L. REV. 595, 604 (2002).

⁷² McCormick & McCormick, *supra* note 43, at 144; see also BYERS, *supra* note 25, at 178 (explaining how a common violation was students not showing up for class but still getting the high grades necessary for continued eligibility); Mike Freeman, *When Values Collide: Clarett Got Unusual Aid in Ohio State Class*, N.Y. TIMES, July 13, 2003, available at 2003 WLNR 5678438 (stating a teaching assistant reported that football players forged names of absent teammates on the class attendance roster); Rick Telander, *Something Must Be Done*, SPORTS ILLUSTRATED, Oct. 2, 1989, <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1068868/index.htm> (describing

told in advance which version of an exam will be administered,⁷⁴ and being allowed to take an oral test in lieu of the regular exam.⁷⁵ Nearly three dozen NCAA Division I universities have awarded academic credit simply for participating in varsity sports.⁷⁶ Many such courses have no syllabus or exam, require no written work, and are graded on a pass/fail basis.⁷⁷ One basketball course at the University of Georgia did have a twenty-question final exam.⁷⁸ Among the questions were “How many halves are in a college basketball game?” and “How many points does a 3-point field goal account for in a Basketball Game?”⁷⁹ At The Ohio State University, enrollment in a two-credit class called *Varsity Football* was limited to football players, and they could take that same course “as many as five times for a total of 10 credits.”⁸⁰

Graduation rates for football and men’s basketball players are appallingly low—especially at those programs with the most athletic

Florida State University President Bernard Sliger as refusing to enforce class attendance rules against Deion Sanders).

⁷³ See, e.g., *Infractions Case: University of Minnesota, Twin Cities*, NCAA NEWS, Nov. 6, 2000, http://web1.ncaa.org/web_files/NCAANewsArchive/2000/division+/infractions%2Bcase_%2Buniversity%2Bof%2Bminnesota,%2Btwin%2Bcities%2B-%2B11-6-00.html (describing case in which university employees completed hundreds of assignments for basketball athletes with the head coach’s knowledge over a five-year period); Freeman, *supra* note 72 (noting the allegations from a teaching assistant, an associate professor, and a football player that academic tutors sometimes did players’ homework for them).

⁷⁴ See Tom Friend, *My Side*, ESPN THE MAG., Nov. 10, 2004, <http://sports.espn.go.com/ncl/news/story?id=1919246>.

⁷⁵ See *id.*; Freeman, *supra* note 72 (reporting that two graduate assistants corroborated this allegation, and stating the athlete was the only student out of eighty in the class allowed such special treatment); see also *Outside the Lines: Zero Percent—College Basketball’s Graduation Crises* (ESPN television broadcast Mar. 1, 2002) (on file with authors) (describing statement of former Duke University basketball player William Avery that one of his professors “didn’t believe in grading on the test” but simply graded him orally).

⁷⁶ Mark Schlabach, *Varsity Athletes Get Class Credit; Some Colleges Give Grades for Playing*, WASH. POST, Aug. 26, 2004, at A01.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*; see also *Lexus Halftime Show: Michigan–Notre Dame Game* (NBC television broadcast Sept. 11, 2004).

⁸⁰ Schlabach, *supra* note 76.

success.⁸¹ In football, for example, the graduation rates for the eight teams that played in the 2005 Bowl Championship Series (BCS) bowl games were significantly lower than the rates for the overall student bodies at those schools.⁸² “At the University of Texas, . . . the graduation rate [in 2005] for football players was only thirty-four percent while that of the overall student body was seventy percent.”⁸³ This pattern existed in basketball as well.⁸⁴

From this evidence, we concluded that, although notable exceptions exist, football and men’s basketball players are not *primarily* students, but, instead, have a primarily commercial or economic relationship with their universities. In the end, we decided that NCAA athletes in revenue-generating sports meet the common law “right of control” standard for employee status, the economic realities standard, and the *Brown University* standard, and therefore, these athletes ought to be viewed as employees. After all, it is by virtue of their labor that intercollegiate athletics has become such a dazzlingly commercial activity. In reality, it has become a professional enterprise, abandoning amateurism in all respects except one: the treatment of the players. As former Florida State University football coach Bobby Bowden⁸⁵ candidly conceded, “The boys go out and earn millions for their university. Everyone benefits except the players.”⁸⁶

At bottom, we concluded that the basis for the separate treatment of athletes rests on the ideal that college sports are amateur—an ideal we believed to be false. And having noted that college athletes are

⁸¹ McCormick & McCormick, *supra* note 43, at 150-55.

⁸² *Id.* at 151-52 & n.384; see INST. FOR DIVERSITY AND ETHICS IN SPORT, UNIV. OF CENT. FLA., KEEPING SCORE WHEN IT COUNTS: ASSESSING THE 2004-05 BOWL-BOUND COLLEGE FOOTBALL TEAMS – GRADUATION RATES, <http://www.bus.ucf.edu/sport/public/downloads/media/ides/Table%20-%20Graduation%20rates%202004-05%20bowl-bound%20teams.pdf> (last visited Jan. 28, 2006) (on file with authors).

⁸³ McCormick & McCormick, *supra* note 43, at 152.

⁸⁴ *Id.*

⁸⁵ See *Bowden Will Coach Bowl Game*, ESPN.COM, Dec. 1, 2009, <http://sports.espn.go.com/ncf/news/story?id=4703506>.

⁸⁶ Orion Riggs, Note, *The Façade of Amateurism: The Inequities of Major College Athletics*, KAN. J.L. & PUB. POL’Y, Spring 1996, at 142 (citing Bob Oates, *The Big Steal: In the Never-Ending Scramble to Uphold the So-Called Amateur Code by Catching and Punishing Great Universities, The Student-Athlete has Become the Forgotten Man*, L.A. TIMES, Oct. 3, 1993, at C3).

not recognized as employees under labor law, we cast our view wider to examine other areas of law—tax and antitrust—to learn how those bodies of law treat college sports. Both, we learned, like labor law, treat major college sports as a noncommercial, amateur enterprise despite its deeply commercial nature.

IV. A BROADER VIEW

In our 2008 article, entitled *The Emperor's New Clothes: Lifting the NCAA's Veil of Amateurism*, we identified three areas of law—labor, antitrust, and tax—in which regulation or lack thereof depends upon the characterization of an activity as commercial or amateur (or, in the case of tax law, for profit or nonprofit).⁸⁷ All three areas of law accord enterprises significant relief from regulation if they are amateur (or nonprofit), as opposed to commercial (or for profit).⁸⁸ Yet all three areas treat major college sports as amateur or nonprofit despite their deeply commercial nature.⁸⁹ For example, as we have seen, labor law treats athletes as student-athletes, not employees, because universities portray their relationship with their athletes (incorrectly in our view) as primarily educational rather than commercial.⁹⁰ And any antitrust challenge to NCAA rules governing players will meet the NCAA's amateurism defense—that the NCAA produces a singular product, one that is by its nature amateur, and the NCAA must be accorded broad latitude to administer and regulate college sports to preserve that product.⁹¹ The United States Supreme Court embraced this reasoning when it wrote in *NCAA v. Board of Regents*, “the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics

⁸⁷ Amy Christian McCormick & Robert A. McCormick, *The Emperor's New Clothes: Lifting the NCAA's Veil of Amateurism*, 45 SAN DIEGO L. REV. 495 (2008).

⁸⁸ See *id.* at 498-506.

⁸⁹ See *id.*

⁹⁰ See *supra* Part III.

⁹¹ See Lee Goldman, *Sports and Antitrust: Should College Students Be Paid to Play?*, 65 NOTRE DAME L. REV. 206, 213-18 (1990); Chad W. Pekron, *The Professional Student-Athlete: Undermining Amateurism as an Antitrust Defense in NCAA Compensation Challenges*, 24 HAMLINE L. REV. 24, 28 (2000); Note, *Sherman Act Invalidation of the NCAA Amateurism Rules*, 105 HARV. L. REV. 1299, 1299-1301 (1992); Kenneth L. Shropshire, *The Erosion of the NCAA Amateurism Model*, ANTITRUST, Spring 2000, at 46, 49.

and is entirely consistent with the goals of the Sherman Act.”⁹² In that case, the Court distinguished between the NCAA’s commercial business activities, like the television marketing plan under scrutiny there, and its so-called noncommercial activities, which the Court characterized as needed to protect amateurism and to preserve the college football product, rendering those noncommercial activities immune from challenge under the Sherman Act.⁹³ The Court wrote, “[i]t is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics.”⁹⁴ Indeed, a primary reason courts have not condemned NCAA rules that fix athlete compensation to the cost of attending a university—an act of naked wage fixing if it occurred among commercial competitors—“is the belief that the restrictions somehow preserve an amateur tradition.”⁹⁵

Finally, under tax law principles, commercial enterprises are subject to income tax while others, including many that are purportedly amateur in nature like the NCAA and its member universities, pay no income taxes because they are considered tax-exempt under the federal income tax laws⁹⁶ and because they are not subject to the Unrelated Business Income Tax (UBIT).⁹⁷

To enjoy tax-exempt status, the entity must be “organized and operated exclusively for” a noncommercial or tax-exempt purpose, such as education.⁹⁸ It must also ensure that “no part of [its] net earnings . . . inures to the benefit of any private shareholder or individual”⁹⁹ Then, even if an entity has achieved tax-exempt status, it must nevertheless still pay taxes under the UBIT to the extent its net income results from the regular conduct of a trade or business not substantially related

⁹² *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 120 (1984). The Court scrutinized under antitrust law the NCAA’s plan of limiting live broadcasting of college football games. *Id.* at 98-121.

⁹³ *Id.*

⁹⁴ *Pekron*, *supra* note 91, at 38 (quoting *Bd. of Regents*, 468 U.S. at 117).

⁹⁵ *Id.* at 28.

⁹⁶ See I.R.C. § 501(a), (c)(3) (2006).

⁹⁷ See I.R.C. §§ 501(b), 511-514 (2006).

⁹⁸ I.R.C. § 501(c)(3) (2006).

⁹⁹ *Id.*

to its exempt purpose.¹⁰⁰ These elements come together to demonstrate that whether an entity should be free from or subject to income taxation depends upon how much it furthers tax-exempt or public objectives, like education, as opposed to commercial objectives, like revenue enhancement and private financial benefit. In short, commercial activities are taxed while amateur activities that promote a public purpose like education are generally tax exempt.

The NCAA and its member universities have long been tax-exempt educational organizations despite their increasing commercialization.¹⁰¹ Even their revenues related to major college sports have been exempt from the UBIT.¹⁰² The vastly increased commercial nature of college sports, however, requires that we reexamine the tax exemption for these earnings. NCAA football and men's basketball do not promote education. On the contrary, NCAA rules promote commercial, not academic, values.¹⁰³ The proliferation of corporate sponsorships and television revenues has introduced powerful commercial, profit-based incentives into athletics decisions.¹⁰⁴ Excessive and ever-escalating salaries for coaches, conference commissioners, and NCAA executives constitute the use of athletic revenues for private financial benefit, not for an educational, public purpose.¹⁰⁵

We do not argue that universities should lose their tax-exempt status, only that their revenues from football and men's basketball

¹⁰⁰ I.R.C. §§ 501(b), 511-513 (2006).

¹⁰¹ See Erin Guruli, *Commerciality of Collegiate Sports: Should the IRS Intercept?*, 12 SPORTS LAW. J. 43, 58 (2005).

¹⁰² See H.R. REP. NO. 81-2319, at 37 (1950), reprinted in 1950-2 C.B. 380, 409; S. REP. NO. 81-2375, at 29 (1950), reprinted in 1950 U.S.C.C.A.N. 3053, 3082 and in 1950-2 C.B. 483, 505 (cursorily concluding that “[a]thletic activities of schools are substantially related to their educational functions”); Rev. Rul. 80-296, 1980-2 C.B. 195.

¹⁰³ See McCormick & McCormick, *supra* note 43, at 135-55 (describing NCAA-sanctioned special admissions policies, eligibility for freshmen athletes, grueling and time-consuming practice and playing schedules, sham curricula, substandard academic performances, institutional academic fraud, insufficient academic progress requirements, and NCAA-sanctioned low graduation rates for athletes, all of which promote NCAA member institutions' commercial interests, not athletes' academic interests).

¹⁰⁴ See McCormick & McCormick, *supra* note 87, at 509-20, 536-44.

¹⁰⁵ See *id.* at 527-36.

should be taxed under the UBIT. Indeed, Congress has recently questioned whether major college sports should remain sheltered from the income tax.¹⁰⁶

Currently, the tax exemption major college sports enjoy is founded on the false premise that they serve the public purpose of education. Thus, in each of these three areas of law—labor, antitrust, and tax—the special treatment that the NCAA and colleges enjoy is based upon the almost farcical idea that their activities are amateur in nature, rather than commercial.

The facts, however, forcefully belie this characterization. NCAA sports is a highly lucrative commercial enterprise.¹⁰⁷ To describe the deeply commercial nature of college sports, we essentially “followed the money.” Most college sports revenues come from payments television broadcasters make to the NCAA and to conferences for the right to broadcast games.¹⁰⁸ The most recent salient examples are the payments of \$6 billion to broadcast March Madness over eleven years¹⁰⁹ and \$320 million to broadcast BCS bowl games for four years.¹¹⁰ Additional important sources of revenue include royalties video game companies pay to the NCAA for the right to sell video games containing the names and logos of the NCAA and its member universities, as well as the likenesses of players on each team.¹¹¹ Other

¹⁰⁶ See Letter from Bill Thomas, Chairman, Comm. on Ways and Means, U.S. House of Representatives, to Myles Brand, President, NCAA (Oct. 2, 2006) (on file with authors).

¹⁰⁷ See NCAA, 2006 NCAA MEMBERSHIP REPORT 18, available at http://web1.ncaa.org/web_video/membership_report/2006_ncaa_membership_report.pdf (last visited July 18, 2010) [hereinafter 2006 MEMBERSHIP REPORT].

¹⁰⁸ See, e.g., *id.*

¹⁰⁹ Welch Suggs, *Big Money in College Sports Flows to the Few*, CHRON. HIGHER EDUC., Oct. 29, 2004, at A46, available at <http://chronicle.com/weekly/v51/i10/10a04601.htm>.

¹¹⁰ Associated Press, *BCS Set to Move Top Bowl Games to ESPN*, BOSTON GLOBE, Nov. 18, 2008, http://www.boston.com/sports/colleges/football/articles/2008/11/18/bcs_set_to_move_top_bowl_games_to_espn?mode=PF.

¹¹¹ See Matthew G. Matzkin, *Gettin' Played: How the Video Game Industry Violates College Athletes' Rights of Publicity by Not Paying for Their Likenesses*, 21 LOY. L.A. ENT. L. REV. 227 (2001) (describing realistic features of computerized video games); Kristine Mueller, *No Control Over Their Rights of Publicity: College Athletes Left Sitting the Bench*, 2 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 70, 83

direct sources of revenue include earnings each university generates from ticket, apparel, and concession sales.¹¹² These include “seat licensing fees,” or charges in addition to regular ticket prices that fans pay for the right to purchase tickets in desirable stadium or arena locations.¹¹³ Indirect financial benefits include increases in donations as well as in the number of student applications following particularly successful athletic seasons.¹¹⁴ After NCAA and conference officials are compensated,¹¹⁵ most of the revenues these entities generate are distributed among member universities,¹¹⁶ and are used to pay coaches, athletic directors, staff, and otherwise to support athletic programs.¹¹⁷ In the end, we argued that major college sports are anything but amateur, and that legal regimes such as labor, antitrust, and tax should recognize that fact.¹¹⁸ Namely, these athletes should be viewed as employees.¹¹⁹ NCAA rules, including those that limit the compensation athletes may

(2004) (describing NCAA practice of allowing video game creators to use schools’ fight songs and uniforms as well as jersey numbers, but not the names, of star athletes); Marcia Chambers, *Men’s Final 4; Sales of College Stars’ Jerseys Raise Ethics Concerns*, N.Y. TIMES, Mar. 31, 2004, at D1, available at 2004 WLNR 5605105.

¹¹² See McCormick & McCormick, *supra* note 87, at 521-23.

¹¹³ See *id.* (describing revenues from ticket sales and identifying examples of “seat licensing fee” charges). For example, in 2004 at the University of Southern California, the “premium seating” charge was as high as \$25,000. Douglas Lederman, *Schools Making Fans Give More to Keep Best Seats: Colleges Say Donations Needed to Meet Costs*, USA TODAY, Aug. 25, 2004, at 01A, available at 2004 WLNR 6667750.

¹¹⁴ See McCormick & McCormick, *supra* note 87, at 524-27.

¹¹⁵ See, e.g., National Collegiate Athletic Association, IRS Form 990, EIN 44-0567264, FYE Aug. 31, 2005 (on file with authors). The Executive Director of the NCAA, Myles Brand, earned \$870,000 in 2004-05, which included his compensation, employee benefit plan contributions, and expense account. *Id.* In 2005-06, Jim Delany, Big Ten Conference Commissioner, earned nearly \$1 million, which included his compensation, employee benefit plan contributions, and expense account. The Big Ten Conference, Inc., IRS Form 990, EIN 36-3640583, FYE June 30, 2006 (on file with authors).

¹¹⁶ See 2006 Membership Report, *supra* note 107, at 19; McCormick & McCormick, *supra* note 87, at 513.

¹¹⁷ See McCormick & McCormick, *supra* note 87, at 527-36.

¹¹⁸ *Id.* at 498.

¹¹⁹ *Id.* at 497, 505.

earn to tuition, room, board, and books, should be subject to antitrust scrutiny.¹²⁰ And athletic revenues should be taxed under the UBIT.¹²¹

V. THE RACIAL IMPLICATION OF NCAA AMATEURISM RULES

Lastly, we looked at one aspect of NCAA amateurism rules that is so obvious as to have initially eluded us—the racial implications of these rules.¹²² In our most recent piece, *Major College Sports: A Modern Apartheid*, we argued that major college sports flourish on the basis of an apartheid system that effectively sanctions the exploitation of mostly African American young men for the enormous commercial gain of mostly European Americans associated with major universities, athletic organizations, and corporations.¹²³ As we showed, college football and men's basketball players are disproportionately African American and generate immense sums of money for a wide array of others who are predominantly of European-American descent.¹²⁴ And while NCAA rules obligate players to live by a code of amateurism that forecloses any real opportunity to earn compensation for their labor, that precept does not apply to university officials, coaches, athletic directors, conference commissioners, corporate partners, or NCAA officials who are predominantly of European-American descent and who alone may enjoy the bounteous wealth created in substantial part by the players.¹²⁵

In short, we looked at the racial composition of the players on the top twenty-five football and men's basketball teams,¹²⁶ and com-

¹²⁰ *Id.* at 497-98, 505.

¹²¹ *Id.* at 498, 505.

¹²² *Id.* at 497 n.11.

¹²³ Robert A. McCormick & Amy Christian McCormick, *Major College Sports: A Modern Apartheid*, 12 TEX. REV. OF ENT. & SPORTS L. (forthcoming 2010).

¹²⁴ *See id.*

¹²⁵ *See id.*

¹²⁶ The top twenty-five teams for 2004 were identified by referring to the preseason *USA Today* coaches polls for college football and men's basketball in the fall of 2004. *See* ESPN, 2004 NCAA FOOTBALL RANKINGS – PRESEASON: USA TODAY POLL, http://espn.go.com/college-football/rankings/_/year/2004/week/1 (last visited Oct. 13, 2010) (revealing top twenty-five football teams in 2004); ESPN, 2005 NCAA MEN'S BASKETBALL RANKINGS – PRESEASON: ESPN/USA TODAY COACHES POLL, http://espn.go.com/mens-college-basketball/rankings/_/year/2005/week/1/seasontype/2 (last visited Oct. 13, 2010) (revealing top twenty-five basketball teams in 2004). The starting lineups for each team were revealed on each university's website.

pared that data with the racial composition of university presidents, athletic directors, and coaches, as well as with the racial composition of the undergraduate student bodies at those same institutions.¹²⁷ We first gathered data in 2004-05 and did so again in 2009-10.¹²⁸ That data showed that during 2004-05 some 68% of football athletes were African American,¹²⁹ while African Americans comprised an average of just 6% of the student population as a whole at those schools.¹³⁰ In the same period, 78% of men's basketball players from the top basketball teams were African Americans, while only 8.5% of students overall at those institutions were African American.¹³¹ This pattern continued, with 61% of football players on the top teams being African American in 2009-10 compared to 5% of the overall student body being African American at that time.¹³² And in basketball, on average, 66% of the athletes on the 2009-10 top basketball teams were African American, while only 7% in the overall student body were.¹³³

More to the point, only 3 of the 75 surveyed administrators—the university president, the head football coach, and the athletic director—from the top football schools in 2009-10, or 4%, were African American.¹³⁴ With regard to the top basketball schools, in 2009-10 only 6 of the 75 surveyed administrators—the president, head basketball coach, and athletic director—or 8%, were African American.¹³⁵ In sum, African American players predominantly staff these athletic teams, while administrators at these same institutions are overwhelmingly European

We identified the elite basketball programs in 2009-10 by referring to the ESPN/USA Today polls again. See ESPN, 2010 NCAA MEN'S BASKETBALL RANKINGS – WEEK 9 (Jan. 11): ESPN/USA TODAY COACHES POLL, http://espn.go.com/mens-college-basketball/rankings/_/year/2010/week/10/seasontype/2 (last visited Oct. 13, 2010) (showing ranked basketball teams). The top twenty-five football programs were identified in 2009 by referring to the BCS standings established at the end of the regular season. ESPN, BCS STANDINGS – DECEMBER 6, 2009, <http://espn.go.com/college-football/bcs> (last visited Oct. 13, 2010) (showing ranked football teams).

¹²⁷ McCormick & McCormick, *supra* note 123.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

Americans.¹³⁶ Thus, it is largely African American labor that generates wealth for a class of mostly European-American individuals, while being denied all but a sliver of that bounty by NCAA rule.¹³⁷

A broader examination of all Football Bowl Subdivision (FBS) universities revealed that more than 92.5% of university presidents were European American in 2007-08 while only 2.5% were African American.¹³⁸ As regards coaches generally, European Americans then held nearly 90% of all head coaching positions in Division I schools, while African Americans held only 7%.¹³⁹ Twenty-three percent of head basketball coaches at Division I schools that year were African American,¹⁴⁰ while only 5% of head football coaches at FBS universities were African American.¹⁴¹ Of head coaches for the 2009-10 top-twenty-five ranked men's basketball teams we surveyed, only 16% were African American,¹⁴² and the percentage for the top-twenty-five ranked football teams was only 4%.¹⁴³ In addition, European Americans hold some 90% of the athletic director positions in all of Division I, while African Americans hold only 7%,¹⁴⁴ and the same percentage holds true for associate and assistant athletic directors as well.¹⁴⁵ Clearly, most individuals who benefit financially from major college sports are of European-American descent.

We have already described how NCAA rules severely limit athletes' ability to support themselves. Because of the racial demographics of the groups involved, the effect of those rules has been to capture the wealth created in substantial part by the labor of predominantly African American young men for the benefit of predominantly European-American university officials.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ RICHARD LAPCHICK ET AL., THE 2008 RACIAL AND GENDER REPORT CARD: COLLEGE SPORT 3 (2009), available at http://web.bus.ucf.edu/documents/sport/2008_college_sport_rgrc.pdf.

¹³⁹ *Id.* at 4.

¹⁴⁰ *Id.* at 14.

¹⁴¹ *Id.* at 5, 14, 37.

¹⁴² McCormick & McCormick, *supra* note 123.

¹⁴³ *Id.*

¹⁴⁴ LAPCHICK, *supra* note 138, at 6.

¹⁴⁵ *Id.*

We do not allege that NCAA rules are discriminatory on their face or that they were created for a racist purpose. At the same time, while neutral in form, these rules have an overwhelmingly disparate economic impact in their application on a distinct racial minority, and U.S. justice properly looks skeptically upon rules that, while neutral on their face, systematically burden racial minorities in grossly disproportionate ways. This skepticism, born of this country's catastrophic experiment with slavery and its struggles to deal with the vestiges of that regime, has given rise to the adverse or disparate impact theory of employment discrimination that prohibits an employer from using facially neutral rules that have an unjustified adverse impact upon members of a protected class.¹⁴⁶ Put somewhat differently, the adverse impact theory outlaws the use of employment rules or practices that do not appear on their face to be discriminatory, but are so in their effect unless the employer can justify those rules as manifestly related to job duties.¹⁴⁷ The Supreme Court has crisply described the doctrine as condemning "employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity."¹⁴⁸

Thus, under sound principles of U.S. law, neutral rules that disproportionately burden racial minorities in significant ways require a legitimizing purpose even in the absence of discriminatory intent.¹⁴⁹ For example, in *Griggs v. Duke Power* the company required entry level employees to take a standardized test and have a high school diploma—two requirements that had the effect of disproportionately excluding African Americans from employment.¹⁵⁰ The Supreme Court held that proof of discriminatory motive is not necessary because Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation."¹⁵¹ As the Court famously put it, the "absence of discriminatory intent does not redeem employ-

¹⁴⁶ See generally MACK A. PLAYER, *EMPLOYMENT DISCRIMINATION LAW* 356-90 (1988) (describing adverse impact law generally); CHARLES A. SULLIVAN ET AL., *EMPLOYMENT DISCRIMINATION* 140-244 (2d ed. 1988) (same).

¹⁴⁷ See *Griggs v. Duke Power Co.*, 401 U.S. 424, 432-33 (1971).

¹⁴⁸ *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977).

¹⁴⁹ See *Griggs*, 401 U.S. at 431-32.

¹⁵⁰ *Id.* at 427-28.

¹⁵¹ *Id.* at 431.

ment procedures or testing mechanisms that operate as ‘built-in headwinds’ for minority groups and are unrelated to measuring job capability.”¹⁵² To justify such rules, the Court wrote, an employer must show that “any given requirement . . . [has] a manifest relationship to the employment in question.”¹⁵³ “If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.”¹⁵⁴

Disparate impact analysis has also been employed under a variety of other federal statutes, including the Age Discrimination in Employment Act,¹⁵⁵ the Rehabilitation Act of 1973,¹⁵⁶ and the Americans with Disabilities Act of 1990.¹⁵⁷ Courts have also used impact analysis to strike down facially neutral literacy tests for voting.¹⁵⁸ In short, this doctrine has been applied in many areas of life because slavery and its aftermath have wisely cautioned us to question rules that disproportionately burden African Americans, even when those rules were not created for a racist purpose.

In this case, the question becomes whether NCAA amateurism rules, ostensibly designed to shield college sports from commercialism, but that also have the effect of financially exploiting mostly African-American young men, can be justified by notions of amateurism. In our view, the answer to that question is no. NCAA rules have done nothing to preserve college sports as an amateur enterprise.¹⁵⁹ Quite to the contrary, major college sports has become a thoroughly commercial enterprise and carries only the façade of amateurism by maintaining a system of rules, like apartheid systems throughout history, that has separated races and classes and assigned the burdens to one, while reserving the financial rewards for the other, creating, in effect, a modern apartheid.

¹⁵² *Id.* at 432.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 431.

¹⁵⁵ See *Smith v. City of Jackson, Miss.*, 544 U.S. 228, 241 (2005).

¹⁵⁶ See *Alexander v. Choate*, 469 U.S. 287, 294-99 (1985).

¹⁵⁷ See *Americans with Disabilities Act of 1990*, 42 U.S.C. § 12112(b)(6) (2006).

¹⁵⁸ See *Gaston County v. United States*, 395 U.S. 285, 288, 297 (1969).

¹⁵⁹ See *supra* text accompanying notes 108-17.

VI. CONCLUSION

The path of our scholarship in the area of sports has been an illuminating, albeit painful, journey. In the end, what we have seen is that young college football and men's basketball players, whose skills and efforts entertain us richly, are being exploited in many ways. On the one hand, even the best of them are rendered ineligible for professional employment for an arbitrary period of time and, accordingly, face the Hobson's choice of leaving the country to earn a living playing their sport or playing at an NCAA institution. If an athlete chooses to play at an NCAA institution, he will be forbidden from earning compensation above an artificial level and will simultaneously be subjected to the myriad NCAA rules that require him to provide his valuable labor in exchange for a form of scrip. At the same time, the vast riches the athlete's work provides will be harvested by a wide array of others.

These factors, taken together, show that the major college athlete today is commonly the subject of economic exploitation. When coupled with the fact that the disproportionate majority of these young men are African American, while those who reap the fruits of their labor are mostly of European-American ancestry, it becomes clear that this form of exploitation is wholly unacceptable and bears many of the characteristics of the exploitation of African Americans that scars this nation's history.

