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Journal of Business & Securities Law

Volume 16 | Issue 1 Article 6

2016

Pay for Play: Unionization and the Business of the NCAA

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Panel Discussion, *Pay for Play: Unionization and the Business of the NCAA*, 16 J. Bus. & Sec. L. 179 (2016),
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Pay for Play: Unionization and the Business of the NCAA

Welcome and Introduction

Samantha Leschek: So, good morning. My name is Samantha Leschek, and I am the Executive Editor of The Journal of Business and Securities Law here at Michigan State University College of Law. It's my pleasure to welcome you to the Third Annual Symposium, Pay for Play Unionization and the Business of the NCAA. Today's symposium will address the most recent developments regarding the NCAA in the movement to unionize college athletes and antitrust litigation involving the association. The movement to unionize college courts has been extremely significant since the *Northwestern University NLRB* case and the case of *O'Bannon versus the NCAA*, which sparked a nationwide debate on whether student athletes deserve to be paid based on participation in revenue generating collegiate sports. So, before I go any further, please help me in welcoming Dean Howarth, the Dean of MSU Law, who will be providing us with a few opening remarks. [applause].

Dean Joan Howarth: Thank you, and my opportunity this morning is really simply to welcome everyone who's here, especially our panelists who are here, and the students and our guests and to thank the students for doing such an excellent job at identifying an important topic that we can move forward, an important set of topics that we can move forward here. And I also I want to congratulate the students in the journal. For having somehow amassed such a, I'm not, I don't think A-team is a sports analogy, is it really? It is really more like a Hollywood analogy, but, just to be

diverse I'll say for having amassed the A-team in the talent and the credentials and the experience, and the work and the importance of the work of the guests who are here to create this symposium. I want to also especially thank Professors McCormick, Professor Bob McCormick and Professor Amy McCormick, because it is a longstanding credit to MSU Law that two of the leading voices on issues related to not just unionization and labor issues with amateur, I'm not sure that's the right word [laughter], athletics with issues related to the NCAA, the issues related to antitrust issues, labor issues, employment issues, racial disparity issues in high powered collegiate sports. Professor Amy McCormick and Professor Bob McCormick are really leaders in that field. And, so I know that the excitement, and the work of the day that will come in many ways we can credit them for having sparked the interest and the importance of these issues here at MSU College of Law. The last thing I want to say, especially to our guests, is that all of us here, from me, to our professors, to our students, anybody here wants to help you have the most productive day possible. So, please let us know if you need anything at all and I know that the Journal has a reputation for putting on very, very, good events. They're very well organized and I expect that to continue and I know that they too want to have you have as productive and enjoyable day as possible. So with that, I will just say we're very glad you're here. And, I'm looking forward to hearing all about the work of the day that's going to follow. Thank you very much. Thank you. [applause].

Samantha Leschek: Thank you again Dean Howarth for helping us kick off our symposium. We are in very enthusiastic to be holding such an exciting event about these current issues in the college sports industry. We will have

two panels today. The first panel will be an analysis of the NCAA and the current movement to unionize college sports and the second will be the second will examine current antitrust issues involving the NCAA. These panels will be led by journal members, who will be serving as moderators. Panel one will run from 9:00 AM to 11:10 and then we will break for lunch and then the second panel will run from 11:50 to 1:55. So, before I hand things over to the first panel I would like to note that the views or opinions expressed by the panelists today are their own and don't necessarily reflect the opinions of Michigan State University. So, without further ado, [laughter and banter] I’ll hand things over the first panel.

Panel 1: Unionization of College Sports

Matthew Morrow: Good morning. I'm Matt Morrow, the incoming Editor in Chief for Volume Sixteen of the Journal of Business and Securities Law, and I'll be serving as the moderator for the first panel here today. This panel will be focusing, as Sam said, on a lot of analysis of the NCAA and the current movement to unionize college sports. Before we get started, I would like to take a brief moment to introduce all the panelists and give you a little bit of background. For more information, they have their full biographies in the symposium programs that you received as you came in. Mr. John Adam is an attorney with Legghio & Israel, P.C. in Royal Oak. He represents unions and is lead attorney for the College Athletes Players Association in the case before the NLRB. Our own Professor Robert McCormick is an Emeritus Professor at the Michigan State University College of Law. He served as an attorney for the National Labor Relations Board before joining the MSU College of Law faculty here. His work is focused on the rights of the

NCAA college athletes, and one of his articles introduced the argument that college athletes of revenue generating sports should be considered for employees under the NLRA. Professor Amy McCormick is also an Emeritus Professor here at Michigan State University. Together with her husband, Professor Robert McCormick, she has authored numerous publications examining the status of college athletes. The thesis from their 2006 publication in the Washington Law Review was instrumental in the action by football players at Northwestern University in 2014 to pursue union representation. And our last panel member is Dr. Andrew Zimbalist, who is the Robert A. Woods Professor of Economics at Smith College. He has consulted in the sports industry for players' associations, cities, companies, teams, and leagues. Dr. Zimbalist has published several dozen articles and twenty-two books on the economics of sport. And now to get us started, Mr. Adam.

John G. Adam: Almost one year ago, Regional Director Peter Ohr of the National Labor Relations Board in Chicago ruled that the Northwestern scholarship football players were employees under the National Labor Relations Act and had the right to organize. I want to tell you about the National Labor Relations Act, about the Northwestern football players, and explain how this [decision] came about and what it could mean.

Now, I checked my email just before I spoke because as you know we're expecting a decision from the NLRB on Northwestern's appeal. As you know, the Regional Director issued his decision, but that decision was appealed to the full board in Washington and that's where it's pending. We don't know when the NLRB will issue its decision.

Today, I want to give you an overview of the National Labor Relations Act. I want to explain how the case was presented. I want to explain basic legal principles. As law students, you might find it interesting to figure out how the case came about and how I got involved?

The petition for an election is how you start an organizing drive. I brought a copy of the petition. We needed at least 30% of the employees to say they're interested in pursuing a right to organize.

We filed the petition in the Northwestern case on January 28, 2014. That has never been done before in the history of college sports. The filing of the petition was very significant in and of itself,. The fact that players would sign representation cards or express interest in unionization was a monumental event. Many said it would never happen, because . . . the relationship between the players and the university is very close. So, it was significant that a petition was filed.

And some ask why was it filed at the NLRB? Well, as law students you know there is federal and state law. Private companies, or private universities, like Northwestern, are subject to the jurisdiction of the National Labor Relations Act.

Michigan State University, on the other hand, is subject to the Michigan Public Employment Relations Act. So, Northwestern and MSU are regulated by a different set of labor laws,. Because Northwestern is a private university to assert legal rights to organize, the players had to file the petition with the NLRB.

If you're in a state that has employee recognition rights you file at the state equivalent, sometimes called state-NLRBs. So, CAPA, the union that filed the petition at Northwestern, decided to go to the NLRB because that's where we got the authorization cards.

What did we do after we filed the petition? The NLRB holds a hearing where you present testimony, you cross-examine witnesses, and then you submit briefs.

In our case, we presented our case, primarily through the testimony of the Northwestern team Captain and quarterback Kain Colter. His testimony was crucial in establishing the basic facts.. So, primarily through Kain Colter's testimony and through the documents—and the NCAA loves documents. Indeed, the NCAA requires universities to document the day-in-and-day-out life of a football player. And so how do you prove whether these football players are employees. What is the legal standard? The Board has created legal standards for employees' status. For example, does the employer control, supervise? Does the employer direct the employee? Is compensation provided to the employee? It is a commonsense approach . . . . Once you understand what college football players do in Division One you see it is an employment relationship, at least that was the conclusion that I came to, if you apply just the normal principles. Do they perform services for the university? Are they compensated? Are they under the direction and control of the employer? These are the basic elements . . .

Now, when we started out doing this, we didn't write from a clean slate. Professors Robert and Amy McCormick published a law review article in 2006 that described the

myth of the student-athlete. Their article applied the NLRB legal standards to football and basketball players. They laid the foundation for really what became ultimately . . . part of our argument.
For those of you on law review, understand law review articles can make a difference because people do read them and here is an example of one that had an impact. The elements we needed to prove were in the McCormick's' article with one distinction I'll talk about later.

After the McCormick's published their article in Labor and Employment Lawnotes. We published a condensed version in 2007. And the article was called: *Are College Athletes Employees?*. Nice headline, right? I was the Associate Editor, and I remember the article, and I thought there are some good points. Little did I know that eight years later, I would be one of the lawyers presenting evidence in Chicago on these points.

You may ask how did a lawyer rom Royal Oak, Michigan get involved in a Northwestern, a Chicago case. Well, the simple answer is, is CAPA, the union that filed the petition, was supported by the Steelworkers Union, not for financial reasons, —the steelworkers have no interest in organizing college athletes— but the Steelworkers have been instrumental in helping athletes asset legal rights.

Marvin Miller, who revolutionized labor unions for Major League Baseball, was once with the Steelworkers. He left the Steelworkers to run the Baseball Players Union. He was instrumental in removing many of the barriers that the baseball players faced back then in terms of free agency and collective bargaining. It may be hard to believe, but not that

long ago, professional athletes were not being paid millions of dollars a year. Not that long ago, they were severely restricted by the owners and by the system that had been set up. And so, Marvin Miller, took over the players union from a traditional labor background. He was able to bring that experience to the Major League Baseball players. Now you see what has happened. The professional athletes are now enjoying very good salaries and baseball and professional sports are growing. There's money to be made in all of these sports. So, the Steelworkers have had an interest in athletes and it's been helping Ramogi Huma, the head of CAPA, in his efforts to have legislative changes to protect athletes, college athletes, from concussions; to try to get legislation in various states to provide medical insurance; to provide some level of protections to the college athletes. So, when Ramogi and others were able to organize, they reached out to the steelworkers and because I've handled a lot of National Labor Relations Board cases over the years, that's how I got involved.

And, my co-counsel was Gary Coleman, an excellent lawyer, who is now General Counsel to the NBA Players Union. So, we were able to bring a variety of legal talent and experience. My experience basically was the NLRB, the nuts and bolts. How do you get a petition? How do you get the card? How do you file the petition? What do you do at a hearing? Because a hearing at the NLRB is not a normal trial. There is a hearing officer, but it's an adversarial although it's not supposed to be. But, my experience at the Board came in handy in presenting this case. I know a formal regional director who said "well, you apply the NLRA model to this, you know, but does that model really fit?" And my answer is, what other model is there? It is federal law that decides

whether someone is an employee. And we presented that model and established what I thought was an overwhelming case for an employment relationship. So, that's kind of the background as to the NLRB, you know how it works. So, when we filed a petition we then had to present a case. OK. So you present a case kind of in a room like this. Actually we ended up, we were at a small conference room at the board. But, because the media attention was so great they sent us to the federal courthouse. Now, I've litigated many NLRB cases but this not your normal case. There was a lot of media attention to it obviously, which I expected. So, we had a hearing in the federal courthouse in Chicago, and we presented Kain Colter's testimony. And people ask me, "when do you think you won the case?" Good lawyers always think they win the case at every point. [laughter]. All right. I'm always thinking I'm winning the case. [laughter]. But at one point after Kain Colter testified, it was pretty much all day testimony, and he was subjected to cross-examination, I thought it is established. There is nothing they can do to undo that record evidence. And the record evidence is that college football players work four to five or more hours a day, for months and months of the year, and then twenty to thirty hours in the off-season. It is a year round job that requires them to give blood, sweat, toil, and tears, under the direct control and supervision of their coaches and the university. The dominant control that the university has over college athletes is akin to an employment relationship, even greater. So, once the evidence came in as to the hours spent, 6 a.m. because Northwestern has their practices in the morning. They get there at six a.m. They have to get taped-up. They have to get prepared.

Even their eating was regulated. Where they live was regulated. What Facebook they had was regulated. The classes, while Northwestern College players are good students and have a

high graduation rate, football dominated their lives. And other universities, it's even probably greater.

Northwestern is a great university. It is a great employer. The university has an extensive staff devoted to the football program. The coaches, the athletics departments, the assistant coaches, the trainers, when you actually look at the football handbook you'll be amazed at the number of coaches and assistant coaches, and staff and trainers. It is mind-boggling the amount of resources devoted to it.

Everyone is paid from the athletic department, to the coaches, to the assistant coaches. Everyone is paid and is treated as an employment relationship. The only ones . . . that aren't treated as employees are the ones who perform the service-the players. Everyone from their level up is treated as an employee. So, the people that perform the service, that actually risk their bodies and risk injuries, and who spend hours and hours, are not treated as employees.

We showed at the hearing an employment relationship. And we did. I took Kain Colter through his testimony of a day in the life of a football player, from the preseason to the regular season, to the postseason. Pre-season starts in August. And it goes all the way to early January. Now, it's even extended further with the super bowl of college football, the F.S.B., the playoff system, they are playing until January.

The work is an ongoing process and ongoing commitment of hours and resources. And we established that through Kain Colter. And we also established it through other evidence. And one piece of evidence that I liked to use, Kain didn't like because it was 2012 game that Northwestern played against U

M. The Hail Mary game, the one that Northwestern lost in overtime. But I told Kain you know you've got to take one for the team. [laughter].

And so we used the NU/UM Hail Mary game as an example of a week in the life of a football player. Kain testified about it and we had the schedules. We call them "work schedules." You got to be here at 6:30 a.m., you got to be here at 10:00 a.m.. You've got to come back to eat.

The football coaches regulate, what players eat, They have to eat the team meal. As part of their stipend they have to eat the Team Meals so it comes out of their stipend, which is part of the compensation. So you're getting a stipend, but then you gotta eat the food, which Kain said really wasn't that good, but they had no choice. So I had Kain testify about the program. As I mentioned, the example I thought was particularly compelling was the game against UM. The game was on Saturday afternoon. The NU players leave Evanston, Illinois, on Friday morning about 8 a.m. From 8 a.m. on until midnight Saturday, there is nothing but football. They go through team meetings, they go through the game plan, they do walkthroughs etc.

We know the physical part of the game. But many people don't realize football requires many hours watching film, studying the game plan and other team. It is a full-time job to understand to play football and to play it at a high level of Division One.

So, Kain talked about the Northwestern game against UM. And it was 26-27 hours or more. And this excludes sleep time, If you look at the NCAA regulations—and I'm sure that

my panelist can talk about this is well, —the regulations regulate everything that the players supposed to do and cannot do.

How many, many of you heard of the 20 hour rule? Athletes are only supposed to, remember you have the 20 hour rule. Of course, this depends on how you define hours, because of "CARA"—that is how the NCAA counts hours. CARA excludes about 30 to 40 hours a week, The NCAA calls it "Countable Athletic Related Activities" CARA. You may have heard about some coaches getting in trouble because they did not fill out the CARA form, which records how much time is devoted to the sport? And for whatever reason the numbers always magically fit within the NCAA rules as to hours. I have never seen any report being submitted that shows it above the NCAA allowed hours.

That is because the NCAA counts hours' of work much differently than you or I. Again, for the whole day that the Northwestern players spent on Friday, traveling from Evanston to Ann Arbor, the time spent in team meetings, the time preparing, and the NCAA records is as for 1.2 hours. I looked at this 1.2 hours and I said "Kain, are we sure about this?" and he said, "yeah, that's probably right." Kain asked in jest "I wonder how they came up with those .2 hours?" (Laughter) So then we review the game day on Saturday and Kain describes how on Saturday, they get up, they have to meet, they do this extensive preparation. They don't just put on their pads. Team meetings, preparation.

In the end, for that whole game day, they counted, three hours. Because that's what the NCAA says a game takes to play. Even though the players start at 7 a.m. and they get back to Evanston around 1 a.m. the next day.

When Kain and I and others were preparing for the NLRA hearing, and we decided this is a good example to drive home the hours spent by the players.

And that's what you do as a lawyer, you figure out how you to tell the story, how to present a case. You have to tell a story, and you got to make the story interesting. So we used examples after we went through the overview. Then we focus on particulars.

And this turned out to be a good thing, because NLRB Regional Director Peter Ohr's decision, cites the UM Hail Mary Game. So when you're presenting a case, you ask how you are going to create a record. The NCAA uses the term student-athlete, right? Student first, -- athlete, it's like it has to be connected, you can never separate the two. And we said, yes a football player is a student but he is also an athlete. And they are separate and distinct roles. That is what we established. We showed the role of a football player is separate and distinct from the role of a student. There is no connection other than the fact that to play football at the universities, you must be a student.

Now that's one area where we differed in part from what Professor McCormick's' had addressed in their law review article. They had evidence that in many programs, that the athletes are not students or at least not even close to being a student. They don't attend classes, or they take classes that aren't academically challenging. They're provided tutors.

That's not the case at Northwestern and so we didn't need to get into make such a claim. We made it simple: "Yes they're students," and "yes these athletes are also very good students," but what their roles as student and athlete are separate and distinct.

We presented facts as to what they do and how they are compensated. I want to talk briefly about compensation because to be an employee you have to be compensated, although there are some people who are being exploited as interns who are not paid but are still employees---but that's a separate issue. So, we showed how the players received compensation. We said the scholarship-grants-in-aid-and are payments. We did not run away from it. In fact, we said yes the players are compensated. Indeed, Northwestern compensates them with a very good scholarship because it is an expensive university. NU provides room and board to the scholarship players. That is compensation and it is for services performed. It's not a gift.

And up until recently, the NCAA, the rules allowed one-year scholarships. Think of the control gives the university over a player. You don't perform, you're done. The new coach does not need the player anymore. They put pressure on the player to leave or they don't have to renew the scholarship. Now, the Northwestern football program, wasn't like that. But the system was set up.

So it becomes clear, when you apply, what Kain did, and what he's compensated for---tuition, and then eventually room and board. When a player lives off campus, that's regulated. To live in an apartment, Kain testified that he had to give his lease to his coach. Not that the coach is a bad guy, but the coach has to make sure that it's not an improper lease, like a someone is giving the player a fancy, beautiful place in downtown Chicago for a $100. . Or they may not the player to live in a bad area. So they review the lease.

As to other matters we addressed, Kain wanted to go home on over the Christmas break before a bowl game. To do so, Kain had to provide a flight schedule. Because NU wants to make sure you're

going to come back a certain time so you can practice. These are just examples of the day-to-day control that the universities have over the players.

Dr. Zimbalist will talk about it the value of the services Division 1 college football is a $6 billion industry and growing. The services the athletes provide are enormously valuable. Not just in revenue, not just in . . . in what it brings the university in terms of the fans and the alumni. It elevates the status of universities in a way that is immeasurable. They call it the Flutie-effect, after then-Boston QB Doug Flutie. If your team wins a bowl game, the university becomes better known, elevated, so more people apply. This creates an atmosphere that is great for business.

It is a business. When the National Labor Relations Act was passed in 1935, the NLRB, did not apply the federal law to private universities, Why not? Because the NLRB ruled that universities were not "commercial enterprises." Well, the NLRB changed that rule decades later when the NLRB found that private universities are commercial enterprises. And so the NLRB extended the right to organize to all university employees.

Well, now we're going to change it for college athletes. Division 1 college athletes—, where the work, and the hours, and the schedule,—meets the definition of employee status under the NLRA, federal law.

We won the case, I thought when Coach Fitzgerald testified, because he didn't refute anything that Kain said about the hours, the schedule---nothing. In fact, Kain testified that Fitz is a great coach. Fitz even set ups a players' committee consisting of a freshman, sophomore, junior, senior. And the players were to elect one representative from year each year to be on the committee.

They would meet with the coach every couple of weeks, and they would discuss problems Sounds like a union. The coach testified, "Yes, he's part of that committee, but he has 51% of the vote and that he runs the program.

Again Coach Fitz did not really challenge the underlying facts in the case about the hours, etc. So, at that I point I thought, we have a very good chance of winning, and that was all in February of last year.

It all happened very quickly, and on March 26, 2014, Regional Director ruled in our favor. Then the university appealed to the board in Washington D.C. , which has the case. Many amicus briefs we also filed. And it's up there. I hope we'll win, I believe we should win. Every lawyer knows the case is not over until you get the final decision and there are no more appeals.

But whatever happens, I think the players at Northwestern deserve and Kain Colter deserves great credit for bringing to the public's attention the need for reform. And whether that reform comes from the NLRB or through antitrust litigation or through other things that are taking place, the players need some basic rights that they don't have. Thank you. [applause].

Matthew Morrow: Thank you very much Mr. Adam. We'll move on now to Professor McCormick. And just a note on the questions, we'll save all of the questions until after all of the panelists have presented and then we will open up the floor. Thank you.

Professor Robert McCormick: I would like to thank Dean Howarth, Ms. Lescheck, and the other members of the Journal for putting this Symposium together. It is a terrific panel, and I'm honored to be a part of it.

I should start by saying I find it wonderfully ironic that we're enjoying this symposium on the opening weekend of March Madness. And that's because it was more than a decade ago that Amy and I, during just such an annual basketball-watching frenzy, began to have the ideas that ultimately led us to our conclusion that football and men's basketball players at NCAA institutions are employees, not merely "student-athletes."

While we were watching the games, we began to wonder why the NCAA was devoting so much time and money to repeating the idea that college athletes at NCAA institutions are "student-athletes." And if you watch the tournament at all, you surely know these ads. Originally, the theme was that these young people would be "going pro in something else." That went on for many years. Usually a swimmer or an athlete of that variety, in this case a swimmer, would emerge from a swimming pool and somehow morph into an airline pilot. Later the theme became that college sports is "not the finish line," depicting a track athlete leaning to reach the tape, or a baseball player sliding home. The idea was that the finish line is something else. Most recently, the central theme of these ads seems to be that the NCAA is a cheerleader, supporting the athletes and on their side. We will be very curious as to what the next theme will be, but the ads will begin to appear soon, especially as the tournament continues. In any event, they will feature athletes from sports other than the revenue-generating sports of football and men's basketball, and they will emphasize that athletes are learning important "life lessons" by participating in intercollegiate athletics.

We wondered why the NCAA was relentlessly airing these promotional ads. After all, advertising space for March Madness is very, very expensive, and therefore, the NCAA was foregoing a lot of potential income by devoting time solely to promoting the idea of the "student-athlete." It seemed like propaganda, and it

occurred to us that the NCAA was essentially protesting too much. Perhaps the relentless insistence on college athletes being designated as “student-athletes” was to mask the idea that they were actually something else.

At the same time, as luck would have it, Amy was reading Walter Byers’s autobiography, *Unsportsmanlike Conduct*.[1] For those of you who don’t know who Walter Byers is, he was, for decades, the Executive Director of the NCAA, and the man under whom the NCAA grew from a small association to the economic powerhouse it is today. His book, written in his retirement, was something of a confessional about the transformation of the NCAA into this economic powerhouse on his watch and under his leadership. Byers’ book was critical in the development of our thesis, because it revealed that the NCAA invented the term “student-athlete” in direct response to a 1953 Colorado Supreme Court decision[2] that an injured football player was an “employee” and entitled to workers’ compensation for his injuries.

This decision alarmed the NCAA greatly, and it reacted swiftly. As Byers wrote: The “threat [from *Nemeth*] was the dreaded notion that NCAA athletes could be identified as *employees* by state industrial commissions and the courts.”[3] To address that threat, he wrote, “We crafted the term *student-athlete*, and soon it was embedded in all NCAA rules and interpretations as a mandated substitute for such words as players and athletes.”[4] Thereafter, all NCAA universities were required to identify their athletes as “student-athletes.”

From this insight, it was no leap for us to conclude that of course

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1 WALTER BYERS WITH CHARLES HAMMER, UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES (1995).
2 Univ. of Denver v. Nemeth, 257 P.2d 423 (Colo. 1953).
3 BYERS, *supra* note 1, at 69 (emphasis in original).
4 *Id.* (emphasis in original).

the NCAA would be alarmed at a determination that an athlete was an employee because universities, after all, have agreed among themselves for decades to limit athletes' compensation to the level of tuition, room, board and books. And those rules, in turn, have enabled schools to reap fantastic financial and other benefits, as John just described, from the athletes' labor, their time, their energy, and their talents, while severely limiting the cost of that labor. What employer wouldn't want that? By creating and maintaining the idea of the "student-athlete," and that college sports are "amateur," the NCAA and its member universities have, like no other association, institution, or business in this country, been able to obtain the benefits of highly valuable labor—in this case the labor that is the product itself—without paying a competitive wage for it.

We knew college sports had become a highly commercial enterprise and that CBS, for example, at that time had paid the NCAA $6 billion, or $550 million a year, for the rights to televise just the March basketball tournament for eleven years.[5] By the way, in 2011 CBS and Turner Broadcasting raised that figure to $10.8 billion or $770 million a year for fourteen years.[6] We also knew that salaries being paid to coaches had been skyrocketing. For those of you who don't know, Nick Saban's current salary exceeds $7 million a year for eight years, or more than $56 million.[7] And, in fact, some college coaches now make more than their professional counterparts.[8] The average salary for the top

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[5] *See* Welch Suggs, *Big Money in College Sports Flows to the Few*, CHRON. HIGHER EDUC., Oct. 29, 2004, at A46.
[6] Michael Wilbon, *College Athletes Deserve to be Paid*, ESPN.COM, Jul. 18, 2011, http://espn.go.com/college-sports/story/_/id/6778847/college-athletes-deserve-paid.
[7] *NCAA Salaries: 2015 NCAAF Coaches*, USA TODAY, http://sports.usatoday.com/ncaa/salaries/ (last visited Apr. 12, 2016).
[8] Dennis Dodd, *Will You Be Outraged if Nick Saban is College Football's First $8 Million Man?*, CBSSPORTS.COM, Feb. 11, 2016,

twenty-five football college coaches is now $3.85 million a year.[9] Such coaches are almost always the highest paid public employees in their states.

I know these figures can be numbing, but I want you to consider just a couple of things. In 2015, March Madness will bring in $1 billion in television advertising revenue for CBS and Turner. That is more revenue than the Super Bowl, and almost as much as the entire NFL postseason. And one final fact, the ten largest football stadiums in America are all *college* football stadiums.[10]

If the NCAA ads were propaganda as they appeared, then we wondered, was the Colorado court correct back in 1953? Are these athletes, in fact, employees? While I am a labor lawyer, this question had never occurred to me. Of course this question leads to the basic, foundational question: What is an employee? It is a question that often arises in the employment context. For example, there are cases pending in the federal courts today to determine whether drivers for Uber and Lyft, which as you know better than I, are private taxi services, are "employees" as the drivers argue, or "independent contractors" as Uber and Lyft contend. The reason this is an important distinction is because employees enjoy a wide range of rights, including the right to form unions and to bargain collectively under the National Labor Relations Act, that independent contractors do not enjoy.

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http://www.cbssports.com/collegefootball/writer/dennis-dodd/25480572/will-you-be-outraged-if-nick-saban-is-cfbs-first-8-million-man-should-you-be.

[9] Matt Murschel, *Season of Parity Perfect for Playoff*, ORLANDO SENTINEL, Oct. 6, 2014.

[10] World Atlas, *50 Largest Stadiums in the World*, WORLDATLAS.COM, Oct. 30, 2015, http://www.worldatlas.com/articles/50-largest-stadiums-in-the-world.html.

So, how does one determine whether someone is an employee. Many of you are law students, so you're going to be familiar with this drill, and John has already run you through it to some degree, but let me lay it out for you, and then you can decide for yourself whether these football and men's basketball players are, or are not, employees.

The primary common law standard is the so-called "right of control" test that John has already alluded to and that constitutes the template by which to make this determination. The standard looks to whether the person: (1) performs services for another; (2) in return for compensation; and (3) subject to the control or the right of control of the employer over the activities of the work life of the employee.[11] As the NLRB 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."[12] From time to time, the NLRB also looks at the "economic realities" of the relationship, that is to say, the degree to which the putative employee is economically dependent upon the putative employer.[13]

We were also aware that the NLRB had been visiting and revisiting the question of whether graduate teaching and research assistants at private universities were employees under the National Labor Relations Act. And because graduate assistants and football players are both students as well, perhaps, as employees, we thought the Board's reasoning in this area might shed light on our theory.

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[11] Brown University, 342 NLRB 483, 490 n.27 (2004).
[12] *Id.*
[13] *See* A. Paladini, Inc., 168 NLRB 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).

Let me just give you a little bit of background on the graduate assistant situation because it's relevant to my talk. In 2004, the NLRB—in a case involving Brown University—overturned an earlier holding and held that graduate assistants were not employees under the NLRA 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."[14] "[G]raduate student assistants," the Board wrote, "are primarily students and have a primarily educational, not economic, relationship with their university."[15]

Thus, despite the fact that the graduate assistants at Brown University met the common law test—that is, they performed services in return for compensation and were under the control of their university—their central purpose in being graduate assistants was not commercial but academic. They were pursuing further education, and their relationship with the universities, the Board decided, was primarily educational, not economic.

Our task, then, was to consider whether college athletes were employees under the common law and *Brown University* standards to determine whether they were employees under the National Labor Relations Act. There was no question in our mind—as John just described—that football and men's basketball players perform valuable services—incredibly valuable services—for their universities. Nor was there any question in our minds that they are compensated for those services by having the cost of their education provided by the universities.

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[14] *Brown*, 342 NLRB at 483.
[15] *Id.* at 487.

Under common law, thus, the only remaining question had to do with the degree of control and right of control that the universities held over the athletes. And since we knew very little about the actual lives of college football players and men's basketball players, we undertook to investigate the reality of those lives. From that, we could learn to what degree these young men were serving under the control of their coaches in athletic departments and whether they were economically dependent upon their universities. Doing so would also help show us whether or not the athletes were "primarily students," with a "primarily educational relationship" with their universities.

To learn more, we interviewed a number of then-current and former NCAA football and men's basketball players, and their stories bore remarkable similarities. In short, we learned that not only are their football and basketball duties closely monitored, but many details of their personal lives are carefully controlled by coaches and athletic staff, not only during the season, but year-around. During the season, a conservative estimate of a college football player's time commitment to football is at least fifty hours per week. At the same time, they are required by NCAA rules to take twelve credit hours each semester, but may not enroll in classes that conflict with practice—thereby essentially foreclosing afternoon classes for many of them.[16] In the offseason, their lives remain under the close control of their coaches. Indeed, even in the summer, they are required to remain on campus during the week and could leave only with the coach's

[16] Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71, 100, 142 & nn.326-28 (2006). Eliminating afternoon classes had the effect of preventing athletes from choosing certain majors, like those in some science subjects that required afternoon lab sessions. *Id.*

permission.

The Regional Director's decision in the *Northwestern* case describes an extensive list of the demands placed on football players at that university, and I urge you to read the opinion.[17] It is a very clear, simple, straightforward opinion that won't take you very long. And it will lay out, as John has already described, some of the details of the athletes' lives. In fact, as I recall in the *Northwestern* case, the football players were required to return to campus on Christmas Day so they could practice for the upcoming bowl game. Am I right about that?

John G. Adam: Yeah.

Professor Robert McCormick: In addition, the athletes' depictions of their dependence upon their universities were surprisingly similar and, in my mind, actually quite poignant.

Many football players and men's basketball players come from families with very limited economic resources. Plus, NCAA rules prohibit them from receiving gifts—even meals—and prevent them from profiting from their reputation as athletes or from receiving royalties for the sale of the jerseys that bear their numbers. The reality is that many of these athletes live below the poverty line, and again Amy will get into this in a minute. In short, we reached the conclusion that these young men are under the pervasive control of their coaches and athletic departments—in fact, more control than is experienced by any other employee at this university, and at all major NCAA universities. Many of them are wholly dependent upon the universities—even for

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[17] Northwestern Univ. and College Athlete Players Ass'n (CAPA), 13-RC-121359 (N.L.R.B. Region 13, Mar. 26, 2014), *available at* http://www.espn.go.com/pdf/2014/0326/espn_uniondecision.PDF.

food and shelter. And because they perform their services under a contract in return for compensation, they appeared to us to clearly meet the common law standard of employee.

This did not end our inquiry, however, because the *Brown* standard imposes a requirement in addition to the common law standard. Under *Brown*, the next question is whether the services these athletes perform are "primarily educational" or whether, instead, those services for their universities are primarily commercial or economic. By this measure, the answer became clear to us as well. The weight of the evidence demonstrated to us that although some of these athletes earn a degree, the majority of them are not *primarily* students with regard to the athletic services they provide. I emphasize *primarily* because that's the Board's language. Graduate assistants at Brown University were primarily students, the Board found when they provided teaching and research services at that university. Our question, thus, was whether or not football and men's basketball players at NCAA universities were *primarily* students with respect to their athletic services?

In our view, many of these athletes are inadequately prepared for academic inquiry and, once enrolled, face enormous—I would say, virtually insurmountable—obstacles to fully experiencing the intellectual aspect of university life. Their primary purpose at the university with regard to their athletic services is not to advance their intellect. That purpose is to contribute to successful athletic teams.

One shocking fact came to our attention during all of this. Under NCAA rules, a high school senior who misses every single question on the SAT, but who has a grade point average of 3.55 in certain core courses may still be admitted

to an NCAA member school where he will be eligible (and expected) to compete immediately as a freshman in intercollegiate athletics.[18] The NCAA, quite frankly, requires no demonstration of any objective academic ability whatsoever to become eligible. And while a 3.55 GPA may sound academically demanding, grades have notoriously been subject to manipulation by high school teachers and administrators seeking to help athletes make it into college athletics. Moreover, special, and sometimes sham, high schools have proliferated to enable athletes to obtain the requisite grades necessary to render them eligible for NCAA competition.[19]

Once they arrive on campus, extensive practice and playing schedules monopolize their lives and leave little time for academic pursuits. Weak curricula also characterize many athletes' college experiences. Universities regularly devise majors with minimal academic rigor to enable athletes to devote maximum time to their sports. Athletes reported to us passing classes they rarely attended; having tutors sometimes do their work for them; being told in advance which version of an exam would be administered; being allowed to take an oral test in lieu of a regular exam; and similar academic misconduct. One basketball course at the University of Georgia did have a twenty-question final exam. 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?"[20]

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[18] NCAA, 2015-16 NCAA DIVISION I MANUAL art. 14.3.1.1.2 (2015) (initial-eligibility index).

[19] *See* Tom Farrey, *It's All Academic Now*, ESPN.COM, Oct. 31, 2002, http://espn.go.com/columns/farrey_tom/1453693.html.

[20] Mark Schlabach, *Varsity Athletes Get Class Credit; Some Colleges Give Grades for Playing*, WASH. POST, Aug. 26, 2004, at A1; *Lexus Halftime Show: Michigan—Notre Dame Game* (NBC television broadcast Sept. 11, 2004).

The recent scandal last year at the University of North Carolina speaks volumes about this issue. There, for years—and this is a distinguished American university—basketball players and men's football players received credit for fraudulent "paper" classes in the Department of African and Afro-American Studies. One counselor, Mary Willingham, reported having worked with athletes who could neither read nor even recognize letters. One athlete wanted her to help him learn to read so he could read the newspaper clippings about his performance.

From all of this we concluded that although there are notable exceptions, football and men's basketball players are not primarily students and their athletic services are not primarily educational, but instead they have a primarily commercial and economic relationship with their universities. In the end, we concluded that NCAA athletes in revenue-generating sports meet the common law standard, the NLRB "right of control" standard, the "economic realities" standard, and the *Brown University* standard. As a result, we concluded, they are employees under the National Labor Relations Act. It is by the virtue of their labor, after all, that intercollegiate athletics has become this dazzlingly commercial activity.

Our thesis raises a lot of questions. Should athletes be able to receive a market-based or a collectively bargained wage? What about athletes in nonrevenue-generating sports? Or non-scholarship athletes? Their lives are tough, too. Are they employees, also? What would the adoption of our theory do to colleges whose athletic budgets are already strapped?

As Yogi Berra once said: "It's tough to make predictions, especially about the future." These are all valid questions, and I think our symposium will give us a chance to think about

them a lot. My particular point—really my only point—is that scholarship football players and men's basketball players at NCAA institutions are employees under the law. We may not like that conclusion, and in fact I often wish it weren't true. I would much prefer it if college sports were, in fact, amateur and if colleges were not exploiting some of their students. Unfortunately, our conclusion that at least football and men's basketball players are employees is inescapable. I'm fond of saying that if anyone is an employee at these universities, these young men are. Recognition of that reality, as the Regional Director did in the *Northwestern* case, will raise a lot of difficult questions for the NCAA and its member institutions. That these challenges may be daunting, however, is no excuse for denying justice to the athletes that create our beloved college sports. Thank you very much.

Professor Amy McCormick: I am Amy McCormick. It is nice to have all of you here. I appreciate your attending. I want to thank Dean Howarth, the Law College, the Journal, and its editors for sponsoring this symposium. The topic is timely, and because college sports is such a big business, I think it is really wonderful that you decided to explore it. You have also outdone yourselves in getting such a great group of experts together to talk about the issues facing college sports today. Both panels have truly top-notch authorities who have explored these questions in depth. So thank you for getting us all together.

I will begin my comments by reminding you that NCAA rules and the practices of universities' athletic departments do not operate in a vacuum. They impact real people and real lives. They have economic, educational, and health and safety consequences. There is much to say about the

educational and health and safety consequences of NCAA rules, but because of the nature of our symposium today, I will limit most of my thoughts to the economic consequences.

A 2011 study found that the room and board provisions in so-called full scholarships left approximately six out of every seven players living below the federal poverty line.[21] These data have been reflected in the comments of numerous athletes over the years, most recently when Shabazz Napier, a basketball player on the national championship Connecticut Huskies, said there are nights athletes go to bed hungry because they do not have enough money for food.

Only after this issue embarrassed the NCAA on national television did it begin taking some steps to reduce the likelihood of athlete hunger. But this was only after decades of hearing about the problem and doing almost nothing to correct it. The steps taken now seem more like a public relations effort than a real movement to treat athletes properly given that none of the changes requires colleges to increase athlete aid[22] and given that college sports brings in billions of dollars every year.[23] Even now, many schools are

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[21] RAMOGI HUMA & ELLEN J. STAUROWSKY, THE PRICE OF POVERTY IN BIG TIME COLLEGE SPORT 4 (2011), http://www.ncpanow.org/research/study-the-price-of-poverty-in-big-time-college-sport (noting that 85% of "full" scholarship players living on campus, and 86% living off campus, live in poverty).

[22] NCAA, 2015-16 NCAA DIVISION I MANUAL arts. 2.13, 15.01.6, 15.02.2, 15.02.5, 15.1 (2015) (describing cost of attendance as being the maximum amount an institution is permitted to provide an athlete).

[23] Patrick Hruby, *Four Years a Student-Athlete: The Racial Injustice of Big-Time College Sports*, VICE SPORTS, Apr. 6, 2016, https://sports.vice.com/en_us/article/four-years-a-student-athlete-the-racial-injustice-of-big-time-college-sports (reporting economist Dan Rascher estimates that Division I football and men's basketball generate between $10 billion and $12 billion annually).

still balking at the suggestion that athletic scholarships should be allowed to cover the full cost of attending college.

College football and men's basketball are exceedingly lucrative industries, generating billions of dollars a year. Although athletes are the primary labor input in this industry, NCAA amateurism rules require them to be paid only in the form of an athletic scholarship which is often worth markedly less than the value they create[24] and can also fall significantly short of the actual cost of attendance.[25] Recent proposals to increase scholarships to cost of attendance do not require greater compensation. They merely raise the cap on compensation. Schools are still permitted to set scholarships below that level.[26] In this regard, the NCAA functions as a cartel, making it possible for universities to collude to pay athletes significantly less than they would be willing to pay them if they had to compete in a free market for their services.[27]

Amazingly, the NCAA has succeeded, through decades of public relations campaigns, to convince the nation that

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[24] HUMA & STAUROWSKY, *supra* note 21, at 4; Hruby, *supra* note 23; Andrew Zimbalist, *College Coaches' Salaries and Higher Education*, HUFFINGTON POST, Dec. 31, 2014 [hereinafter Zimbalist, *Coaches' Salaries*]; Transcript of PBS Frontline Interview of Andrew Zimbalist, Professor of Economics, Smith College (Jan. 29, 2011), http://www.pbs.org/wgbh/pages/frontline/money-and-march-madness/interviews/andrew-zimbalist.html [hereinafter Zimbalist, Frontline].

[25] *E.g.*, Zimbalist, Frontline, *supra* note 24.

[26] *See supra* note 22.

[27] *E.g.*, *Big Labor on College Campuses: Examining the Consequences of Unionizing Student Athletes: Hearing Before the H. Comm. on Educ. & the Workforce*, 113th Cong., 2d Sess. (May 8, 2014)(expanded written testimony of Andy Schwarz) at 1; Gary Becker, *The NCAA as a Powerful Cartel*, THE BECKER-POSNER BLOG, Apr. 3, 2011, http://www.becker-posner-blog.com/2011/04/the-ncaa-as-a-powerful-cartel-becker.html; Zimbalist, Frontline, *supra* note 24.

paying athletes for their services constitutes corruption.[28] Nowhere else in America would it be acceptable to say that people who have provided valuable talents and marketable skills should not be paid for their hard work, especially when that work generates billions of dollars. Conveniently for NCAA officials, coaches, athletic directors, and conference commissioners, who all effectively run that association, convincing the public that paying athletes is wrong allows them to reserve the money for themselves.[29]

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[28] *See* WALTER BYERS WITH CHARLES HAMMER, UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES 371 (1995).

[29] Hruby, *supra* note 23 (quoting Associate Professor Eddie Comeaux as suggesting NCAA rules are purposefully designed to benefit those in control); *see also* Schwarz, *supra* note 27, at 7; Andy Schwarz, *How Not to Reform the NCAA*, REGRESSING DEADSPIN, Aug. 1, 2014, http://regressing.deadspin.com/how-not-to-reform-the-ncaa-1614553705; Zimbalist, *Coaches' Salaries*, *supra* note 24 (describing how amateurism rules imposed on athletes allow coaches' and athletic directors' salaries to surge beyond their true market values); Zimbalist, Frontline, *supra* note 24 (same).

Reserving the vast financial proceeds from college sports for themselves has allowed athletic officials to benefit handsomely from revenues that would not exist were it not for the athletes' hard and dangerous work. To name a few examples, in 2013-14, NCAA President Mark Emmert earned more than $1.8 million. National Collegiate Athletic Association, IRS Form 990, EIN 44-0567264, FYE Aug. 31, 2014. In the same year, Jim Delaney, the Big Ten Conference commissioner, earned about $3.4 million, The Big Ten Conference, Inc., IRS Form 990, EIN 36-3640583, FYE June 30, 2014, and Pac-12 Conference commissioner, Larry Scott, made over $3.5 million. Pac-12 Conference, IRS Form 990, EIN 94-1459048, FYE June 30, 2014. Coaches also typically make millions of dollars a year in cash and other perquisites, while athletic directors, bowl game directors, and even assistant coaches also fare very well. Hruby, *supra* note 23. I am hardly the first to characterize athletic administrators as operating the enterprise of college athletics as a cartel for their own economic benefit. It was insiders, like Walter Byers and Sonny Vaccaro, who revealed these problems much earlier. *See* BYERS, *supra* note 28; Taylor Branch, *The Shame of College Sports*, THE ATLANTIC, Oct. 2011, at 81; *30 for 30: Sole Man* (ESPN television broadcast) (interviewing Sonny Vaccaro and detailing his rise in the athletic apparel industry).

In a normal market, employers recruit talent by offering higher pay than competitors. So, how does a university recruit players when it is not allowed to pay them? Because schools have agreed not to compete with each other monetarily for athlete services, they wind up competing with substitutes for pay: national exposure; performance of the team; facilities; and coaching prestige.[30] Of course, national exposure and performance of the team are associated with the coach. So all the schools compete for the best coaches so they can, in turn, attract the best players.[31] Coaching pay gets artificially driven up to dizzying levels because schools can use the value athletes create to supplement the coaches' pay.[32] Economists widely agree that athletes' amateur status is the element that contributes most directly to coaches' inflated salaries.[33] And if schools were not allowed to collude to suppress athlete pay, coaching pay would naturally fall to more reasonable levels because some "money would flow to . . . athletes instead of to their coaches."[34]

In the current system, "the money the market would channel towards male athletes is [also effectively] diverted into . . . other substitutes for direct compensation . . . [—like large, luxurious stadiums and] practice facilities."[35] One such facility famously includes waterfalls. "There is a reason why

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[30] Zimbalist, Frontline, *supra* note 24.
[31] Andy Schwarz, *Excuses, Not Reasons: 13 Myths about (Not) Paying College Athletes*, https://drive.google.com/file/d/0BxM4wdtZ5uI-OWFhNGE1ZTItZTllYS00YmVlLTk0YmItYTM4ZDUyY2MwNTE2/view, presented at Santa Clara Sports Law Symposium (Sept. 8, 2011) at 59; Zimbalist, Frontline, *supra* note 24.
[32] Zimbalist, Frontline, *supra* note 24; Hruby, *supra* note 23.
[33] *E.g.*, Schwarz, *supra* note 29.
[34] Schwarz, *supra* note 29, at 7.
[35] *Id.*; *see* Schwarz, *supra* note 31, at 59.

FBS locker rooms are more ostentatiously appointed than NFL locker rooms – in the NFL, *pay* is the primary recruiting tool, while in FBS[, *facilities and coaching* are].”[36] Because of university collusion, resources are largely being diverted to coaches and facilities to recruit athletes indirectly instead of being paid to athletes to recruit them directly. Colluding to cap athletes’ compensation is price fixing, plain and simple.[37] This “price fixing . . . distorts the [entire] market, and . . . imposes a high cost on young men, many of whom come from families who do not have the luxury of shrugging off that economic loss.”[38]

Not only should athletes have a legal right to seek a share of the economic value they create, they also need a share of that economic value. “[T]he current collusion among colleges not to compete economically is robbing . . . [98% of their] athletes[—the ones who will not ‘go pro’[39]—]of what . . . [would have been] their four or five highest earning years in their sports careers, and [in some cases in] . . . their entire li[ves].”[40] It is simply unjust to keep this value from them.

Left to its own devices, the NCAA drags its feet. It inches towards reform only when there is outside pressure to do so. It has taken more than a decade to get the NCAA even to talk about the possibility that there is a concussion problem, for

[36] Schwarz, *supra* note 27, at 7 (emphasis added).
[37] *Id.* at 1, 2.
[38] *Id.* at 3.
[39] Only 1.2% of NCAA men’s basketball players and 1.6% of NCAA football players go on to play in the NBA or NFL. NCAA, Estimated Probability of Competing in Professional Athletics, NCAA.ORG, http://www.ncaa.org/about/resources/research/estimated-probability-competing-professional-athletics (last updated Apr. 9, 2016).
[40] Schwarz, *supra* note 27, at 6; *see* Schwarz, *supra* note 29; *see also* Hruby, *supra* note 23.

example.[41] Many of the recent reforms being considered at some institutions are simply reactions to the bad press and barrage of legal challenges the NCAA has recently been facing.[42] Those cases have received a lot of public attention, and the NCAA seeks to control the damage and repair its tainted image. So now there is movement to raise the cap on athlete pay to cover the full cost of attendance, rather than just tuition, room, board, and books.[43] And there is movement to reinstate—on an optional basis—multi-year scholarships in place of the scholarships that are limited to a single year and renewable at the coach's unfettered discretion.[44] Even the multi-year scholarships, however, can be revoked fairly easily.[45] It is only when there is outside pressure that reform, however incremental, takes place.

A union of athletes—with the right to talk about their concerns and seek better working conditions—would be a good mechanism to apply outside pressure to make the NCAA adopt athlete protections. And "[g]iven the one-sided market power imposed by collusion, it's not surprising that the players have turned to labor law and unionization for a modicum of countervailing bargaining power."[46] A players'

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[41] Sara Ganim, *Unnecessary Roughness? Players Question NCAA's Record on Concussions*, CNN.COM, Oct. 30, 2014, http://www.cnn.com/interactive/2014/10/us/ncaa-concussions/; *see also* CARE-FC, *CARE-FC Statement*, 1 (Nov. 9, 2015) http://care-fc.org/care-fc-statement/ (describing decades of litigation by NCAA to avoid addressing athlete concerns).

[42] Patrick Hruby, *Return of the Full Ride*, SPORTS ON EARTH, June 27, 2014, http://www.sportsonearth.com/article/81801184/why-schools-suddenly-support-four-year-scholarships-for-college-athletes (alleging motives for NCAA's reintroduction of the multi-year scholarship and for its approval of cost-of-attendance stipends).

[43] *Id.*

[44] *Id.*

[45] CARE-FC, *supra* note 41, at 4.

[46] Schwarz, *supra* note 27, at 2; *see also id.* at 9.

union would be a more efficient, much less wasteful, way of exerting steady outside pressure on the NCAA, rather than having to resort to constant litigation to enforce athletes' rights. Just yesterday, Jack Swarbrick, the Athletic Director at Notre Dame, echoed this view when he conceded that unionization might be beneficial by creating cost certainty through collective bargaining and by serving as an alternative to all the recent litigation.[47]

As you know, the College Athletes Players Association (CAPA), asserting that college football players at Northwestern University are employees, has sought to organize them. Although I believe athletes should receive monetary compensation more in line with their fair market value than what they earn now, CAPA has no plans to seek such monetary compensation.[48] Unions certainly have the right to seek for their members a share of the economic value they help create. But unions bargain over many matters other than wages, too—specifically, hours and "other terms and conditions of employment." Athletes face plenty of non-wage issues, both educational and health-and-safety related. These are what the Northwestern football players are concerned about and what CAPA will focus on if certified.[49]

So, what could a union accomplish for college football and men's basketball players? In the current system, athletes often exhaust eligibility, and their scholarships end before

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[47] Dennis Dodd, *Notre Dame AD Has a Vision of Two College Athletic Associations*, CBSSPORTS.COM, Mar. 18, 2015, http://www.cbssports.com/collegefootball/writer/dennis-dodd/25112658/notre-dame-ad-has-a-vision-of-two-college-athletic-associations.
[48] Kevin Trahan, *Questions Dog Players' Unionization Bid*, USA TODAY, *reprinted in* LANSING ST. J., Mar. 31, 2014, at 8C.
[49] Schwarz, *supra* note 27, at 5.

they have enough credits to graduate. These athletes often leave school with no degree and little likelihood of being able to make it in the professional leagues. By being in a union, players "could negotiate for a guarantee that no matter how long it takes, . . . [a] student could finish his degree . . . after his . . . eligibility [is over]."[50] By being in a union, the athlete could bargain to ensure he is "given real access to the full range of majors and programs at a school, . . . [not just the] dead-end majors."[51] A union could bargain to get players more time to pursue their coursework.

A union could also negotiate for healthcare coverage for sports-related injuries and could seek health and safety requirements, not mere guidelines, that "lower the risk of serious head trauma . . . [and] lifelong disability."[52] For example, independent concussion experts could be required, not merely recommended, to be on the sidelines.[53]

Finally, legal recognition of a union of players, expressing their concerns and views to their employers, would grant these young men dignity.[54] It would give them the right to talk about these issues for the first time and the right to be listened to. Being in a union would allow athletes the flexibility to bargain for the packages that could serve *their*

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[50] *Id.*; *see also* Schwarz, *supra* note 31, at 65.
[51] Schwarz, *supra* note 27, at 5.
[52] *Id.*
[53] *See* Editorial Board, *NCAA Not Tackling Concussions Yet: Our View: The NFL, by Contrast, Has Adopted Tough, Mandatory Rules*, USA TODAY, Aug. 21, 2014 (criticizing NCAA for adopting mere voluntary guidelines regarding concussions); Ganim, *supra* note 41 (same).
[54] CARE-FC, *supra* note 41, at 1, 7 (criticizing current system for "strip[ping athletes] . . . of opportunities for their own self-determination and personal development" and calling for athletes to be treated "humanely and with dignity"); *cf.* Hruby, *supra* note 23 (contrasting athletes with those who have recognized legal rights, and describing athletes as "second-class citizens").

particular needs, rather than face a "take-it-or-leave-it" offer of "one-size-fits-all" rules from a system that currently serves the NCAA's interests.[55] Athletes could describe what *they* want rather than having *universities* decide what they think the athletes should want,[56] and in that sense, unionization counteracts paternalism and serves athletes' autonomy as full human beings with dignity.

I have shared my view that the revenues diverted from athletes to coaches and stadium builders through university collusion properly belong to athletes. Others say that the money should not go back to the athletes, but should instead be used to fund the academic departments of universities to further the institutions' educational mission.[57] Some intend to accomplish this by convincing Congress to enact an antitrust exemption for the NCAA in exchange for the NCAA agreeing to certain conditions, including using this new antitrust exemption to cap coaches' salaries.[58] Under

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[55] *See generally* Schwarz, *supra* note 27, at 5 (describing wide-ranging types of benefits athletes might choose to bargain over).

[56] *See* CARE-FC, *supra* note 41, at 7 (noting that limitations on athletes' voices "prevent . . . [them] from proposing salutary changes for the industry").

[57] *See, e.g.*, Zimbalist, *Coaches' Salaries*, *supra* note 24; *cf.* Matthew Mitten & Stephen F. Ross, *A Regulatory Solution to Better Promote the Educational Values and Economic Sustainability of Intercollegiate Athletics*, 92 OR. L. REV. 837, 845, 847, 848 n.38, 849, 850, 867-68, 872-74 (2014) (not arguing that coaches' salaries be used directly to finance academics but suggesting, instead, that all athletic department spending, including that for nonrevenue sports, be reduced, with meaningful amounts being diverted to academic uses in the university, including for teaching, research, and postgraduate programs).

[58] *See* College Athlete Protection (CAP) Act, draft dated June 10, 2014, *available at* https://drakegroupblog.files.wordpress.com/2014/06/college-athlete-protection-act-6-10-14.pdf (containing proposal advanced by some Drake Group members); Brad Wolverton, *Watchdog Group's Proposal Calls for Antitrust Exemption for NCAA*, CHRON. HIGHER EDUC. (Oct. 11, 2013), http://chronicle.com/blogs/players/watchdog-groups-proposal-calls-for-

other proposals, the NCAA would allow universities to terminate many nonrevenue sports and would significantly limit the number of football scholarships as cost-saving measures,[59] and NCAA members would transfer these combined savings to academic departments in the university or to some "socially worthy causes" to be identified by a new "independent commission."[60]

In my view, these approaches are just another way of taking value from athletes and, instead of giving it to coaches, stadium builders, and others in the athletic department, giving it to professors. While professors do socially valuable work, it is not the professors' money either. Exploitation of athletes is not justified, in my view, by directing the money to some supposedly better cause.[61]

Why, might you ask, should the money generated in college sports be used to compensate athletes rather than be transferred to academic programs?

First, many of the athletes need the money. Many are from impoverished families. Some already have families and children of their own. Some will have long-term injuries and health problems. Ninety-eight percent of these young men will not be able to "go pro." As I have already stated, the time they played sports in college represents the four or five highest earning years in their sports careers and, in some

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antitrust-exemption-for-ncaa/33711; Zimbalist, *Coaches' Salaries*, *supra* note 24 (suggesting savings from limiting coaches' salaries could fund the academic side of the university).

[59] Mitten & Ross, *supra* note 57, at 872-73; Stephen F. Ross, *Radical Reform of Intercollegiate Athletics: Antitrust and Public Policy Implications*, 86 TUL. L. REV. 933, 933 (2012).

[60] Mitten & Ross, supra note 57, at 850, 867-68, 869, 873.

[61] Schwarz, *supra* note 31.

cases, in their entire lives.[62]

Second, keeping the money from players imposes costs on the public. Collusion by universities denies hard working young men fair compensation for their valuable skills. This shifts the burden to taxpayer-funded Pell grants and food stamps.[63] About "40 to 45% of all FBS football athletes come from families with low enough means that they receive Pell grants. As one example, in 2006, 65% of UCLA's [f]ootball [a]thletes received the[m]."[64] "[Many] athletes [also] qualify for food stamps. If collusion among major colleges were ended, economic compensation would turn those Pell Grant [and food stamp] recipients into skilled earners."[65] Even though the full scholarship cap has now been increased to the cost of attendance, NCAA rules do not require that additional pay,[66] so there will still be many athletes who will qualify for these government aid programs.

Third, a large percentage of college football and men's basketball players in Division I are African-American.[67] Racial minorities, like any group, should not be deprived of their earnings or forced to forego those earnings in favor of white coaches, universities' academic departments, or other "socially worthy causes." As Nobel Prize winner and Presidential Medal of Freedom honoree, Gary Becker, once

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62 *See supra* note 39.
63 Schwarz, *supra* note 27, at 7.
64 *Id.*
65 *Id.*
66 *See supra* note 232.
67 In 2014-15, 47.1% of football players and 58.3% of men's basketball players on NCAA Division I teams were Black. National Collegiate Athletic Association, Sport Sponsorship, Participation and Demographics Search [Data file], http://web1.ncaa.org/rgdSearch/exec/main (2015). Including other racial minorities, the numbers go up to 59.7% for football and 74.8% for men's basketball. *Id.*

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said:

> A large fraction of the Division I players in [men's] basketball and football . . . are recruited from poor families; many of them are African-Americans from inner cities and rural areas. Every restriction on the size of scholarships that can be given to athletes in these sports usually takes money away from poor athletes and their families, and in effect transfers these resources to richer students in the form of lower tuition and cheaper tickets for games.[68]

Why should poor athletes, many of whom are African-American, and their families be forced to finance the educational side of a university?

Fourth, perhaps most obviously, it is wrong to take the money from the athletes because, economically, it is their money. It comes from their efforts. They played the games. They put in the hours and provided the athletic services, day after day, month after month, all year around.[69] They took the hits and got the injuries. Because it is their money, it should be their decision as to what to do with it.

Athletes are experiencing "wage theft" as a result of collusion by their universities. The solution, in my view, is not to recoup the stolen wages from coaches and give them to some third party other than the athletes. The solution is for

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[68] Becker, *supra* note 27.
[69] *See* Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71, 97-108 (2006) (detailing the arduous daily obligations of college football and men's basketball athletes to their institutions).

athletes, themselves, to share in that value.[70] Just like other human beings, athletes have the right to freely seek their value within the marketplace.

Underlying the argument that the money should go to academic programs is the notion that money is the source of corruption.[71] The NCAA certainly wants people to believe that when athletes get money, it is corrupting.[72] But there is nothing corrupt about "earning what you're worth in the marketplace . . . [, and] there's nothing wrong with universities realizing that they have . . . a very successful commercial product called college sports, and . . . commercializing it,"[73] just like they do when they commercialize successful patents that make the world a better place.[74]

The fact is, we are not going to go back to the days when college sports was de-commercialized. That ship has sailed. College sports is too valuable. No one is going to walk away from that much money. And if we are not going to de-commercialize, then the issue is how will the money be shared? Should the current beneficiaries be able to continue making all the rules and keep most of the money for themselves? Should the money be captured from the athletes

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[70] *Accord* Schwarz, *supra* note 29; Schwarz, *supra* note 27, at 2 (arguing against amateurism restrictions on athlete pay and advocating allowing the free market, or the acceptable proxy of collective bargaining, to operate to determine athletes' compensation). Concerns that some players would earn less under this system than their current scholarships are worth, and, therefore, that they would be worse off and unable to afford college, could be easily addressed by bargaining sets of uniform wage scales, including adopting a sufficient minimum salary, as is universally done in U.S. professional sports leagues through collective bargaining agreements.
[71] Schwarz, *supra* note 29.
[72] *See* BYERS, *supra* note 28, at 371.
[73] Schwarz, *supra* note 2931.
[74] *Id.*

and used for the university's educational functions so we can hire more professors or pay them more? Or should the people who compete in the arenas and on the fields, who literally risk life and limb, who have worked so hard to provide arduous and valuable services, be allowed to share in the revenues they are primarily responsible for generating?

Thank you for taking the time to be here. I will look forward to your questions.

Matthew Morrow: Thank you much Professor McCormick. And now to wrap our panel on unionization from A to Z, Dr. Zimbalist.

Dr. Andrew Zimbalist.: Thank you. To quote a good friend of mine, Stefan Szymanski, "I feel a bit like an undertaker at a wedding." Many of the . . . I had a formal Powerpoint presentation I was going to make, but many of the things I was going to say have already been said, so instead I think I am going to just make some comments. I agree with MOST of what has been said this afternoon or this morning. My concern is what the alternative world looks like that enables the further professionalization and commercialization of college sports. I think, in essence, when we analyze college sports today we have to acknowledge that it's a hybrid system that has elements of commercialism and it has elements of amateurism in it. It is also apparent that those two forces are coming into acute contradiction and they're increasingly unsustainable. And when we talk about reform, therefore, we have to talk about moving in one of two directions. One is toward greater commercialization and professionalization and the other is towards trying to roll it all back into an educational model. I'm frankly a little bit conflicted between the two but for the moment my preference would be to try to roll it back into an educational model. I'm concerned about what the professional model

would end up looking like. If we move along the lines that Amy was suggesting and introduce unionization and free markets into big time college sports. What do we do? Well, one question that needs to be addressed, for instance, is are the athletes going to continue to be matriculated? Or are we going to move to a system where there's a Michigan State football team that plays a Spartan stadium, but the students are not matriculated? So in essence what it becomes is a minor league football team and same with basketball.

Are we going to end the charade that Bob McCormick talked about where individuals who are not equipped to be students, and don't have the interest in being students, and don't have the time to be students. Are we going to continue with that charade and say, "OK. You're going to be now paid basketball players or paid football players and you're going to be students." Or are we going to say no, we're making a clean break and we have minor league football now. We can call them the Michigan State Spartans if we want, but they're not students. Maybe we give them a voucher and we say to them, "Here. When you're done playing for us, sometime in the future, maybe in two years maybe in ten years, maybe in twenty years, if you want to be students and you're equipped . . . you're qualified to be a student at Michigan State, here's a voucher you could come back here for free. Here's four years of free education." I think that's . . . It's a plausible way to go. I don't think it's, from my point of view, it's not the most desirable choice.

With regard to unionization, I think that the athletes at Northwestern have done a great service to college athletics because they have pushed questions about exploitation and necessary benefits and I think that they're going to be

advancing. They've helped advance some of the reforms. The reason . . . one of the reasons we have now a provision in the power five conferences to allow a cost of attendance stipend up to $5 thousand is because of what the Northwestern athletes or the football players have done.

That's great but If we take it a step further and say let's move to a unionization model, let's do something where we can have a collective bargaining agreement where there are controls on labor costs so that we know what they're actually going to cost maybe we can get 45%, 47%, like in the NFL . . . players should get the same share as they do in the NFL. Well part of the problem there is that Northwestern, as has been said, is a private school and is subject to the NLRB. Public schools are not subject to the NLRB. Public schools are subject to the collective bargaining rights that are determined in each of the states. So I think that we have a very messy and institutional environment that we would have to navigate.

I pity the poor athletes at the University of Wisconsin that are dealing with Governor Walker. And many, many, states are "right to work" law states right now. So I think the mosaic that would emerge would make it very, very difficult to have some kind of a consistent pattern and consistent collective bargaining like we have in the individual sports.

I think another issue is the brand. One of the reasons why college sports is as popular as it is today is because it is branded as a college activity and that it's an amateur activity. Now I don't know exactly what would happen to its popularity if all of a sudden it became minor league sports or became fully professionalized, but I think it's a real issue. It's a real issue that has to be confronted. Another concern that I have is

what happens to Title IX. It's no secret that the successful football programs and successful male basketball programs funnel money to women's sports. In my view, what women's sports do in furthering the intellectual and emotional development and professional development of women athletes is wonderful and I think it's totally congruent with the conventional notions of what college sports is supposed to be about.

So, if we are to move to professional model and separate out men's football and men's basketball, what happens to the surplus that has been financing women's sports and some of the Olympic sports for men? Still another issue, and Amy [McCormick] I think largely addressed this, I want to a few comments about it, another issue is the current financial situation in Division one or If we want to restrict ourselves to F.B.S. athletic programs. According to the last study that came out by Dan Fulks, who does the biannual studies on revenues and expenditures for the NCAA, in the fiscal year of 2014 the average operating loss for an F.B.S. athletic program was $20 million. Ten years earlier, the average loss was $5.4 million. So then average loss is growing at 14% per year. It's likely to continue growing for a variety of reasons. One of those reasons is that college sports programs don't have stockholders. You don't have to show a profit at the end of the quarter to make their stock go up. You do have stakeholders but there are no stockholders.

Another thing, of course, that's happening, and Amy has pointed this out, when you're not allowed to pay the players explicitly, the people who recruit the players get the value, or a lot of the value, that the players produce. So coaches get these mammoth salaries many times higher than professional coaches salaries, because they're recruiting players who are

producing value and the players aren't getting paid. I think that one of the things that has to happen here is there needs to be a reform. We can do it through an antitrust exemption. You could do it through other mechanisms. But these coaches have a best alternative situation, or an opportunity cost, that would pay them a salary that is far, far below what they're currently getting. Maybe they would get if they went to S.C.S. instead of F.B.S. or if they went to coaching in high school, maybe they get $50 thousand a year, maybe $100 thousand a year, and they're getting the average salary. . . . Bob told us the top, I think you said the top thirty five coaches or roughly that, is something like $3.6 million a year. The difference between the $3.6 million a year and the $100 thousand, or whatever the best alternative might be for an individual, that's called rent. Economists call that rent. That's a payment to a factor of production that's unneeded to get that factor of production to allocate his or her services to that activity. If we had an antitrust exemption or a partial antitrust exemption, whether it were for the NCAA. or some alternative body that can control those coaches' salaries, we would be liberating large amounts of money. And if the head coaches salaries went down by a million or two million or three million dollars, the assistant coaches salaries would go down, and if they went down the athletic director salaries would go down, and the conference commissioner salaries would go down, and you'd be able to save a lot of money. Now there's an alternative of course that Amy was outlining which is pay the players and then the coaches won't get that revenue. That's part of the professional model that I think has some problems. Over time what would happen, it would not happen right away, but over time what would happen as coaches contracts expire, because some of them we know, like with Calipari, seven or eight year contracts . . . It wouldn't happen tomorrow that Calipari's

salary went from $8 million down to, whatever, $300 thousand, it would happen over series of years. And not only that the contract stands in the way, but tradition stands in the way. And momentum stands in the way. And other kinds of expenditures that have happened in order to attract athletes are things like, again Amy mentioned it, good training facilities, grandiose and luxurious stadiums. Those commitments, those financial commitments have been made and they're for twenty or thirty years. So you're not going to get, although the market will adjust if we start paying the players, it's not going to adjust immediately. And we're going to have these athletic departments that are already running substantial deficits, running larger and larger deficits, which would be a drain on the university and a drain on the financing of other activities in college sports. So I would much prefer that we think about reform first as a set of measures to reduce the exploitation of college athletes. So, do things like introduce a cost of attendance stipend. Do things like allow players to get licensing income or publicity rights income from the use of their names, images, and likenesses through a trust fund that they can access after they graduate. Remove some of the restrictions about not being able to enter the draft or not being able to sign with an agent. Provide them with long term health insurance, not just the catastrophic the limited catastrophic insurance that currently exists. Provide them with insurance that would compensate them for disabling injury that robs them of lifetime income if they were going to become professional athletes.

I think the unionization drive at Northwestern is something that's raising and pushing those interests. And it's wonderful for doing that, but to then assume that that's going to be our model and that's the way that we should be going for the

future is something that's going to undermine the college sports that we've come to love in the United States, and it's going to increasingly threaten the financial viability of college sports. Thank you very much.

Matthew Morrow: Thank you again to our panel for coming in today and giving us your time. We'd like start the question answer portion of the first panel now. I would like to open it up with a question Dr. Zimbalist talked on for a little bit there on the end to the rest of panel members. And that is what unionization would mean for college sports to the sports that are not the big money revenue generating sports, your basketball and football. How does unionization affect them and how do you think that should be factored in to the decisions that are being made?

Professor Robert McCormick: Well, let me just say there's no question in my mind, or I think any of our minds, that athletes in nonrevenue-generating sports work very hard, and they sacrifice a lot. And they're under the control of their coaches and athletic departments just like football and men's basketball players are. The reason that Amy and I took the position we did, which was to limit employment status simply to athletes in the revenue generating sports of football men's basketball, was because we could not in good faith reach the conclusion under the *Brown* decision that the services of wrestlers or field hockey players created a primarily commercial relationship with the university. I don't think that applies to them. They're not bringing in money for the university. In fact, they're costing the university money. So we didn't feel that we could meet the *Brown* standard, that they have a primarily commercial relationship with the university, unlike football and men's basketball players, who in our view, plainly have a commercial relationship, and not primarily an academic relationship, with the university. So that's why we took the

position that we took. Do we have sympathy for those young men and women in the nonrevenue-generating sports? Of course we do. You know they work hard, they get injured, and they have many of the same life experiences as football and men's basketball players, but the relationship between the athlete and the university is a very different relationship because the nonrevenue sports are not generating billions of dollars. So, just as a legal matter that's why we took the position that we took. But, it's a fair question. Should this status be extended also to these other young people? I guess I would leave that for somebody else to decide. But, for our purposes, I just wanted to explain the reason why we limited our theory to the scholarship players, not the walk-ons, and not athletes in the nonrevenue-generating sports. It was only these athletes, the scholarship players in football and men's basketball, who fit the legal argument that we were making.

Professor Amy McCormick: One concern that people have raised is if you start paying football and men's basketball players, doing so will take a subsidy away from the nonrevenue sports, and some of these sports will, as a consequence, essentially go out of business.

I want to point out that the decision of whether to fund a nonrevenue sport is a decision about priorities in the university. If it is a priority to have lacrosse or field hockey or men's diving, the university can decide to continue funding those activities. University budgets, as a whole dwarf Athletic Department budgets,[75] so there is enough money in the university to fund

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[75] Andy Schwarz, *My Reply to the House Committee on Education and the Workforce*, http://sportsgeekonomics.tumblr.com/post/95972743323/my-reply-to-the-house-committee-on-education-and (noting that "[w]ith a few exceptions, most schools' athletic budgets account for 5% or less of the total institutional budget").

nonrevenue sports if the university decides to prioritize them. Many programs in a university lose money. I am referring to the Classics and English Departments, for example.[76] But although those programs lose money, if they are prioritized, they get funded.

So the question is, is this nonrevenue sport a priority? Are people willing to pay for the nonrevenue sport even though it does not generate funds? Are they willing to pay for it if it loses the subsidy it is currently receiving from football or men's basketball? If we are not willing to prioritize a certain sport, so that it closes down without the subsidy, if we are not willing to prioritize it because we think it falls at the end of the line, behind all the other programs in the university, if *we* are not willing to pay for it *ourselves*, then why should we force *football players* and *men's basketball players* to pay for that nonrevenue sport?[77] That is precisely what that cross-subsidy does. It forces football and men's basketball players to pay for an activity[78] that we have already decided *we* are not willing to pay for because we do not value it enough to prioritize it. I do not think it is appropriate to *force* another group of people to pay for an activity that *we* do not value enough to pay for ourselves.

Another way of saying this is that it's a fallacy to assume that the nonrevenue sports are necessarily funded by surpluses from football and men's basketball – surpluses that exist because of collusion capping those players' compensation. Nonrevenue sports are funded by money from the university. Full stop. Whether that money is viewed as coming from football and men's basketball surpluses, or from coaches' salaries, or from the athletic director's salary, or even from grants obtained by researchers or students'

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[76] *See* Schwarz, *supra* note 31, at 53.
[77] *Id.* at 57.
[78] *See* Zimbalist, Frontline, *supra* note 24.

tuition dollars, depends only on your point of view. Money the university spends on nonrevenue sports is simply money the university has – from whatever source – which it decides to spend this way. Blaming fairer compensation of football or men's basketball players for the potential loss of a nonrevenue sport is blaming only one potential cause of the problem. Why aren't we blaming the high pay of football or men's basketball coaches, or of athletic directors? Why aren't we blaming researchers, or trustees who set tuition, for the potential loss of a nonrevenue sport? It's illogical to put the onus of nonrevenue sports funding solely on the backs of 18- to 22-year-old athletes who had nothing to do with setting up the system we have now.

Dr. Andrew Zimbalist: Can I share?

Matthew Morrow: Sure.

Dr. Andrew Zimbalist: I'll chime in on that. I think that if we fairly look at the revenue generators on an F.B.S. football team. And the average F.B.S. football team, as you know is, 85% are scholarship athletes and has 35 walk ons. If we fairly look at the value of the output of those players what we would find is that there are a handful of players that have, very, very, high productivity. And then there's another group of players that have some reasonable level of productivity and then we have the masses of those 120 players who are getting. Well it's eighty five players for scholarship, they're getting a scholarship that might be worth thirty or fifty or Northwestern I think they say sixty one thousand dollars a year. Whose actual marginal revenue product or the value of what they produce is below the scholarship that they get. I'm very concerned about those superstars in college who might be generating three or four, five million dollars worth of value and they getting a scholarship that for them might be worth forty or

fifty thousand dollars give or take. There's exploitation going on there and has been has been pointed out more often than not. Those people are minority. They come from minority groups, which makes it even more concerning, particularly tense, to cross subsidy a subsidy that's going to white male tennis players from the upper middle class or golfers or some of the women sports that that we were talking about briefly before. It seems to me that one way to deal with that is to make sure that these superstars who in the year or two or three, if it's basketball's usually in one year, are about to become very well paid millionaires in the NBA To make sure that that those individuals are taking care of in case they get injured. That they have injury disability insurance so that if their professional career is shortened or aborted by a college injury that they get some large share of the income that they would otherwise have gotten in the professional ranks. In terms of the cross subsidies more generally, look I think that fundamentally we have to decide what it is that happens at college and what is what is the environment in the culture that we want to rule in a college. We don't pay the first violinist in our school orchestras. We don't pay the tuba player in the marching band. We don't pay thespians in college plays. We don't, I don't, I know Smith College doesn't, we don't use the market system to allocate resources once somebody is in the door. I don't take bids if I have too many people signing up for my sports economics class. I don't take competitive bids to see who gets in my class. Everybody has an equal chance in terms of money resources, obviously there are qualifications, prerequisites, and stuff, but do we want to have the dollar in the marketplace invade the social relations and the priorities that exist within the university. I do think that with women's sports and the non-revenue men sports, one of the ways we can save money is and that would help allow us to provide much better benefits for the highly productive athletes is to stop giving scholarships to people who play on the lacrosse team that doesn't generate any money. Stop

giving scholarships to people who are on the swimming team that doesn't generate any money. Why should they get athletic scholarships? So lots of things can change. But, again I start with the premise that before we move for a professional model and throw everything out the window that we should see if we can make the educational model work.

Matthew Morrow: Great thank you. I would like to throw it out to the room now and at this point answer any questions form the audience.

Scott Harris: Hello, my name is Scott Harris. I am the Vice President of white-collar sports nation. We train high school student athletes on how to pursue sports business careers. We just happen to do a review this month that touches on some of the things that the McCormicks were talking about. We found a study in the May 2013 of Pittsburgh Post Gazette. It says that the University of Pittsburgh, Pen State University, and the top 25 college basketball and football programs. Out of those programs all the athletes major in five specific disciplines: business, communications, interdisciplinary studies, fitness studies, and sociology. Obviously, that's not going to help them when they graduate. So they asked the President of the NCAA about this, Mark Emmert. I think it was about a year ago he did a conference call and they gave him these numbers. He says the NCAA can do nothing to ensure athletes will receive a credible education and can only promote overall goals. And then he said whether or not an individual schools providing the kind of quality education for athletes or the rigor you need to be a successful graduate has to be something the university itself pays attention to. So I just wanted you all to comment on that.

Dr. Andrew Zimbalist: We can't criticize Mark Emmert.

Professor Robert McCormick: Heaven forbid.

Dr. Andrew Zimbalist: No look, again, I think that for a large majority of the football players and male basketball players in F.B.S. schools they're being asked to live a lie and we're not doing them a favor by giving them one route to the pros, which is to go to college. And so that should be stopped and whatever reform happens to the NCAA itself for college sports itself. I think that there ought to be minor leagues available for these players now that the NBA has made a move in that direction. Obviously, Major League Baseball has that hockey has had some options available. Ah, football doesn't really have direct options, but that seems to me that both the NBA and the NFL are getting tremendously subsidized by college sports. And it's time for them to start training and developing their own players or at least some of their own players, so that we don't force these high school athletes to go into a situation that makes them live a lie.

Professor Robert McCormick: Can I just add very briefly, because there are lots of other questions, that I think in some ways the American academy has behaved in a pretty shameful way. Many of you know their argument is, "Hey they're getting a free college education. That's a good deal. A lot of people would like a free college education!" But are they really getting an education? Is it possible for a student to get an education while playing football and lifting weights and running for forty, fifty, hours a week? You are not really getting a real education. This is not really possible. Universities—these great virtuous institutions—are engaging in this fraud, pretending that this is an amateur activity and that these athletes are getting quality educations at quality institutions. This is something Emmert always emphasizes. And it's just not true. It's just not true for the vast majority of

them. And to me that's something that the American academy should be hanging its head about.

John G. Adam: Let me just say one comment about the free ride because that came up in the testimony at the hearing. We asked Kain about that. Kain, you know, they say you get a free ride and he says there's nothing free about what he did. Those guys devote enormous hours, enormous commitment, to it. It's not a free ride, its compensation. And from my viewpoint, from the viewpoint of the NLRB case. That's what we were focusing on. As opposed to some of these some of these other issues about models and what you actually do with it. But there's nothing free about what they do they earn it and they get compensated for it. And I think that came through. And it came through in the testimony too, if you just read about what these guys do on a day to day basis. And where you draw the line people always say where do you draw the line what about these other programs. That's what lawyers always argue to. That's why you ask the question where do you draw the line. Well actually that's what litigation helps determine. And there's always the beginning in litigation and we can't predict exactly what will happen. That's why if the NCAA and universities don't fix the problems, it ends up in the legal system right that's what happens if the legislative bodies don't respond—people go to the courts, the board or other agencies, and the board, yes, it can be messy. Where do you draw the line? Well, the McCormick's have articulated the commercial enterprise nature of these sports. That's one way to draw the line. Look, Taylor Branch and Dr. Zimbalist and others aren't talking about the exploitation of the tuba players or the violinist or the marching band members. It's a different relationship. Football and basketball that level is a commercial enterprise. And I think we delude. We deny reality. So where do you draw the line? That may be where you draw the line. Where it will come down, I don't know, but that's what happens when you

litigate instead of legislate to fix the problems. And so, if it's messy maybe it will be messy. But, collective bargaining can be messy and what the model will be will take brains like Dr. Zimbalist and the McCormicks and others to figure through. What we're trying to do in Northwestern is to raise these issues. And let's get legal rulings on it and if we need to resolve it through some other means that's what we do.

Matthew Morrow: Great. Thank you, next question.

Audience Member: Some of you may be aware that when arena football players started to talk about their grievances clearly employs professional sport. And they were persuaded that a free market would work best for them or might well work best for them. The Arena Football League locked them out and demanding that they form a union to collectively bargain. The NLRB then found that that was an unfair labor practice to then force them to be a union if they didn't want to. But, then they did negotiate a collective bargaining agreement that was satisfactory to both sides. So I wanted to preface my question with that sort of legal observation. We've heard from Mr. Adam why college football players are employees under the National Labor Relations Act. And we've heard the CAPA model is to only negotiate with Northwestern about things that Northwestern can do within NCAA rules. That's the CAPA statement. I presume although I welcome Mr. Adam's comment, that that would be bargaining in good faith for Northwestern to say sorry we're not leaving the NCAA so we're not going to agree to anything that will put us outside of the NCAA, and, we can talk about it all you want, but we're never going to grant that so let's talk about these other demands. We've heard from Amy McCormick that NCAA policies are set by a bunch of officials, athlete directors, professors who are basically self-interested carteliers conspiring to enrich themselves. That's

what they're about. So my question, if we put these two things together to Mr. Adams is if the college officials are as Amy McCormick has portrayed them. Why wouldn't they just say Amy McCormick is right here’s what we are going to do, you win Adam, we're going to recognize unions everywhere and at the beginning of spring practice we're just announcing we're locking everybody out. We're going to recognize all unions because you want to be a union now that's not in the football league case. We're going to lock everybody out. And you are not playing sports you are not showing yourself for the pros. Your valuable time is wasting away until you sign a collective bargaining agreement that is basically. And, here is the NCAA bylaws.

John G. Adam: While you got a lot in that question.

Audience Member: If they are the profit making carteliers that Amy McCormick described then isn’t that the strategy that they should be pursuing? Why in your judgment won't it work?

John G. Adam: I don't want to speculate on. There's a lot of speculation that I would have to do even to try to answer that question. It seems unlikely that what you suggested is going to happen, even by any stretch under the current situation. So what, all we’re trying to do in the *Northwestern* case is established the legal principle. And what happens from it. How bargaining takes place what happens. That will have to be decided when confronted with those things. I do you know, the idea that if the NCAA says we want to recognize CAPA for all university football players. Is that we are suggesting they're going to do?

Audience Member: Well I'm not a labor lawyer and I've never done a single labor relations bargaining. I’m asking you as a labor lawyer who has some experience in this area, why you think that

wouldn't be a smart strategy. And why it wouldn’t be an effective strategy for NCAA officials. If we assume that they're going to lose the point on employees, they’ve already given up on the tax, social security, workers comp, OSHA, and all the other things that come with being labeled employee. So they know they've lost that because you're messing litigation and now these guys are legally employees you won that principle. Why isn't a smart and effective move for them to just lockout the players and slam them down with a grossly unfair collective bargaining.

Professor Robert McCormick: Steve, your question assumes that there’s one union for the players. And all we’re talking about here, all John’s talking about is one union at one school. If you had one union and if the NCAA, rather than the college, was the respondent to the union, then your hypothetical would, I think have some application.

John G. Adam: The premise of your question is really based on some flawed premises. But, lets just answer the generic question. If the NCAA came to CAPA or to some union and said we want to grant recognition to you as a bargaining representative. I think we would look at that as a good thing. I just doubt that, that is just not going to happen in the real world. Ultimately, the reason, and Dr. Zimbalist and others can testify, the reason, in professional sports anyways, you have a multi-player employer league. And they basically are exempt from the anti-trust that's why employers normally they can’t conspire to fix prices, antitrust. But, if it's through collective bargaining agreement, employers can get together, negotiate, fix prices, wages. And that's going to be considered exempt and that's what they do in professional sports and that's what they do in other things. Is that model going to apply here? Potentially, there are issues of state and federal law. So you know it would be a good strategy would I welcome the NCAA

deciding to grant recognition if they could. I think that would be great strategy, but the idea that the any university, Northwestern or elsewhere is going to simply shut down these football programs because of the unionization effort, its just not going to happen. There's too much money to be made, far too much money.

Professor Robert McCormick: Can I just add something? If that were to be the case, and I agree it is highly unlikely that it would be the case, that would be a way in which the NCAA and this union, as John was just alluding to, could negotiate a uniform wage scale like the UAW does. And that then might be the way the NCAA could actually have these anti-competitive arrangements and preserve them through the non-statutory labor exemption. But they would be doing so in a way that would actually protect the players' interests for a change, so, in that case, it might be a good idea.

Audience Member: [inaudible clarifying point].

Professor McCormick: Well whatever you know, well whatever they agree to, some wouldn't. That's what collective bargaining does.

John G. Adam: And yet, CAPA's position has been we're not advocating that these players be pay particular in the context of the Northwest. There are other ways to compensate the players. There's been allusion to the rights of their publicity, the right to certain revenues, additional tuition, additional stipend those are ways to do it. So there's a model that doesn't require the idea that everyone's going to get paid a salary. So I think there's a way to do it.

Matthew Morrow: Great, at the table right up front here.

Audience Member: This question is more for you. In your analysis, did you just look at full scholarship players or were half scholarship or three quarter scholarship players included in your analysis of what is an employee.

John G. Adam: They were all full scholarship players at Northwestern. That wasn't even an issue.

Audience Member: Oh I see, but how would you treat people who don't receive full scholarship, like whether they are employees or not. And then what would we do with walk on players, would they be apart of the union even though they're not being compensated by a scholarship.

John G. Adam: Yeah, walk-on is also is another term used for the non-scholarship, so they're not getting scholarship. We filed a petition only with respect to players that are receiving the scholarship compensation. And we did it because the in McCormick's have made reference to that, it shows that they're clearly compensated for their services. The walk ons you call the non-scholarship as you call it, they're obviously not receiving compensation. They're not receiving specific scholarships. We took the position that we would welcome them within the bargaining unit. That they have all the attributes of employment, but obviously they don't have the compensation portion of it.

We took the position we could include them or they can be excluded. Our petition was based upon only the scholarships. Don't forget the walk ons also potentially can get scholarships it's not uncommon. So there's an argument to give made that they could be included in it. But, applying the NLRB standards you do run into these issues where it's not the normal employment relationship.

And it's not the normal employment relationships because the entire infrastructure of collegiate sports has been built on what we call the student athlete myth. All right. So, our positions were to limit it to the scholarship athletes, and that's what the regional director ruled in this case.

Matthew Morrow: All right, down the middle right here.

Audience Member: So I'm not a lawyer but I found the arguments about why these are ways incredibly persuasive so you have my vote

John G. Adam: Thank you no further questions. (Audience Laughter). No go ahead.

Audience Member: Actually I would like to invite you to speculate a bit more, which is to say well okay and this is what I have read is that if in fact the NLRB did recognize them as a union and they were treated as employees then it's conceivable that Congress might step in and pass some kind of law which says no you are student athletes no you are not employees or whatever. So whether that is possible or not I don't know you have an opinion on that but also I would like to know what you think the constitutionality of that, would that be challengeable or would, could congress really do that and get away with it.

John G. Adam: The National Labor Relations Act was passed by Congress in 1935 and has been amended. Congress can change it. Congress has changed it over the decades. We all know what they're called, what are they called when they change the law. When Congress changes the law it, amends it. Okay you can even amend the Constitution. So if the

National Labor Relations Board rules that they are employees. Then it would be within the purgative of Congress to amend the National Labor Relations Board Act to say, so-called students performing athletic services are not employees within the National Labor Relations Act. If the majority of Congress passed it and the president signed it, then yes it would effectively override the NLRB decision. And it does happen where Congress will override an agency's determination of the law, so that is a possibility. In the state of Michigan, the governor and the legislature in December, amended exactly what they did, exactly what you're talking about, they amended the state National Labor Relations Act so speak the mini version of it that applies to public employees to exclude quote so-called student athletes from rights under the Public Employer Relations Act in Michigan. Effectively meaning that collegiate athletes at LSU or U of M could not organize. By definition they are excluded from the protections of the Act. And these laws, you know, Congress and the state legislature can decide how the law and whether certain laws will extend a certain groups. Whether extends to medical professionals will extend to executives they can decide that. And that's what the Michigan legislature did and the governor signed with actually no hearings, without any petition being filed in Michigan. And it was ironically I think signed by Governor Snyder the same day that Jim Harbaugh was given a $45 million long-term contract. Which by the way many of these contracts that we hear about salary, they don't, you don't even hear about the other benefits. The low interest free loans that college coaches get, camps, the amount of money they make with TV revenue, apparel. The coaches will require the players sometimes at some universities, you know, to appear on the radio station with a coach who has a programming. But Congress, yes,

could do it and some members, the Republican members, of Congress have actually threatened or suggested they would do that. If they did it, would it be challenged under the Constitution, I'll leave that to some constitutional law professor. But generally you know, Congress can control how the labor relations laws will be governed, unless somehow it effects some type of constitutional right.

Professor Amy McCormick: I just want to jump in. In 2014, the NCAA tripled the amount it was spending on lobbying in Congress compared to the prior year.[79] So, yes, I do think the NCAA is trying to influence legislation. It is facing a lot of pressure. The NCAA would love to get an antitrust exemption and make *O'Bannon* and *Jenkins* and all the other antitrust cases go away. It would love to get an amendment to the NLRA to say that college athletes are not employees. So, yes, I am quite sure that NCAA leaders are considering all of their legislative options.

John G. Adam: And I want to mention that the antitrust litigation is very important in this thing. You know, while I'm involved in Northwestern case and I think we've helped make progress. The antitrust litigation is what could blow up the whole NCAA system. Because if the NCAA system is broken up. That will open up a lot of other things. And so the antitrust litigation is really very direct challenge to the structure of the NCAA. And I want to ask you how many of you even know how the NCAA came about, how it was created? Does anyone know?

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[79] *See* Steve Berkowitz, *NCAA Drastically Increases Its Spending on Lobbying*, USA TODAY SPORTS, Jan. 20, 2015, *available at* http://www.usatoday.com/story/sports/college/2015/01/20/ncaa-lobbying-expenditures-congress-capitol-hill-washington/22078773/.

Audience Member: Didn't they trick Kentucky into accepting some sort of sanction and then sometime in the 50s they convinced Kentucky . . .

John G. Adam: No, no, no. 1903, because college football players,1906 whenever it was . . .

Dr. Zimbalist: December 5. [laughter].

Professor Amy McCormick: Teddy Roosevelt. [laughter].

Professor Robert McCormick: A century ago. [laughter].

John G. Adam: College football players were actually dying in large numbers.

Professor Amy McCormick: Literally.

John G. Adam: I don't know twenty or thirty a year in collegiate sports back in the turn of the century and Teddy Roosevelt decided to bring together the heads of these universities predominantly a lot of them were Ivy League. You know back then, the eastern, bring them together and say these players are getting killed. Dying in large numbers. Literally being maimed. So the NCAA was created. The original purpose was to protect the, ah . . .

Professor Amy McCormick: Their health and safety.

John G. Adam: Yeah, the health and safety. But you know a lot of organizations start with a certain purpose and then evolve over time. [laughter]. And that's what's happened to

the NCAA, it's evolved over time. I mean look the universities don't really like the NCAA, the coaches don't like the NCAA, the players don't like the NCAA. No one really likes it. But it does allow for this cartel to be maintained and it does give cover to the universities. So while the universities don't like it. It does allow them to maintain this system in place. And so that's where I think the ultimate significant change will come as to the antitrust and Jeff Kessler is leading one of the antitrust lawyers, is also representing the NFL players unions and is representing Tom Brady and others. That case is challenging the cap on what we call compensation. That, if I was the NCAA, I don't think they are worried about me, I would worry about Jeff Kessler and the others in the antitrust. That could make a big difference, because if they say to the NCAA. you can't limit the cap, you can't cap it to scholarships. Then what would it do Dr. Zimbalist that would, wouldn't that be significant.

Professor Amy McCormick: Then the NCAA would want a union.

John G. Adam: They would want a union. They'd come to me and say we want a union.

Professor Robert McCormick: They would, they would just like the NFL.

Audience Member: Yes, I had a question actually about Dr. Zimbalist distinction between the public and private sort of problem. So, it seems that at the seventeen private schools, there's a possible unionization route, which seems kind of like a distinction without a difference considering that the universities that are all over that are public have the exact

same student athlete issue and the thing that kind of stands out is that the NCAA, which all of you have alluded to is controlling the same things at both universities. So I guess the question is how feasible is it to prove employee status against the NCAA because then possibly you could unionize there.

John G. Adam: That is a good question. Well, you're asking is goes to the legal concept of joint employer. Where you have two entities that basically control terms and conditions of employment. And I'm not, I don't want to speculate on this too much but if you have a situation where you have an entity where employers are part of it and that helps to set the terms and conditions of employment. Then the larger entity, that is helping set the terms and conditions, is viewed as a joint employer. So some have suggested that the NCAA and the universities are in fact our joint employers. And therefore the employment status should extend to the university and to the NCAA But our position, when we filed it at Northwestern we focused on Northwestern to make our case because it's never been done before, you've got to make the case, you've got to work your legal strategy. And the strategy was Northwestern, it makes it a simple straightforward proposition. And part of what you do when you advocate for changes you have to educate the public. Because the public is inundated with the things the McCormicks have talked about, student athletes, student athletes, when you drove by here it is called the student athlete building, okay. Many members of the public don't understand this, like what are you talking about how can they be. So part of what you do through litigation is also you're educating the public. And now for the first time well maybe not the first time, but people now are talking about the issue in a much more concrete fashion and

they understand it. They may not agree with unionization, they may think it's not the way to go. But now they understand maybe a little bit better what's happening. And that you know, even members of Congress, the Republican members, have said look you know I don't like what's going on but you've got to fix this. This is a problem. We all know it. If you don't fix it somebody else is going to do it.

Matthew Morrow: Anyone else?

Audience Member: All of the professors kind of touched on this, but to me, the big kind of problem in college sports is the pull between amateurism and professionalism. Amateurism being mentioned in the NCAA manual like upwards of 200 times. And a lot of this we can focus on basketball now, coming more to a head with teams like Kentucky and Duke being just one and done factories churning out these professional players. How much would it solve that problem, it could kind of work for football as well, if there is some sort of requirement for attendance of college so that these athletes aren't just there one year, receiving no value, no utility from their time at the university. But rather requiring that athletes at least try or attempt to attain a degree. And those who are just going to use it as a stepping-stone to the pros not necessarily be bared from going, but there be some sort of contractual obligation from the student that they stay and perform as a student while they are at the university acting as an athlete. Is that you know a solution or is that something that is maybe not feasible.

Dr. Andrew Zimbalist: So I think one of the things that you have to confront is that the college teams even as successful as they are still way below the revenue levels in professional

sports. The top thirty basketball teams in Division one, I think they have the median revenue of about $15 million as opposed to $180 million which is the average revenue in the NBA and the top thirty two football teams and F.B.S. are about $50 million, in the NFL it's $300 million. So even if we can transition to a professionalized relatively free labor market in college sports where athletes are paid. They are still going to be paid a lot less in college and remember also that today's college sports have a variety of tax preferences that might go out the window and that could hurt them even more. But the other constraint is that in the collective bargaining agreements in the NBA in the NFL They have stipulations about when players can go from college. In the NFL you have to be three years out of high school in the NBA it's currently one year out of high school that's created the one and done phenomenon. So there would be constraints on both ends that would prevent what I think you're suggesting could be a salutary development. That is to say to the student athletes or college athletes would stay in school longer and minimize the problem of the one and done.

John G. Adam: I was going to mention, somebody mentioned the concept amateurism and one of the Northwestern officials to testify was the director of NCAA compliance. The level of employment in the athletic department actually staggering, the amount of people that are there to regulate this and I just took him through the NCAA book and said look let's talk about amateurism. It's okay if they get a watch if they go to a bowl game as long as it’s less than $500. That's right so that doesn't, that's still amateurism. If it's $499, that's right, but if it's $501 well, then it's not amateurism. So your definition of amateurism is whatever you want to make it isn't it. Well, whatever we define it is, that's

what it is okay. I don't view them as amateurs because I view the scholarships as significant compensation. And I don't want to get too far afield and the others may know more about this but for a long time there was the belief that Olympic athletes must remain amateurs. That it will destroy the Olympic athletes, right. They have to be pure amateurs. And what happened is a lot of the athletes had to give up their collegiate careers. They couldn't continue competing if they wanted to draw a revenue. Mark Spitz has to, when he wins his gold medals he has to stop competing and he sells commercials. That's all changed now. Those athletes for the most part don't receive salaries do they?

Dr. Andrew Zimbalist: When in the Olympics?

John G. Adam: Yeah

Dr. Andrew Zimbalist: Sure they do.

John G. Adam: Well they get endorsements.

Dr. Andrew Zimbalist: But they get salaries from they international federations also.

John G. Adam: From the federation, but they also get endorsements is where they can make money. So I don't know that anyone's arguing that the Olympic athletes that are not receiving compensations of different, that's hurt them. In fact it has prolonged the careers now, it seems to me. But again amateurism is all how you define it. And the NCAA defines ours a certain way and it defines amateurs in a certain way. So I just don't, would not hold much value as to how they define it.

Matt Morrow: In the back.

Audience Member: Lately the sports world has been focused a lot on the former Wisconsin football player and San Francisco NFL player Chris Borland. And with Chris Borland his issue is the head injuries and he retired early. Now I believe that it was you Mr. Zimbalist who suggested potentially insurance for players, potentially who get injured and potentially looking further past, for their future earning power. How does the aspect of one being able to determine a head injury and the potential earning power and also seeing how much a player can progress into being profitable, or making their career profitable in professional sports? How do you assess that or how do you see that being assessed in the future?

Dr. Andrew Zimbalist: I'm not sure I understand what, let me take a crack at it, I don't know if I'll be answering your question or not but I think the way that insurance companies would approach that is by using probabilities and that you'd have to project somebody based upon their college career. What they would likely earn in the pros and how long they would likely be in the pros. I don't think they could anticipate somebody deciding after one year that they didn't want to subject themselves to the risk of injury though. You know currently my understanding is and somebody can correct me. The law, the NCAA introduced long-term disability insurance for college athletes, somewhere around ten years ago. And my understanding is that in order to qualify to get that as an athlete you have to have said, you have to show symptoms at the time that you leave college or while you're still playing in college. So a lot of the brain trauma injuries that we're reading about, that we're seeing litigations

over are cases where people don't show obvious symptoms for many, many, years after they graduate. And hence this injury, which we now know, is probably the most common and disabling injury from playing football is not covered by the NCAA insurance.

John G. Adam: And that is one of the things that drove Kain Colter and the Northwestern drive is to expand and mandate medical insurance and long-term medical insurance for certain injuries. Because Northwestern does a decent job at it but a lot of it is not required and a lot of it has loopholes. And that's an area where you can definitely bargain and try to seek improvement. And it reminds me that Ramogi Huma of the head of N.C.P.A. I think it was on Stephen Colbert and he said you know what we used to think that head injuries, head traumas was going to be the end of football but now it's going to be unionization. So the head injury thing is a serious problem. Especially in football it's the most brutal of sports, and most demanding and something has to be done about it either through collective bargaining or through some other means.

Matthew Morrow: All right time for one more question.

Audience Member: So kind of what you guys have been mentioning is more of I guess an individual union per school and I kind of wonder how that will go across for I'll say the outlier sports, the non traditional revenue generating sports. And I'm thinking of like UCON's women's basketball or the University of Virginia baseball, which are popular sports at those schools and how those athletes could potentially utilize the unionization. And then how that could potentially affect competitive balance within the different schools and those

sports and affect those schools.

John G. Adam: Well so far our focus has been obviously the Northwestern case and division one collegiate football and basketball. Whether it expands beyond that really is speculation and depends on lots of different developments. But again it goes to the slippery slope issue where do you draw the line and is the line drawn with commercial revenue or not and I just want to win at the NLRB right now. And I want Jeff Kessler and others to have some victories and others will be sorted through the courts or the board or the legislative bodies will have to try to fix the problem.

Matthew Morrow: All right, well great. I'd like to give a thank you to the panel for coming here today and sharing with us. That will conclude the panel for the first half of the day. Lunch will be provided shortly, and I hope that everyone can stick around for the second panel starting around noon, which should be coming back together then. Thank you.

Panel 2: Antitrust Cases Involving the NCAA

Paige Szymanski: Good afternoon. I hope that everyone enjoyed their lunch. My name is Paige Szymanski and I am the journal's incoming Managing Editor of Articles for volume sixteen. And I'll be serving as the moderator for this panel. This afternoon's panel will examine the current antitrust cases involving the NCAA. Before we begin. I'd like to briefly introduce the panelists for our discussion their full back with biographies will also be in your programs.

Dr. Rodney Fort is a professor of sport management at the University of Michigan. He is recognized internationally as an authority and speaker on sports economics and business. His many publications cover sports topics as diverse as sports itself. Dr. Fort serves on the Journal Editorial Board and serves as Vice President for the International Association of Sports Economists. He has testified before the U.S. Subcommittee on Antitrust concerning competitive balance issues in baseball.

Professor Stephen Ross is a professor of law at the Dickinson School of Law at Penn State University. He teaches and writes in the areas of sports law and comparative constitutional law. He has provided expert testimony and advice on sports antitrust issues to governmental entities in both the United States and Canada. He has served as pro bono counsel to the American Antitrust Institute and consumer groups on antitrust and sports litigation.

Dr. Richard Southall is tenured associate professor at the University of South Carolina in the department of Sport Entertainment Management. His research focuses critically on examining the NCAA collegiate model of athletics, and he's a recognized expert on big time college sport issues. Dr. Southall has been a consultant for plaintiffs in the ongoing O'Bannon versus NCAA litigation. And in 2014 was invited to testify before the U.S. Senate subcommittee on Commerce Science and Transportation during a committee hearing on safety and well-being of college athletes.

Dr. Ellen Staurowsky is a full-time professor at the in the Department of Sport Management at Drexel University. She is internationally recognized as an expert on social justice issues in sports. She was also an expert witness in the historic *O'Bannon versus NCAA* case. Dr. Staurowsky is an athlete's

rights researcher and has co-authored several studies with the National College Players Association. Each panelist will have twenty minutes for the presentation. And we will start with Professor Fort.

Dr. Rodney Fort: Hi. It's interesting how the tides have turned, right? I mean three lawyers, one economist. Not so much. *Audience laughter.*

One of the earlier panelists talked about "basics" and sports especially at the college level. It requires I think some basic truth and we need to start maybe three steps back. From seeing exactly what's going on in the minutia of the actual administration of college sports and kind of wonder more about the organizational structure of college sports and what that means for policy. So that's what I want to talk about today. It's always a matter of basics. So here you go.

Which one's better? Clearly the B.C.S. would have given us 'Bama versus F.S.U. The College Football Playoff gave us Ohio State versus Oregon. Which one is better? I suspect that there would be a difference of opinion in the room. And that's all because it depends on the choice of the playoff basics, doesn't it? And so instead of arguing about what the B.C.S. ranking system did, now we argue about what the C.F.P. selection committee did. And we're just as unhappy being the fifth, sixth, seventh, and eighth team as we used to be. I have a book that's full of these sorts of wonderings about myths and things like that so you want to go see Chapter 7 on this.

I think this is just as essential an observation about assessing college sports policy. So I want to get way back to basics. This might be like kindergarten basics. And that's the

first thing, to sort of figure out what exactly does the structure look like. What is it doing? How does it work? And here's a model.

Caveat, since I'm in a room full of lawyers. I'm not sure I believe this model. I'm not sure this model does anything except set the stage for us to be able to investigate college sports in a meaningful way that has to do with stating some hypothesis that we believe and testing whether we reject it or fail to reject it. So here's a model.

We've got university administrators there telling ADs and conference administrators what to do. Conference administrators and Ads can work through the NCAA to make policy choice happen. Or university administrators have the other option of going straight through the NCAA to make the same thing happen. So you've got this control where university admins work on ADs, they both work on the NCAA, and out of it comes policy choice. So the way that I structured it, the university administrators monitor this set up to run college sports.

And as the first panel pointed out that's an interesting, amorphous, difficult thing to “get your arms around”. But it does happen at colleges and that almost forces us to look at what's going on at the university. We don't pay as much attention to the clients and boosters of the engineering school when we wonder about whether or not the engineering school is doing what it ought to do with engineering students. We go to university administrators and get them to sit down and think about what's going on.

So we can have a null hypothesis, a very basic null. Essentially, the NCAA is effectively providing what university administrators want. There are a small number of

epic fails. Every oversight system is going to have some probability of failure. University administrators don't want that to happen any more than anybody else does. But that's just the nature of the beast. So they're holding on for dear life steering the course of a good ship in the sea of life.

That allows us then to form an alternative hypothesis. The alternative is that there's abdication by university administrators and my basic model comes apart. The model unravels because admins aren't doing their job. Abdication by university administrators, a "runaway" idea, has the tail wagging the dog and I can't help but put Reveille up there because sometimes the dog is the tail. Well, one good joke. *Audience laughter.*

It matters. I think it matters a lot, how we think about college sports. If we fail to reject the null, then we can go back to a long line of organization inquiry into college sports. My favorite goes back to Professor Fry in 1987. The problems then, don't go to what we think of as the NCAA. They go to college administrators. That's where the issue lies and that's where meaningful reform will happen.

If you reject the null then you get the problem observed by so many, namely, that we're driving athletics away from the academic mission of the university. I just picked this as good a statement as any by the many organizations critical of college sports. This implies a need for further thoughts on regulation. But if you *fail to reject* it's all about university administrators.

Something's going to have to happen to change their margins. Admins make the choices right now. And if we're going to have meaningful reform, if we fail to reject the

null, it's going to have to be by changing the margins for university administrators. If you reject the null then it's all about reforming the NCAA, doing things through the NCAA, about the NCAA, including things like an antitrust exemption.

That test has to be done. In my overview, my reading, my work, the sharpening of my pointy head up in the ivory tower, that I do day to day out, I'm unconvinced that the test has been done very well. So that's what I'm doing. I'm sitting up there trying to do the tests, trying to find, what does this model look like? How is it performing? That's what I'm doing. And yes I think there is a lot of head banging involved. But that's okay, I mean you know we're masochists to even take on this job anyway.

Oh by the way you know that I could have chosen unionization, I could have chosen any number of topics. But some folks on Twitter said, “Well I hope the issue of the antitrust exemption comes up” and I said, “Yeah it will. Because I'm going to make it come up!”.

I tried tracking the college sports antitrust exemption down. I hope you'll inform me if I don't have the right lineage. It's extremely important we stand on big shoulders. I saw a passing reference of it by Gary Roberts in a ‘95 piece. Andy Zimbalist has on more than one occasion advocated for it and described how life would look with an antitrust exemption. About the same time Matt Mitten and the folks over at the Marquette Law School were moving down the same path.

The idea is to grant the NCAA a limited or full antitrust exemption. This should gain you some power to steer the NCAA in directions that you would like it to go. The

comparable idea that I've seen concerns not-for-profits. You can sort of nudge them in directions you would like them to go by threatening their tax-free status. Good things can happen. It could happen to the form of play.

If I recall right that was Professor Zimablist's first shot at it. We had this B.C.S. thing but a playoff is better in the eyes of at least a majority of the fans. But nobody's moving that way. Well if the NCAA had an antitrust exemption you might be able to threaten that exemption to get them to move in the direction of restructuring the championship. In addition to directing the championship in the F.B.S., threatening the antitrust exemption could work on the financial bottom line. Wasted spending is the Knight Commission's focus. So is redirected spending towards gender equity. And then there's the whole long litany of athlete rights, most of which I think were touched on by the first panel.

But what if the result of testing the null hypothesis was "fail to reject"? What if what is what's really going on is not some sort of inability of the process to get a job done but that the process is doing exactly what university administrators want it to do? Which is to create a whole bunch of values that don't appear on the books of the athletic program, but instead occur across the rest of the university? And occur in a way that's reasonably effective, reasonably efficient, and can't be done any other way? Then the issue is with university administrators, not college sports per se.

Well now. The NCAA leadership is lobbying for the antitrust exemption. I think this might be getting lost on some folks. The NCAA leadership thinks, apparently, life for them will be better under the antitrust exemption than it would be under the current system on the current path

where they're not exempt. Where White v. NCAA can come along, O'Bannon v. NCAA can come along. Where Jenkins v. NCAA, which is the case right now, can come along and tackle the NCAA head on, through the antitrust laws.

Apparently NCAA leadership anticipated it would be better for university administrator members to deal with Congress and not the courts. And I think there's ample historical evidence about why it would be better for them through Congress, from their perspective. Originally when Title IX passed there was a movement afoot to exempt football from Title IX. It was discussed at length. It was discussed at a very high level in Congress. The "football exemption" didn't pass but it was very clear that Congress was to a large extent on the side of the athletic directors on this one. Couldn't make it happen but they were revealing their preference for the direction of college sports. It's not clear that the Congressional preference for college sports is the one that you want it to be if you are critics of the way the college sports are working right now.

There's also been recently some fairly lackluster intervention threats and hearings on college football. Most of that had to do with not moving towards a playoff relative to the B.C.S. and you know exactly where it came from. It came from Idaho and Hawaii and Utah. It came from all the places that were being excluded from being able to get a B.C.S. game, because of Congressional interest, because their constituents care.

So if the verdict is fail to reject that college sports is producing just what university administrators want, it could be the case then that the revoking of any hypothesized NCAA antitrust exemption is really not much of a threat. Remember, for the case of not-for-profit status, that threat is

large and it's impact is easy to add up. It's easy to see what would my tax situation be in the absence of a tax exemption.

In the case of a hypothesized antitrust exemption, it's taking an organization that since the 1950s has had many intrusions into its ability to run that 1950s model for its membership. And that's where they're starting from. Give them an exemption where they think they'll be even better off and your only threat is to put them back into a world where they're doing pretty good anyway. Which is the world that they're in right now.

By the way, we are still watching. White settled so it's not exactly clear what happened in terms of how well off or bad off was the NCAA. O'Bannon is still under review at least. I'm not a lawyer so I read what the lawyer's say, and it appears that they are wondering if the appeals court may well side the first finding on the issues that surround the amateur requirement. That is, that the amateur requirement is pretty much whatever the NCAA says it is, so it's not much of a requirement. But the lawyers I read also say that particular payments arrived at by the lower court aren't going to fly. That they're going to maybe go in the direction of trying to let the NCAA figure out how to make that payment scheme happen. So it's not clear then that O'Bannon has had the big impact yet on the operation of college sports by university administrators through the National Collegiate Athletic Association that we think it has.

On Jenkins, Mr. Kessler is a very good lawyer. As was pointed out he was counsel on the original NFL antitrust suit '91-'94, depending on how you count it, that resulted in free agency in the National Football League. And he's had subsequent successes. Whether he'll have the same success

against the NCAA remains to be seen, he's certainly not the first to give it a try.

And yet the amateur requirement still plods on and on. So whether revoking an antitrust exemption would be that big a threat remains to be seen as well. And in the meantime the NCAA by their observed behavior has made it clear that they think they're better off under the antitrust exemption than they would otherwise be.

I think that gives us pause to use the null and alternative hypothesis idea to wonder sort of how would the world look under an antitrust exemption/ I think you should expect to see minimal concessions. Agents might be allowed to participate, student athletes might be allowed to go test the draft waters and come back, for example. I don't think that does significant harm really to the amateur model, or the ability to draw replacement players to college sports if it changes something about how and when and why athletes move from college to pro. There's a long waiting list of players to do just that. Given America's fascination with turning out nothing but the very best talent, nothing's going to get in the way of that anyway. There will be plenty of players lined up at the door.

So you should expect no truly costly reform success. I would be amazed to see the NCAA relent on the basics of the amateur requirement. Raising up to full cost of attendance is a pittance. A million to two million bucks is the amount coming out in the press in particular places. These are on athletic department budgets that range from $80 million to $225 million, and more. And the increase to full cost of attendance is just not that much money, relatively speaking.

Especially if the money is coming from university

administrators. Because now we're talking about how they might need another million or so in institutional support I don't know what the operating budget of Michigan State University is. I know some others. Michigan's operating budget is about $4-6 billion a year. A million or so on that kind of money is—they spend more on toilet paper. Even if you go down to, say, my previous institution, Washington State University. The operating budgets there between $400-600 million a year. And again a million or so is just not that much money, just not that much.

So you'll see these marginal concessions but I'd be amazed if you'll see anything major. Because what's the stick? Oh we'll take away your antitrust exemption. I mean, they would have enjoyed the exemption while they could but actually the world they were living in before the anti-trust exemption wasn't all that awful to begin with.

Doing the test, framing the world in this way and wondering, okay well, is it this nice tight little oversight activity that we see or is it not, helps us to sharpen our policy focus. It helps us to think about whom we are going to go after? Are we going to regulate the agent? Are we going to continue to focus on the NCAA, or are we going to start to get after what we think of as the principals in this activity, which are university administrators. And this did come up in the earlier discussion.

The upshot, if it's "fail to reject", is that there needs to be, as there usually is at a university, a meaningful dialogue about the proper place of Program A in the overall activity of the university. And it needs to be opened up in a discussion that includes all of the relevant participants so that the university ends up doing a good job for its constituency groups.

My favorite example is the evolution of business schools and higher education. You may not know that there hasn't always been a business school at any given university. Now when the academy first started to advance, it was a liberal arts training program. Business schools and the like were viewed as vocational and technical training, the benefits falling primarily to the people who undertook that training. And if that's the case then that sounds like a really good thing to do privately. That sounds like a really good thing for businesses to do, train their students send them out right into those vocations. And there was a long and heated debate as constituent groups started to demand from their universities that they have B-schools, that they train business decision makers.

At first it wasn't done very well. You could go through those curricula and you could see that they weren't highly academically rigorous. And the Academy criticized that in what you could only sort of describe as a real dogfight. Advocates for vocational education at institutions of higher learning versus the staunch liberal arts group. Well, they had a talk. And they had papers and they had conferences and they had sessions all about well what can we do with the B-school. Some said just continue to exclude it. We're liberal arts training. But the group that won were the ones that said let's just improve the academic content of what the business degree is all about. Let's make it a real for real academic degree that can stand up and hold its head up high with all the rest of the degrees on campus.

These dialogues can happen. These discussions can happen. The point of the book that I just suggested to you at the end of it all is as long as we continue to not do the test, as long as we continue to maybe not know what the real cause of

the problem is, the longer it's going to be easy for the NCAA to obfuscate, the longer it's going to be easy for the NCAA to misrepresent, a lot easier and longer it's going to be for the NCAA to just continue doing business the way it's been doing it.

If we end up failing to reject then university administrators need to be called to the task of sitting down and figuring out what the heck they really ought to be doing with college sports on campus. I look forward to that discussion. The other discussions happening elsewhere are fine and they are lots of fun to write about because we can have a good time poking fun at the clearly inane positions the NCAA must take because it's adopted a really stupid criteria like amateurism. And that's lots of fun.

But is it progressing us at all, that's sort of my worry and my wonder. I suspect that if we keep working on the test we'll get a better handle on that. And then maybe we'll bring a good discussion of college sports to a place where we can handle that issue.

Stephen Ross: Thanks for inviting me. It is great to be here with some old friends and to meet some new ones. Let me provide a very quick, basic run through. To start with the basics, antitrust law is primarily designed passed for profit making companies, and it generally views joint agreements as falling into one of two categories. Either the joint agreement is an efficient promotion of consumer welfare – such as collaborating to make a new product -- or it is an anti-competitive regime to take monopoly profits from consumers and put them into the pockets of the conspirators. That's what antitrust is designed to distinguish and to prevent. The NCAA has a fundamentally different model to fit into this round hole with its square peg. The

NCAA tries to cartelize as many markets as it can for the purpose of maximizing revenue. They were not allowed to do it in broadcasting by the Supreme Court in 1984. The purpose is to spend the money on what they consider to be worthy causes (and we can have a good debate about what causes are worthy). But that is their model, that is why the administrators seek to maximize revenue and minimize costs. The fundamental decisions are being made by university presidents, and I think it's a pretty weak claim to suggest that they're doing it to line their own pockets from their own salaries. Further, NCAA member schools spend wastefully on a bunch of things that they can't cartelize. But if they could, they would. When we talk about the high salaries paid to coaches, that was because of an antitrust decision that struck down restraints on coaches. If the NCAA could cartelize coaches' salaries to spend more money on what they think is worthy causes, they would; if they could agree on how to limit the size of locker rooms they would. The NCAA used to have a rule limiting the number of colors you could use in a brochure to try to hold down printing costs. As your economics professors will tell you, it is hard to organize a cartel and they just they just couldn't do it. But that's the NCAA model.

Now, this model of restricting competition to spend money on worthy causes is not a valid antitrust defense. Before William Howard Taft was President, he was a judge who wrote one of the most important anti-trust decisions in the history of antitrust law—a case called *United States v. Addyston Pipe & Steel Company.* (Taft he went on after losing the presidency to President Roosevelt, to go to Yale Law School, where he wrote a book on the Sherman Act.) He was an antitrust expert, and he wrote that to allow courts to decide when competition was in the public interest and when it

was not, is "to set sail on a sea of doubt." Of course, the Sherman Act is just a statute, what Judge Taft teaches is not that free markets should govern everything, but that if there was to be an exemption from the antitrust laws, it needs to be made by the elected representatives in Congress, not by the conspirators themselves trying to persuade the court.
However, in my view what the NCAA is trying to do now in their Brief in the *O'Bannon* case is to persuade three judges sitting in San Francisco who serve with life tenure that competition is really not in the public interest. And so I hope that that argument fails.

The only legal defense under the antitrust laws is that a restraint results in the efficient promotion of consumer welfare by differentiating your product. Indeed, the NCAA has done a great job of doing that. I've talked to people who know way more about it than I do, but apparently there is no question that by any objective measurement the qualitative difference between major league baseball and AAA baseball is far narrower than the difference between the National Football League and Division 1 and FBS Football. Yet, FBS Football is wildly popular—way more popular than minor league baseball. Why? Because the NCAA has differentiated its product. There was discussion from the prior panel about how the notion of a student-athlete is somehow deceptive, but unless you want to sue for consumer deception, the fraud doesn't matter. I'll give you another example. Like the difference between the NFL and FBS football, there is no question that the quality of the automobiles used in Indy Car and Formula 1 racing is far superior to modified stock cars: the cars go faster, they are way better than NASCAR. Yet, NASCAR is very close if not exceeding them in popularity and competition. Why? Because consumers think that the No. 88 Chevy Camaro driven by Dale Earnhardt, Jr. is something like the Camaro they are actually driving. In the history of NASCAR, this actually happened for one

race where they had a true stock cars; the engines overheated, the bolts fell off, and NASCAR decided to change the rules and ever since then, there is very little resemblance to what you could actually buy on a lot. But people still think that it's true. So, it doesn't matter whether a bunch of professors think that the student athlete name is a misnomer and a myth, what's important from antitrust is whether *fans* think it's a misnomer and a myth.

This point can be illustrated by two fundamentally separate principles in NCAA rules: The NCAA says we want to promote amateurism, and I think Professor Fort and others have done a pretty good job of debunking the objective content of that term. But the NCAA also has a rule that says we want to maintain a clear line of demarcation between college sports and pro sports. That, in economic terms, is product differentiation, and that is a valid antitrust defense.

What was the evidence in *O'Bannon* to support this product differentiation claim? There was anecdotal evidence, which antitrust courts generally disregard, by athletic administrators who said "if we pay athletes nobody will come to their games," but no empirical support for this claim. The NCAA presented a study that purported to show that people said that if you paid student athletes $50,000 a year on top of their scholarship, they would be less likely to go to the game. Cross-examination disclosed that many of the respondents didn't understand the question, and they thought they were asked about illegal, under-the-table payments of $50,000. Even so, it's easy in a public opinion poll to say I'm not going to go to a game, there was no evidence that people would actually do that in any way.

So, where are we right now? As I've argued in an article in the *Penn State Law Review* (*A Rapid Reaction to O'Bannon: The Need*

for Analytics in Applying the Sherman Act to Overly Restrictive Joint Venture Schemes, co-authored with Marketing Professor Wayne DeSarbo), consider what would have happened if O'Bannon had never filed his lawsuit, and top football schools evolved into an autonomous situation, and the Power Five Conferences adopted a rule that required every student athlete to receive no more than the full cost of education, and required athletes to give all their image rights in perpetuity to the colleges as a condition of playing football, but provided them $5,000 a year to be put in a trust fund, which they can use at the end, and then some Alabama five-star recruit sued the Southesast Conference on the basis of that agreement. If the Alabama district judge followed Judge Wilken's reasoning in the *O'Bannon* case -- up until she issues her order -- you would conclude that this agreement was illegal. As to the only defense recognized – that universities need to differentiate their product from the pros -- there is no evidence that you need to limit payments to $5,000. There is a marketing technique, called conjoin analysis, that allows for pretty thorough survey research that gets you a little further to the question that where is the tipping point where people might stop paying attention and might stop going to games. But there is no evidence that it is anywhere near $5,000. So, that's one of the legal problems right now facing the *O'Bannon* case and as these things go forward.

Turning to the policy aspects of this issue, the premise of antitrust law is that people in labor markets should receive the economic value of their work. What the previous panel glided over was that this principle of antitrust law is in contradiction with the fundamental purpose of labor law. Labor law is designed instead so that workers can cartelize the labor market for their own benefit to receive *more* than the economic value of their work; the law was passed in 1935 when Congress determined that, considering the

economic power of labor and capital in the marketplace, the market value is unfair to workers. Moreover, on macroeconomic grounds Congress wanted to give more money to workers to increase their purchasing power to get out of the Great Depression. I hope I am quoting Prof. Amy McCormick accurately; I believe she said (I hope I got this right), "It is unjust to take this earning power from them." The question is, who is the *them*? It's not exactly clear, but there is a very strong argument that the "them" who are currently receiving less than the economic value of their work – and I accept that big-time intercollegiate athletics is "work" -- are two or three players on every basketball team and ten or fifteen players on every football team. They are the ones who really drive the value. If you look at the economic contribution of the rest of the football team, compared to who you could get next (a walk-on), the value may not be so much.

The closest analogy I can think of is the motion picture industry. And if you look at the pay scales between--for a blockbuster movie and how much the A list actors get, and how much the sixth or seventh best actor gets on the play, it's startling how little the seventh biggest actor gets. The reason is not because they're not contributing a key element to the movie, it's because there are a lot of other actors who are just like them and if they don't want to work for $200,000 on a $370 million movie, there is somebody else you can find to do the same thing. So, if we're really talking about a free market principle, if that's what is really driving us, there is no question that people are being exploited. But, I would suggest that, from a public policy perspective, it does make a difference if you think a free market will result in more money will all go to 85 football players, or, instead, a system where ten or fifteen people make well into six figures and the majority of marginal players at Michigan State and Penn State are actually having to pay part of their tuition, because the salary that they're

getting from the University that reflects their economic value to the Spartans or Nittany Lions doesn't even come close to their educational expenses.

Let me conclude with some final comments about two related matters. One is the question of the antitrust exemption. I spent two years on the staff of the U.S. Senate Judiciary Committee. I actually worked on an antitrust exemption for local government. So I have sort of been there in the sausage grinde,r to paraphrase Bismarck. And there are a bunch of risks to really pushing full on for an antitrust exemption. One is you won't like the sausage that comes out at the other end. The second is the constant threat of further legislative meddling. Once you get an exemption, you develop a bunch of rules in reliance of the exemption, and it becomes very costly and risky for a big organization like the NCAA or a professional sports league to do anything to jeopardize the exemption. And I have seen this in professional sports. Senator Arlen Specter made a political career out of this. He theoretically opposed sports exemptions but never tried to end them, and every time a sports league did something he didn't like, he would hold a hearing and threaten to take away their exemption. And then when they would move 10% of the way toward Sen. Specter by making some modest concession, he'd hold a big press conference with the leading sports authorities, shaking their hand and claiming credit. So, one of the problems with an exemption is it becomes a sword of Damacles that is always over the head of the NCAA. My prediction is things have to get a lot worse before all stakeholders agree that legislation is better than the status quo. As long as the NCAA thinks they have a chance to win the *O'Bannon* case, they are never going to agree to really meaningful exemptions that critics really like. Professor McCormick is not going to endorse an antitrust exemption that gives about a third of the loaf, where players going to be paid significantly less than she believes is

unjust, until she really thinks that otherwise things are just going to be terrible and even worse than they are today.

My final comment is about an overlooked aspect of the cartel. If you look at the NCAA institutionally and legally, much of the problem can be attributed to a single one of the thirteen constitutional principles it has adopted. I'm not referring to the amateurism principle, which has no content and they don't really follow it anyway. It is the principle of "competitive equity." It is the idea that an innovative proposal, that might well serve one or more of the other thirteen constitutional principles, is going to be defeated because some schools will be able to use it for comparative advantage. There is a scene, which I understand was fiction, but is archetypically representative of my point, in the movie *The Blind Side.* An officious NCAA investigator is grilling Michael Oher, the movie's protagonist, about why he went to the University of Mississippi where his adoptive parents went, and she expresses a concern that other people might do this. And the point was that the NCAA would actually be concerned if maybe 500, or one thousand wealthy people with lots of extra money would find some poor, underprivileged kid, take them into their home, give them love, give them an education, give them tutoring, then might be able to steer this gifted athlete to their alma mater. The implication is that this would be terrible. Only an organization like the NCAA thinks like that, but that is a key aspect of the principle of competitive equity. In sum, if we are thinking about a reform model, rather than purely antitrust regulation, my suggestion is the place to start would be for the NCAA to repeal the competitive equity principle, and in fact declare that any proposal that is motivated by competitive equity is an illegitimate proposal that internally should be barred by NCAA procedures. I look forward to the views of people who have been thinking about this issue longer than I have and the Q&A. Thank you very much for your

attention.

Dr. Richard Southall: Thank you. I want to thank Michigan State University, and the Journal of Business and Securities Law for inviting me. For an English, history, and philosophy major from Western State Colorado University, this is a huge treat and honor to be on a panel with such esteemed colleagues. I hope that by the end of this presentation or this discussion, you'll be able to connect my work to an antitrust setting. A great deal of my work involves institutional propaganda, and how the NCAA has used institutional propaganda as an antitrust defense strategy. So, I was really happy today when John talked about in the previous panel is that part of litigation is building or telling a story—because that's really what the NCAA is wonderfully good at doing. So, today I'm going to talk a little bit about the concept of institutional propaganda and then I'll highlight several examples of the NCAA's college sport institutional propaganda. And then we'll examine how that institutional propaganda has been used as an antitrust defense strategy. And I'll also point out nuanced changes in institutional propaganda elements the NCAA has utilized during the various stages (e.g., pretrial, trial, appeal) of the O'Bannon case.

Dr. Emmert – the President of the NCAA – testified before Congress this past summer and noted that for the vast majority of those who participate in NCAA sports, the experience is exactly what it is intended to be—a meaningful extension of the educational process. So, when we analyze that statement, we know he is talking about the vast majority of the 460,000 or more NCAA athletes that are mentioned in the NCAA's public service announcements (PSAs). However, most people do not know (Dr. Staurowsky is probably one of the few people in attendance today who does know this.) that when the NCAA first developed the now familiar tag line ("460 students-athletes going pro in something

other than sports."), the athletes to which the NCAA referred did not include all athletes. When Diane Dickman of the NCAA was asked, "Where did you come up with that number?" she noted that when the NCAA developed that figure, which has grown from 280,000 to 460,000 to now more than 500,000 athletes, there were two categories of athletes who were excluded from that computation: FBS football, and Division I men's basketball players. These athletes were not included in the original figure.

Most often when Dr. Emmert acknowledges concerns, challenges and issues with FBS football and NCAA D-I men's basketball players, he also mentions these athletes represent only 3.5% of all NCAA athletes. So what is he saying? That's not a rhetorical question. What is he saying? Somebody . . . [AUDIENCE MEMBER] "It's not a problem with that may people." Yeah, it's okay. There's not that many people in the sweatshops. And we like our cheap shoes.

Dan Woodenfield, the NCAA expert economist at the O'Bannon trial called the NCAA a joint venture—we hear about joint venture in the earlier panel, which I thought was a very interesting term—between the organization and the colleges. The NCAA is a three–part institution: the national office, members, and the organization or the governance structure (e.g., committees, etc.).. He called it a type of cartel, but not classic price fixing for profit variety that we were talking about earlier. And then, the NCAA attorneys characterized it as a benevolent cartel. The NCAA lawyer, Greg Kurtnan said, "It's a cartel that does good things, not a cartel that does bad things."

Now, I have been to Colombia by the way. I've spent time in Medellin. I was in Colombia when Pablo Escobar was a drug kingpin. In many ways, Escobar did a lot of really good things for

"his" people. So, when the NCAA says, "While we're involved in anticompetitive things, and we're violating the law, but we're not bad!" So, the concept I use a great deal is hegemony: the spontaneous consent given by the great mass of the population to the general direction imposed on the public by a small group of powerful individuals. It's the more powerful folks—economically, socially, politically—telling the rest this is the appropriate thing to do. Such spontaneous consent can be achieved through pressure, coercion, and force, but most often it is achieved through language. Through language. Thought control achieved by creating and reinforcing "common sense."

This common sense is conveyed through dooms-day scenarios and statements such as: "If 'student-athletes' are 'paid,' college sports as we know it will end! We can't pay college athletes! Can't do it. It's too complex." Really? Why? It's pretty basic in many ways. However, the defendants in the O'Bannon trial have consistently warned that if the plaintiffs prevailed, it would end college sport as we know it.

How many of you have been to a Michigan State Football game? How many of you had a good time? If that goes away, what will you do? What will you do?

Hegemony is sustained through the use of language and symbols. Watch any NCAA broadcast and you can see how such broadcasts are packaged, re-presented, put together. College sport broadcasts are spot-on examples of institutional propaganda, which institutions utilize as risk management or protection mechanisms.

A classic example of institutional propaganda has been discussed earlier today—the term, "student athlete." I had a student, a graduate student at the University of North Carolina email me the

last couple of days with an idea of having a "student athlete's" rights conference. I wrote the student back and said, "I appreciate your sentiment, but why are you using the 'oppressor's language' in proposing an athlete's rights conference?" He responded, "I never thought about this." Most people can't **stop** using that term. His response is fascinating because it reflects linguistic manipulation and dissemination that's very purposeful. The term "student athlete" in the collegiate model—we'll talk more about where that term came from— is central to how the NCAA differentiates college athletes from the business of college sport enterprise.

An example of this linguistic manipulation is the argument that the fundamental reason you cannot pay college athletes is because they are students not employees. Why aren't they employees? Because, we don't pay them. Why don't we pay them? Because, they're not employees. This is clearly an example of circular reasoning, but it's like, "Really? Where are we going with this?" But that's a very effective argument, because we must avoid at all cost: "Pay for play." I loved the title of this symposium. Technically we can never pay college athletes within the NCAA system, because Bylaw 12.02.8. By the way, studying the NCAA Manual is akin to being a rabbinical scholar.
In the NCAA Manual "pay" is defined as, "The receipt of funds awards or benefits not permitted by the governing legislation of the Association for participation in athletics." So, if we ever approve payment of funds, what can it not be? Pay. This is because, since this compensation is now approved, it is no longer "pay."

So when Mark Emmert says, "We will never pay college athletes." Well of course you won't, because your Bible says

if you approve it, by its definition it is no longer pay. It's a stipend. Look up the word. Stipend. First thing in the definition. What word is first in the definition of stipend? “Pay.” We're not going to pay them, but we will give them a stipend. Really, it’s pay!

OK, we're not going to pay them, but we're going to give their parents $3 thousand to go to a C.F.P. – College Football Playoff game. We're going to give them full “cost of attendance.” How are you going to raise the full amount? What is the gap? We’ll give them some money. But you're not going to pay them!

As I go through these linguistic gyrations, it seems as if I'm back in the 60s. It seems as if I’m “Woodstuck,” still living in the 60s. Moving on to a discussion of another example of NCAA institutional propaganda, let’s examine its “Collegiate Model of Athletics,” a term used repeatedly in the pretrial phase of the *O'Bannon* case. In 2003 Myles Brand and Wally Renfro developed the collegiate model nomenclature as a means to articulate a better understood definition of amateurism.

So what is the collegiate model that Brand discussed? Brand once said, “We must not be drawn to the professional model like moths to a flame.” Wow! What an interesting simile. Michigan State is just flying around like a moth, and the next thing you know you’re fried. If we go there (to the professional model), if we pay college athletes, it’s so bad that it leads to being burned alive!

Let me ask a question: “Why are you in law school?” To become a lawyer. But what if my firm’s policy is we don’t

pay lawyers until after they've completed four years of service. Sorry, it's against our firm's policy. We don't pay amateur lawyers. You generate revenue for our firm, but we have a policy that your first four years, we give you an office, provide you with CEUs, allow you to gain valuable experience, and provide you with cost of living allowances. However, we'll let you take on cases, and bill clients for your services, but all the revenue flows to the firm. We're providing you with valuable training for the next job you take, or you can go pro after four years of our arrangement.

This is analogous to the collegiate model, since those who participate in collegiate athletics must be students attending a university. The fundamental reason college athletes, some of whom generate millions of dollars in revenue, are unpaid is that they are students, not employees. The old fashioned concept of amateurism is a tough sell to some people, so what did the NCAA do?

They rebranded amateurism. In the president's briefing memo that was prepared for president Emmert is the following language. "Critical to begin reestablishing through messaging the concept of the collegiate model. Also critical is to understand this term serves as a template for behavior." The collegiate model is a "term of art" created by Myles Brand as a surrogate, but not a replacement, for the concept of amateurism. According to the collegiate model, "amateur defines the *participants*, not the enterprise." That's a direct quote: "Amateur defines the participants," (the players) "not the enterprise."

So for everybody on the enterprise side, the business side, boom let's make as much dang money as possible. Dr. Brand

said university athletic departments have a “moral obligation” to maximize revenues in order to provide the good benefits for the athletes who will go pro in something other than sports. In other words, it is okay to screw the 3% of the college athletes who have a large market value, so that the 97% who have no market value can get what they want – a chance to participate in college sport. In order to justify this exploitation, intercollegiate athletics has to be tied to higher education.

However, we need to tie intercollegiate athletics to higher education without imposing its avocational nature on revenue producing opportunities.

According to the collegiate model framework, as amateurs, college athletes are engaged in college sport as an avocation – sort of a hobby. But for the director of marketing, it’s a no hobby dude! You better generate revenue, or we’ll fire you. But the athletes, you know, it's just an avocation, just a hobby. So another necessary linguistic manipulation is to make sure college sport is identified as an educational endeavor. How is this connection made? Through the development of a graduation rate metric that results in higher and higher graduation rates, so the public can feel good about athletes getting an education (e.g., graduating).

So at the same time Dr. Brand created the Collegiate Model of Athletics, the NCAA developed and launched its Graduation Success Rate (GSR). In 2003, as part of its Academic Progress Program (APP) the GSR was introduced. This metric had been in development since 1985, in response to public pressure that was the result of low graduation rates of football and men’s basketball players.

The NCAA looked at the current methodology, the Federal Graduation Rate (FGR), and developed the GSR in response. The FGR is basically the number of first-time, full-time students who graduate in six years. You have 10 students who enroll full-time in year 1; six receive their diploma from that university after six years. Your FGR is 60%.

But the NCAA also began tracking athletes who left an institution in good academic standing (e.g., dropped out or transferred). They calculated a graduation rate that removed these athletes from the computation.

So think about it. If in a particular sample of 10 athletes who came to university X, only four of graduated, that would result in a FGR of 40%, which is a low number. But the question is how might you make that number more palatable? You can't increase the FGR in any other way than having more athletes actually graduate in six years. But what can we do to increase the graduation rate we report? We need to look at the six who didn't graduate and see if we can remove them from the denominator (e.g., reduce the 10 athlete sample.).

Well, out of those six who did not graduate, let's say four left in good academic standing. If we remove them from the cohort (the denominator), then we are only dealing with a sample of six total athletes. If we divide six into four, we're going to get a "graduation" rate of 80%.

This removal of athletes who transfer or leave in "good academic standing" from the sample results in large increases in graduation rates. Look at the increases that

result from the use of this methodology: 67%, 49%, and 58%. Large increases. And what do we call that metric? We call it the Graduation Success Rate, with an emphasis on the word "success," as if we don't already know graduation is our proxy for success. It's Marketing 101. "New and Improved."

What's interesting is where this adjustment had the most effect. In which two sports? Surprise: football and men's basketball. The GSR results in higher relative graduation rates in those two sports more than any other.

Why is this important? These are the athletes who are the labor that's generating the revenue. They are workers. So what happened? From 2003 to this date the NCAA, in its messaging, consistently says the federally mandated rate is inaccurate. The GSR is a better, more accurate, more real-time measure of graduation. And while they've never named a single university president who supposedly asked for the GSR, they say the GSR was developed at the request of college presidents who felt the FGR was inaccurately representing the life of college athletes.

Of course, if you're a college president, are you going to turn down a graduation metric that makes you look better? Of course not! It's called risk management. So the NCAA and its member universities consistently identify the GSR as an improved a more accurate metric that consistently results in record graduation rates. So Dr. Brand could show his academic reform program was successful by referring to record GSRs. What happens with the G.S.R. every year? You have incremental increases of about 1% a year. So we have a record every year. We're better than ever. The NCAA used GSR rhetoric throughout the O'Bannon trial.

If you watch a *YouTube* streaming of the O'Bannon appeal you'll notice a subtle change in strategy. In this phase of the case, the focus is on "pay for play." The defense attorneys' consistent messaging was the amateur model bars all forms of "pay." We have rules that protect amateurism. The athlete must not be paid. However, the NCAA argued we can "reimburse" athletes for reasonable expenses related to their educational experience, or their status as "students." But, notably, the NCAA insisted reimbursement for reasonable expenses is not…pay. Because, oh my god, if we "pay" them, it will be the end of mankind as we know it. We have to maintain the "tradition of amateurism" and the rules of amateur eligibility.

As I watched the court proceedings I kept track of the number of times they used the term "pay for play." So now they've shifted their focus from using the collegiate model to a focus on payments to athletes.

So now it's pay for play. All three of these institutional propaganda tactics have been used as defense strategies by the NCAA in antitrust cases, and also utilized in media relation's campaigns since 2003.

The effectiveness of the NCAA's institutional propaganda was evident in Judge Wilken's ruling, which was ostensibly in favor of the plaintiffs. In her opinion, she used the term "student athlete" 277 times. It is fascinating to me that a court would be so sloppy in the use of their language in writing an opinion. But many observers have noted the plaintiffs didn't actually prevail. And so we'll see where this is going to go moving forward.

Paige Szymanski: Thank you.

Dr. Richard Southall: Thank you for this.

Dr. Ellen Staurowsky: It's after lunch, I'm the eighth speaker baby. I have quite a mountain to climb. Hi everybody, I'm a roamer as well. And I've been assured that I'll be able to tidy up my remarks in terms of the transcript and I anticipated that I was going to go off the mark in terms of exactly what my intention is because there are so many teachable moments in terms of things that have come up earlier today that strike me as maybe needing to be tidied up or maybe finished up a little bit as we get to the end of the program.

This is my general plan. I'm going to talk a little bit about the business of the NCAA. I was taking off of the title of the program to look at the business of the NCAA, to look at the tools of "player control" as I call them, otherwise known as NCAA rules and language. And then offer some concluding thoughts along the way. But I begin with David Ferrie. Anybody know who David Ferrie is? In the film J.F.K., David Ferrie is a character that is someone who may know something about whether or not John F. Kennedy was assassinated. A lawyer is asking him about whether or not he knows. And frantically, he is pacing up and down in a room, and he has a drug habit so he is really over the top. And he is repeating over and over and over again, "Who the hell knows, who the hell knows!" It's a mystery wrapped in a riddle inside an enigma. And I think that as the day has gone on, that one of the lessons that we learned in terms of trying to deal with college sport's issues, is that this idea of a mystery wrapped in a riddle inside an enigma, is exactly

and precisely where the NCAA wishes and wants you to be and will do everything in its power to make sure that you do not get out of.

And so our contemplation about language is really, I think, very important to the conversation where the root of these terms come from, what the history is behind them, the legacies that they carry forward, are things that deliver to us the contradictions, the hypocrisies, the problems, the motivations that lead us to the point where we want to challenge them. And hopefully do right in the midst of all of this. And so hopefully by the time we get to the end of it we will throw out this concept that it's a mystery, wrapped in a riddle, inside an enigma because it is not nearly as complicated as the NCAA would have us believe, at least in my view.

Interesting, in terms of the O'Bannon hearing from March 17th, St. Patrick's Day, here are two quotes. Seth Waxmen presented on behalf of the NCAA in its appeal to O'Bannon. And one of the first things he said was the following: "The NCAA was founded so that athletes must not be paid." You heard the history of the NCAA stated to you by John Adam earlier today. And by Amy McCormick talking about how there have been deaths and injuries in football and that was a precipitating factor. This was not a motivation. This notion of the NCAA being founded so that athletes must not be paid. Not 1906. And maybe not ever. Maybe not ever from a historical standpoint, and I'll explain what I mean by that in a minute. I did find it interesting later on that there was a clear statement also from Waxman that "we, the NCAA, define what 'pay' constitutes." And point of fact if you go into that four hundred forty four page rulebook, one of the

bylaws has a definition of pay, and it essentially says exactly that. The NCAA is not opposed to pay; it is supposed to pay under terms and conditions that it does not approve of.

Interesting way to define amateurism. Because our sensibilities about amateurism is that we cannot get paid. I mean point to fact, the NCAA objects to payment on its terms and conditions, which it approves. Now Dr. Emmert has been mentioned a number of times I just felt like he needed to see is picture in case you haven't yet today. There is an interesting moment in the congressional hearing that Dr. Southall participated in. And it had to do with the athletic scholarship.

The athletic of scholarship was adopted by the NCAA in 1956. And at that time, one of the reasons why they adopted it was because they cannot regulate pay to the degree that they wanted to. They had some schools that were paying, they had other schools that weren't, and they had some schools that were doing things under the table.

What to do with such an unruly crowd? Well. Concede. We're no longer opposed to pay. But we will create a mechanism called a grant in aid, what we popularly refer to as an athletic scholarship, and that that will manage the relationship that way. In 1956 it was adopted for a four-year time frame. By 1973, we went to a one-year scholarship. And in the course of the hearing, Dr. Emmert was asked why that is actually was, why it was that that decision had been made. It was very interesting, his response, because he said, to Senator Rockefeller, he said, "I don't know the answer to that question and I'm reasonably sure that no one knows."

Now. Richard. I was sitting in the very back of the

audience. It’s not participatory democracy when you're in there. Because I'm going to raise my hand and say, “I'm going to that question for you.” But what is interesting is that the head of the NCAA said that he did not know and especially in light of the events here and the number of transcripts and the amount of history that had been brought to bear on their name for their business practices. I’ll return to that in a minute.

But I think these statements are laying a foundation for the kind of business that we are actually talking about. And then I wanted to really get into a little bit of the specifics about the business. Has anybody seen this? What do you know about it?

Audience Member: I just know that is in Indianapolis, where the Final Four is this year. And they have projected or somehow put the whole bracket up on the side of the hotel that is where the Final Four is going to be, to build up hype.

Dr. Ellen Staurowsky: Yeah, I mean that's a good summary of what's going on here. So it's a sixteen story – sixteen story – bracket right in downtown Indianapolis. Does anybody know what kind of a deal the NCAA has with the city of Indianapolis relative to its headquarters? Which also in Indianapolis.

Dr. Richard Southall: It is surrounded by a moat.

Dr. Ellen Staurowsky: That's true there's one. The NCAA ended up in Indianapolis after working out a deal with a $15 million incentive for them to come to take their

business to Indianapolis. So they got that $15 million dollar subsidy to come and they pay a dollar rent every year. A dollar rent. OK. At least according to projections, and Rod I know that you'll appreciate this, and we can have like a whole other panel on how accurate this figure is. But what they are projecting is that the business that will be brought to Indianapolis for the final four is going to be $70 million in economic impact. In this city and enough of us alone. I think the reason why this is important is to my thinking relative to how the business works. Is that we talk about the member schools we talk about the NCAA as an institution or an entity that is representative of colleges and universities. But this is also an institution unto itself. It has its own self-interests and has its own five hundred employees who are contributing to the economy of Indianapolis. And so in terms of the interests of the parties involved, this is not just simply a mouthpiece for whatever colleges and universities tell it to do that it has its own interests at heart as well. And notably the one party, which is not a member to this, is the athletes. The athletes are not members of the NCAA College and universities are. The NCAA itself is its own institution. But athletes themselves are not members. Now in terms of the clear line of demarcation between professional sport and college sport. There is a distinction perhaps in brand. I'm not so sure that that really makes them any less professional. When we look at the Nielsen state of the media. In terms of viewership we see that NFL's Super Bowl clearly is king and has been for a long time and continues that way. But you'll see college football playoffs are next, the Sugar Bowl, the Rose Bowl. The three top-ranked cable programs in the history of cable T.V. back in January. We see the NCAA championship just under the NBA Christmas game. And then we see the NCAA in terms of

viewership. And so let's make no mistake about this. This is a business that is not about amateurs. This is about the pros and college sport intends to run with this group. This is what their business practices are- they intend to be successful to outpace the NBA This is their full intention. When we talk about the industry we often talk about the big dollars that are associated with the industry itself. We hear about the twelve-year $10.8 billion television contract with C.B.S. and Turner for example. We hear about $1.5 million at they go with a final four and with the men's basketball tournament which compares almost to the dollar to what we have with Super Bowl ads for instance. But what I think we miss when we talk about the largest of the financial stakes is that we forget that so many other industries are built on this labor. If we just look here we see that part of the ESPN's expansion has been expressly the result of college sport. ESPN network, Longhorn Network, ESPNU. And then of course the programming that goes into classic and into the others as well. So this industry, which helps to keep Disney afloat, is built in large part on the college sports industry. And then we also have this contradiction. And I just want to pause for a second let you look at this. This is one of the more fascinating shots I think. But the countdown to the brackets is much less than that now of course. In terms of the profit that Las Vegas is expecting to turn as a result of March Madness, they're expecting to make a hundred million dollars in profit just for this month. So when we think about the financial stakes involved. I think when we hear discussions about profitability and about revenue generation. I think we forget about this magnitude of other industries that are connected to the core. So we have tourism. We have merchandising. We have the gambling industry. There are all of these other satellite

industries that oftentimes get overlooked. And they're important because of what we're talking about relative to player value and the control over player value. Because all of these entities are profiting off of the business practices that the NCAA has adopted. Now in terms of tools to control an unnamed an unrecognized labor force. Now I do believe that this is the case. We see the grenade. We see a quote unquote student athlete. And we've got amateurism as well. And we actually have the. And Richard you did a beautiful job of kind of mapping out sort of the rolling media relation's strategy to constantly require us to follow the bouncing ball relative to what the core issue actually is in this entity and what's actually going on. And I'm going to talk about those terms and some others as we move forward. Periodically, I hear people say that they were surprised. They were surprised by Northwestern. John Adam earlier said that people could never imagine or expect that college football hires would sign union cards. That they couldn't imagine or expect that O'Bannon would take exception to the use of his image and that this one day would be litigated in court; that they just couldn't expect those things would happen. And my suggestion to you is that it is not only expected, but I think it is likely that if we do not get meaningful change then we are going to continue to see more and more cases in one way or another coming back until this gets resolved in a way that's favorable to athletes. I think you do need to put into perspective or at least I think it's helpful to put into perspective that we've had athletes starting in 1936 who were boycotting their program. And take a look at the reasons why they were boycotting. They were boycotting because of medical coverage. They were boycotting because of food and they were boycotting because of campus jobs.

Compensation. Food. Medical coverage. That's 1936. It comes all the way through to today. You have been bombarded with the use of the term student athlete being a response to the worker compensation cases in a way to avoid worker compensation and intentionality there. I want to pause here though, because if you stop at the term student athlete I think you miss a big piece of the entire picture of what was going on relative to player control. In 1956 we had the grant that gets adopted. The athletic administrators at that time understood that it was pay for play. That's what's so interesting about the way that we use this expression today. Fritz Crisler who was the athletic director at Michigan at the time was quoted as saying that he understood, that they understood, that by adopting this practice they were reserving the right to exploit and to professionalize athletes under their own terms and conditions. They were taking it away from other entities and they were creating the opportunity for them to exploit and professionalize under the terms and conditions that were convenient to the athletic entity. There were athletic directors at that time that understood what this meant. But in 1967 we have a development that occurs in terms of the fraudulent misrepresentation will. Does anybody have any idea what that means, a fraudulent misrepresentation will? Do we have any former scholarship athletes or current athletes in the room? Had you ever heard of this rule?

Audience Member: No.

Dr. Ellen Staurowsky: It would apply to you. And there we have it. I teach this one course on college sport policy and literally every day with the athletes who are in the room, we end the day by saying, “What did we learn today that we didn't know?” And there's always some rule that they

signed their life away on in terms of their athletes statement or were like, “We don't know that rule was out there.” Fraudulent misrepresentation rule effectively gave license to coaches to be able to unload athletes who they felt were either acting in bad faith or that they just simply wanted to get rid of because they were dead wood or they were injured early or there was some kind of reason. Fraudulent misrepresentation, that’s 1967. And you notice that only a couple of years later we end up with a one your scholarship rule.

There's something else that's going on here in terms of the 1967 time frame. Because it's in 1967 or earlier that we have protests on campus- we have the athletic revolution that's going on, we have a black athlete revolts going on. This is a time period when we have an attempt to integrate formally white teams. And so all of these concerns about player behavior and how coaches are going to manage players percolates around during this period of time. One of the articles that captures this moment is one that was written by Sports Illustrated writer John Underwood. It was referred to as “The Desperate Coach.” And in this article he chronicles coach after coach- football coach, basketball coach, coaches at universities all across the country who are lamenting that they cannot control their athletes because they cannot run dictatorships the way that they would like. And so we end up with a fraudulent misrepresentation rule. But that isn't enough so we go to the one-year scholarship. One-year scholarship which effectively creates the opportunity to get rid of athletes at-will. So what's significant about this is not only the intentionality of what occurs in the control mechanism, but also what occurs within the athlete population. Because it takes. pretty much from 1973, to White in 2006, Oliver in 2009, Jeremy Bloom

in 2002-ish. It takes all of that time before we really see athletes really litigating to try to go after their right. So this mechanism creates a culture of fear, threat, and retaliation that is one of the most effective means of shutting down player dissent. And it shuts it down so that when we litigate today we still have athletes who will say behind the scenes that they cheer us on. But they do not want to come forward. When Kain Colter came forward that was an act of tremendous courage on his part because the payback for any athlete who does that is going to be considerable. Life in the locker room was never the same for him again. Never again. Those coaches treated him differently. They put pressure on him. And this is part of what is going on here. And this is the stakes that I think are so high.

And this whole mix of conversation around whether or not the system will be broken, whether or not there is going to be college sport Armageddon, if college athletes are recognized for the value that they bring to the table. Women's sport gets pulled into this primarily in terms of Title IX. I want to direct your attention to this quote from Donna Shalala from 2011, and she says: “Those of us in the business know that universities have been end running Title IX for a very long time. And they do it until they are caught.” So my question to you was this- if all these conference commissioners of the NCAA, administrators, if all of the college athletic directors who you hear invoke Title IX every time we get close to having some kind of fairness for the revenue producers was so committed to Title IX, then why is there such a history that Donna Shalala’s talking about. This isn’t a system that is committed to either equity and it has built itself on exploitation. The two actually do go hand in hand but not the way that you think, in my view. The same system that has ignored this piece of federal legislation with

impunity for over forty years is just as likely to thumb their noses at any other legislation that comes down the pipe until such time as they are held accountable. But it's part of the con game to think that this is a commitment to Title IX.

I want to close out with a couple of things for you to consider. Earlier in the question and answer there was an observation about amateurism. How many times is amateurism cited in the manual? A student said it earlier.

Audience Member: A ton. Hundreds and hundreds of times.

Dr. Ellen Staurowsky: I was a little concerned about your health actually that you knew that. *[Audience laughter]*. But think about this for a minute. The NCAA defense in terms of amateurism is that it is the pillar of college sports. Now, one would think that a pillar would be a pillar- right, that it would be pretty solid. Not to be kind of cast in the ground. That come an earthquake it would still pretty much be there at the end of the day. A lot of people don't know that there're actually three different operating definitions depending on which manual you look at. There's a different amateurism definition for Division 3, Division 2 and, Division 1. And interestingly enough the way that the term gets applied is actually much more liberal in Division 3 when it comes to paid athletes. Paid athlete absolutes pretty much can come into the system when they want to. But the control mechanism gets tighter and tighter the closer you get to the revenue producers. Revenue producers are the ones that are controlled most under amateurism. And even a Division 3 is more liberal a standard than is Division 1. So that tells us something about the pillar. Richard, you talked about how in Judge Wilkin's ruling that she uses the term student athlete 277 times. If you look in contrast at

Regional Director Ohr's opinion in Northwestern. He never uses that term except when he is quoting something specifically from the NCAA He refers only to college football players, to college athletes. He never uses that term. And for those of you who are thinking about going on and maybe doing this kind of work. The one thing that you really have to do in my view, is you have to get out of the NCAA box. The NCAA for many years has had this kind of mystique about it so that in terms of rules and regulations, college administrators for example- they will defer to their athletic department, provost presidents. They will say about all manner of things relative to the NCAA They will kind of give up authority and they will say to the athletic director when you tell me what this is. As lawyers, if you want to litigate against the NCAA get out of their manual. Get out of their terminology. Do not use student athletes when you know that it was an invention specifically designed to avoid worker compensation. Get out of that terminology. Because the more you do that, the more you interrupt them. And one of the things that they are facing now is the fact that it is harder and harder to defend these principles that they have been so effectively doing for so many years.

And so I'll leave you with this thought as well. I thought it would be interesting to sort of just sponsor like a, "Don't use student athletes for an entire day." Like in an athletic department. And just like how you would have a jar if you cursed and you put a quarter in. I am telling you it would be a major fundraiser. It would be a major fundraiser if people just stop using the term. So that might be a way to appeal some of this litigation. Anyway. I'll close on that. Thank you all very much.

Audience: *[Applause]*.

Paige Szymanski: Thank you Dr. Staurowsky and all the panelists. First I want to give any of the panelists an opportunity to comment on anything else that you have right now before we start asking questions. No more comments? I'll open it up to the floor.

Audience Member: I do you have questions about what you're talking about regarding propaganda. I don't remember what the other two were but Big Ten Commissioner DeLaney said, or there's two things he said last year to do with your comments. He said if pay for play is approved by any of the Big Ten universities, he said they would be kicked out of the conference. And he also said if the *O'Bannon* case got approved we're going to D3 which means no athletic scholarships and we're going to downsize. So that's part of what you're talking about, is that something that he could really do if it did happen?

Professor Stephen Ross: Well there are a few things to share about some of the rhetoric that athletic administrators use. If you look at the language of the NCAA rule in their definition of pay, it is virtually identical in legal significance if not rhetoric to the NBA salary cap. You cannot receive anything of value, under NCAA rules, unless it is approved under the rules. The NBA has the same rule. You cannot receive any compensation for your services as an NBA player except for compensation that is authorized under the NBA salary which is which is collectively bargained for. The only difference is the salary cap is a lot higher in the case of the NBA.

The second thing is to have some skepticism about these threats. In the 1980s, I was working at the Senate Judiciary

Committee after the *Oakland Raiders* case, which a lot of the professional sports leagues, in particular the National Football League, didn't like. Paul Tagliabue was the attorney for the NFL at the time. In any litigation, he would argue that the *Raiders'* case was this very narrow fact specific precedent, that merely held that in one specific case the Oakland Raiders could move to Los Angeles. But when he would come up to Capitol Hill, he'd say the *Raiders'* case is a disaster and the NFL would fall apart unless they received an antitrust exemption. So I don't place too much stock in what people say they're going to do if something changes the status quo. The better approach is to first ask what is economically rational. And if what they claim they're going to do is economically irrational, then the next thing I want to ask is the psychology and organizational behavior people if there was there some reason that they're going to do something that isn't economically rational for some other motivation. And if there is little these folks can suggest, then I think the most probable conclusion is that these officials are simply complaining. So I think we really have to look at it in that context.

Dr. Rodney Fort: I would chime in NO and NO. I mean the first one is along these lines. The idea that if you just simply weigh the economic rationale of it, there's no way in the whole wide world of sports that Michigan, Wisconsin, Michigan State, just walk down the line, are going to reduce their competitiveness for students, if nothing else, by dropping down to D3. It's as far fetched as I can imagine. And the second part is just the functional part of, you know, conferences don't kick members out. I would ask my learned folks in the audience who might be studying that history, but when was the last time someone was kicked out

of an F.B.S. football conference?

Dr. Richard Southall: In fact it's the opposite they come up with rules to try to find ways to keep people in.

Dr. Rodney Fort: Years ago I was at a different institution. And I asked that question about the bottom feeders of what was then a Pac-10 Conference. Why don't you just kick them out and send them to the Big Sky, that's essentially the level of sports they're playing anyway and he just visibly paled and said we would never kick any member of the Pac-Ten out of the Pac-Ten. There could be a decision process where they might leave. But kicking them out is simply not his job.

Dr. Richard Southall: I think this goes back to earlier when you asked about if universities were to lock out the players. What do you think the top five spring sporting events are? What are they, what's number one? What are people looking forward to right around this time. Major league baseball spring training. What's number two? March Madness. Number three? NFL draft. If the universities locked out their players, the NFL in a heartbeat would say you open those damn doors. And you get us our players. So what you have to understand- I call it the Chicken Little defense. Which I said to the senator from Maine when I was testifying, and she did not laugh at all, and Ellen felt really bad for me because it's one thing to bomb in a classroom. But in a Senate committee if you are being smart-alecky and she looked at me and went and I thought I better tell my daughter to move out of the state of Maine, which is where she was teaching at the time, and I said Crystal look for another job.

Dr. Ellen Staurowsky: You know there is an interesting thing about that comment- in terms of we need to become Division 3 because in a way they're insulting their members and their members said nothing. And to me, and their members in division three have really undervalued their own contributions from the standpoint of what they mean to this enterprise because if you pull Division 3 out of there you see it for the profit-seeking entity it is. Division 3 gives them education cover, gives them education credibility if there is any left it comes from Division 3. So it is very interesting that he actually does use that expression in my view, because it is very telling in terms of the hypocrisy of the whole thing.

Dr. Richard Southall: NCAA Division-III is what I would call a "loss leader." If you understand the concept of a loss leader, you can go to WalMart or any other big-box retail store, and there are certain items they sell below cost, with the expectation that you will purchase other more expensive products. So we need to have D-III athletes (the amateurs) who work just as hard as FBS football players (employees). Take a look at team photos from FBS athletic departments in all the sports other than football and men's basketball and see whom those individuals are. The current system is akin to a regressive taxation system in which disproportionately Olympic sport and women's sport athletes are upper middle / upper class and white. And we don't want to talk about that because all of a sudden everyone is going "Oh no!"

Professor Stephen Ross: Let me just throw in one other point to answer your question. Prior to the 1984 antitrust decision in *Board of Regents,* the NCAA used to have one contract with CBS and one contract with ABC; viewers could watch about five games on Saturday and that was it. And now the Supreme Court said that

was illegal, there are over 30 games on television. But it isn't individualized competition, it is conference competition. The BIG 10 has a contract, the PAC-12 has a contract, and the SEC has a contract. This could happen with student aid policies as well, if the NCAA got out of the business of setting rules and just left it up to the individual conferences. That might pass antitrust muster, given some of the challenges in the broadcast case. But that is not going to get you to the free market model where the most elite athletes are being paid their economic value. Because what I predict will happen is you'd have the BIG 10 will hire some antitrust lawyers because they know how to do this, and they will announce their policy and then the PAC 12 will follow their policy and then the SEC will announce their policy which will be a little more generous. Then the BIG 10 will decide, "Can we compete with those guys along those terms?" Well the SEC already is somewhat dominant, so the fact that the SEC does a little more, that's ok and we will still have our own strategy. And if the SEC gets too out of line, the BIG 10 is not going to go to Division 3, they will work out a deal that they and the PAC-12 and the A.C.C will have something they call "the real college football playoff" and just leave the SEC out of it; SEC can play Alabama v. LSU for the national championship with players who are being paid. That might well satisfy antitrust muster. It is not going to remedy a world where you believe it is unjust for student athletes not to receive the economic value of their services because there will not be a lot of options for them.

Paige Szymanski: Do you have any questions?

Audience Member: The structure of this panel is very, very different from the one this morning where the other panel was very clear issue with a clear question of are these people employed, are they employees- yes they are. And it was more or less that. There

are implications in that. But this panel, there seems to me that there's a huge kind of philosophical variation in what sort of things you might want and what might be the outcome. What struck me, I don't have any skin in this game, for example, I'm not from this country and I didn't grow up with college sports. It doesn't bother me either way. But it seems to me that you as Americans really care about this. This really, really matters to you. I come from a world, like the rest of the world, where the big sport is soccer. Where if you think about the way athletes train and develop in the soccer world well- basically the way it works is this. The coaches identify you at the age of eight or nine or maybe even six or seven there's been instances of contracts signed at five years old and then basically you don't bother studying in school. You go to high school, you have league where you have to go. You don't study because you're going to make it as a professional soccer player. But again, like college sports, 98% of you are going to fail. Then age sixteen or seventeen you're dropped by your club and there you go, you have no qualifications, no education, and you're probably going to fail at an interview. It always struck me that for all the faults of the college system, grant you that terrible things go on, but nonetheless some people come out with an education which will give them something. They may not finish the degree, but they got something. They went to some classes, they saw the books. So my question is, what do each of you think, what's your ideal, what would it mean for the student athletes? What would their lives actually be like in the world you are describing? In a way that would you like to see?

Professor Stephen Ross: I would be really interested hearing from those who are more critical than I am as to their philosophical foundation. Prof. Amy McCormick articulated her philosophical view it is unjust not to pay people their full economic value. Even the union guy, Mr. Adam, said "I don't necessarily agree with

that." If you want to assert a certain right as a fundamental principle to your animating philosophy, then it seems to me that you have to look at all the implications of that animating philosophy. To me, it really is just a question of public policy, and some sort of utilitarianism, with some Rawlsian justice for the very bottom. And that is how you'd sort of solve this on a more reform way. But a lot of the critics I feel are so caught up in the rhetoric of attacking the NCAA, that on the positive side I'd really welcome the answer to the question.

Ellen Staurowsky: I think of it differently to your question in terms of the ideal situation. Last week, just over a week ago, Richard Nye along with Professors McCormick and McCormick, we announced the formation of a group called College Athlete Rights and Empowerment Faculty Coalition. And the motivating force behind that Coalition is to maybe answer your question in terms of what the future may hold from the standpoint that we see economic and academic mistreatment of the athletes in the profit sports of football and basketball, most of which are racial minorities. If we are looking at the sport of men's basketball we're looking at a racial composition of possibly as high as 70%. So we have all those factors. In terms of the reason, the definitional reason of why status is important to recognize this group as the labor force that it is, creates the portal through which treatment can then be examined. At the present time, within the way statuses are constructed, college athletes are neither employees nor are they students. When they become an athlete on a college campus through the imposition of something called privilege, the participation in athletics is a privilege is not a right. They give up most of their rights as students. On the other hand since they are not recognized as employees, they occupy a space where they do not have access to basic, fundamental, civil and human rights to their own value, to who they are as people, to self-determination.

Within a higher education context they cannot necessarily speak out on their own behalf. They are barred by NCAA rules from having representation. Their coaches can negotiate multimillion dollar contracts thanks to agents. Athletes are barred from having that kind of representation. So this in my view, it is less about putting a specific number on how much a quarterback is worth than it is on their value as human beings. And this system denies them basic human rights. And this is something that should not be tolerated in higher education. Not in America. Not anywhere. But it is. When we talk about this, we talk about this in terms of the 3%. Like some have the 3% don't matter, and the 3% do matter. So for me, it would be rectifying that injustice and everything else will fall into line.

Dr. Rodney Fort: My response is that there were actually two. We heard Professor McCormick and then I heard Andy Zimbalist say let's see if we can make it work inside the educational model. If it's going to be an educational activity, then let's do that. And the analogy to me is the fine arts. So, if you think of the fine arts, here are performing people. They're learning a skill that's as physical as it is mental in many cases. And so the parallel for me, I know it may be speaking treason, is to have that conversation, step back a little bit, and actually take one of Walt Byer's off-the-cuff remarks in his *Un-Sportsman-Like Conduct* and wonder about eliminating this tension that we as the academy actually have created, which is to force people who want to be athletes to be engineers. I think we worry too much about, well here's a person who wanted to be an engineer but because of the demands on their time, they take another degree. And I'm not going to be as disparaging of those other degrees as others are off-the-cuff like sociology and business. There's nothing wrong with sociology and business and there's nothing wrong with general studies as a matter of fact. But, we sort of say they didn't get their chance to do what they wanted. Well,

the vast majority of athletes are doing exactly what they want to do. The problem is we don't recognize it as a legitimate activity academically.

Walt Byers said on page 327, I only know that because I jotted it down the other day, he says there should be a legitimate recognition of the pursuit of sport participation as an academic endeavor. And he talks about the fine arts as a comparison. If we step back and we think about what are we doing in higher education, we do a whole lot of things. Is there an educational mission in sports? Absolutely. Where do all of our coaches come from? Right? We force them to be sort of like high school teachers and they coach. All coaches played. So then all coaches were trained usually at institutions of higher ed. So there's absolutely an educational activity going on. How to run a football practice. How to run a soccer match. All of these things we know now because its being done now and its being observed by the players who take it and do the next generation of it. It can be an educational activity. I gave you the B-school example earlier where it was viewed as not rigorous enough. Well fine, make it rigorous! That's not hard to do. We're good at that! Economists are better at it than most- let's take simple things and make them real hard. For me then, the idea is to think broadly, well narrowly, but broadly in terms of Andy's suggestion which is that we're an educational institution, what do we do, how do we serve the athlete best? All of the human rights issues are absolutely important, but somehow we don't worry about them for dance, those issues don't arise.

Professor Stephen Ross: But if we're not monetizing the dancer--

Dr. Rodney Fort: Oh, we certainly are monetizing the dancer.

Professor Stephen Ross: But we're not.

Dr. Rodney Fort: We have to buy tickets to go watch university fine arts activities. It's just a matter of degree. The fact that people aren't willing to pay as much doesn't make it a non-monetized activity.

Dr. Richard Southall: I said that the Mark Twain quote earlier, "Nobody minds a war so long as it is not too big or in your own backyard." What we have to fundamentally understand is employees can still go to school. Just because you have employee status and have basic human rights doesn't mean that somehow you are foreclosed from going to college. I could negotiate as an employee that one of the benefits I get is a bonafide education that I control instead of giving them something. The amount of paternalism that is involved in college sport and in fantasizing college athletes is incredible. They are 18 years of age. They can serve in the military. They can die for us. But we somehow don't think that they can negotiate a labor agreement. Figure it out.

Dr. Rodney Fort: In my opinion, it is a moot point. But you can go in the direction of legitimizing their activity on the university campus.

Professor Stephen Ross: There are a number of reasons to be persuaded of the outcomes that my two panelists to my left have advocated. But I couldn't disagree more with their methodological approach. To argue that this is an issue of fundamental human rights is to contradict the last panel, because the fundamental aspect of the National Labor Relations Act is the right of a majority of workers in a bargaining unit to bargain as an exclusive representative of the entire unit, and pay some members of the unit less than their economic value. A fundamental right means one that does not change, cannot change, the right to vote, freedom of

religion, etc. Now there are a lot of libertarians who agree with a fundamental right to free market value for labor and services, and they would get rid of our labor laws. That is not what we are talking about now. The use of oppositional rhetoric to the NCAA as if this some 60's protest of "speaking truth to the Man," maybe that works. But I hope law students at Michigan State University would be wary of advocating a policy position, where perhaps there are compromising and balanced interests, as a fundamental right. And perhaps we do not true market value for everyone, perhaps we want something that gives athletes greater protection, some more money, but not completely. That is, I think, a much more advanced way to argue the debate than using the rhetoric of fundamental rights and individual rights and things of that nature. So I really fundamentally disagree with that rhetorical approach.

Paige Szymanski: We have a couple minutes.

Dr. Richard Southall: I did not make a statement about these being legal rights. My background and training is philosophy and ethics. When I talk about a fundamental right, I'm talking about is it a deontological based right, a consequentialist based right, or an existential right.

Professor Stephen Ross: So what about the labor law? Is that a violation of philosophical rights in your judgment? The fact that there are current major league baseball players who are less than 6 years of major league service who receive far less than their economic value to their club--

Dr. Richard Southall: The very basic ethical proposition is that it would be pragmatic. Which is fine. But you have to first look at the basic rights that an athlete should have to negotiate. To negotiate. Instead of simply putting the athlete in a subservient

position that he has no rights to access the labor law. That the athlete has no rights to challenge a system put in place. To deny both labor rights and basic fundamental human rights. So, basic human rights are not obtained through a legal mechanism. Immanuel Kant says that each one of us has a right to be treated as an end in him or herself, not as a means to an end. So I'm talking philosophical.

Professor Stephen Ross: So philosophically, the Wagner Act violates that Kantian right.

Dr. Richard Southall: It might. Which is fine. I'm not trained as a lawyer. My background and training is in ethics. So I'm going to question something based on that. I'll leave the attorneys to tell me to be happy with what you get closest to what you want. As long as everyone is able to access that, I'll probably be okay. Let the players have a good agent who can negotiate.

Paige Szymanksi: And we are just about out of time. *[Audience Laughter]*. We really are! It's true. I'm not lying to you. I'd like all of us to thank the panelists one more time.

Ashley Byers: For those of you wondering, it is 39-27 at the beginning of the second half, MSU is winning. My name is Ashley Byers and I am the current Editor in Chief of the Journal of Business and Securities Law. I just want to thank you all for attending today's symposium and I would like to specifically recognize a few people. First, I'd like to again thank our wonderful panelists for being with us today. We are really appreciative and we're very honored to be part of your dialogue. I'd also like to thank Professors Robert and Amy McCormick for all of the help and assistance they provided the journal with during the planning process for today. I'd also like to thank our advisor Professor

Elliott Spoon for his support throughout the year. I'd also like to thank the entre journal staff for all their work today as well as for the entire year. Also, I'd like to specially recognize the journal's Executive Editor, Samantha, for all of the hard work she put into today's event. So please join me in giving her a round of applause. As the newest member of Michigan State University College of Law's journal community, the Journal of Business and Securities Law prides itself on publishing the best academic work relating to business law and securities law. The primary purpose of the journal is to provide insight into the business community through legal analysis and other types of publications such as articles, personal narratives, and commentary. Today's event is directly in line with the journal's mission. We are thrilled to have worked with our panelists to present a symposium on a topic that affects the business life of the United States. Again, thank you very much to attending and we are looking forward to seeing you next year.

End note: A position statement has been prepared by some of the panelists that presented at this symposium. College Athletes Rights and Empowerment Faculty Coalition (CARE-FC) is a national coalition of faculty concerned with the academic and economic mistreatment of college athletes in the profit sports of football and basketball. The mission of CARE-FC is to support college athletes in their quest to fundamentally change the existing college sport industry by recognizing they are employees who deserve protections afforded such status. For more information, please visit http://care-fc.org/ and read the positions statements CARE-FC has prepared.[80]

[80] CARE-FC, *CARE-FC Statement* (Nov. 9, 2015) http://care-fc.org/care-fc-statement/