**OUT OF THE BOX: A CRITICAL RACE THEORY PERSPECTIVE ON “PAY FOR PLAY”**

Kevin Brown & Antonio Williams[[1]](#footnote-1)

Abstract

*Under the amateur/education model, the amount that colleges and universities can provide to their student/athletes is limited to the athlete’s cost of attending their institution. While this model makes sense for most college sports, NCAA Division I Football Bowl Subdivision and Division I Men’s Basketball tend to generate almost all the revenue to fund their institution’s entire athletic programs, as well as the revenues received by the NCAA. Added to this is the realization that a majority of the elite athletes in these two revenue generating sports are black. Thus, as revenues generated by these sports has escalated, a contentious debate has raged for over 30 years about the potential racial exploitation of the application of the amateur/education model to these two sports. Both sides of this debate tend to see the issue of racial exploitation in terms of dividing the revenues between the athletes or the NCAA and its member institutions. Either the institutions receive more of the funds to use as they see fit or more of the revenues are provided to the athletes—probably at the expense of the amateur/education model. This article attempts to reformulate this debate about racial exploitation by focusing on the interest of the entire Black Community, not just the interest of the elite black male athletes. By taking the Black Community’s perspective, a different view of the issue of racial exploitation and, more importantly, potential solutions to the dilemma emerge. In order to counteract the charge that the amateur/education model is potentially racially exploitive, the NCAA and its member institutions could also institute and fund massive programs that would increase the college attendance and graduation rates for the entire Black Community. Admittedly, these programs would have to be tailored in such a way as not to run afoul of the current interpretations of anti-discrimination laws, but that is possible.*

1. **INTRODUCTION**

Historically, what defined college sports were the twin principles of its identification with an academic tradition and amateurism.[[2]](#footnote-2) In other words, academic institutions conventionally view their athletic programs as vital parts of their educational mission with their athletes as essential members of the student body. Further, amateurism holds that college athletes should not receive compensation beyond expenses related to attending college to play their sport. Thus, as the NCAA Constitution puts it, the participation of student-athletes:

Should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises.[[3]](#footnote-3)

Professor Timothy Davis calls this view of college athletic programs the “amateur/education model.”[[4]](#footnote-4) We make sense of this by considering college sports from the viewpoint of more than 460,000 student-athletes competing in the three divisions of the NCAA.[[5]](#footnote-5)

Whether the amateur/education model, especially the principal of amateurism, should apply to the primary revenue generating college sports of NCAA Division I Football Bowl Subdivision (FBS Football) and Division I Men’s Basketball may be another matter.[[6]](#footnote-6) Even though only about twenty of the Division I athletic departments report a surplus,[[7]](#footnote-7) for colleges and universities that field FBS Football and Division I Men’s Basketball teams, the net profits from those two sports provides a substantial portion of the athletic related revenue that is used to cover the expenses of all the other sports programs.[[8]](#footnote-8) For example, at Indiana University-Bloomington for fiscal year of July 1, 2015 to June 30, 2016, the men’s basketball and football team generated 98.2% of the allocated revenue from all sports teams.[[9]](#footnote-9) The net allocated revenue from men’s basketball was $11,705,810 and football $11,412,804.[[10]](#footnote-10) All other sports combined to report a loss of $21,090,498.[[11]](#footnote-11) Thus, in addition to funding the expenses of the athletes in the revenue generating sports, this revenue pays for escalating coaching salaries in revenue generating sports, scholarships for non-revenue athletes, coaching expenses for non-revenue sports, increased staffs of athletic departments, updated athletic facilities for all sports teams, luxury boxes at football and basketball stadiums for alumni, donors, and dignitaries, and subsidizing university budgets.[[12]](#footnote-12) Also, Division I Men’s Basketball is the primary source for the revenue received by the NCAA. It owns the marketing rights for the NCAA Men’s Basketball tournament, which includes the television rights for which it currently receives about $700 million from CBS and Turner Broadcasting.[[13]](#footnote-13)

Civil rights historian Taylor Branch noted that the sentiment of amateurism “blinds us to what’s before our eyes. Big-time college sports are fully commercialized. Billions of dollars flow through them each year. The NCAA makes money, and enables universities and corporations to make money, from the unpaid labor of young athletes.”[[14]](#footnote-14) Added to this dire situation is the realization that the majority of the elite athletes in revenue generating sports are now black. For example, in 2016, 43.8 percent of Division I football players were black, but the percentage was higher at FBS schools, 53.8 percent.[[15]](#footnote-15) As for Division I Men’s Basketball, black men made up 54.8 percent of the players.[[16]](#footnote-16) In regards to the Power Five Conferences,[[17]](#footnote-17) black males constituted only 2.5 percent of the undergraduate students at these institutions, but they made up even higher percentages of the athletes in revenue generating sports, 56.3 percent of football players and 60.8 percent of men’s basketball players.[[18]](#footnote-18) As a result of this substantial overrepresentation of black male athletes, critics often raise a potential charge that the application of the amateur/education model to revenue generating sports is imbued with racial exploitation.[[19]](#footnote-19) As ESPN reporter Kevin Blackstone put it, “one could clearly envision Black men as gerbils on a wheel that produce the financial energy for all intercollegiate sports to survive and prosper.”[[20]](#footnote-20) More candidly, the former legendary LSU basketball coach Dale Brown stated, “Look at the money we make off predominantly poor black kids, we’re the whoremasters.”[[21]](#footnote-21) This criticism, however, is not new. It has been leveled at college sports for more than three decades. For example, Malcolm Gladwell discussed this in a 1986 article in the *New Republic* as did Professor Gary Sailes in a different writing.[[22]](#footnote-22)

Typically, the arguments about whether the amateur/education model is racially exploitive are directly related to whether athletes receive adequate compensation from their institutions for their services. This leads to another argument about whether the funds for college education are enough for the services rendered by the student athletes or should these athletes be paid even more to play their sport. The Washington Post reported results of a poll in September of 2017 where it found that half of U.S. sports fans felt that a scholarship was adequate compensation for college football and basketball players and 41 percent believed they should be paid more.[[23]](#footnote-23)

Those who believe in the amateur/education model relate any shortcomings in the current system to the failure of institutions to provide the athletes with enough resources in order to have a realistic opportunity to obtain a valuable four-year degree. For these believers, the colleges and universities simply need to do more to assure that their athletes graduate with meaningful degrees. But it is important to note that the NCAA and its member institutions have taken several steps over the past 35 years to increase the percentages of athletes graduating with meaningful degrees. These measures have significantly improved graduation rates of all athletes, but particularly black male athletes in revenue generating sports. In addition, as a result of the threat of antitrust litigation,[[24]](#footnote-24) the NCAA has repealed regulations that limited athletic scholarships to one-year renewable at the option of the institution and that limited the amount of the scholarships to cover tuition and fees, room and board, and required course-related books (collectively known as “grant-in-aid” amounts). Member institutions can now offer full “cost of attendance” scholarships. Colleges and universities can choose to add $2500 to $5000 to the grant-in-aid amounts in order to cover miscellaneous expenses incurred when attending college such as laundry, entertainment, and trips back and forth to home. Thus, proponents of the amateur/education model must reckon with the reality that conditions for athletes have significantly improved. There is also the possibility that there will come a time when colleges and universities reach the extent of their abilities to ensure that their athletes have a realistic opportunity to receive a legitimate four-year college degree. Nonetheless, the revenues generated by FBS Football and Division I Men’s Basketball continue to increase. For example, in 2010 the NCAA signed a 14 year $11 billion deal for the broadcasting rights to the NCAA Men’s Basketball Tournament. While this was a 41 percent increase over its prior deal, the NCAA reached an agreement for an eight-year extension in 2016 with CBS and Turner. Now the contract won’t expire until 2032 and the NCAA receives about $1.1 billion per year, which is a $330 million annual increase.[[25]](#footnote-25) In 2012, ESPN paid $5.64 billion for the broadcasting rights for the first College Football Playoffs.[[26]](#footnote-26) So, for those who do not view the amateur/education model as currently racially exploitive, what happens 10 or 20 years from now as the funds from these sports continues to escalate and there is little or no room for improving graduation chances of these athletes?

Some believe amateur/education model does not allow the athletes to receive enough compensation for their services. They want the NCAA and the member institutions to provide or allow them to receive more funds. The most common suggestion is to allow or compel the institutions to pay the athletes for playing. But this position is not as tenable as it seems. To begin with, there is a risk that the Internal Revenue Service (IRS) may revisit the question of whether the funds produced by revenue generating sports are unrelated income for the colleges and universities. If they are, then these revenues of the colleges and universities would be subject to federal income taxes. Paying athletes also runs the risk that they become employees. Such a determination carries with it various concerns including the following: federal income taxes; state income taxes; social security and Medicare contributions by both the athletes and their institutions; unemployment taxes; and increased tort liability for colleges and universities through the application of *respondeat superior*. Educational institutions must additionally comply with Title IX, which requires equal treatment of the male and female athletes. Beyond these legal considerations are the practical considerations of how to equitably compensate players. After all, shouldn’t the starting quarterback receive more than the third string left guard? Or the leading basketball scorer receive more than the reserve defensive specialist? Admittedly there is less competitive balance in college sports than most sports fans would like. For example, as recently pointed out by Purdue University President Mitch Daniels, in the five years leading up to the 2017-8 season, 45 percent of the “five-star” basketball recruits, and 58 percent of those that played for one year before turning pro have gone to just 5 schools.[[27]](#footnote-27) And it has become common place to cheer against the University of Alabama winning another College Football Championship. But, the question still exists, what happens to the competitive balance that still exists in these college sports if the athletes are paid to play? Proponents of this view, therefore, must reckon with the possibility that the implementation of their approach could very well lead to the dissolution of college sports as we know it.[[28]](#footnote-28) In considering racial exploitation, this solution could generate the ironic result that by paying players the institutions significantly reduce the number of blacks attending and graduating from their colleges and universities.

A closer look at the structure of the arguments around whether the amateur/education model is racially exploitive can reveal the embedded limits of the structure of the arguments both for and against the continued use of the model. Both sides tend to see the solutions to the current issue of racial exploitation in terms of dividing the revenues between the institutions or the athletes. Either the institutions receive more of the funds to use as they see fit or some of the revenues are provided to the FBS Football and Division I Men’s Basketball players, possible at the expense of the amateur/education model.

To raise the question about the possible racially exploitive nature of the amateur/education model involves an understanding of the concept of race discrimination. The predominant legal definition of racial discrimination requires that for it to exist, discriminatory intent must motivate the actor’s conduct. To prove discriminatory intent more is required than an awareness of the racial consequences of an otherwise neutral policy. The relevant decision maker must adopt the policy at issue because of—not merely in spite of—its adverse effects on an identifiable racial group.[[29]](#footnote-29) This is the definition of racial discrimination contained in the equal protection clause of the Fourteenth Amendment that applies to public colleges universities because they are governmental entities. It is also the definition used in lawsuits derived from Title VI of the Civil Rights Act of 1964 that applies to all colleges and universities because they receive federal funds. Further, it is the definition of race discrimination under Section 1981, which applies to the NCAA and its member institutions. So the reality that the NCAA and member institutions are aware of the fact that black male athletes are generating the revenue that is benefitting so many other non-revenue student athletes, coaches, administrators, students, alumni, boosters, and others is irrelevant. No one can persuasively argue that the principle of amateurism was adopted or maintained by the NCAA and its member institutions motivated out of a desire to discriminate against blacks. Thus, it is very unlikely that there will be any legal resolution through the application of anti-discrimination law to the potential racial exploitation that exists with the application of the amateur/education model to revenue generating sports. However, beyond the predominant legal definition of racism, another concept of racial exploitation is centered on a concept of race discrimination not in terms of the motives of an actor, but the effects of the actor’s conduct. These negative effects may result in part from discriminatory intent, but they may also result from unconscious racism, the use of stereotypes, or institutional racism – specifically formal or informal structural mechanisms such as policies and programs that work to systematically produce disproportionately negative consequences on under resourced minorities. It is from this latter viewpoint—discriminatory effects—that issues about the racially exploitive nature of the amateur/education model makes the most sense.

In a groundbreaking article 40 years ago, Professor Alan Freeman pointed out these two different conceptions of racial discrimination.[[30]](#footnote-30) Freeman’s article argued that the distinction between defining discrimination in terms of the intent of the actor, as opposed to effects of the actions, represents a distinction between the perpetrator’s perspective of discrimination as opposed to the victim’s perspective. *From the standpoint of the victim’s perspective, it is important to realize that the victim is the entire Black Community, not just a collection of individual blacks*. Despite the declaration of many pundits that America has already become a post-racial society,[[31]](#footnote-31) there are still huge racial and ethnic disparities in important socioeconomic conditions of different racial groups. For example, the median household income of blacks in 2016 was $39,490, which was only 60.7 percent of white family income and 48.5 percent of Asian family income.[[32]](#footnote-32) With respect to per capita earnings, the figure for blacks of $22,861 was only 65 percent of white and 63 percent of Asian per capita income.[[33]](#footnote-33) The 2016 unemployment rates for blacks (8.4 percent) was more than twice that of Asians (3.6 percent), nearly twice that of whites (4.3 percent), and significantly higher than that of Hispanics (4.7 percent).[[34]](#footnote-34) A much larger percentage of blacks also live in poverty. The poverty rate in the Black Community stands at 27.2 percent, in contrast to Hispanics at 25.6 percent, Asians at 11.7 percent, and whites at 9.9 percent.[[35]](#footnote-35) The disparities in poverty rates are even higher for blacks under the age of 18. Over a third of black children, 36.7 percent, live below the poverty line, in contrast to Hispanics at 33.8 percent, whites at 18.5 percent, and Asians at 13.8 percent.[[36]](#footnote-36) Beyond racial differences in income levels, black families also have considerably less accumulated wealth than white families. According to a September 2017 report issued by Prosperity Now and the Institute for Policy Studies, in 2016 the average white family possessed $134,000 in wealth, compared to $11,000 for the average black family.[[37]](#footnote-37) In other words, the average white family was more than twelve times wealthier than the average black family. While blacks with college degrees have more wealth, the gap is considerably greater and the ratio is about the same. According to a 2016 report on educational attainment, the wealth gap between blacks and whites over the age of 25 with college degrees has remained stable for decades.[[38]](#footnote-38) In fact, “[w]hite households headed by someone with a college degree have a median wealth of $301,300 compared to college-educated black households, which have a median wealth of $26,300.”[[39]](#footnote-39)

As Freeman noted in his article, from the victim’s perspective, the elimination of racial discrimination is accompanied by some significant changes in the conditions of life that were associated with racial discrimination. These changes would include substantial improvements in the material conditions of life, such as better employment opportunities, more income, less poverty, more wealth, and greater educational achievement. By taking the Black Community’s perspective, instead of the prevailing perspective limited to that of elite black male athletes, a different view of the issue of racial exploitation and, more importantly, potential solutions to combat the exploitation that is embedded in the amateur/education model emerge. If we see the issue of racial exploitation in consideration of the entire Black Community, then potential solutions are not limited to simply deciding how to split the funds generated by FBS Football or Division I Men’s Basketball between the institutions or the athletes. But in order to counteract the charge that the amateur/education model is potentially racially exploitive, the NCAA and its member institutions could institute and fund massive programs that would increase the college attendance and graduation rates for the entire Black Community. These programs would not only assist blacks that are currently on the campuses of these colleges and univerisities, but also help students in predominately black school districts throughout the country enroll in colleges and universities after high school. Admittedly, these programs would have to be tailored in such a way as not to run afoul of the current interpretations of anti-discrimination laws, but that is possible.[[40]](#footnote-40) We must also trust that college and university administrators will not simply reallocate athletic revenue and use it to replace funds currently spent on diversity programs.

As formerly mentioned we recognize that anti-discrimination law is not likely to have much of an impact on the legality of the amateur/education model. We also recognize that most of the current major legal cases addressing the issues of whether college athletes should be paid involve the NCAA in antitrust litigation.[[41]](#footnote-41) There are no provisions addressing issues of race discrimination written into the Sherman Antitrust Act. The goal of this article is, therefore, not a strictly legal one. Rather, it is to recast the debate that has raged for over 30 years about whether the amateur/education model applied to the revenue generating sports is racially exploitive by focusing on the interest of the entire Black Community, rather than just the interest of elite black males in those sports. As such, we are following the urging of University of California at Berkeley sociology professor, Harry Edwards, who once wrote, “Far from de-emphasizing or abandoning sport, or simply allowing our involvement to wane, black people must now more than ever intelligently, constructively, and proactively pursue sports involvement.”[[42]](#footnote-42) From this point of view, we believe it would be ironic, if not tragic, to force colleges and universities to pay their elite college athletes because of a prevailing belief that the current system is racist, if the result is to substantially reduce the opportunities that blacks in this country have to pursue and obtain valuable college degrees. This Article will conclude by recommending that the NCAA and its member institutions devote a substantial proportion of the funds that they receive from revenue-generating sports where black males are substantially overrepresented into programs that will help to improve the college attendance and graduation rates in the Black Community.

While alumni, faculty, students, and boosters have long celebrated the athletes of their institutions, college sports was not always a major commercial activity. In 1984, the Supreme Court rendered its only antitrust opinion involving college sports. In *NCAA v Board of Regents*, the Court ended the 33-year reign of the NCAA over the television rights to college football games of its member institutions. By deregulating this control of the NCAA, the Court paved the way for substantial increases in revenues generated by college sports. At the same time, by accepting the amateur/education model put forward by the NCAA as the basis of college sports for antitrust purposes, the Court limited antitrust challenges to the compensation that college athletes could receive.[[43]](#footnote-43) Section II will discuss the rise of the business of college sports as well as the Supreme Court opinion that helped to make it possible. Within the amateur/education model, the coaches of the football and basketball teams have every right to try to get as much out of a player as possible. But, in exchange they should provide that player with every legitimate means necessary to obtain a meaningful college degree. Section III will then discuss several policies and programs adopted and instituted by the NCAA and its member institutions over the past thirty-five years that have significantly improved the chances that member institutions will fulfill their part of the student athlete/institution bargain generated by the amateur/education model. It will also discuss some of the legal obstacles that exist to paying athletes to play beyond the cost of attending their institutions. As a result, substantial legal hurdles exist to abandoning the amateur/education model even as the NCAA is running out of room within the model to improve the situation of the athletes competing in revenue generating sports. Yet, the profits generated by FBS Football and Division I Men’s Basketball continue to escalate. As a result, the tension regarding the possible racial exploitation of the amateur/education model will only intensify in the future. Section IV will look at the amateur/education model from the perspective of the Black Community. It will point to the long history of racial subordination and the struggle against it that have produced a reality where the experiences of individual blacks are connected to those of the Black Community. It will also point out how college sports helps to contribute to maintaining the most destructive stereotypes that blacks encounter including a lack of intelligence and being prone to aggressive and violent behavior. As a result, the situation of black athletes in revenue generating sports are connected to the experiences of the Black Community. Part V will discuss a number of programs that the NCAA and its member institutions could consider that would advance the college attendance and graduation rates of the entire Black Community in order to address the charge that the amateur/education model is racially exploitive.

1. **RISE OF THE BUSINESS OF COLLEGE SPORTS**

Up through the 1970s, the idea that college sports was not a separate commercial activity, was deeply ingrained in higher education. This was a more innocent time for college sports. Seventh Circuit Federal Judge Flaum put it succinctly: This was “an era where recruiting scandals were virtually unknown, where amateurism was more a reality than an ideal, and where post-season bowl games were named for commodities, not corporations.”[[44]](#footnote-44) At this time, the compensation paid to college coaches fell in line with the overall university salary structure. For example, legendary UCLA basketball coach John Wooden’s Bruins won ten NCAA titles between 1964 and 1975. His last title came in his last year of coaching when he was paid $40,000.[[45]](#footnote-45) The head basketball coach at Columbia University made the same as the renowned Marquette basketball coach, Al McGuire.[[46]](#footnote-46) Barry Switzer, who won national college football titles coaching the University of Oklahoma Sooners in 1974 and 1975, was making just $60,000 in 1984.[[47]](#footnote-47)

In 1984, the Supreme Court rendered its only opinion applying Sherman Antitrust Law to college sports, *NCAA v. Board of Regents*.[[48]](#footnote-48) For the 33 years before the Court’s decision, the NCAA, not individual schools or conferences, negotiated college football television contracts with the major television and cable networks.[[49]](#footnote-49) The NCAA imposed strict parameters on television appearances of member institutions. It limited the number of times a given school could appear on television, set a minimum number of schools that had to appear at least once, and set the limit for the amount that each school would receive for its televised appearances. The Universities of Oklahoma and Georgia challenged these NCAA restrictions under antitrust law as unreasonable restraints on trade and the Supreme Court agreed.

In rendering its opinion, however, the Court accepted the model of college sports put forward by the NCAA, which rests on the twin principals of the identification of it with an academic tradition and amateurism.[[50]](#footnote-50) In the opinion, the Court wrote:

[T]he NCAA seeks to market a particular brand of football—college football….*In order to preserve the character and quality of th[is] “product,” athletes must not be paid*, must be required to attend class, and the like. And the integrity of the “product” cannot be preserved except by mutual agreement; if an institution adopted such restrictions unilaterally, its effectiveness as a competitor on the playing field might soon be destroyed. *Thus, the NCAA plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable. In performing this role, its actions widen consumer choice—not only the choices available to sports fans but also those available to athletes*—and hence can be viewed as procompetitive” (emphasis added).[[51]](#footnote-51)

In rendering this decision to eliminate the NCAA’s control over television rights, the Court paved the way for dramatic increases in broadcasting and other revenues for colleges and universities with big time sports teams. Simultaneously, the Court allowed the NCAA and its member institutions to strictly limit the compensation of the athletes responsible for producing these increased revenues. In other words, the Court foreclosed the possibility that antitrust litigation would succeed in providing student-athletes in revenue generating sports a means to substantially share in the increased revenues that started to flow to member institutions as a result of the Court’s own deregulation of televised broadcasting rights for college sports.

Since the Supreme Court’s opinion in *Board of Regents,* college sports have become not just big business, but a massive business industry generating tremendous revenues from the production and distribution of games. Collectively, the revenue from FBS Football and Division I Men’s Basketball is more than $7 billion.[[52]](#footnote-52) These revenues exceed those of the English Premier Soccer League, the NBA, and the NHL.[[53]](#footnote-53) It makes college sports the third most lucrative sports industry in the world behind only the NFL and Major League Baseball.[[54]](#footnote-54) Due to technological advances in broadcasting in recent years, the ability of the public to see college sports games has been augmented by the creation of satellite and internet broadcasting, as well as regional sports networks like the Big Ten Network and the SEC Network. To get a sense of how much more revenue college sports generates today than when *Board of Regents* was decided, we can look at the television contracts executed by the NCAA that were the subject of that litigation. The NCAA had four-year television agreements with ABC and CBS that ran through the 1985 season, with each network paying a minimum of $131.75 million for broadcasting at least 35 games each year. In addition, there was a two year $18 million deal with Turner Broadcasting. Thus, the average annual television revenues for all college football games televised were approximately $75 million.[[55]](#footnote-55) According to an article by Paula Lavigne of ESPN.com., in 2015 the Power Five conferences collectively received over $6 billion in revenue of which $1.4 billion came from selling TV rights.[[56]](#footnote-56)

According to USA Today’s annual college revenue for sports breakdown in 2015-16, Texas A&M topped the list of colleges with over $194 million in revenue, followed by the University of Texas at nearly $188 million. There were 28 public universities–more than double the amount from 2013–where the athletic department’s revenues exceed $100 million.[[57]](#footnote-57) More than 58 public universities reported revenues in excess of $50 million.[[58]](#footnote-58) Moreover, revenues from college sports are likely to increase going into the future as college conferences are now looking for opportunities on internet platforms like Google and Amazon to further capitalize on their broadcasting rights.[[59]](#footnote-59) As evidence of the escalating proceeds generated by college sports, the median generated revenue of the FBS Football programs increased by over 160 percent between 2004 to 2014, to 21.7 million and for Division I Men’s Basketball it increased by almost 45 percent over that time to 5.8 million.[[60]](#footnote-60)

While there are a number of different ways to try to assess whether college athletes in revenue generating sports are undercompensated. One way is to compare them to professional athletes. Unlike college athletes, both NFL and NBA players have players’ unions to represent their interests and negotiate with the owners on their behalf. Under the current NFL collective bargaining agreement that runs through the 2020 season, the players receive a minimum of 47 percent of league wide revenue.[[61]](#footnote-61) The NBA players receive a 50-50 split of basketball related revenue under the terms of their ten year Collective Bargaining Agreement signed in December 2011.[[62]](#footnote-62) Yet, if you take the average revenue for an FBS Football program of 21.7 million and divide it by 85 scholarship athletes you come up to over $255,000 in revenue generated by each athlete. For the 13 scholarship basketball athletes, the corresponding amount is $446,000. In contrast, according to the 2014 college pricing report by the College Board, the average cost of tuition and fees and room and board (grant in aid amounts) are $32,762 for public colleges and $42,419 for private ones.[[63]](#footnote-63) Often these amounts are discounted by the colleges and universities, especially the totals for tuition and fees.[[64]](#footnote-64) Richard Huma and Ellen J. Staurowsky[[65]](#footnote-65) conducted a collaborative study between the National College Players Association and Drexel University Sports Management Program of the amateur/athlete model. They concluded that the market value for big time college football and men’s basketball players to be $137,357 and $289,031, respectively.[[66]](#footnote-66) Recently, Richard Borghesi, a Finance Associate Professor at the University of South Florida, conducted a study of FBS football recruits where he concluded that five-star players would be entitled to an additional $799,000 per year, for four-star players it would be an additional $361,000, for three-star players an additional $29,000 and $21,000 for two star players.[[67]](#footnote-67)

Freed from the need to provide additional compensation to student athletes in the revenue generating sports, the amounts colleges and universities spend on other parts of their athletic sports programs have exploded. And, this arms race is continuing.[[68]](#footnote-68) For example, salaries that colleges and universities pay to their successful coaches in revenue generating sports have skyrocketed. The highest-paid state official in 39 of the 50 states is a men’s college basketball or football head coach.[[69]](#footnote-69) The average salaries for the 44 head football coaches in the NCAA Bowl Championship Series increased from $273,300 in 1986 to $2,054,700 by 2013,[[70]](#footnote-70) while over the same time the cost of living only doubled.[[71]](#footnote-71) The compensation for successful coaches has likewise skyrocketed. Compared to John Wooden’s $40,000 salary, current UCLA head basketball coach Steve Alford earned $2.6 million.[[72]](#footnote-72) And the $60,000 annual salary paid by Oklahoma University to Barry Switzer now exceeds $5 million, which is paid to Booby Stoops.[[73]](#footnote-73) The compensation of the most successful head coaches has reached amounts nearly as high as those for Fortune 500 CEOs.[[74]](#footnote-74) According to *USA Today*, the highest-paid college basketball coaches in 2017 were Rick Pitino (Louisville at $7.7 million), John Calipari (Kentucky at $7.4 million), Mike Krzyzewski (Duke at $5.5 million), Bill Self (Kansas at $4.9 million), and Tom Izzo (Michigan State at $4.2 million).[[75]](#footnote-75) *USA Today* also reported that Nick Saban was the highest-paid college football coach, receiving over $11 million a year from the University of Alabama. Saban is followed by Clemson’s Dabo Swinney, Michigan’s Jim Harbaugh, Ohio State’s Urban Meyer, Arizona’s Rich Rodgriguez, Florida State’s Jimbo Fisher, Stanford’s David Shaw, Texas’s Tom Herman, Texas Christian’s Gary Patterson, and Texas A&M’s Kevin Sumlin—all of whom are paid $5 million or more by their universities.[[76]](#footnote-76) These figures do not include outside pay and bonuses that push the coaches’ compensation even higher.[[77]](#footnote-77)

The increases in expenditures for college sports does not stop with head coaches in revenue generating sports. In the decade following 2004, Will Hobson and Steven Rich noted that non-coaching payrolls of the athletic departments of the 48 schools in the five wealthiest conferences increased from $454 million to $767 million, a seventy percent increase in a decade.[[78]](#footnote-78) And, in 2014, one in five Division I athletic directors said their departments planned on spending more than $50 million on facilities in the next five years.[[79]](#footnote-79)

The NCAA has also reaped huge benefits from increasing college sports revenues. The vast majority of the NCAA’s revenues come from the operation of the Division I Men’s Basketball Tournament. The first one was held in March of 1939 and lost money.[[80]](#footnote-80) In 1985, the NCAA received $31 million from the television rights for the Tournament.[[81]](#footnote-81) In fiscal year 2014, however, the NCAA’s total revenues exceeded $1 billion with the majority of those revenues, about $700 million, from television and marketing agreements with CBS and Turner Broadcasting for the Tournament.[[82]](#footnote-82) Most of the other revenue generated by the NCAA is also tied to the Tournament, including ticket sales. Of course, the NCAA distributes a significant portion of its revenues to its member schools and conferences, including $547.1 million given to Division I schools and conferences from 2014 revenues.[[83]](#footnote-83) However, due to the money the NCAA receives, its net assets doubled between 2006 and 2012 to over $566 million.[[84]](#footnote-84) NCAA also had a surplus in 2014 of nearly $80.5 million.[[85]](#footnote-85) This increased NCAA assets to almost $708 million.[[86]](#footnote-86) But the NCAA incurred significantly more expenditures in 2016, $1.4 billion, which dropped its total assets down to a little under $300 million.[[87]](#footnote-87)

**III. LIMITS OF AND OBSTACLES TO ABANDONING THE AMATEUR/EDUCATION MODEL**

When speaking about football players, legendary Ohio State head coach Woody Hayes succinctly summarized the *quid pro quo* of the amateur/education model.

The coach will squeeze every bit of football from each player that he can, but in return the coach must give that man every legitimate measure of help he needs to get ‘the rest’ of his education.… [W]e feel that the man who plays college football and does not graduate has been cheated.[[88]](#footnote-88)

Under this model, the maximum obligation of the institution to the athlete is to provide scholarships to cover all costs related to pursuing a four-year academic degree and the academic support necessary to give athletes a realistic opportunity to obtain that degree.

For the black athlete, Woody Hayes’s view of college sports was more the exception than the rule. For example, a 1982 article in the *Sporting News* revealed that only 50 percent of seniors regularly playing basketball in seven major conferences graduated with a degree and in the Southwest Conference the figure was only 17 percent.[[89]](#footnote-89) A survey during the 1980s of 100 Division I basketball and football programs showed that at 35 of the schools the graduation rate for male basketball players was under 20 percent and the same was true at 14 of these institutions for football players.[[90]](#footnote-90) Malcolm Gladwell pointed out in a 1986 article in the New Republic entitled *Dunk and Flunk*, that only one fourth of the nation’s black male athletes in major college sports graduate from college and 75 percent of them have degrees in physical education.[[91]](#footnote-91)

Sometimes responding to public criticism, sometimes under the threat of litigation, and sometimes based on their own initiatives, over the past 35 years the NCAA and its member institutions have made strides towards achieving the maximum compensation allowable for student athletes in revenue generating sports under the amateur/education model. They have instituted several measures to improve the academic performance of athletes, especially those in revenue generating sports. And, many institutions have also increased the financial value of their athletic scholarships. While there is still much that has to be done to make the promise of a genuine opportunity for a meaningful college degree an absolute reality, the NCAA and its member institutions have travelled a long way down this road.

The first section of this part will discuss a number of changes instituted by the NCAA to increase academic eligibility requirements for college athletes, especially those in revenue generating sports. These increased academic requirements helped to ensure that more prospective athletes are academically prepared for the rigors of college study and proceeding towards obtaining a degree. The second section will discuss the adoption of the Academic Progress Rate. This is a measure that provides an incentive to the member institutions to ensure that their athletes are progressing towards a college degree in each sport, including football and basketball. Failure of an institution to ensure that their athletes are doing so can lead to sanctions imposed by the NCAA. With regard to financial support to pay for the cost of a college education, until recently the NCAA limited the scholarships to one year, renewable at the option of the institution. Additionally, the NCAA limited the amount of an academic scholarship to the grant-in-aid amount. As such, the scholarships did not cover all of the cost an athlete encountered in pursuing their degree. Due to the threat of litigation, the NCAA has repealed these limitations. Conferences and member institutions are now able to offer multi-year scholarships. They can also provide full cost of attendance scholarships to their athletes. The third section will discuss the information about the recent increases in financial support that college athletes have received. There is evidence that all of these changes are improving persistence and graduation rates of athletes, especially those in revenue generating sports, which is discussed in the fourth section of this part. Even if the NCAA allowed its member institutions (voluntarily or as a result of court injunctions), to pay athletes compensation beyond the cost of attending their institutions, there are several significant legal obstacles that colleges and universities desiring to do so will encounter. Addressing these obstacles may substantially increase the cost of abandoning the amateur/education model. It is, therefore, unlikely that many member institutions would have the desire and the ability to do so. Thus, it is important to understand the legal obstacles that may make the amateur/education model one that only a few institutions could abandon. These challenges are delineated in the final section of this Part.

1. NCAA AND MEMBER INSTITUIONS EFFORTS TO IMPROVE ACADEMIC PERFORMANCE BY ADOPTING AND INCREASING ACADEMIC ELIBILITY REQUIREMENTS FOR ATHLETES.

For some time, the NCAA has consistently increased academic requirements for athletes competing at major universities. However, this narrative must take into account the societal changes that started to bring increasing numbers of black students to mainstream college campuses. As William Bowen and Derek Bok noted in their hugely influential book, *The Shape of the River*, “it is probably safe to say… that prior to 1960, no selective college or university was making determined efforts to seek out and admit substantial numbers of African Americans.”[[92]](#footnote-92) The same was true with regard to their athletic programs as well. This would start to change with the Civil Rights Movement of the 1960s, but it would take longer for universities in the South to give black athletes opportunities. Recall that President Kennedy had to call out the National Guard in order to ensure the registration of James Meredith at Ole Miss in the fall of 1962. And who can forget Alabama Governor George Wallace’s famous inauguration speech delivered at the portico of the Alabama State Capitol in January, 1963 where he proclaimed “Segregation now, segregation tomorrow, segregation forever”? [[93]](#footnote-93) Indeed, legendary Alabama head football coach Bear Bryant had wanted to recruit black players for years, but couldn’t due to Wallace’s objection.[[94]](#footnote-94) It was not until Billy Jones of Maryland played during the 1965-6 season that the ACC had its first African-American basketball player.[[95]](#footnote-95) Elvin Hayes and Don Chaney were the first black basketball players recruited by Guy Lewis at the University of Houston in 1966.[[96]](#footnote-96) And, the first black to play for a team in the SEC was Kentucky’s Nat Northington when he played in a game at Indiana University in Bloomington on September 23, 1967. By the early 1970s, however, major recruiting efforts for black players were underway. This led to a substantial influx of black athletes to Division I campuses for the first time ever during the 1970s and early 1980s. In about a generation, blacks had gone from very small numbers on major college campuses, to dominant sports figures.[[97]](#footnote-97)

Prior to 1964, the NCAA let each institution set rules about their athlete’s qualifications for admissions and to play. In 1964, the NCAA adopted a rule that required prospective athletes have a minimum 1.6 predicted GPA at the institution they sought to enroll. This was determined by the student’s high school GPA, class ranking, and combined SAT or ACT score. In 1968, the NCAA decided to allow freshmen to compete on sports teams other than in football and basketball. Four years later, this restriction was lifted for those sports as well.

Academically stronger institutions raised complaints about the 1.6 predicted GPA requirement because it varied based upon the academic strength of a given institution’s programs. These institutions pointed out that a 1.6 GPA at their institution did not mean that an athlete was a marginal academic student. The rule also had a negative disparate impact on black athletes right at the time that many mainstream colleges and universities were finally starting to recruit meaningful numbers of black students.[[98]](#footnote-98) These complaints led the NCAA to repeal the predicted 1.6 GPA requirement in 1973. Thus, the need for a prospective athlete to have a minimum 2.0 high school GPA was the only academic qualification imposed by the NCAA as the number of black athletes on college campuses exploded.[[99]](#footnote-99)

After several academic scandals, in 1983, the NCAA adopted the controversial Proposition 48, which took effect in 1986. Prop 48 required that a prospective athlete who wanted to compete as a freshmen obtain a minimum 2.0 GPA in eleven core academic high school courses and 700 SAT or 15 ACT score. Athletes who met either (but not both) requirements were deemed partial qualifiers, could still enroll in school, and received an athletic scholarship. However, a partial qualifier was not eligible to practice or play as a freshman. If the institution concluded that the athlete made satisfactory academic progress, then the athlete could play the following year.

Due to the racial differences in standardized test scores, Prop 48’s negative disparate impact on prospective black male athletes was obvious. Richard Lapchick observed that if Prop 48 was in effect in 1981, it would have made 69 percent of the black male scholarship athletes ineligible to participate in their sport during their first year.[[100]](#footnote-100) For the first two years after Prop 48 was adopted (1984–86), blacks would have constituted 92 percent of the academically ineligible basketball and 84 percent of the ineligible football players.[[101]](#footnote-101) Nevertheless, in 1989, the NCAA adopted Proposition 42 to strengthen Prop 48. Prop 48 still allowed member institutions to recruit academically marginal athletes if they were partial qualifiers. Prop 42 eliminated the ability of the partial qualifier to receive an athletic scholarship. But the NCAA allowed them to receive need-based scholarships. Prospective athletes that did not meet either qualification, however, were banned from receiving even need based scholarships. These measures led to a sharp drop in the participation rates of black athletes in Division, 24 percent to 17 percent. By 1993, however, the percentage of blacks in Division I sports had rebounded to 28.[[102]](#footnote-102)

The NCAA increased academic requirements for freshmen again when it adopted Proposition 16 in 1992, which took effect in 1996.[[103]](#footnote-103) Prop 16 increased the core academic courses from 11 to 13. This was increased again to 14 in 2003, and to 16 in 2008. Proposition 16 also introduced a sliding scale for the minimum GPA and SAT/ACT scores. So, the higher the athlete’s high school grades the lower their required corresponding SAT or ACT score and vice-a-versa.

UNDER THE CURRENT SLIDING SCALE - If you have a:

* + 3.55 GPA, then you need 400 on the SAT or 37 on the ACT
  + 3.25 GPA, then you need 520 on the SAT or 46 on the ACT
  + 3.00 GPA, then you need 620 on the SAT or 52 on the ACT
  + 2.75 GPA, then you need 720 on the SAT or 59 on the ACT
  + 2.50 GPA, then you need 820 on the SAT or 68 on the ACT
  + 2.30 GPA, then you need 900 on the SAT or 75 on the ACT

There is also a sliding scale for athletes that are considered academic redshirts if they at least have a 2.0 high school GPA and high enough SAT or ACT. As an academic redshirt, the athlete can receive a scholarship and practice, but not play in competition.[[104]](#footnote-104)

The academic requirements were raised again for students enrolling in August 2016. The same basic sixteen (16) academic core courses are now required. However, athletes must complete ten (10) of those courses before their seventh semester and seven (7) of the 10 must be in English, math or natural /physical science.

Beyond the requirements for freshmen eligibility, the NCAA has also adopted measures to ensure that athletes are progressing towards a college degree. Under these requirements, in order to retain athletic eligibility, an athlete must make satisfactory progress towards a degree. Thus, prior to the start of the second year, the athlete must have completed at least 24 semester hours or 36 quarter hours and obtain a GPA that is at least 90 percent of the GPA to graduate (1.8 if 2.0 is required). Starting their third year, the athlete must designate a program of study that will lead to a Bachelor’s degree, completed 40 percent of academic requirements for that field of study, and obtain 95 percent of the GPA to graduate. Prior to the fourth year, the degree completion percentage increases to 60 percent and 100 percent of the GPA to graduate and prior to the fifth year, 80 percent toward the degree and 100 percent of the GPA.[[105]](#footnote-105)

B. OBLIGATIONS OF MEMBER INSTITUTIONS TO IMPROVE ACADEMIC PERFORMANCE OF ITS ATHLETES

In May 2004, the NCAA adopted legislation that instituted a metric known as academic progress rate (APR). Each student-athlete receiving athletically related financial aid earns one retention point for staying in school and one eligibility point for being academically eligible. A team’s APR is calculated by taking the points and dividing them by the total points possible, then multiplying them by 1000. NCAA President Myles Brand called its adoption the “most far-reaching effort of its kind in NCAA history.”[[106]](#footnote-106) The APR system was instituted by the NCAA to place more accountability and responsibility on athletic programs in order to ensure the academic success of the student-athletes and their progression toward graduations within five years. It is the first time, the NCAA adopted a requirement that made the institutions responsible for the academic performance of their athletes.

The NCAA requires a 930 minimum APR score. This is supposed to generate a 50 percent graduation rate. For an athletic team at a given school that fails to meet the minimum, they can suffer sanctions starting with reduced practice time. The sanctions can escalate to coaching suspensions, financial aid reductions and restricted NCAA memberships. [[107]](#footnote-107) This provides an incentive to member institutions to strengthen their academic advising, counseling, and tutoring services provided to athletes.

C. MULTI-YEAR AND INCREASES IN AMOUNT OF ATHLETIC SCHOLARSHIPS

Due to the risk of antitrust litigation, the NCAA has moved to increase the ability of member institutions to provide more financial support to athletes in recent years. In 1973, the NCAA adopted a measure that limited athletic scholarships to one-year, renewable at the option of the institution. [[108]](#footnote-108) Thus, an institution was under no obligation to provide an injured student who could not play a scholarship for the following year. In addition, a coach could decide not to renew the scholarship of an athlete that did not meet the coach’s expectation of athletic ability. This was a common practice. According to the National College Players Association, which claims 7,000 active members, 22 percent of top Division I Men’s Basketball players found their scholarships were not renewed between 2008 and 2009.[[109]](#footnote-109) However, under the threat of litigation, the NCAA has abandoned its rule that limited an athletic scholarship to a renewable one-year scholarship.[[110]](#footnote-110) Now member institutions are free to make their own decisions regarding whether to provide student-athletes with multi-year scholarships that the athlete will not lose due to injury or inadequate athletic performance. Both the Big Ten and Pac 12 have agreed to offer multi-year scholarships to all of their athletes as long as the athletes follow team rules and remain academically eligible.[[111]](#footnote-111) A number of other schools, including Florida, South Carolina, Oklahoma State, Kentucky, Clemson, and Virginia, have also decided to offer multi-year scholarships.[[112]](#footnote-112)

In addition to previous NCAA rules limiting scholarships to renewable one-year ones, the NCAA also imposed rules that limited the amount of an athletic scholarship to the cost of tuition and fees, room and board, and required course-related books.[[113]](#footnote-113) These grant-in-aid amounts never covered the full “cost of attending” college, because they did not include funds for miscellaneous expenses such as incidental living expenses, books not required for courses, entertainment, and transportation, including for trips to and from the athletes permanent residence. These additional amounts are calculated by the financial aid officers under the authority of the U. S. Department of Education who use their “professional judgement” to determine the appropriate amount.[[114]](#footnote-114) The amounts vary from one institution to the next. However, commentators have generally estimated the average of these expenses at between $2500 and $5000.[[115]](#footnote-115)

On August 8, 2014, Federal District Court Judge Claudia Wilken opinion struck down as an unreasonable restraint on trade the NCAA rules that prohibited athletic scholarships from exceeding the amount of grant-in-aid for both FBS Football and Division I Men’s Basketball players in *O’Bannon v NCAA*.[[116]](#footnote-116) Prompted by the decision, the NCAA repealed its rule that limited athletic scholarships to grant-in-aid amounts that month. In her opinion, Judge Wilken did not preclude the NCAA from capping the amount of compensation that athletes received while in school. She did enjoin it from setting this cap below the cost of attendance, as the term is defined in its current bylaws.[[117]](#footnote-117) She also prohibited the NCAA from enforcing any rules preventing a member school or conference from depositing up to $5000 a year of deferred compensation from funds derived by the use of student-athletes’ name, image or likeness in an account for each of them as long they remained academically eligible to compete. The colleges and universities, however, could not distribute these funds to student-athletes until they left the institution or their eligibility expired.[[118]](#footnote-118) Yet, Judge Wilken’s order did not prohibit the NCAA from enacting and enforcing rules that required each recruit in the same class to receive the same amount of deferred compensation.[[119]](#footnote-119)

On September 30, 2015, the 9th Circuit affirmed in part and vacated in part Judge Wilken’s decision. All three judges agreed that the District Court was correct in enjoining the NCAA from limiting scholarships to anything less than the full cost of attendance. The judges pointed out that student-athletes who receive the full cost of attendance for their services are still not receiving compensation beyond their college expenses. Allowing colleges and universities to pay the full cost of attendance of their athletes is completely consistent with amateurism and is a less restrictive way of advancing that pro-competitive justification than limiting the scholarships of athletes to grant-in-aid amounts. But, the deferred compensation was another matter. The judges split 2 to 1 on whether the District Court should have enjoined the NCAA from preventing member institutions and conferences from providing student-athletes with up to $5000 a year in deferred compensation. The majority rejected the notion, but Chief Judge Thomas would have upheld the lower court’s injunction on this matter as well.[[120]](#footnote-120)

As with multi-year scholarships, the choice of increasing the amount of an athletic scholarship from the grant-in-aid amount to the cost of attendance amount is left to the member institutions. At the NCAA’s January 2015 Convention, the Power Five Conferences approved a measure that increased their athletic scholarships to cover the athlete’s full cost of attendance. A number of other non-Power Five Conferences have followed this example including the Mid-American Conference, the Horizon League, the Big South and schools including College of Charleston and Towson State.[[121]](#footnote-121) The result of these changes led to an almost 9 percent gain in 2016 in the amount of financial aid provided by the 230 Division I schools’ that USA Today tracks. This was the largest gain in financial aid for athletes since 2010.[[122]](#footnote-122) It should be noted that the litigation in the *O’Bannon* case only involved athletes in revenue generating sports, but the reaction by the conferences and institutions has been to increase the scholarships of all athletes. So once again, the athletes in revenue generating sports are the impetus to improving the compensation provided to all college athletes.

In 2016, the NCAA Board of Governors approved a one-time supplemental distribution of $200 million to Division I schools that was distributed in the Spring of 2017. The institutions could use the money for literacy and mental health programs, expand academic advising services, provide unlimited meals and snacks for athletes, help to cover the full cost of attendance scholarships, and pay for four-year scholarships. As mentioned earlier, the NCAA signed an eight year extension with Turner and CBS covering the broadcasting rights for the Men’s Basketball Tournament in 2016. So, the NCAA also passed a resolution deciding to distribute some of the increased funds it will receive to its member institutions based on a formula that will take into account the academic performance of their teams.[[123]](#footnote-123) And, in the Spring of 2017, Judge Claudia Willkens approved a $208.7 million settlement in a class-action lawsuit by FBS Football and Division I Men’s and Women’s Basketball players who played from March 2010 to through the 2016-7 seasons. This settlement concluded the damages part of the lawsuit filed by former student athletes who argued that the cap on the economic value of the scholarship to grant-in-aid amounts was a violation of federal antitrust law. Each of the 40,000 eligible athletes will receive approximately $6,500.[[124]](#footnote-124)

D. EVIDENCE OF IMPROVED GRADUATION RATES

The desire to win on the athletic field provides a strong incentive for FBS Football and Division I Men’s Basketball teams to place the needs of their athletic programs above the academic interest of their student-athletes. Thus, the revenue generating sports continue to be plagued by academic scandals such as the recent one at one of America’s most venerated academic institutions, the University of North Carolina.[[125]](#footnote-125) Nevertheless, all of the changes noted above appear to have increased the academic success of student athletes in revenue generating sports.

There are two different reported ways to assess academic success of student athletes. First, the federal approach is essentially a two snap shot approach to determining the percentage of college graduates at a given institution. One snapshot looks at the number of students that enter an institution and the second at how many of those who entered graduated from that institution six years later. As a result, this approach fails to account for students that transfer to a different institution and graduate. Indeed, any transfer student is treated as a drop out, even though as many as one-third of students transfer at least once while in college and still graduate.[[126]](#footnote-126) Since the NCAA tracks student-athletes for six years, it has the capability of taking into account transfers in its calculations of academic success. Thus, the NCAA developed the graduation success rates (GSR) approach in 2005 because it felt that there was a need for a more accurate measure of academic success than the methodology employed by federal government. In contrast to the federal graduation rate, the GSR will add to the number of incoming freshmen in a given cohort students who first enter college in the middle of the first year, as well as, transfer students that receive athletic aid. The GSR also deducts from the numbers of a given cohort allowable exclusions[[127]](#footnote-127) and athletes who left their institution prior to graduation that still had athletic eligibility remaining and were academically eligible to compete had they returned to their institutions. While the GSR is more accurate than the federal approach, the GSR is not comparable to the graduation results generated by the federal approach.

Using federal graduation data, Shaun Harper, Collin Williams, and Horatio Blackman of the Center for the Study of Race & Equity in Education at the University of Pennsylvania studied the 76 member institutions of six major Division I conferences, Atlantic Coast Conference (ACC), Big Ten Conference, Big 12 Conference, Pac 12 Conference, the Southeastern Conference (SEC), and the old Big East.[[128]](#footnote-128) They found that across four cohorts who graduated between 2007 and 2010, the black male student-athletes graduated at a rate of 50.2 percent in six years. In contrast, they found that the percentage for black undergraduate males at these institutions that graduated in six years was 55.5 percent. For comparisons, their study found that 66.9 percent of student-athletes overall, and 72.8 percent of undergraduate students overall graduated in six years.[[129]](#footnote-129) Shaun Harper did a follow up study three years later and found that six year graduation rates for all groups had improved. He found that “53.6% of Black male student-athletes graduated within six years, compared to 68.5% of student-athletes overall, 58.4% of Black undergraduate men overall, and 75.4% of undergraduate students overall.”[[130]](#footnote-130)

Where the above study indicated that black male athletes had lower graduation rates than black male students on the same campuses, other evidence suggests that black male athletes are graduating at higher rates than other black males. According to Michelle Brutlag Hosick, based on federal graduation rates, 55 percent black male student athletes in Division I who started college in 2010 graduated in six years, whereas only 40 percent of black male undergraduates did.[[131]](#footnote-131) The black athletes are outpacing all blacks in Division I, graduating at a rate of 59 percent compared to 46 percent. The 59 percent graduation rate is a substantial increase from the 35 percent rate for the ones entering college in 1984.[[132]](#footnote-132)

The GSR paints an even rosier picture regarding the increasing academic progress of black male student athletes. In 2017, the GSR reached an all-time high of 87 percent for Division I athletes.[[133]](#footnote-133) The overall GSR for black male student-athletes in Division I was 77 percent, which is a 21 percent increase since 2002.[[134]](#footnote-134) In addition, 78 percent of black male Division I Men’s Basketball players earned their degrees, which is up a staggering 32 points since 2002.[[135]](#footnote-135) For black football players who were enrolled in FBS Schools, their GSR was a record 73 percent, which is a 20 point increase since 2002 years.[[136]](#footnote-136) In a separate study, Richard Lapchick reported that the average GSR for the black male athletes in the 80 Division I football schools that played in a bowl game in 2016 was 68 percent, two percent higher than in 2015.[[137]](#footnote-137)

E. LEGAL OBSTACLES TO ALTERING AMATEUR/EDUCATION MODEL

The amateur/education model is not just the product of the desires of the NCAA and its member institutions. There are several significant legal obstacles that prevent colleges and universities from abandoning the principal of amateurism with regard to its student athletes. Thus, even if the NCAA allowed its member institutions, voluntarily or as a result of court injunctions, to compensate athletes in revenue generating sports beyond full cost of attendance scholarships, not many of them are likely to do so.

The IRS last adopted a Revenue Ruling, 77-263, that applied to college athletic scholarships over 40 years ago. Under current federal income tax law, college and university sports programs are viewed as amateur athletics and part of the educational mission of their institutions. As a result, the incomes that these institutions receive from the operations of their FBS Football and Division I Men’s Basketball programs are not taxable. This could be up for reconsideration if the IRS views revenue generating sports as a commercial activity separate from the educational mission of their respective institution. Like other tax-exempt institutions a college or university could be taxed as a regular corporation would on what is considered unrelated business income. That is a business venture that is not substantially related to the institutions exempt purposes, which for a college would be education.[[138]](#footnote-138)

Student athletes are not viewed as employees under the various legal regimes that otherwise apply to the employer/employee relationship.[[139]](#footnote-139) As Professor Matt Mitten, the director of the National Sports Law Institute at Marquette Law School, pointed out, if college athletes are paid “they would likely be characterized as employees. And that has a number of implications.”[[140]](#footnote-140) Thus, if colleges and universities start to pay athletes funds beyond cost of attendance, the notion that they are not employees might change. To start with, the IRS states that amounts paid to a student as compensation for past, present or future employment services do not qualify as scholarships.[[141]](#footnote-141) However, scholarships for athletes that are used to pay qualified educational expenses do not count as income for federal tax purposes.[[142]](#footnote-142) The IRS defines qualified expenses as tuition, required fees, and/or books, supplies, and equipment required of all students in the course. The characterization of the amounts currently given to athletes could change if the basic relationship between the university and the athlete is re-conceptualized as one of employer/employee. Such a change could also have implications for state and local income taxes as well.

Scholarship funds paid to employees are currently not subject to Federal Insurance Contributions Act (“FICA”). Under FICA, wages paid to employees are subject to a 7.65 percent tax for each the employer and employee, up to a certain income limit.[[143]](#footnote-143) These funds are used to cover social security and Medicare payments to the elderly. Section 3121(b)(10) of the IRS Code excludes wages paid by a university to a student enrolled and regularly attending classes.[[144]](#footnote-144) Treasury Department regulations, however, do not allow this exclusion if a student is considered a full-time employee with a normal work schedule over 40 hours. In a 2011 opinion, the Supreme Court held that this regulation meant that medical students enrolled in residency programs do not qualify for the exclusion.[[145]](#footnote-145) If student athletes are paid, the IRS may re-examine its current position regarding these exclusions of funds received by student athletes.

There are several other potential legal issues involved if athletes become employers. Universities, as employers, might also have to pay unemployment insurance premiums on the wages of its athletes turned employees. If student athletes are viewed as employees, then state Workmen’s Compensation laws might apply.[[146]](#footnote-146) If so, such laws would require colleges and universities to provide athletes who are employees with certain benefits when they are “injured on the job.” These benefits could include not only permanent disability payments, but also payment of long term medical care for sports related injuries. Courts might have to revisit whether the Federal Labor Standards Act (FLSA) applies to members of FBS Football and Division I Men’s Basketball teams.[[147]](#footnote-147) While a student-athlete receiving scholarships that cover even the grant-in-aid amounts would receive far more than minimum wage, what about partial scholarship recipients or the walk-on non-scholarship athlete on a revenue generating sports team? Does the fact that many of the non-scholarship athletes’ teammates are being compensated beyond the cost of attendance convert these non-scholarship athletes into employees for FLSA purposes and, thus, eligible for minimum wage requirements for their athletic “work”?

There are other legal issues that institutions that want to pay college athletes to play must consider. Through the legal doctrine of *respondeat superior,* colleges and universities could also become civilly liable for some of the tortious conduct of their athlete employees, including outrageous conduct during sporting contests. This would increase universities’ exposure to civil liability. Athletes that are considered employees who play for public universities might gain certain due process rights to their continued membership on their respective team, and, possibly, playing time.[[148]](#footnote-148) Another significant legal hurdle that must be addressed if athletes in revenue generating sports are provided compensation beyond cost of attendance scholarships is Title IX. The requirement of equity for both sexes in athletic programs will prevent colleges and universities from providing extra compensation to just male student athletes. And this list of legal obstacles to abandoning the amateur/education model for athletes in revenue generating sports is not exhaustive. Thus, despite current antitrust actions in the courts, it seems very unlikely that many colleges and universities will abandon the amateur/education model.[[149]](#footnote-149)

F. CONCLUSION

There is still more room within the amateur/education model for institutions to improve the situation of athletes in revenue generating sports. For example, not all institutions provide their athletes with multi-year and full cost of attendance scholarships. Also, in June 2014, Athletic Director of Indiana University Fred Glass announced an athletic bill of rights for their athletes. Among the rights specified for athletes is a lifetime degree commitment. Accordingly, the University will pay the cost of tuition for any athlete that left the university without obtaining an undergraduate degree that wants to return and pursue one.[[150]](#footnote-150) The university also allows the athlete to choose any course of study, major, degree or the like, with corresponding academic support services.[[151]](#footnote-151) These guarantees are improvements in the academic situation of athletes in revenue-generating sports, but within the amateur/education model.[[152]](#footnote-152) Another improvement in the situation of athletes is suggested by the statute recently adopted by the State of Nebraska. The statute has established an administrative system for providing medical and disability benefits to injured university athletes.[[153]](#footnote-153) Perhaps other colleges and universities could agree to cover both the short and long term athletically related medical expenses of its athletes.

Nevertheless, what the above demonstrates is that the criticisms of racial exploitation of athletes participating in revenue generating sports has existed for a very long time. And the NCAA and its member institutions, sometimes responding to public criticism, sometimes under the threat of litigation, and sometimes based on their own initiatives have made strides towards achieving the maximum compensation allowable for student athletes in revenue generating sports. It is also clear that these measures have had a positive impact on the academic opportunities of the athletes. *But the question remains, will maximizing the benefits of the athletes under the amateur/education model be enough to rebut the criticisms of racial exploitation of the current system, especially as the revenues continue to climb?*

**IV. CRITICAL RACE THEORY PERSPECTIVE ON AMATEUR/EDUCATION MODEL**

Often the charge of racial discrimination or racial exploitation conflates two different concepts into a single misguided analysis. One form of racism is based on the concept of discriminatory intent that is drawn from the notion that our society is composed of a collection of individuals, and, thus, when we interact with each other we should be colorblind. This form of racism understands that individuals act for many different reasons, but it is only when their actions are primarily motivated by a desire to deny someone else their individuality that their actions are discriminatory. And, the victim of intentional discrimination are the ones directly impacted by the actor’s motivations. The second form of racial discrimination focuses on the discriminatory effects of given actions, policies, or procedures and is drawn from the recognition that our society is composed of various racial and ethnic groups who live in very different socio-economic conditions. The cause of these discriminatory effects could be conscious racial discrimination, but could also result from unconscious racism, the use of stereotypes, or institutional racism. Unlike the first form of discrimination, motivations are irrelevant in determining what policies, programs, rules, or institutions are discriminatory; only their effects count. And, the effects are not on individuals, but on racial/ethnic groups.

If discriminatory intent is used as the definition of racial discrimination or racial exploitation, then it is obvious that the NCAA’s rules governing amateurism are not discriminatory. Few, if any, commentators or legal scholars would argue that the NCAA adopted rules and regulations embracing the principal of amateurism as a result of a conscious desire to discriminate against black male athletes. When commentators are implying that the NCAA’s embrace of amateurism is racially discriminatory or racially exploitive, they have to have in mind a different concept of racism than discriminatory intent. That concept must look beyond the intent of the NCAA or its member institutions to the effects of the application of the principal of amateurism on blacks. *However, once we start to focus on the effects of amateurisms, the focus should no longer be limited to just the interest of a few elite black athletes in FBS Football or Division I Men’s Basketball.* Rather, the consideration should be about the interest of the entire Black Community. From that standpoint, the discussion about whether the current system that limits compensation for elite student athletes in revenue generating sports is racially exploitive is a discussion about the impact of this system on the entire Black Community. More importantly, however, this new point of view suggests that there are plenty of other measures that the NCAA and its member institutions could institute to assist the Black Community in increasing college attendance and graduation rates that would help to rebut any charge that the amateur/education model is racially discriminatory.

The first section of this part will discuss the nature of the African-American experience that produced a collective group whose individual experiences are connected to those of the entire group. The second section will discuss a few major examples where the connection of individual blacks to the collective struggle by the Black Community against its oppression led to the sacrifice of the interest of individual blacks to help advance the Black Community. Because of the connected nature of the African-American experience in the United States, the actions and the images of black male athletes in revenue-generating sports will impact the experiences of all blacks. The third section will discuss how media images of black males in revenue generating sports helps to sustain some of the most harmful negative stereotypes that blacks encounter.

1. THE NATURE OF THE AFRICAN-AMERICAN EXPERIENCE IN THE UNITED STATES

The central feature of the African American experience in the United States is the treatment of an individual as an involuntary member of a historically oppressed racial group. As noted black scholar W.E.B. DuBois summarized it, “The So called Negro group . . . while it is in no sense absolutely set off physically from its fellow Americans, has nevertheless a strong, hereditary cultural unity born of slavery, common suffering, prolonged proscription, and curtailment of political and civil rights. . . . Prolonged policies of segregation and discrimination have involuntarily welded the mass almost into a nation within a nation.”[[154]](#footnote-154) But, the Black Community developed a counter narrative to its subjugation. The central feature of which was the collective struggle against their racial oppression. As James Forman stated about this aspect of the African American experience, “our basic history is one of resistance.”[[155]](#footnote-155)

Race continues to be the dominant feature of the historical experience of African Americans. The experience, however, has two different aspects. One aspect involved what it meant to be a victim of racial discrimination. With regard to the descendants of the soil of Africa, for much of America’s history, dominant American culture was deeply invested in notions of white (or at least Anglo-Saxon and Teutonic) superiority. Thus, dominant American cultural attitudes had clear concepts of what it meant to be black and imposed those notions on dark-skinned people. Black people have long been negatively stereotyped. For example, the first edition of the Encyclopedia Britannica published in 1798 stated that black people are prone to “idleness, treachery, revenge, cruelty, impudence, stealing, lying, debauchery, nastiness and intemperance.”[[156]](#footnote-156) Within this aspect, African Americans are viewed as passive objects completely subjected to domination, rather than as people with their own wills, hopes, and desires, who influence their own destiny. Because this aspect presupposed that blacks were inferior or substandard in some important way to whites, it obscured the injustice of the discriminatory treatment that blacks experienced. Instead, it functioned to make the subjugation of blacks appear as the natural order of things. Thus, one aspect of the experience of historical discrimination is the experience of what it means to be “raced” or branded as inferior.[[157]](#footnote-157)

Against the background of racial domination, however, the descendants of the sons and daughters of the soil of Africa in the U.S. developed a counter-discourse to how mainstream American society viewed and treated them. They actively engaged in a collective struggle that resisted their oppression. Commenting on this, Mari Matsuda noted that “Black Americans, the paradigmatic victim group of our history, have turned the Bible and the Constitution into texts of liberation.”[[158]](#footnote-158) From the perspective of the counter-discourse, blacks are not viewed as inferior, but as oppressed. Thus, in contrast to the “raced” aspect of the historical experience of blacks was the active experience of a group who did not control the visible reins of power, but still served as the architects of their own struggles against the conditions of their oppression. This counter-historical experience was limited by and responsive to the racial oppression imposed on the Black Community. Nevertheless, this commitment to the struggle against racial oppression and its concomitant sacrifice of the interest of the individuals for the advancement of the Black Community is as much a part of the historical experience of blacks in the United States as the experience of being victims of racial oppression.

1. MAJOR EXAMPLES OF SACRIFICES TO BENEFIT THE BLACK COMMUNITY

There are many historical examples of the sacrifice of members of the Black Community for the betterment of the entire Community. In fact, major advances of the Black Community tend to result only from the sacrifices of many individuals blacks. For example, official statistics show that almost 179,000 black soldiers served in the Union army, 7,122 of whom were officers.[[159]](#footnote-159) By the end of the Civil War, African Americans comprised 10 percent of the Union’s armed forces. An additional 29,000 blacks served as sailors, comprising 25 percent of Union seamen.[[160]](#footnote-160) The black troops also paid a heavy price during the War that led to the abolition of slavery, suffering a disproportionately large number of casualties. Approximately 37,300 blacks died during the conflict, amounting to over 10 percent of the Union war deaths.[[161]](#footnote-161) President Lincoln often emphasized the significance of the black soldiers to Union’s war effort. Lincoln candidly noted that without the black troops, no administration could save the Union.[[162]](#footnote-162) However, the black troops were not fighting in the Civil War just to preserve the Union. They were fighting to liberate the entire Black Community.

During America’s long years of fighting against legally entrenched segregation, the interest of many individuals in the Black Community was sacrificed. For example, between 1954 and 1972 over 70,000 black teachers lost their jobs in the Southern and Border States as America sought to desegregate its public schools.[[163]](#footnote-163) Also, 96 percent of the African-American principals lost their jobs due to racial integration in North Carolina, 90 percent in Kentucky and Arkansas, 80 percent in Alabama, 78 percent in Virginia, and 77 percent in South Carolina and Tennessee.[[164]](#footnote-164) Beyond the sacrifices of black teachers and administrators were the sacrifices of black elementary and secondary students whose education was completely disrupted by the efforts to desegregate American public education.[[165]](#footnote-165)

To draw a closer analogy to elite black male athletes in revenue generating sports, consider the impact of affirmative action policies at selective colleges and universities. We often hear assertions that certain blacks who would be admitted into selective higher education programs without the benefit of affirmative action are having their academic accomplishments devalued by these programs.[[166]](#footnote-166) This devaluation is visible in the comments made in December 2015 by the late Justice Antonio Scalia during oral arguments for the last affirmative action decision of the Supreme Court in which he participated. Justice Scalia suggested that African-American students on affirmative action would do better if they attended “a less-advanced school, a less -- a slower-track school where they do well.”[[167]](#footnote-167) Thus, for the ones who were not on affirmative action, there accomplishments were being tainted by their “less qualified” brethren. These comments by a sitting Supreme Court justice stigmatized all blacks who attend selective higher education programs, regardless of whether they individually benefitted from affirmative action. Yet, the history of affirmative action measures is that they have significantly increased the number of black lawyers, doctors, business executives, and other professionals.

C. IMPACT OF STEREOTYPICAL IMAGES OF BLACK MALE ATHLETES ON THE BLACK COMMUNITY

Black athletes playing revenue generating college sports are inherently connected to the Black Community and their conduct both advantages and disadvantages other blacks in numerous ways. Stereotypes of groups are the product of consistent association of its members with specific traits. The mass media helps to create and perpetuate these stereotypes, thus, media images of blacks can influence perception of all blacks. Since sports permeates American culture, especially basketball and football, the American public is often exposed to images of sports figures. For example, 23 million people watched the NCAA Men’s Basketball Tournament Championship between the University of North Carolina and Gonzaga University in March of 2017 and nearly 28 million people watched Alabama defeat Georgia 26-23 in the College Football Playoff national championship game on ESPN on January 8, 2018.

Among the most destructive racial stereotypes of blacks are that most of them lack significant intelligence. There is a long standing belief that the success of black athletes results from their natural athletic ability, not their intellectual abilities. But for white athletes, physical strength is the result of their diligence and intelligence. Media coverage of revenue generating sports tends to reaffirm this notion. According to Rchard Lapchick’s 2016 Racial and Gender Report Card: College Sports, 76.8 percent of Men’s Basketball and 91.9 percent of football head coaches in Division I were white. The percentage of white coaches was only slightly less in FBS football where they constituted nearly 88 percent of the coaches. Thus, as America watches college football games it is often introduced to the specter of a football team on the field where a majority of the players are black, but the person in charge of the intellectual aspect of the game is white. Given the overrepresentation of black athletes in revenue generating sports, the paucity of black head coaches in college basketball and football tends to reaffirm the notion that blacks are not as intelligent.

Another of the most destructive stereotypes of blacks, particularly males, are the stereotypes that they are aggressive, dangerous predators, and prone to violence. Because off field activities of athletes in revenue generating sports are also the subject of substantial media coverage, much of America is treated to images of black players engaged in violent and criminal acts, like Florida State quarterback De’Andre Jordan punching his girlfriend and are made aware of suspected criminal activities by other well-known college star athletes like Lawrence Phillips, Maurice Clarett, and Darrell Williams. Outside the Lines did a report in 2015 of a study it conducted where it examined more than 2,000 documents related to criminal activity of basketball and football players at 10 universities with major collegiate sports programs (Auburn, Florida, Florida State, Michigan State, Missouri, Notre Dame, Oklahoma State, Oregon State, Texas A&M, and Wisconsin). According to their story in half the programs at least 15 percent of the athletes were involved in some kind of criminal activity. And, elite athletes in college sports are often portrayed as self-centered, arrogant, mercenary, deviant, drug abusers, and generally misbehaving. Beyond the off-field activities, football and basketball, but especially football, are violent games. Thus, just watching college football exposes Americans on a weekly basis every autumn to images of black males engaged in a very violent activity.

The above is not intended to cast blame of black male athletes in revenue generating sports. The point is to make the connection between them and our society’s negative impressions of blacks. Such negative media attention of black male athletes cannot but help to contribute to negative stereotypes of black people. As Kevin Blackstone has pointed out, “there is a connection between black male sports athletes and the American stereotypical image that black males are threatening characters.” Likewise, James Cullen Evans once stated, “Unfortunately, the sports media has perpetuated an image of African American athletes as dangerous criminals. This image has been fashioned through the media’s racialized reporting of athlete crime, and the media’s portrayal of African American athletes as bestial, intellectually inferior, beings.”

These aforementioned portrayals of black males in sports certainly contributes to the mass incarceration of blacks in the criminal justice system. According to the U.S. Bureau of Justice in 2014, about 539,500 blacks in the United States were in either state or federal prisons. They made up approximately 35.7 percent of all prisoners. When you add to the number of 263,800 blacks who on average are in local jails, there are a total of about 800,000 blacks behind bars. Estimates indicate that 32.2 percent of African American males will spend part of their life in prison, versus 17.2 percent of Hispanic males and 5.9 percent of white males. Wisconsin sociology professor Pamela Oliver further points out that, “about a third of African American men are under the supervision of the criminal justice system, and about 12% of African American men in their 20s and 30s are incarcerated.”

The performance of black male athletes in revenue generating sports may have other less obvious impacts on other blacks in the criminal justice system. For example, a study by Louisiana State University economics professors Ozkan Eran and Naci Mocan looked at decisions rendered by judges that graduated from LSU in juvenile courts in Louisiana between 1996 and 2012. They found that when LSU won a football game they were supposed to win or lost a football game they were supposed to lose, there was no effect on the sentences that these judges meted out to black males. However, when the LSU football team was upset, the judges imposed longer sentences on the black males who appeared in front of them the following week. The study also found that an LSU upset win did not benefit black males who appeared in front of these judges. Thus, an upset win did not lead to lighter sentences for black males.

**V. PROGRAMS AND POLICIES TO HELP THE BLACK COMMUNITY**

The purpose of this Article is to reformulate the debate about whether the amateur/education model applied to the revenue generating sports of FBS Football and Division I Men’s Basketball is racially exploitive by focusing on the interest of the entire Black Community. In doing so, we will suggest that a substantial percentage of the revenues generated by FBS Football and Division I Men’s Basketball be devoted to the funding and creation of programs that are directed towards increasing the college attendance and graduation rates of the Black Community. The primary reason to suggest that these programs focus on college attendance and participation rates is to take advantage of the existing educational expertise that the NCAA and its member institutions possess. Indeed, it is also likely that the black students on the campuses of revenue generating sports programs have to fight the negative stereotypes that sports coverage contributes to perpetuating. While black male student athletes often encounter negative stereotypes that view them as dumb jocks, these negative stereotypes also negatively impact the educational experiences of the black male students that are not athletes.[[168]](#footnote-168)

There are other reasons that the programs and policies we suggest should focus on the college attendance and graduation rates of blacks. Substantial racial and ethnic gaps exist in terms of educational achievement statistics. A 2013 report by the National Center on Education Statistics noted that, for freshmen entering high school in 2006 and due to graduate in 2010, the number of students able to graduate in four years varied substantially for the different racial groups. Only 66.1 percent of blacks graduated in four years, compared with 69.1 percent for Native Americans, 71.4 percent for Hispanic, 83.0 percent for whites, and 93.5 percent for Asians.[[169]](#footnote-169) According to a Pew Research Center report in 2014, while blacks made up 16 percent of high school graduates, they were only 14 percent of those enrolled in college and only 9 percent of those with bachelor degrees or higher.[[170]](#footnote-170) Also, the percentage of those with college degrees in 2010 varies substantially among the racial/ethnic groups. Thus, whereas 19.8 percent of blacks over the age of 25 have a college degree, 30.3 percent of whites, and 52.4 percent of Asians have obtained such a degree.[[171]](#footnote-171) And these racial gaps in college attendance and obtaining degrees has persisted in our society. For example, in 1975, 6 percent of blacks over the age of 25 had college degrees compared to 14 percent of whites.[[172]](#footnote-172)

Where over 80 percent of Asians, whites, and Latinos start college at age 20 or younger only 69 percent of blacks do.[[173]](#footnote-173) In addition, only 38 percent of blacks who started college in 2010 completed a certificate or degree within six years compared to 63.2 percent of Asians, 62 percent of white, and 45.8 percent of Latinos.[[174]](#footnote-174) Blacks tend to borrow more money to graduate with a bachelor’s degree than any other group due to their lower levels of income and wealth. While only 14 percent of blacks have no student debt when they graduate with a bachelor’s degree, almost a third of them have accrued more than $40,000 in student debt. In contrast, the respective percentages for Asians are 43 and 7, for whites 32 and 16 and for Latinos 27 and 17.[[175]](#footnote-175) Financial difficulties also help to explain why it often takes blacks longer to finish a college degree. Almost 30 percent of blacks take 10 years or longer, which is more than twice the percentage of Asians, 50 percent more than whites, and more than Latinos.[[176]](#footnote-176)

The need to devote proceeds from revenue generating sports to increase the college participation and graduating rates of blacks may even be more important due to the changing nature of the black college athlete in these sports. Most Americans still have the vision of poor urban inner city blacks dominating college football and basketball. However, the rising academic requirements of college sports and the need to enroll youngsters in special athletic programs well before the time they reach college may be having the effect of substantially reducing the percentage of first generation and poor blacks that receive athletic scholarships. In an article entitled, *The Gentrification of College Sports*, Thomas Ferry points out that starting in 2010, the NCAA began to ask college athletes whether they were first generation college attendees as part of a little-known GOALS Study. The results of the study showed that between 2010 and 2015, most sports are seeing a drop in first generation athletes. As of 2015, the percentage of freshmen who were first generation at all of the nation’s four-year colleges was 17.2 percent. In contrast, only 14.2 percent of all Division I athletes are first generation, the figure was 19 percent for Division I basketball and 23 percent of Division I football.[[177]](#footnote-177) The figures for these two sports, however, are down 9 percentage points and 3 percentage points, respectively, in 5 years. Thus, in 2015, only 25 percent of black Division I basketball players are first generation.

Increasing the college attendance and graduation rates of blacks is also a good way to combat the racial income gaps that exist in our country. The income gaps between those with college degrees compared to high school diplomas have grown substantially over the past fifty years.[[178]](#footnote-178)Ron Haskins at the Brookings Institution points out that college education is also the best hedge that the America’s poorest people have to break the cycle of poverty. For the children of those in the bottom quintile of income, if they finish college only 16 percent will end up in the bottom quintile, whereas if they do not 45 percent will.[[179]](#footnote-179)

Among the programs that the NCAA and its member institutions could institute or fund are ones that could help the other black students on their campuses. This realization has not gone unnoticed by all commentators. Shaun Harper has called upon colleges and universities to extend targeted academic advising, tutoring, clubs, and activities, like skills development resources, structured study spaces, alumni networks, and committed institutional agents to black men who were not athletes in order to improve their academic success and college completion rates.[[180]](#footnote-180) He also suggests that colleges and universities provide more financial aid to non-student athlete black males in order to reduce the number of hours they have to work. Thus, he implies that among other ways to the NCAA and its member institutions can respond to the charge of exploitation of black male athletes in revenue generating sports is to provide more academic assistance to black male students at the universities that are not athletes.

Beyond instituting policies and programs to improve the graduation rates of blacks at Division I institutions, the NCAA and its member institutions could institute more rigorous programs in urban school districts with large populations of black students to increase college attendance rates for all blacks. For example, the NCAA could establish SAT and ACT preparation courses in high schools with a high concentration of black students. It could provide college counselors or financial aid advisors in these kind of high schools to help ensure that these students are aware of the demands/expectations for college as well as any potential funding sources for their education.

**CONCLUSION**

The governing amateur/education model of college sports provides that the college or university has the right to squeeze every bit of talent and effort from each student athlete, but in return the institution must give that athlete every legitimate measure of help needed to obtain their four year degree. However, under the *quid pro quo* of the amateur/education model, there is a limit to how much the institution has to do in order to satisfy its obligations to the athlete. As long as colleges and universities provide their athletes with scholarships to cover the entire cost of their education and the academic support necessary to give the athlete a realistic opportunity to graduate, they have discharged their obligations. In recognition of these obligations owed to the student athlete, the NCAA and its member institutions have enacted several policies and programs over the past thirty-five years to reach a point of providing the maximum ability to discharge their obligations. While there is still a ways to go, the NCAA and its member institutions have travelled a long way on this road.

The amateur/education model could provide an acceptable way to look at college sports for those athletes in non-revenue sports. However, the revenues generated by FBS Football and Division I Men’s Basketball have grown substantially since the Supreme Court’s 1984 decision *NCAA v Board of Regents*. For many of the Division I institutions with these sports, the funds they produced are used to subsidize the expenses of the entire athletic department, including not just the expenses related to the athletes in revenue generating sports, but also escalating salaries of their coaches, scholarships for non-revenue sports athletes, coaching salaries for non-revenue sports, and equipment and facilities for non-revenue sports. The funds produced by revenue generating sports also pay for the athletic facilities for their own sports, which increasingly include luxury boxes for cherished university officials and alums. Some colleges and universities even use monies generated by FBS Football and Division I Men’s Basketball to subsidize general university expenses. As a result, the current structure of college sports that built upon the amateur/education model has produced a situation where so many other interested groups are profiting from the toil of the athletes in the revenue generating sports.

The problematic nature of amateur/education model is exacerbated when we realize that the majority of elite athletes in FBS Football and Division I Men’s Basketball are black males. Thus, added to the concerns about the amateur/education model is the argument that its application is potentially racially exploitive because the interest of black male athletes are being sacrificed at the altar of their institutions for the benefit of so many others. The typical discussion of this situation involves whether the institutions have given enough to the athletes by providing them with a realistic opportunity to receive a paid for education that leads to a meaningful four year college degree or whether the athletes should be compensated beyond those limits. But those who believe that the athletes should receive more compensation generally suggest that college sports abandon the amateur/education model. However, there are several legal obstacles to paying the athletes for playing their sport. Doing so could very well destroy college sports as we know it. The impact of which may actually lessen the opportunities for blacks to obtain coveted university degrees. As a result, the realistic choices are either to accept the amateur/education model that allows the institutions to profit from the work of the athletes or to destroy college sports as we know it by abandoning the amateur/education model.

The purpose of this article is to reformulate the debate about whether the amateur/education model applied to the revenue generating sports of FBS Football and Division I Men’s Basketball is racially exploitive by focusing on the interest of the entire Black Community. If we see the issue of racial exploitation in terms of the entire Black Community, then potential solutions are not limited to simply deciding how to split the funds generated by Division I Men’s Basketball or FBS Football between the institutions or the athletes. In order to counteract the charge that the amateur/educational model is potentially racially exploitive, the NCAA and its members institutions could institute and fund programs that would increase the college attendance and graduation rates for the entire Black Community. The programs that the NCAA and its member institutions could institute or fund can help not only blacks that are currently on the campuses of Division I schools, but also assist students in predominately black school districts throughout the country. These programs for high school and junior high schools students could include providing these students with access to college counselors and financial aid experts, SAT and ACT preparation courses, tutors in math and science, and establishing college mentor programs.

1. Kevin Brown, Richard S. Melvin Professor, Indiana University Maurer School of Law and Emeritus Director of Hudson & Holland Scholars Program, Indiana University; B.S., 1978, Indiana University; J.D., 1982, Yale University; and Antonio Williams, Associate Professor, Indiana University School of Public Health; B.S., 2005, South Carolina State University; M.S., 2007, Indiana University; Ph.D., 2010, Indiana University. We would like to acknowledge and express our appreciation to many colleagues and other friends whose support and suggestions have been so valuable to this Article. Special thanks to Professors Andr’e Douglas Pond Cummings, Luis Fuentes-Rowher, David Gamage, Timothy Lovelace, Jayma Meyers, Todd Pettys, Gary Sailes, and Joseph Yockey. Earlier drafts of this Article were presented by the authors at the “Sports Project: 4th Global Meeting held at Mansfield College, Oxford University in Oxford, United Kingdom on September 26, 2015 and at Midwest Black Law Students Association Regional Convention in Indianapolis, Indiana on February 21, 2015. In addition Professor Kevin Brown delivered earlier versions of this article to the faculty of the University of Iowa College of Law on March 24, 2017, Iowa City Iowa; at the 66th Annual Meeting of the Seventh Circuit Bar Association and Judicial Conference of the Seventh Circuit May 2, 2017, held in Indianapolis, Indiana; and at the Conference entitled “Sport: Probing the Boundaries” as part of the Inaugural Meeting of the International Association for the Interdisciplinary Study of Sport on December 3, 2017 held in Vienna, Austria. We would like to thank the participants of both conferences for their helpful suggestions. We also would like to thank Elaena Harris and Ashante Travis for their exceptional research assistance, and the Indiana University Maurer School of Law and the Indiana University School of Public Health for the financial support they provided for this Article. [↑](#footnote-ref-1)
2. The NCAA’s Principle of Amateurism states: “Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises.” NCAA Const. art. 2.9. [↑](#footnote-ref-2)
3. NCAA Const. art. 2.9; *see also* 2015–6 NCAA Division 1 Manual 3 (2015),

   ]<http://www.ncaapublications.com/productdownloads/D116.pdf>. [↑](#footnote-ref-3)
4. Timothy Davis, *Intercollegiate Athletics: Competing Models and Conflicting Realities*, 25 Rutgers L.J. 269, 270 (1994). [↑](#footnote-ref-4)
5. *Student Athletes*, NCAA, <http://www.ncaa.org/student-athletes> (last visited Feb. 2, 2018). [↑](#footnote-ref-5)
6. Although other sports generate significant revenues for certain colleges and universities, the two college sports that typically generate the largest revenues are FBS Football and Division I Men’s Basketball. Throughout this Article, mention of revenue generating sports refers only to these two sports. [↑](#footnote-ref-6)
7. The NCAA defines operating surplus in its biannual Revenues and Expenditures report to refer to generated revenues (including donations) minus operating costs, where operating costs exclude most capital expenses.

   *See* Daniel L. Fulks, Revenues & Expenses: 2004–2014 Ncaa Division I Intercollegiate Athletics Programs Report 11, 24 (2015), <https://www.ncaa.org/sites/default/files/2015%20Division%20I%20RE%20report.pdf> [hereinafter NCAA, Revenues and Expenses 2015]. Based on these calculations, the NCAA noted, “A total of 24 athletics programs in the FBS reported positive net revenues for the 2014 fiscal year.” *Id.* at 8. [↑](#footnote-ref-7)
8. For example, in fiscal year 2010, the FBS Football programs earned a median of $3.1 million more than revenue for the team. Division I Men’s basketball teams produced a median profit of $788,000. But the medians for all other sports were net losses. *See e.g.* Ahmed E. Taha, *Are College Athletes Economically Exploited?* 2 Wake Forest J. L. & Pol’y 69, 72 (2012). *See also* Knight Commission on Intercollegiate Athletics, College Sports 101, Chapter 3: Revenue(2009), <http://www.knightcommission.org/collegesports101/chapter-3>. [↑](#footnote-ref-8)
9. Total allocated revenue was $63,524,353 of which $24,560,829 came from Men’s Basketball and $37,085,787 from football. U.S. Dept. of Education, *Indiana University–Bloomington*, Equity in Athletics Data Analysis, <https://ope.ed.gov/athletics/#/institution/details> (last visited Feb.4, 2018). [↑](#footnote-ref-9)
10. For basketball the net income was $11,705,810 ($24,560,829 - $12,855,019) and for football it was $11,412,804 ($37,085,787 - $25,672,983). *Id.* [↑](#footnote-ref-10)
11. For sports other than basketball and football, the total allocated net loss was $21,873,304 ($1,616,235- $23,489,539). *Id.* Thus, it could be asserted that the net profits from basketball and football were used to provide the funds for all of the expenses of the other sports programs at Indiana University. [↑](#footnote-ref-11)
12. For instance, a 2015 press release announcing the dedication of Indiana University-Bloomington’s new Global and International Studies Building stated that the “new $53 million building was funded entirely through university sources with half of the funding coming from IU's Big Ten Network revenues, representing the largest-ever commitment from IU Athletics revenue to support the core academic mission of the university.” Press Release, *IU to Dedicate Its New Global and International Studies Building*, IU Newsroom, <http://archive.news.indiana.edu/releases/iu/2015/09/global-and-international-studies-building.shtml> (Sept 25, 2015). [↑](#footnote-ref-12)
13. *See* Steve Berkowitz, *NCAA Nearly Topped $1 Billion in Revenue in 2014*, USA Today (Mar. 11, 2015, 4:59 PM), <http://www.usatoday.com/story/sports/college/2015/03/11/ncaa-financial-statement-2014-1-billion-revenue/70161386/>. [↑](#footnote-ref-13)
14. Taylor Branch, *The Shame of College Sports*, The Atlantic Magazine 80–103 (2011). [↑](#footnote-ref-14)
15. *See* Richard Lapchick et al., Univ. Cent. of Fla. Inst. for Diversity and Ethics in Sport, The 2016 Racial and Gender Report Card: College Sport 5 (2017), <http://nebula.wsimg.com/38d2d0480373afd027ca38308220711f?AccessKeyId=DAC3A56D8FB782449D2A&disposition=0&alloworigin=1>. [↑](#footnote-ref-15)
16. *Id*. [↑](#footnote-ref-16)
17. The Atlantic Coast Conference (ACC), Big Ten Conference, Big 12 Conference, Pac 12 Conference, and the Southeastern Conference (SEC) are the Power Five Conferences. [↑](#footnote-ref-17)
18. Shaun Harper, Univ. of Pa. Center for the Study of Race and Equity in Education, Black Male Student-Athletes and Racial Inequities in NCAA Division I College Sports 2016 Edition 1 (2016), <https://equity.gse.upenn.edu/sites/default/files/publications/Harper_Sports_2016.pdf>. [↑](#footnote-ref-18)
19. *See, e.g.*,Emma Kerr, *The NCAA as Modern Jim Crow? A Sports Historian Explains Why She Drew the Parallel*, The Chronical of Higher Education (Jan. 12, 2018)<https://www.chronicle.com/article/The-NCAA-as-Modern-Jim-Crow-A/242240?cid=wb&utm_source=wb&utm_medium=en&elqTrackId=6103a75a8c28482dbc6c8e89af0171a0&elq=b2f5156d29a34204b0dac0b17e04b084&elqaid=17459&elqat=1&elqCampaignId=7641> (last visited Feb. 2, 2018). [↑](#footnote-ref-19)
20. Harper*, supra* note 18*,* at 2. [↑](#footnote-ref-20)
21. Branch, *supra* note 14. [↑](#footnote-ref-21)
22. *See, e.g*, Norton, *No Time for Classes,* 4 Calif. Law 42, 46 (1984); Malcolm Gladwell, *Dunk and Flunk*, 194 New Republic 13–15 (1986); Gary Sailes, *The Exploitation of the Black Athlete: Some Alternative Solutions*, 55 J. NEGRO EDUC. 439 (1986); *see also* Erik Jensen, *Taxation, the Student Athlete, and the Professionalization of College Athletics,*1987 Utah L. Rev. 35 (1987). [↑](#footnote-ref-22)
23. Pamela MacLean and Eben Novy-Williams, *NCAA, Athletes Draw Questions from Judge Over Pay for Play*, Bloomberg (Jan. 16, 2018, 7:57 PM), <https://www.bloomberg.com/news/articles/2018-01-17/ncaa-athletes-draw-questions-from-judge-over-pay-for-play>; *see also*  Associated Press, *NCAA to distribute some revenue for academic performance* (Oct. 27, 2016) *available at* http://www.espn.com/college-sports/story/\_/id/17903878/ncaa-distribute-some-revenue-academic-performance. [↑](#footnote-ref-23)
24. O’Bannon v. NCAA, 7 F. Supp. 3d 955, 971 (N.D. Cal. 2014) *rev*. O’Bannon v. NCAA, 802 F.3d 1049 (9th Cir., 2015) *cert. den.* 137 S. Ct. 277 (2016). In this case, the District Court enjoined the NCAA from limiting scholarships to grant in aid amounts for FBS Football and Division I Men’s Basketball scholarship athletes. *See also* Agnew v. NCAA, 683 F.3d 328 (7th Cir. 2012) (led the NCAA to repeal its ban on multi-year scholarships). [↑](#footnote-ref-24)
25. Thomas O’Toole, *NCAA Reaches 14-Year Deal with CBS/Turner for Men’s Basketball Tournament, Which Expands to 68 Teams for Now*, USA Today (Apr. 22, 2010, 4:09 PM), <http://content.usatoday.com/communities/campusrivalry/post/2010/04/ncaa-reaches-14-year-deal-with-cbsturner/1#.WmTUmmdEAoJ>. [↑](#footnote-ref-25)
26. Rachel Bachman, *ESPN Strikes Deal for College Football Playoff*, Wall Street Journal (Nov. 21, 2012, 1:46 PM),<http://www.wsj.com/articles/SB10001424127887324851704578133223970790516>. [↑](#footnote-ref-26)
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129. *Id.* at 2. [↑](#footnote-ref-129)
130. *Id.* at 1. [↑](#footnote-ref-130)
131. Michelle Brutlag Hosick, *DI African-American Student-Athletes Graduate at Record Rates*, NCAA (Nov. 8, 2017, 1:00 PM), <http://www.ncaa.org/about/resources/media-center/news/di-african-american-student-athletes-graduate-record-rates>. [↑](#footnote-ref-131)
132. *Id*. [↑](#footnote-ref-132)
133. A record 84 percent of Division I athletes who entered college in 2007, graduated six years later. Jake New, *More Athletes Get to the Finish Line,* Inside Higher Education (Oct. 29, 2014) (discussing the GSR vs. federal rate generally),<https://www.insidehighered.com/news/2014/10/29/graduation-rates-athletes-hit-record-high> (last visited Feb. 3, 2018). [↑](#footnote-ref-133)
134. Hosick, *supra* note 130. [↑](#footnote-ref-134)
135. *Id*. [↑](#footnote-ref-135)
136. *Id.* [↑](#footnote-ref-136)
137. Richard Lapchick et al., Inst. for Diversity and Ethics in Sports, Keeping Score When It Counts: Assessing the Academic Records of the 2016-2017 Bowl-bound College Football Team (2016), <http://nebula.wsimg.com/13533ce46b93ecad13c6a8304c43868f?AccessKeyId=DAC3A56D8FB782449D2A&disposition=0&alloworigin=1>. [↑](#footnote-ref-137)
138. *See, e.g.,* Jensen, *supra* note 22. [↑](#footnote-ref-138)
139. The Northwestern University football players that receive scholarships for grant-in-aid amounts filed a petition under the National Labor Relations Act (NLRA) to have a representation election to have the College Athletes Players Association represent them for collective bargaining purposes. The National Labor Relations Board (NLRB) unanimously decided on August 17, 2015not to assert jurisdiction over this attempt. 362 NLRB No. 167 (2015). The NLRB General Counsel, however, issued a memorandum on January 31, 2017 stating that he nevertheless found that FBS Football players on scholarship were employees under the NLRA. *See* Memorandum GC 17-01at <https://www.nlrb.gov/reports-guidance/general-counsel-memos>. But, some jurisdictions have passed laws to prevent students athletes from unionizing. *See* Ohio Rev. Code §3345.56 (2015) and Mich. Comp. Laws 423.201 (l(e(iii))) (2015*).* [↑](#footnote-ref-139)
140. Ivan Maisel, *Paying Players Might Create Havoc*, ESPN (July 15, 2011), <http://www.espn.com/college-sports/story/_/id/6768571/legal-issues-arise-paying-student-athletes> (last visited Feb. 3, 2018). [↑](#footnote-ref-140)
141. 26 C.F.R. § 1.117–4(c). [↑](#footnote-ref-141)
142. Section 117 of the Internal Revenue Code allows a student pursuing a degree to exclude any amounts of a qualified scholarship from their gross income. This includes amounts spent for tuition, fees, books and supplies. [↑](#footnote-ref-142)
143. There are two components to the FICA contributions, 6.2% for social security and 1.45% for Medicare premiums. While there is no income limit for the calculation of Medicare premiums, there is a limit of $128,400 in 2018 for social security contributions. [↑](#footnote-ref-143)
144. 26 U.S.C. § 3121(b)(10) (2012). [↑](#footnote-ref-144)
145. Mayo Foundation for Medical Educ. and Research v. United States, 562 U.S. 44 (2011). [↑](#footnote-ref-145)
146. One of the concerns that led to the NCAA becoming more of an enforcement mechanism were cases that held student athletes were employees under Workmen’s Compensation statutes. *See* Univ. of Denver v Nemeth, 257 P2d 423 (Colo. 1953) and Van Horn v Indus. Accident Comm’n, 33 Cal. Rptr. 169 (Cal. Ct. App. 1963). [↑](#footnote-ref-146)
147. Berger v. NCAA, 843 F.3d 285 (7th Cir. 2016) (rejecting claim by University of Pennsylvania women’s track and field athletes that FLSA applies to them). *But see* *id.* at 294 (Hamilton, J. concurring) (“I am less confident, however, that our reasoning should extend to students who receive athletic scholarships to participate in so-called revenue sports like Division I men's basketball and FBS football.”). *See also* Dawson v NCAA, 2016 WL 5405638 (N.D. Cal. Filed Sept. 26, 2016) [↑](#footnote-ref-147)
148. *See, e.g.*,Hysaw v. Washburn Univ. of Topeka, 690 F. Supp. 940 (D. Kan. 1987). [↑](#footnote-ref-148)
149. However, some commentators assume that these obstacles are not insurmountable and that paying athletes may not alter college sports very much. *See e.g.* Jeffrey Standen, *The Next Labor Market in Sports*, 92 Or. L. Rev. 1093 (2014). [↑](#footnote-ref-149)
150. *See* Student-Athlete Bill of Rights, Indiana University, <http://iuhoosiers.com/documents/2015/5/21/genrel_2013_14_misc_non_event__BillOfRights.pdf>. [↑](#footnote-ref-150)
151. *Id.* [↑](#footnote-ref-151)
152. Jeffrey Kessler’s antitrust case involving FBS Football and Division I Men’s Basketball of *Jenkins v. NCAA* is still in the courts. In this case, Kessler asks for an end to the limits on athlete compensation by the NCAA. [↑](#footnote-ref-152)
153. *See* Neb. Rev. Stat. $85-106.5 (2016). [↑](#footnote-ref-153)
154. W.E.B. DuBois, *Three Centuries of Discrimination*, in The Crisis 54, 362–63 (1947). [↑](#footnote-ref-154)
155. *See* Stephen Tuck, We Ain’t What We Ought to Be: The Black Freedom Struggle From Emancipation to Obama 2 (2010). [↑](#footnote-ref-155)
156. The first edition of the Encyclopedia Britannica in 1798 used this to define “Negroes.” *See* Kevin Brown, Race, Law and Education in the Post-Desegregation Era 66 (2005). [↑](#footnote-ref-156)
157. *See, e.g.*, Kendall Thomas, Comment, *Frontiers of Legal Thought Conference, Duke Law School* (Jan. 26, 1990), *quoted in* Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 Duke L. J. 431, *in* Mari J. Matsuda, Charles R. Lawrence III, Richard Delgado & Kimberlé W. Crenshaw, Words That Wound 53, 61 (1993); *see also* D. Marvin Jones, *Darkness Made Visible: Law, Metaphor, and the Racial Self*,82 Geo. L. J. 437 (1993)(arguing that racial categories are neither objective nor natural, but ideological and constructed. In these terms race is not so much a category but a practice: people are raced). [↑](#footnote-ref-157)
158. Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 Harv. C.R.-C.L. L. Rev. 323, 335 (1987). [↑](#footnote-ref-158)
159. James M. McPherson, The Negro’s Civil War: How American Blacks Felt & Acted During the War For the Union 241 (1991). [↑](#footnote-ref-159)
160. Maulana Karenga, Introduction to Black Studies 144 (2d ed. 1993). [↑](#footnote-ref-160)
161. McPherson, *supra* note 158. [↑](#footnote-ref-161)
162. *See Letter to Charles D. Robinson, August 17, 1864*, in The Collected Works of Abraham Lincoln 499–501 (ed. Roy P. Basler 1953). [↑](#footnote-ref-162)
163. *See* Samuel B. Etheridge, *Impact of the 1954 Brown v. Topeka Board of Education Decision on Black Educators*, 30 The Negro Educ. Rev. 213, 223–4 (1979). Another source put the number at more than 31,000 in southern and border states. Smith & Smith, *Desegregation in the South and the Demise of the Black Educator*, 20 J. Soc. & Behav. Sci. 28–40 (1974). [↑](#footnote-ref-163)
164. *Displacement and Present Status of Black School Principals in Desegregated School Districts: Hearings Before the U.S. Senate Select Committee on Equal Educational Opportunity*, 92d Cong., 1st Sess. (1971) (statement of Benjamin Epstein). In addition, Epstein also testified that 50 percent of the African-American principals lost their jobs in Georgia and 30 percent did so in Maryland. *Id.* [↑](#footnote-ref-164)
165. For example, In Prince Edward County, Virginia, many black school children went without education for five years, as part of the effort to compel the integration of the public schools there. The Little Rock Nine that integrated Little Rock’s Central High School received a rude introduction when they enrolled in the high school. And black students seeking to desegregate public schools encountered this rude experience all over the country. Also, Black students disproportionately started their school days earlier and ended them later than their white counterparts because they bore the brunt of school bussing for the purpose of desegregation. *See* KEVIN BROWN, RACE, LAW AND EDUCATION IN THE POST-DESEGREGATION ERA: FOUR PERSPECTIVES ON DESEGREGATION AND RESEGREGATION 167 - 174 (2005). [↑](#footnote-ref-165)
166. *See, e.g.*,Stephen Carter, Reflections Of An Affirmative Action Baby (1991). [↑](#footnote-ref-166)
167. *See, e.g.*,Yanan Wang, *Morning Mix Where Justice Scalia Got The Idea That African Americans Might Be Better Off at ‘Slower-Track’ Universities*, Washington Post (Dec. 10, 2015), <https://www.washingtonpost.com/news/morning-mix/wp/2015/12/10/where-justice-scalias-got-the-idea-that-african-americans-might-be-better-off-at-slower-track-universities/> (last visited Feb. 3, 2018). [↑](#footnote-ref-167)
168. *See, e.g.*,Shaun Harper, *Black Male College Achievers and Resistant Responses to Racist Stereotypes at Predominantly White Colleges and Universities*, 85 Harv. Educ. Rev. 614 (2015). [↑](#footnote-ref-168)
169. Robert Stillwell & Jennifer Stable, U.S. Department of Education, Public School Graduates and Dropouts from the Common Core of Data: School Year 2009 –10: First Look (Provisional Data) 4 (2013). These high school graduation rates are based on receipt of a diploma. Therefore, they exclude from high school graduates those that only receive a certificate of completion or its equivalent. [↑](#footnote-ref-169)
170. Jens Manuel Krogstad & Richard Fry, *More Hispanics,* *Blacks Enrolling in College, But Lag in Bachelor’s Degrees*, Pew Research Center: Fact Tank (Apr. 24, 2014), <http://www.pewresearch.org/fact-tank/2014/04/24/more-hispanics-blacks-enrolling-in-college-but-lag-in-bachelors-degrees/>. [↑](#footnote-ref-170)
171. For Hispanic/Latinos, the percentage is only 13.9 percent. *See Educational Attainment by Race and Hispanic Origin: 1970 to 2010*, U.S. Census Bureau 9 tbl.2. [↑](#footnote-ref-171)
172. Bureau of the Census, The Social and Economic Status of the Black Population in the United States: An Historical View, 1790‑1978: Current Population Reports, Special Studies, Series P-23, No. 80, 93 tbl.70, <https://files.eric.ed.gov/fulltext/ED175974.pdf>. [↑](#footnote-ref-172)
173. Doug Shapiro et al., Signature 12 Supplement: Completing College: A National View of Student Attainment Rates by Race and Ethnicity 7 fig.3 (2017), [https://nscresearchcenter.org/wp-content/uploads/Signature12-RaceEthnicity.pdf.](https://nscresearchcenter.org/wp-content/uploads/Signature12-RaceEthnicity.pdf) [↑](#footnote-ref-173)
174. *Id*. at 10, fig.6. [↑](#footnote-ref-174)
175. College Board, Trends in Student Aid 2015, 27 (2015), <http://trends.collegeboard.org/sites/default/files/trends-student-aid-web-final-508-2.pdf>. [↑](#footnote-ref-175)
176. For Asians 14% take at least 10 years. For whites and Latinos, the comparison figures are 17 and 20%, respectively. *Id.* [↑](#footnote-ref-176)
177. *See* Thomas Ferry, *The Gentrification of College Sports, available at* https://theundefeated.com/features/gentrification-of-ncaa-division-1-college-basketball/ [↑](#footnote-ref-177)
178. Roy Haskins, *Education and Economic Mobility*, in Getting Ahead or Losing Ground: Economic Mobility In America (eds. Julia B. Isaac, Isabel V. Sawhill, and Roy Haskins, 2008), <http://www.brookings.edu/~/media/research/files/reports/2008/2/economic-mobility-sawhill/02_economic_mobility_sawhill_ch8.pdf>. [↑](#footnote-ref-178)
179. *Id.* at 5, fig.6. [↑](#footnote-ref-179)
180. Harper*, supra* note 18*,* at 16–17. [↑](#footnote-ref-180)