ARTICLES

Emancipating College Athletes from Amateurism Under the Fair Labor Standards Act

Michael H. LeRoy†

When an appellate court ruled that amateur athletics involves work outside the Fair Labor Standards Act (FLSA) in Berger v. National Collegiate Athletic Association *it relied on* Vanskike v. Peters*, where a prisoner lost his FLSA case for minimum wages.* Vanskike *invoked the Thirteenth Amendment's slavery exception, which allows for compulsory prison labor as punishment for a crime. Citing* Vanskike*,* Berger *said that the FLSA failed "to capture the true nature of the relationship between student athletes and their schools and is not a helpful guide."*

The Third Circuit is hearing a similar case in Johnson v. National Collegiate Athletic Association*. To show that* Berger *erred by equating prison and college athletic labor, I trace the origins of the slavery exception to the Ordinance of 1787, which prohibited slavery and involuntary labor in the Northwest Territory except as punishment for a crime. In 1863, Lincoln's Emancipation Proclamation drew directly from the Ordinance. After the Civil War, Congress used these sources for the Thirteenth Amendment. More recently, courts have applied this narrow exception in prison labor cases.*

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Using archival records and photos, I develop a parallel timeline for college athletics, beginning at Harvard in 1800. Blacks were largely excluded from athletics, a byproduct of slavery and segregation. College athletics grew in a white space of privilege until the 1960s.

From its inception in 1906, the NCAA has fused amateurism to a racialized ideology of athletic competition. As university leaders embraced eugenics, they unabashedly said that the white race could be preserved by promoting collegiate athletics in a racialized context. More recently, economists have shown that the NCAA's amateur model transfers billions of dollars, largely from Black football and men's basketball players to white coaches and white athletes in non-revenue sports.

Comparing more than two centuries of legal developments in the slavery exception doctrine to college athletics, I show that the NCAA's amateurism rules and systemic racism in college athletics have always co-existed. Berger*'s heavy reliance on* Vanskike *has thrown an unexpected light on the racially biased implications of wageless college athletics by comparing amateurism to involuntary prison work. In* Johnson*, the Third Circuit should explicitly reject* Berger *and its faulty reliance on* Vanskike *by recalling the words of Lincoln in the Emancipation Proclamation, that formerly enslaved persons should "labor faithfully for* reasonable wages*."* (emphasis added).

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I. INTRODUCTION

A. Statement of the Research Question

In 1852, the Missouri Supreme Court ruled against Dred Scott's claim for freedom.[1] The same year, Harvard and Yale launched their annual boat race on Lake Winnipesaukee, marking the first intercollegiate athletic contest.[2] Ever since, chattel slavery and athletic privilege have coexisted in separate and unequal American realms.

The Thirteenth Amendment abolished slavery and involuntary servitude,[3] but Black Codes and court rulings subverted congressional intent to free Black labor.[4] Most Black workers were trapped in debt labor or segregated jobs from 1865 until passage of the 1964 Civil Rights Act.[5]

Meanwhile, college athletics grew in a culture of privilege, marked by the absence of Black students. University leaders formed the Intercollege Athletic Association of the United States (IAAUS) in 1905—later renamed the National Collegiate Athletic Association (NCAA) in 1910.[6] College leaders adopted principles of amateurism which survive today.[7] They were

1. Scott v. Emerson, 15 Mo. 576, 587 (Mo. 1852).

2. *Harvard-Yale Regatta - 150 Years of Tradition*, HARVARD UNIV. ATHLETICS, https://gocrimson.com/sports/2020/5/9/harvard-yale-regatta-150-years-of-tradition.aspx [https://perma.cc/V9D3-89E3].

3. U.S. CONST. amend. XIV, § 2.

4. *See infra* note 158 and accompanying text.

5. *See infra* notes 172-174 and accompanying text.

6. *See Timeline - 1900s*, NAT'L COLLEGIATE ATHLETIC ASS'N, https://www.ncaa.org/sports/2021/6/14/timeline-1900s.aspx [https://perma.cc/4YMF-6A9C]; *Timeline - 1910s*, NAT'L COLLEGIATE ATHLETIC ASS'N, https://www.ncaa.org/sports/2021/6/14/timeline-1910s.aspx [https://perma.cc/68FK-D7GP]. To avoid confusion, I refer to the IAAUS as the NCAA, unless specifically referencing a source.

7. *See Constitution and By-Laws of the Intercollegiate Athletic Association of the United States*, PROCS. OF THE THIRD ANN. CONVENTION OF THE INTERCOLLEGIATE ATHLETIC ASS'N OF THE U.S. 78-79 (Jan. 2, 1909). Rule 1 required a student to take a full schedule of courses. Rule 2 required a student who served as a trainer or instructor to have never been paid for athletic competition. Rule 3 required a student who played in an athletic contest to have never been paid for this activity. Rule 4 prohibited a student

influenced by eugenics, which they adapted to athletic competition to preserve the white race.[8]

Black athletes, being mostly excluded from higher education, did not break the color barrier for major college teams until the 1960s.[9] Amateurism remains inequitable for Black athletes in Division I football and men's basketball, where these players labor to earn revenue for athletic programs.[10] The NCAA prohibits college athletes from being paid to play.[11] While NCAA rules fundamentally differ from slavery, they exploit unpaid labor.[12]

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from competing if he had participated the four previous years. Rule 5 required a student to complete a year of instruction at his school before competing in athletics (only for a student who has been registered at another college or university). Rule 6 required a football player to complete two out of three terms in the prior year. Rule 7 required students to complete a card with information about his previous athletic competitions.

8. *See infra* notes 295-300.

9. Sean Gregory, *How Loyola-Chicago's Basketball Team Broke a Racial Barrier 55 Years Ago*, SPORTS ILLUSTRATED (Mar. 30, 2018), https://www.si.com/college/2018/03/30/how-loyola-chicagos-basketball-team-shattered-racial-barrier-black-athletes-55-years-ago-0 [https://perma.cc/8EWL-7263].

10. Craig Garthwaite et al., *Who Profits from Amateurism? Rent Sharing in Modern College Sports* (Nat'l Bureau of Econ. Rsch., Working Paper No. 27734, 2020), http://www.nber.org/papers/w27734 [https://perma.cc/2WKA-6NN4].

11. *See* NAT'L COLLEGIATE ATHLETIC ASS'N, 2020-21 NCAA DIV. I MANUAL, art. 1, § 1.3.1 (2020), stating:

> A basic purpose of this Association is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports.

To make amateur competition an explicit requirement, the NCAA has promulgated these rules:

> Art. 2.9 The Principle of Amateurism. 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.
>
> Art. 2.13 The Principle Governing Financial Aid. A student-athlete may receive athletically related financial aid administered by the institution without violating the principle of amateurism, provided the amount does not exceed the cost of education authorized by the Association; however, such aid as defined by the Association shall not exceed the cost of attendance as published by each institution. Any other financial assistance, except that received from one upon whom the student-athlete is naturally or legally dependent, shall be prohibited unless specifically authorized by the Association.

12. My study adds to literature criticizing the NCAA's amateurism model. Stephen Horn, *Intercollegiate Athletics: Waning Professionalism and Rising Professionalism*, 5 J. COLL. & UNIV. L. 97, 98 (1977), published one of the earliest critiques, noting:

> Too often the jockeying for power within the NCAA has reflected the economic positions between institutions rather than concerns about what should be the basic purpose of the organization: the protection of student-athletes from unscrupulous actions by those who would exploit them for their own purposes.

For more recent critiques, see Richard Smith, Comment, *The Perfect Play: Why the Fair Labor Standards Act Applies to Division I Men's Basketball and Football Players*, 67 CATH. U. L. REV. 549 (2018); Sam C. Ehrlich, *The FLSA and the NCAA's Potential Terrible, Horrible, No Good, Very Bad Day*, 39 LOY. L.A. ENT. L. REV. 77 (2018); Marc Edelman, *From Student-Athletes to Employee-Athletes: Why a "Pay for Play" Model of College Sports Would Not Necessarily Make Educational Scholarships Taxable*, 58 B.C. L. REV. 1137 (2017); Richard Karcher, *Big-Time College Athletes' Status as Employees*, 33 ABA J. LAB. & EMP. L. 31 (2017); Jay D. Lonick, *Bargaining with the Real Boss: How the Joint-Employer Doctrine Can Expand Student-Athlete Unionization to the NCAA as an Employer*, 15 VA. SPORTS & ENT.

This backdrop frames four recent lawsuits brought by college athletes under the Fair Labor Standards Act (FLSA) to challenge their status as amateurs under NCAA rules.[13] In *Berger v. NCAA*, college athletes sought minimum wages for unpaid athletic labor.[14] A Seventh Circuit appeals court rejected Gillian Berger's claim in 2016,[15] partly because of a legal theory called the "slavery exception."[16] It said that Berger's arguments for minimum wages did "not take into account this tradition of amateurism or the reality of the student-athlete experience."[17] This conclusion drew from *Vanskike v. Peters*,[18] where an inmate assigned to kitchen work sued Illinois unsuccessfully for minimum wages.[19] *Berger* analogized amateur college athletics to prison labor, concluding that the FLSA does not cover some work.[20] In 2019, the NCAA won similar cases in *Dawson v. NCAA*[21] and *Livers v. NCAA*.[22]

College athletes are now on their fourth FLSA lawsuit to become employees: *Johnson v. NCAA*.[23] The NCAA avoids any mention of *Vanskike* in this Third Circuit case.[24] Taking a subtle approach, the NCAA keeps *Vanskike* in play by asking the court to use *Berger* as a precedent.[25] Paul

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L.J. 135 (2015); Michelle A. Winters, Comment, *In Sickness and In Health: How California's Student-Athlete Bill of Rights Protects Against the Uncertain Future of Injured Players*, 24 MARQ. SPORTS L. REV. 295 (2013); Jeffrey J.R. Sundram, Comment, *The Downside of Success: How Increased Commercialism Could Cost the NCAA Its Biggest Antitrust Defense,* 85 TUL. L. REV. 543 (2010); Daniel Lazaroff, *The NCAA in Its Second Century: Defender of Amateurism or Antitrust Recidivist*, 86 OR. L. REV. 329 (2007); and Robert A. McCormick & Amy C. McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71, 97-108 (2006).

13. *See infra* notes 14, 21, 22 & 23.

14. Berger v. Nat'l Collegiate Athletics Ass'n, 843 F.3d 285, 289 (7th Cir. 2016).

15. *Id*. at 294.

16. *See* Michael McCann, *SEC Fears of Johnson v. NCAA Labor Case Laid out in Amicus Brief*, SPORTICO (June 20, 2022), https://www.sportico.com/law/analysis/2022/southeastern-conference-amicus-1234679127 [https://perma.cc/JEP2-8QXS] ("[T]he NCAA emphasized case law (Vanskike v. Peters) indicating that while the 13th Amendment abolished slavery and involuntary servitude, there is a so-called 'slavery loophole' for prisoners and, arguably, college athletes."); *see also* Dan Papscun, *College Athlete Pay Suit Confronts NCAA's Supreme Court Loss*, BLOOMBERG LAW (July 6, 2021) ("That defense is tied to . . . Vanskike v. Peters, which ruled that federal inmates aren't entitled to minimum wages for prison labor. . . . In previous cases, the NCAA has used the exception to get cases dismissed before the court could apply employment tests, Johnson's attorneys said.")

17. *Berger*, 843 F.3d at 291.

18. Vanskike v. Peters, 974 F.2d 806, 807 (7th Cir.1992).

19. *Id*. at 813.

20. *See Berger*, 843 F.3d at 291.

21. Dawson v. Nat'l Collegiate Athletics Ass'n, 932 F.3d 905, 911 (9th Cir. 2019) (citing *Vanskike* to support the idea that a multi-factor employment test is not suitable for college athletes in a FLSA case).

22. Livers v. Nat'l Collegiate Athletics Ass'n, No. CV 17-4271, 2018 WL 2291027, at *16 (E.D. Pa. May 17, 2018) (holding that a former college athlete failed to meet the economic realities test without explicitly affirming *Vanskike's* rejection of a multi-factor test).

23. Granting Motion to Certify for Interlocutory Appeal, Johnson v. NCAA, 556 F. Supp. 3d 491 (E.D. Pa. 2021), 2021 WL 6125095 (Dec. 28, 2021).

24. *See* Appellants' Opening Brief at 11, Johnson v. NCAA, No. 22-1223 (3d Cir. Feb 8, 2022).

25. *See id*. at 6 (citing *Berger* passim).

McDonald, lead attorney for plaintiff Ralph "Trey" Johnson and other athletes, believes this is a backdoor argument for *Vanskike*. His Second Amended Complaint asserts that the "NCAA's reliance on *Vanskike* to analogize Student Athletes to prisoners, who may be required to work without pay because the Thirteenth Amendment permits involuntary servitude as punishment for crime, is both offensive and misplaced."[26]

This background frames my purpose for this Article. Should the *Johnson* court follow *Berger* in adopting the *Vanskike* slavery exception for NCAA athletes? Or should the court rule that *Berger* improperly relied on *Vanskike* in affirming the dismissal of a FLSA complaint?[27] For reasons dating to the Ordinance of 1787, and the first college football games at Harvard in 1800, I demonstrate that *Berger* was wrongly decided. The *Johnson* court should—at long last—emancipate college athletes from the yoke of wageless amateurism.

B. Organization of this Article

To explain why *Berger*'s prison labor analogy is faulty, Part II develops a two-track chronology of the origins of the Thirteenth Amendment's slavery exception and the first college athletic contests, exclusively conducted in white spaces.[28] Part II.A examines the Thirteenth Amendment's legal antecedents before the Constitutional Convention of 1787, Congress's passage of the Ordinance of 1787, state constitutions incorporating this law, and the "once free, always free" doctrine.[29] Part II.B examines the circumstances and legal developments surrounding Dred Scott, and how his treatment by courts reflected judicial rejection of the "once free, always free" doctrine.[30] In Part II.C, I explore university archives that shed light on college athletics during the antebellum years, and demonstrate that only whites played college athletics at a time when Black people were enslaved and fugitive slave laws were expanding in scope.[31]

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26. Complaint at 26, 29, 31, Johnson v. NCAA, No. 2:19-cv-05230 (E.D. Pa. Nov. 6, 2019), 2019 WL 5847321. The NCAA's reliance on *Vanskike* as legal justification for classifying Student Athletes as unpaid laborers rather than employees was rejected by the *Livers* Court and has been denounced. The NCAA has thrice relied on *Vanskike* to argue that, as a threshold matter, courts should not even consider—i.e., should not apply a test to determine—whether Student Athletes are employees under the FLSA. *See* Berger v. NCAA, 843 F.3d 285 (7th Cir. 2016); Dawson v. NCAA, 250 F. Supp. 3d 401 (N.D. Cal. 2017); Livers v. NCAA, No. CV 17-4271, 2018 WL 2291027 (E.D. Pa. May 17, 2018). The NCAA's reliance on *Vanskike* to analogize Student Athletes to prisoners, who may be required to work without pay because the Thirteenth Amendment permits involuntary servitude as punishment for crime, is both offensive and misplaced. *See generally* Papscun, *supra* note 16.

27. *See supra* note 16.

28. *See infra* Part II.

29. *See infra* Part II.A.

30. *See infra* Part II.B.

31. *See infra* Part II.C.

Part III compares the separate and vastly unequal realms of Black incarcerated labor and white college athletics from the end of the Civil War through the Civil Rights Act of 1964.[32] Part III.A shows that the Thirteenth Amendment revived the lost principles of the Ordinance of 1787 and its emphasis on free labor.[33] Part III.B shows the emergence of sharecropping and peonage, and explains how racialized criminal laws for vagrancy and fraud in labor contracts enhanced these coercive labor practices.[34] Part III.C.1 uses archives from Ivy League schools to show that college athletics mirrored systemic race discrimination.[35] Part III.C.2 revisits research and eugenics interests in preserving the white race, which NCAA faculty representatives used to justify college athletics.[36] Part III.C.3 explores a black market for paying to recruit and retain white college athletes from the 1880s through the 1930s.[37]

Part IV brings the timeline forward from the Thirteenth Amendment's slavery exception clause to the Seventh Circuit's analysis in *Berger*.[38] Part IV.A provides an overview of court rulings in cases brought by prisoners who challenge compulsory work during their incarceration under the FLSA.[39] Part IV.B shows that prison labor cannot be discussed in the abstract without reference to its racial disparities, which severely impact Black men.[40] Part IV.C analyzes *Berger*'s comparison of prison labor to collegiate athletic labor, focusing on *Berger*'s adoption of *Vanskike*'s reasoning.[41]

Part V explains why *Berger*'s comparison is flawed, and why the *Johnson* court should directly repudiate it.[42] In *Johnson v. NCAA*, the time has come to emancipate NCAA athletes from the amateurism model and allow their labor to be compensated under the Fair Labor Standards Act.

II. NO INVOLUNTARY LABOR "EXCEPT AS PUNISHMENT FOR A CRIME" AND COLLEGE ATHLETICS

This Article aims to provide a compelling legal justification to overturn *Berger*'s reliance on the "slavery exception" for denying college athletes a right to minimum wages under the FLSA. With this purpose in mind, my study develops two lengthy timelines that intersect in *Johnson v. NCAA*.

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32. *See infra* Part III.
33. *See infra* Part III.A.
34. *See infra* Part III.B
35. *See infra* Part III.C.1.
36. *See infra* Part III.C.2.
37. *See infra* Part III.C.3.
38. *See infra* Part IV.
39. *See infra* Part IV.A.
40. *See infra* Part IV.B.
41. *See infra* Part IV.C.
42. *See infra* Part V.

The first timeline demonstrates the evolution of the free labor doctrine, enshrined in the Thirteenth Amendment, which bars slavery and involuntary servitude except for punishment for a crime.[43] *Berger* compared a NCAA track athlete's labor to a convicted prisoner's labor to explain excluding both from FLSA coverage. One should clearly see that *Berger*'s reliance on the slavery exception's rationale in the context of NCAA athletics is categorically flawed. My analysis does more: By tracing the free labor language in the Thirteenth Amendment to the earliest years of a Massachusetts colonial law, I demonstrate that any comparison of college athletics to compulsory prison labor is a pernicious expansion of the "slavery exception" that has no legal justification, no historical rationale, and no moral foundation.

In the second timeline, I chronicle more than a century of excluding Black athletes from college athletics. This historical evidence reinforces the legal argument for overturning *Berger*. I trace collegiate sports' long arc of excluding Black athletes, then segregating Black athletes, and now exploiting Black athletes for their labor, which generates most of the revenue for universities and colleges under the guise of amateurism in a wageless enterprise.[44] Seen in its historical context, the NCAA's amateurism rule is disturbingly like the very types of involuntary labor that the Thirteenth Amendment and the Ordinance of 1787 emphatically rejected. Numerous lawmakers who supported the Thirteenth Amendment spoke of the formerly enslaved person's "right to the fruits of his labor."[45] That idea is no less important in current and future FLSA actions to allow college athletes—especially Black college athletes—to enjoy the fruits of their labor, which is generating billions of dollars.[46]

A. The Ordinance of 1787: Source of "Except as Punishment for a Crime"

The *Berger* court's facile comparison of NCAA amateurism to prison labor overlooked nearly four centuries of American jurisprudence that barred slavery and involuntary servitude except for punishment of a crime. This history calls attention to *Berger*'s unwarranted retreat from the enduring free labor principle that originated nationally in the Ordinance of 1787.

A Massachusetts ordinance in 1641 may have been the first colonial law to prohibit slavery in terms that appeared later in the Thirteenth Amendment. It prohibited "bond slavery, villenage, (and) captivity amongst us, with the

43. U.S. CONST. amend. XIII, § 1.

44. *See* Garthwaite et al., *supra* note 10, at 5-6.

45. Lea S. Vandervelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437, 473 (2009).

46. Garthwaite et al., *supra* note 10, at 1.

exception of lawful captives taken in just wars, *or those judicially sentenced to servitude, as a punishment for crime.*"[47]

This ordinance had no apparent influence for more than a century. Adoption of the "punishment for a crime" exception to involuntary labor depended first on a law prohibiting such labor. No colony or state completely outlawed slavery in the 1770s. Pennsylvania's anti-slavery law of 1780 applied prospectively in freeing enslaved persons.[48] A Massachusetts court abolished slavery in 1783.[49] Connecticut and Rhode Island passed emancipation legislation in 1784.[50]

Deep sectional divisions over the free status of Black people limited progress on emancipation laws. The Confederation Congress enacted the Ordinance of 1784, a law that created a framework to establish territorial governments north of the Ohio River.[51] Reflecting tension between slavery and abolition interests, this bill's proposal to ban slavery was omitted during the final floor debate before a vote.[52] However, abolitionists succeeded when the newly formed U.S. Congress passed the Ordinance of 1787.[53]

Article Six of the Ordinance of 1787 (also called the Northwest Ordinance), whose prohibitory phrasing later appeared in the Thirteenth Amendment,[54] greatly advanced the cause of abolition:[55]

> Article the Sixth. *There shall be neither Slavery nor involuntary Servitude in the said territory otherwise than in the punishment of crimes, whereof the party shall have been duly convicted*; provided always that any person escaping into the same, from whom labor or service is lawfully claimed in

47. Commonwealth v. Aves, 35 Mass. 193, 208 (1836) (emphasis added).

48. An Act for the Gradual Abolition of Slavery, § 3, 5th Gen. Assembly (Pa. 1780) ("[A]ll persons, as well Negroes and Mulattoes as others, who shall be born within this state from and after the passing of this act, shall not be deemed and considered as servants for life, or slaves; and that all servitude for life, or slavery of children, in consequence of the slavery of their mothers, in the cafe of all children born within this state, from and after the passing of this act as aforesaid, shall be, and hereby is utterly taken away, extinguished and forever abolished.")

49. Lanier v. President of Harvard Coll., 490 Mass. 37, 80 (2022) (Cypher, J., concurring) (citing J.D. Cushing, *The Cushing Court and the Abolition of Slavery in Massachusetts: More Notes on the "Quock Walker Case,"* 5 AM. J. LEGAL HIST. 118, 133 (1961) to explain that in 1783 the Massachusetts court of appeals abolished slavery in the Quock Walker Case).

50. Peter P. Hinks, *Gradual Emancipation Reflected the Struggle of Some to Envision Black Freedom*, CONN. HIST. (Jan. 2, 2020), https://connecticuthistory.org/gradual-emancipation-reflected-the-struggle-of-some-to-envision-black-freedom [https://perma.cc/4QVQ-J9RG].

51. *The Ordinance of 1784,* HIST., ART, & ARCHIVES, U.S. HOUSE OF REPRESENTATIVES, https://history.house.gov/Historical-Highlights/1700s/Ordinance-of-1784 [https://perma.cc/ZWH8-T685].

52. *See id.*

53. The Northwest Ordinance 1787, IND. HIST. BUREAU, https://www.in.gov/history/about-indiana-history-and-trivia/explore-indiana-history-by-topic/indiana-documents-leading-to-statehood/the-northwest-ordinance-1787 [https://perma.cc/MBM8-MCFC] (prohibiting slavery except as punishment for a crime in the territory northwest of the Ohio River).

54. U.S. CONST. amend. XIII, § 1.

55. *See* Harry v. Decker, 1 Miss. 36, 39-40 (1818).

> any one of the original States, such fugitive may be lawfully reclaimed and conveyed to the person claiming his or her labor or service as aforesaid.[56]

As state constitutions were passed in the Northwest Territory, Ohio,[57] Michigan,[58] Indiana,[59] Illinois,[60] and Wisconsin[61] adopted the prohibitory language in Article Six. Courts referred to this statute, or similar expressions in state constitutions, when enslaved persons sued for freedom.[62] The Northwest Ordinance was so widely accepted that even the Mississippi Supreme Court upheld a lower court order freeing enslaved persons who were taken from Virginia to Indiana before they were transported to the slave state.[63]

Missouri courts also interpreted whether the Ordinance in a free labor state such as Illinois applied to an enslaved person who returned to this state. Long before Dred Scott was returned by his master to Missouri from the free

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56. The Northwest Ordinance, *supra* note 53 (emphasis added).

57. OHIO CONST. of 1802, art. VIII, § 2 ("There shall be neither slavery nor involuntary servitude in this State, otherwise than for the punishment of crimes, whereof the party shall have been duly convicted.").

58. MICH. CONST. of 1835, art. XI, sec. 1 ("Slavery prohibited. 1. Neither slavery nor involuntary servitude shall ever be introduced into this state, except for the punishment of crimes of which the party shall have been duly convicted.")

59. IND. CONST. of 1816, art. XI, § 7 ("There shall be neither slavery nor involuntary servitude in this state, otherwise than for the punishment of crimes, whereof the party shall have been duly convicted. Nor shall any indenture of any negro or mulatto hereafter made and executed out of the bounds of this state be of any validity within the state."). *See also* State v. Lasselle, 1 Blackf. 60, 62 (Ind. 1820) ("[I]t is declared that 'There shall be neither slavery nor involuntary servitude in this State, otherwise than for the punishment of crimes, whereof the party shall have been duly convicted.' It is evident that by these provisions, the framers of our constitution intended a total and entire prohibition of slavery in this State; and we can conceive of no form of words in which that intention could have been more clearly expressed.").

60. ILL. CONST. of 1818, art. VI, § 1 ("Neither slavery nor involuntary servitude shall hereafter be introduced into this State, otherwise than for the punishment of crimes, whereof the party shall have been duly convicted.")

61. WIS. CONST. of 1848, art. I, § 2 ("There shall be neither slavery nor involuntary servitude in this State, otherwise than for the punishment of crime, whereof the party shall have been duly convicted.").

62. *See, e.g.*, Choisser v. Hargrave, 2 Ill. 317, 319 (1836) (affirming a ruling that an indentured servant brought into Illinois was a free person); *Lasselle*, 1 Blackf. at 60, 62 (decreeing the freedom of a "woman of color" held as a slave); Boon v. Juliet, 2 Ill. 258, 261 (1836) ("[T]he children of registered negroes and mulattoes, under the laws of the Territories of Indiana and Illinois, are unquestionably free[.]").

63. Harry v. Decker, 1 Miss. 36, 42 (1818) ("Can it be that slavery exists in Indiana? If it does, language loses its force, and a constitution intended to protect rights, would be illusory and insecure, indeed. If the language is plain, saying there shall be neither slavery nor involuntary servitude, does it comport with the constitution to say there shall be slavery? This dilemma cannot be got over, by those who give it a construction, that would make the petitioners slaves.").

state of Illinois, Missouri recognized the "once free, always free" legal doctrine,[64] albeit with exceptions.[65]

This profound change in the legal sphere—the abnegation of the "once free, always free" principle associated with the Ordinance—matched the nation's growing hostility to free and enslaved Black labor. During the 1830s, "slave mechanics were often hired out by their masters and in many cases were allowed to hire their own free time."[66] In time, the labor market competition from these skilled artisans led to legislation to criminalize their hiring.[67] One commentator on American life in the 1840s remarked: "In several states, Virginia among others, I heard of strikes, where the white

64. *See, e.g.,* Winny v. Whitesides, 1 Mo. 472, 473 (1824) (tracing this principle to "the government of the territory of the United States, north west of the river Ohio," which outlawed slavery or involuntary servitude. Winny was an enslaved woman brought by her masters, a husband and wife, from North Carolina to Missouri, and for some unspecified time, to Illinois before returning to Missouri). The Missouri Supreme Court ruled for Winny's freedom:

> It was urged . . . that the slaves of persons settling in that country do not thereby become free. The words of the ordinance are, 'that there shall be neither slavery nor involuntary servitude in the said Territory.' We did not suppose that any person could mistake the policy of Congress in making this provision. When the States assumed the right of self-government they found their citizens claiming a right of property in a miserable portion of the human race. Sound national policy required that the evil should be restricted as much as possible. What they could, they did. They said, by their representatives, it shall not vest within these limits, and by their acts for nearly half a century they have approved and sanctioned this declaration.

Id. at 475-76.

See also Milly v. Smith, 2 Mo. 36, 39 (1828) ("[I]t has often been decided by courts of the late Territory of Missouri, and of this State, that slaves carried into Illinois with a view to residence, and staying there long enough to acquire the character of residents, do by virtue of such residence become free"); Ralph v. Duncan, 3 Mo. 194, 195 (1833) ("The object of the ordinance of 1787, was to prohibit the introduction of slaves . . . and the master who permits his slave to go there to hire himself, offends against the law as much as one who takes his slave along with himself to reside there."); Julia v. McKinney, 3 Mo. 270, 272 (1833) ("The plaintiff's claim to freedom is based on the 6th article of the constitution of the State of Illinois, which declares that neither slavery nor involuntary servitude shall hereafter be introduced into this State . . . . We see by this constitution that the very introduction of slavery works an emancipation of the slave."); *Id.* at 276 ("We believe the object of this prohibition was to prevent slave labor from becoming a substitute for white or free labor throughout the State.").

See, e.g., Merry v. Tiffin, 1 Mo. 725, 726 (1827), stating:

> The whole of these instruments, taken together, are unable to create any doubt in our minds, as to the meaning of the 6th article of the ordinance?? The express words in the cession act of Virginia, that the inhabitants shall be protected in the enjoyment of their rights and liberties, are completely satisfied, by securing to them the enjoyment of such rights as they then had, and not that the things or objects that might then happen to be. Property should be so throughout all future time. This man was not then born, and when he was born into existence, the law forbid slavery to exist; and at the time of the making the cession act, this man, John, was not property; and at the time of his birth, he could not be property.

65. *See, e.g.*, Theoteste v. Chouteau, 2 Mo. 144 (1829) (enslaved woman born before passage of the Ordinance at Prairie du Rocher, later part of Illinois, remained enslaved because no law provided for his freedom at the time of her birth); Chouteau v. Pierre, 9 Mo. 3 (1845) (enslaved woman who was held in a place under British control after the Ordinance of 1787 went into effect was not freed).

66. THE NEGRO AMERICAN ARTISAN 31 (W.E.B. DuBois & Augustus Dill eds., 1912).

67. *Id*. at 32-33 (reporting on a Georgia law barring the hiring of enslaved or free mechanics and masons).

workmen bound themselves not to return to their employment until the master had discharged all his colored people."[68]

In sum, the history of the free labor doctrine originated at the time the nation was founded. President Abraham Lincoln recontextualized the text and meaning of this principle in the Emancipation Proclamation, and the Thirteenth Amendment.

B. Dred Scott: Loss of the "Slavery Exception" in the Ordinance of 1787

This section highlights a retrogressive line of cases that effectively nullified the judicial consensus that once an enslaved person set foot in the Northwest Territory and any of its eventual states, they were emancipated. The *Berger* decision mirrors this lost meaning of the bar against slavery and involuntary servitude except for punishment of a crime by analogizing college athletic labor to prison labor. As I show in this section, Dred Scott's lost bid for freedom set the stage for the Reconstruction Congress to revitalize the sundered principle of free labor that originated in the Ordinance of 1787. This revitalized idea formed the core of the Thirteenth Amendment—an amendment whose slavery exception is frequently cited in FLSA cases involving prisoner claims for FLSA coverage[69] *and* explicitly relied upon by *Vanskike*.[70] While it might suffice to argue that prison labor and college athletic labor cannot fairly be compared in a FLSA context, Dred Scott's Missouri litigation that broke from the "once free, always free" doctrine amplifies the magnitude of the error in *Berger*'s unfortunate analogy. That is, *Berger*'s effect in keeping college athletes from earning wages rests on the flawed premise in Dred Scott's Missouri litigation that erased the Ordinance of 1787 by ignoring that law's allowance for unpaid labor *only* for prisoners convicted of a crime.

Dred Scott engaged in more than one court action to secure his freedom.[71] Beginning in December 1833, he was enslaved by Dr. John Emerson, an Army surgeon from St. Louis, in Fort Armstrong, Illinois and Fort Snelling in the Wisconsin Territory.[72] Ordered in 1840 to serve in the

68. CHARLES LYELL, A SECOND VISIT TO THE UNITED STATES 83 (1849).

69. *See* McCann, *supra* note 16.

70. Vanskike v. Peters, 974 F.2d 806, 809 (7th Cir. 1992).

71. Walter Ehrlich, *The Origins of the Dred Scott Case*, 59 J. NEGRO HIST. 132, 135-36 (1974) (commenting on how little is actually known about the long trail of court cases involving Dred Scott's efforts to obtain freedom: "The plain fact is that many of the court records in the Dred Scott case have long since been destroyed or have disappeared, and it is for this reason that its history has been so obscure and never fully told.").

72. Charles Noble Gregory, *A Great Judicial Character, Roger Brooke Taney*, 18 YALE L.J. 10, 19-20 (1906), detailing the background of the Dred Scott case:

> Dred Scott brought an action for his freedom in the Circuit Court for St. Louis County, Missouri, which was appealed to the State Supreme Court, and finally carried by writ of error to the Supreme Court of the United States. . . . The facts were agreed that plaintiff had been a negro slave belonging to Dr. Emerson, a surgeon in the army. That Emerson in 1834 took him from

Seminole War in Florida, Dr. Emerson returned to St. Louis and left Dred and Harriett Scott with his wife, Irene Emerson.[73] Dr. Emerson died shortly after this transfer.[74]

On April 6, 1846, Scott initiated the first of several legal actions to secure his freedom, suing Irene Emerson in trespass for false imprisonment.[75] In 1847, a trial was held in St. Louis County, followed by an appeal to the Missouri Supreme Court in 1848, and a second trial in 1850.[76] This led to an appeal to the state's highest court. A published decision, *Scott v. Emerson*, reported that Scott prevailed in the 1850 trial.[77]

Although Scott argued that he was entitled to freedom under the Ordinance of 1787,[78] the majority opinion never mentioned this law.[79] Instead, it said that Missouri was not bound by a grant of freedom to an enslaved person in foreign jurisdictions,[80] thereby severing the doctrinal thread of "once free, always free," ruled upon with favor in numerous Missouri court rulings in the 1820s and 1830s,[81] without explicit rejection.

Justice Hamilton Gamble's dissenting opinion, to no avail, cited cases in other slave states that recognized the principle of "once free, always free."[82] He believed that Missouri was obligated to respect the anti-slavery law in Illinois:

Missouri to Rock Island and later to Fort Snelling in the Louisiana territory. That Harriet was the slave of a major in the army who took her also to Fort Snelling and sold her to Emerson. That Dred and Eliza were married in 1836 at Fort Snelling and the children were born of that marriage. That in 1836 Emerson removed them all to Missouri, and that he as their owner imprisoned them. The claim was that having been taken by their master into territory where, by act of Congress, slavery was forbidden, they became free and being once free that they continued free when taken back into slave territory.

73. Ehrlich, *supra* note 71, at 132.

74. *Id*.

75. *Id*.

76. *Id*. at 132-33.

77. *See* Scott v. Emerson, 15 Mo. 576, 582 (1852).

78. *See id*. at 590 (Gamble, J., dissenting).

79. *See id.* at 582-87.

80. *Compare id*. at 584 ("It is a humiliating spectacle, to see the courts of a State confiscating the property of her own citizens by the command of a foreign law. If Scott is freed, by what means will it be effected, but by the Constitution of the State of Illinois, or the territorial laws of the United States?"), *with* Maria v. Kirby, 51 Ky. 542, 548 (1852) ("A statute of any non-slaveholding State declaring that any slave brought into that State by his owner, though taken there for a temporary purpose only, should be instantly free, will not be enforced in Kentucky.").

81. *See supra* note 64.

82. *Scott*, 15 Mo. at 590-91 (citing Lunsford v. Coquillon, 2 Mart. (n.s.) 401 (La. 1824) (holding that a master moving an enslaved person from Kentucky to Ohio with the intention to live there emancipated the enslaved individual) Justice Gamble's dissenting opinion added: "Times may have changed, public feeling may have changed, but principles have not and do not change; and, in my judgment, there can be no safe basis for judicial decisions, but in those principles, which are immutable." *Id.* at 591-92. *See also* Marie Louise v. Marot, 9 La. 473 (1836); Smith v. Smith, 13 La. R. 441 (1839) (holding that an enslaved person is granted emancipation when moved to a country where slavery is illegal, like France); Harry v. Decker, 1 Miss. 36 (1818) (holding that enslaved persons in the Northwest territory became free by the Ordinance of 1787 and could assert their rights in Mississippi courts); Griffith v.

> As citizens of a slaveholding State, we have no right to complain of our neighbors of Illinois, because they introduce into their State Constitution a prohibition of slavery; nor has any citizen of Missouri, who removes with his slave to Illinois, a right to complain that the fundamental law of the State to which he removes, and in which he makes his residence, dissolves the relation between him and his slave.[83]

When an owner brought an enslaved person to Illinois, it was "as much his own voluntary act, as if he had executed a deed of emancipation."[84] Justice Gamble also based his opinion on precedents that gave full effect to the anti-slavery provisions in the Ordinance of 1787.[85]

In a remarkable twist of history, Scott had been delivered into the custody of the sheriff, who was ordered by a court during the pendency of this long litigation to hire out Scott for wages.[86] The matter might have ended there, but Dred Scott's supporters arranged for Roswell Field to continue legal proceedings.[87] Field decided that a federal lawsuit based on diversity of citizenship would allow courts to take jurisdiction.[88] He framed the issue: Did residence in a free state or territory permanently free an enslaved person?[89] Essentially, this approach attempted to restore the "once free, always free" doctrine. Meanwhile, for unknown reasons, ownership of Scott transferred from Irene Emerson to her brother in New York, John Sanford.[90]

Chief Justice Roger Taney's ignominious opinion in *Dred Scott v. Sandford* misspelled Sanford's surname.[91] Its ruling that the Court lacked jurisdiction was not a surprise. The Supreme Court first ruled on a slavery issue related to the Ordinance of 1787 in 1831, when Pierre Menard appealed the Missouri Supreme Court's denial of his right to own an enslaved person.

Fanny, 21 Va. (Gilmer) 143 (1820) (holding that an enslaved person in Ohio was entitled to freedom under the state's constitution)).

83. *Scott*, 15 Mo. at 589.

84. *Id*.

85. *Id*. at 592, stating:

> So far as it may be claimed in this case, that there is anything peculiar in the manner in which the slave was held in the free country, by reason of his master being an officer of the United States army, it is sufficient to answer, that this court, in Rachael v. Walker, 4 Mo. R. 350, considered the effect of that circumstance, and decided that such officers were not authorized, any more than private individuals, to hold slaves, either in the Northwest territory or in the territory west of the Mississippi and north of thirty-six degrees thirty minutes, north latitude. The act of Congress, called the Missouri Compromise, was, in that case, held as operative as the Ordinance of 1787.

86. FREDERICK TREVOR HILL, DECISIVE BATTLES OF THE LAW 199 (1907), at 119.

87. *See Missouri's Dred Scott Case, 1846-1857*, MO. STATE ARCHIVES, https://www.sos.mo.gov/archives/resources/africanamerican/scott/scott.asp [https://perma.cc/TPB6-NLHB].

88. *Id*.

89. *Id*.

90. *Id*.

91. Dred Scott v. Sandford, 60 U.S. 393 (1856).

In *Menard v. Aspasia*,[92] a daughter of an enslaved person domiciled in the Illinois territory who was born after 1787 successfully sued for freedom in Missouri after Menard purchased her there.[93] Aspasia claimed that the Ordinance of 1787 freed her.[94] The Supreme Court decided this case solely on procedural grounds, asking whether the Judiciary Act of 1789, which allowed review of a state's highest court decision on a question of federal law, conferred federal jurisdiction over Menard's appeal.[95] The Court dismissed the appeal for lack of jurisdiction.[96]

Twenty-five years later, *Dred Scott v. Sandford* presented the Court an opportunity to use similarly narrow reasoning.[97] But Taney failed to cite *Menard* even once, declining to base his jurisdictional ruling on this precedent. Taney and a majority of the Court, inflamed by the sectionalism of the 1850s, fully embraced a radically racist jurisprudence.[98] Building on this predicate, Taney deduced that Africans and their descendants were never meant to be citizens of states or the nation.[99] His opinion ruled that the circuit court erroneously found jurisdiction to hear Scott's case and ordered judgment for Scott to be reversed.[100] The effect of the Ordinance of 1787 in freeing an enslaved person who crossed into Illinois, widely understood by Missouri courts in the early 1800s,[101] was erased.

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92. *See* Menard v. Aspasia, 30 U.S. 505, 511 (1831).

93. *Id*. at 505.

94. *Id*.

95. *Id*. at 516-17.

96. *Id*. at 517.

97. Dred Scott v. Sandford, 60 U.S. 393, 400 (1856) ("There are two leading questions presented by the record: 1. Had the Circuit Court of the United States jurisdiction to hear and determine the case between these parties? And 2. If it had jurisdiction, is the judgment it has given erroneous or not?").

98. *Id.* at 475 (stating that "the African negro race never have been acknowledged as belonging to the family of nations"). Long before Taney's opinion, another court rendered a dehumanized view of enslaved African persons and descendants. *See, e.g.*, Jarman v. Patterson, 17 Ky. (7 T.B. Mon.) 644, 645-46 (1828) ("Slaves, although they are human beings, are by our laws placed on the same footing with living properly of the brute creation. However deeply it may be regretted, and whether it be politic or impolitic, a slave by our code, is not treated as a person, but . . . a thing, as he stood in the civil code of the Roman Empire.").

99. *Dred Scott* at 481-82, explaining:

> [In] the establishment of the several communities now the States of this Union, and in the formation of the Federal Government, the African was not deemed politically a person. He was regarded and owned in every State in the Union as property merely, and as such was not and could not be a party or an actor, much less a peer in any compact or form of government established by the States or the United States . . . . That so far as rights and immunities appertaining to citizens have been defined and secured by the Constitution and laws of the United States, the African race is not and never was recognized either by the language or purposes of the former; and it has been expressly excluded by every act of Congress providing for the creation of citizens by naturalization, these laws, as has already been remarked, being restricted to free white aliens exclusively.

100. *Id*. at 518.

101. *See supra* note 64.

In sum, while the *Dred Scott* opinion is widely known for its dehumanizing view of Black people, it marked the culmination of prolonged litigation in which the Missouri Supreme Court circumvented the "once free, always free" doctrine. The more sweeping justification for ruling against Dred Scott in Taney's opinion provided a direct and compelling justification for Congress to reintroduce the main principles of the Ordinance of 1787 in the Thirteenth Amendment. Proponents of that legislation repeatedly said that every laborer should have a "right to the fruits of his labor."[102] In 2016, the Berger court ignored this concept while citing a prison labor case to justify the exclusion of college athletes from FLSA coverage.[103] Dred Scott's legal journey provides the full story behind the restoration of the free labor principle, demonstrating the gravity of *Berger*'s flawed analogy.

C. Early College Athletics: Privilege and Race

Ralph "Trey" Johnson is a Black athlete.[104] As the lead plaintiff in *Johnson v. NCAA*, he is like other Black football and men's basketball players in major athletic programs who disproportionately generate wealth for college athletic programs,[105] but cannot make a wage for playing their sport due to the NCAA's amateurism rules.[106] This situation is not comparable to chattel slavery, and the amateur model does not use the forms of coercion that were common in peonage, sharecropping, and convict leasing. Nonetheless, it is a contemporary form of compulsory wageless labor which is a particular detriment to revenue-producing Black athletes.

I do not contend that the NCAA's amateurism model was adopted to exploit Black labor, but the model developed in an exclusive space for white athletes who enjoyed extraordinary privilege in attending private schools in the 1800s.[107] In the following analysis, I show that college athletics germinated in a racially self-contained world that was held in place by laws, norms, and racial prejudice that foreclosed, in a separate and unequal space, freedom and education for Black people—those who were enslaved, those who were segregated, and those who would have otherwise participated in college sports.

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102. Vandervelde, *supra* note 45, at 473.

103. Berger v. NCAA, 843 F.3d 285, 291 (7th Cir. 2016).

104. *See* Weston Blasi, *Former College Football Player Sues NCAA, Says Student Athletes Should Be Paid Minimum Wage*, MARKETWATCH (Nov. 9, 2019), https://www.marketwatch.com/story/former-college-football-player-sues-ncaa-says-student-athletes-should-be-paid-minimum-wage-2019-11-08 [https://perma.cc/3R26-XU2Z].

105. Garthwaite, *supra* note 10. Although Johnson's school was not included in the Garthwaite study, his race symbolizes the larger significance of what his lawsuit means for potentially transforming Black athletes into wage earners.

106. *See supra* note 11.

107. *See infra* Part III.C.

Concurrent with the emergence of this racially privileged athletics enclave, Dred Scott's legal struggle to be declared free helped eviscerate the Ordinance of 1787. The Fugitive Slave Act of 1850—passed just two years before the first intercollegiate contest and the Missouri Supreme Court's denial of freedom to Dred Scott—further expanded the reach of slavery.[108] In this way, the tentacles of slavery gradually spread north, where college sports was emerging. The thoroughgoing whiteness of early college athletics is hard to demonstrate because of scant record keeping before the Civil War. Nonetheless, *H Book of Harvard Athletics 1852-1922* narrates Harvard University's rowdy sports scene in the early 1800s.[109] This account explains that "both sexes took part in the game in England at Shrove-tide" in 1175, the event that inspired Harvard students for Bloody Monday.[110] Harvard conducted competitions for rowing, baseball, football, hockey, track, lawn tennis, and golf.[111] The first team pictures in this book are from 1852.[112] The absence of Black athletes in photos of this early period, beginning in 1852 (below),[113] corresponded to the nearly total absence of Black students at Harvard.[114]

108. Alice L. Baumgartner, *Enforcing the Fugitive Slave Acts in the South: Federalism, Irony, and the Conflict of Jurisdictions, 1787-1861*, 88 J. S. HIST. 475, 491-92 (explaining that the act "granted exclusive jurisdiction to the federal courts over runaway slaves . . . [and] returned fugitive slaves to their owners").

109. H BOOK OF HARVARD ATHLETICS 1852-1922, at 311-14 (John A. Blanchard ed., 1923).

110. *Id*. at 313.

111. *Id*. at vii-viii.

112. *Id*. at 11.

113. *Id.* at 212 (featuring 1902 baseball team photo as first evidence of a Black member, seated lower left).

114. Kris Snibbe, *A Window into African-American History*, HARVARD GAZETTE (Feb. 4, 2011), https://news.harvard.edu/gazette/story/2011/02/a-window-into-african-american-history [https://perma.cc/RM9E-U4CW].

Figure 1: Harvard University crew team, 1852

Harvard football descended from an early English football tradition, originating in the twelfth century as Shrove Tuesday.[115] Edward II banned the game in 1348 due to its violence and property damage.[116] Later, James I renewed a ban on football because it was better "for laming than making able users thereof."[117]

Harvard students, not subject to these decrees, played football in 1800 on Bloody Monday.[118] The *H Book*, published in 1923, recounts the early history of football:

> Shrove Tuesday rivaled Bloody Monday at Harvard in roughness, and it is interesting to note, in view of the present movement for girl teams, that both sexes took part in the game at Shrove-tide in England. Yet on that day 'shutters had to be put up and houses closed in order to prevent damage.'

115. MONTAGUE SHEARMAN, ATHLETICS AND FOOTBALL 269 (1887).

116. *Id*. at 270 ("Forasmuch as there is great noise in the city caused by hustling over large balls . . . from which many evils might arise which God forbid: we command and forbid on behalf of the king, on pain of imprisonment, such game to be used in the city in future.")

117. H BOOK OF HARVARD ATHLETICS, *supra* note 109, at 313 n.1.

118. *Id*.

> Sometimes fatal accidents occurred, the game fell into bad repute and finally "Shrove Tuesday," football day 'gradually died out about 1830,' when football was in full blast at Harvard and the first Monday after Commencement was its great day.[119]

The absence of Black athletes at Harvard in this period corresponded to non-existent academic opportunities for Black students. Beverly Garnett Williams, the first Black person to be admitted to Harvard, died before the school year began in 1847.[120]

At Yale University, football appeared in the spring of 1840 as a challenge between freshmen and sophomores.[121] Race is not mentioned in early accounts of Yale football, but descriptions of the sport depict high-styled participants playing in front of college buildings while wearing "tall steeple hats."[122] The games attracted "many spectators . . . including ladies" who "displayed great interest."[123] Yale faculty found the ruffian game so objectionable that they banished it from the campus, relegating it to a public green.[124] At an off-campus game in 1841, football players "came in collision with the firemen on parade who, endeavoring to drive them off the ground, met with a determined resistance," leading to the arrest and fining of a student.[125]

Yale football cultivated a warrior spirit in men whose social identities were defined in terms of their graduating class. Challenged to a contest by the class of 1862, the class 1861 smugly accepted:

> Come!
> And like sacrifices in their trim,
> to the fire-eyed maid of smoky war
> All hot and bleeding we will offer you.[126]

Similar to Harvard and Yale, athletics at Brown began as impromptu games in the early 1800s.[127] Eventually, an annual freshman-sophomore football game occurred in the fall with "every member of the class participating in what amounted to a free-for-all. The ball had to be advanced

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119. *Id*.

120. Snibbe, *supra* note 114 (reporting that Harvard did not graduate a Black student until Richard T. Greener graduated in 1870).

121. RICHARD M. HURD, A HISTORY OF YALE ATHLETICS, 1840-1888, at 32 (1888).

122. *Id*.

123. *Id*. at 54.

124. *Id*. at 54-55.

125. *Id*.

126. *Id*. at 53.

127. Peter Mackie, *A History of Brown Athletics Facilities: The Beginning of Intercollegiate Competition—1859-1899,* BROWN UNIV. ATHLETICS (June 10, 2010), https://brownbears.com/sports/2018/4/27/general-facilities-history-1.aspx [https://perma.cc/82UZ-MYDR] (reporting on Williams Latham's diary records for March 22, 1827, which said that "[w]e had a great play at ball today at noon").

beyond the goals, two large elms on Waterman and George Streets."[128] Brown's first intercollegiate competition was a crew race against Harvard and Yale on July 26, 1859.[129] Black athletes were absent from Brown University's pre-Civil War athletics because none were students.[130]

Summing up Part II, the period bounded by the Ordinance of 1787 and the Civil War shaped college athletics, with implications for *Johnson v. NCAA*.

Part II reveals an emerging white athletic and academic culture in higher education in the first half of the 1800s. Intercollegiate athletics began in 1852, the year that the Missouri Supreme Court denied freedom to Dred Scott.[131] Athletics built on the foundations of white privilege evidenced in college team photos.[132] The amateurism model had not yet developed. However, wealth and privilege defined its culture, as evidenced in team photos of men in professional attire, intercollegiate contests played before fans, intense school rivalries, and integration of sports and school identity. Racially exclusive teams drew from, and amplified, these cultural totems. This social context set the tone for the amateurism model that was officially created in 1905.[133] In contrast to the growth of racial exclusivity in prominent colleges and universities,[134] the free labor principle was a constitutional requirement for future states in the Northwest Territory. This fundamental right to work

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128. *Id*.

129. *Id*. (noting that baseball began at Brown in 1863 in a game played against Harvard).

130. *From Martha Mitchell's Encyclopedia Brunoniana*: *African Americans*, OFF. UNIV. COMMC'N (1993), https://www.brown.edu/Administration/News_Bureau/Databases/Encyclopedia/search.php?serial=A0080 [https://perma.cc/NJ2A-EGSQ] [hereinafter *Martha Mitchell's Encyclopedia*] (noting that Inman Page and George Washington Milford, both of the class of 1877, were the first known Black students at Brown University).

131. Scott v. Emerson, 15 Mo. 576, 587 (1852); Harvard-Yale Regatta, *supra* note 2.

132. H BOOK OF HARVARD ATHLETICS, *supra* note 109, at 311-14; *see generally infra* notes 194, 203, 216, 228-31, 245.

133. NAT'L COLLEGIATE ATHLETIC ASS'N, *supra* note 6 and accompanying text.

134. For example, Ronald Story, *Harvard Students, the Boston Elite, and the New England Preparatory System, 1800-1876*, 15 HIST. EDUC. Q. 291, 293 (1975), described Harvard's adoption of policies that tended to benefit wealthy white students from the Boston elite to the exclusion of other students:

> Did Harvard deliberately adopt policies, as critics sometimes insinuated, which excluded the provincial and the poor? . . . High tuition and high requirements both had the unexceptionable aim of enhancing the quality of student life and instruction. In practice, it improved the situation of a small number of students who came, as critics and defenders alike acknowledged, increasingly from the Boston elite. The fact that costs and requirements began to rise just as Boston lawyers and businessmen gained administrative power at Harvard doubtless made matters seem vaguely collusive.

for a wage,[135] rather than as an indentured servant,[136] announced a broad principle of free labor that, to this day, conflicts with the NCAA's legal position in *Johnson* that wageless athletic labor is a "revered tradition of amateurism."[137]

III. SEPARATE AND UNEQUAL: RACIALLY INCARCERATED LABOR AND WHITE COLLEGE ATHLETICS

The *Dred Scott* decision effectively ended the anti-slavery principles of the Ordinance of 1787 by removing federal jurisdiction to hear lawsuits for freedom brought by enslaved persons and their descendants. Part III.A demonstrates how the Emancipation Proclamation revived these lost principles and how the Reconstruction Congress re-enacted a key part of Article 6 of the Ordinance of 1787 in the Thirteenth Amendment.[138]

Part III.B shows that sharecropping[139] and peonage[140] were pervasive in the South, limiting the freedom of Black farmers and agricultural laborers to a degree that recalled slavery. Criminal laws for petty and vague offenses such as vagrancy[141] and fraud in the performance of oppressive labor contracts fueled a rise in bonded and leased labor of Black convicts.[142] Incarceration was essential to these unconscionable work arrangements, prompting legal disputes over the Thirteenth Amendment's ban on involuntary labor and its exception for criminal punishment.[143]

Part III.C.1 uses archival records and photos to show how college athletics mirrored deeply ingrained race discrimination.[144] Part III.C.2

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135. For evidence that a wage economy had formed by the time the Northwest Territory was founded, see U.S. DEP'T OF LAB., BUREAU OF LAB. STAT., 30 MONTHLY LAB. REV. 1, 12 (1930), reporting:

> Wages rose steadily with the opening of the new century, after Federal and State Governments had begun really to function and the new Republic to find itself. "It is impossible," McMaster states, "to read the many memorials which for 20 years (1790-1810) had been coming to Congress, without noticing the general complaint of the high price of wages. To us, when we consider the long hours of labor and the cost of living, these wages seem extremely low." John Jay calls the wage demands of mechanics and laborers at this period "very extravagant."

136. Founding of the Northwest Territory coincided with a sharp drop in the number of immigrant laborers who entered as indentured servants. *See* Aaron S. Fogelman, *From Slaves, Convicts, and Servants to Free Passengers: The Transformation of Immigration in the Era of the American Revolution*, 85 J. AM. HIST. 43, 44 (estimating that 96,600 indentured servants entered from 1607-1699; 103,600 entered from 1700-1775; 18,300 entered from 1776-1809; and 5,300 entered from 1810-1819).

137. Johnson v. NCAA, 556 F. Supp. 3d 491, 500 (E.D. Pa. 2021) (citing NCAA v. Bd. Of Regents, 468 U.S. 85, 120 (1984)).

138. *See infra* Part III.A.

139. *See infra* notes 168-82 and accompanying text.

140. *See infra* notes 183-91 and accompanying text.

141. *See infra* notes 176, 179 and accompanying text.

142. *See infra* notes 179-91 and accompanying text.

143. *See infra* notes 186-91 and accompanying text.

144. *See infra* Part III.C.1.

extends this analysis to the IAAUS and NCAA.[145] College leaders sought to remove unenrolled professional athletes by limiting contests to fully enrolled students.[146] As I demonstrate below, these leaders embraced eugenics in numerous disciplines, and some with NCAA ties believed that athletic competition would preserve the white race by strengthening physical prowess and character.[147] Thus, college amateurism and now-discredited notions of racial superiority were interwoven.

A. The Emancipation Proclamation and the Thirteenth Amendment

President Lincoln issued two emancipation proclamations. Both influenced Congress's consideration of language for the Thirteenth Amendment. The first Emancipation Proclamation was a battlefield speech dated September 22, 1862.[148] This lengthier version contained ten sections with specific policies related to freeing enslaved persons in rebellious states. In Section 9, it mentioned "servitude,"[149] stating that "all slaves of such persons found on (or) being within any place occupied by rebel forces and afterwards occupied by the forces of the United States, shall be deemed captives of war, and shall be forever *free of their servitude* and not again held as slaves."[150] The shorter version declared on January 1, 1863 that enslaved persons in rebel states were free, that the U.S. executive branch and military would "recognize and maintain the freedom of such persons," and that formerly enslaved persons should "labor faithfully for reasonable wages."[151]

By 1864, Congress debated a constitutional amendment to abolish slavery.[152] In these preliminary discussions, some lawmakers were aware of the Ordinance of 1787.[153] They agreed on the idea that every laborer should have a "right to the fruits of his labor."[154] What's more, before these discussions Thomas Jefferson had promoted this idea to argue against taxation powers aimed at addressing social inequality.[155] And in the context of slavery, the idea was proposed before the Civil War, too: once during a

145. *See infra* Part III.C.2.

146. *See infra* notes 286-93 and accompanying text.

147. *See infra* note 295 and accompanying text.

148. *See* Proclamation No. 93, Declaring the Objectives of the War Including Emancipation of Slaves in Rebellious States on January 1, 1863, 12 Stat. 1267 (Sept. 22, 1862).

149. U.S. CONST. amend. XIII, § 1.

150. Proclamation No. 93, *supra* note 148 (emphasis added).

151. *See* Proclamation No. 95, Regarding the Status of Slaves in States Engaged in Rebellion Against the United States [Emancipation Proclamation], 12 Stat. 1267 (Jan. 1, 1863).

152. Vandervelde, *supra* note 45, at 468-74.

153. *Id*. at 450.

154. *Id*. at 473 n.152.

155. Joseph Dorfman, *The Economic Philosophy of Thomas Jefferson*, 55 POL. SCI. Q. 98, 120 (1940) (noting that Jefferson's first principle of society was "the guarantee to every one of a free exercise of his industry and the fruits acquired by it"—an ironic point for a slave owner).

stump speech in 1856 by Rep. James Ashley[156] and once by Henry Wilson in a Senate speech in 1858.[157]

As the end of the Civil War neared, Missouri Senator John B. Henderson, a slaveholder, proposed language that nearly approximated the final terms of the Thirteenth Amendment.[158] The Senate Judiciary Committee reported a bill adopting his language on February 10, 1864, with an amendment "that followed the phraseology of Article VI of the Northwest Ordinance even more closely than [other] resolutions and subsequently was adopted precisely as reported."[159]

Even before the Confederacy surrendered at Appomattox on April 9, 1865, the Thirty-Ninth Congress enacted the Thirteenth Amendment.[160] Congress spent little time debating it.[161] On February 1, 1865, Congress submitted to the states a proposed amendment "declaring that neither slavery nor involuntary servitude, except as a punishment for crime, shall exist in the United States."[162] By December 6, 1865, three-fourths of state legislatures ratified this Amendment.[163]

The meaning of the Thirteenth Amendment led to immediate controversy. Congress enacted the Civil Rights Act of 1866 to implement specific legal protections for freed Black people and all persons.[164] President

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156. Rebecca E. Zietlow, *James Ashley's Thirteenth Amendment*, 112 COLUM. L. REV. 1697, 1721 (2012) (quoting Ashley's declaration in a stump speech: "I demand for every human soul within our gates, whether black or white, or of mixed blood, the equal protection of the law, and that everywhere beneath our flag, on the land or on the sea, that they be protected in their right to life and liberty, and the secure possession of the fruits of their labor.").

157. Lea S. Vandervelde, *Henry Wilson: Cobbler of the Frayed Constitution, Strategist of the Thirteenth Amendment,* 15 GEO. J.L. & PUB. POL'Y 173, 189 n.63 (2017) (quoting Wilson's declaration in a Senate speech: "The poorest man that treads her soil, no matter what blood may run in his veins, is protected in his rights and incited to labor by no other force than the assurance that the fruits of his toil belong to himself, to the wife of his bosom, and the children of his love.").

158. *See* Howard D. Hamilton, *The Legislative History of the Thirteenth Amendment* (May 15, 1950) (Ph.D. thesis, University of Illinois) (ProQuest).

159. *Id*. at 6 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 553, 1313 (Feb. 8, 1864)), stating:

> Article XIII
> Sec. 1. Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist in the United States or any place subject to their Jurisdiction.
> Sec. 2. Congress shall have power to enforce this article by appropriate legislation.

160. U.S. CONST. amend. XIII, § 1.

161. *See* Vandervelde, *supra* note 45, at 468-75.

162. A Bill to Maintain and Enforce the Freedom of the Inhabitants of the United States, S. 55, 39th Cong. (1865).

163. Ken Drexler, *13th Amendment to the U.S. Constitution: Primary Documents in American History*, LIBR. OF CONG. (Sept. 18, 2018), https://guides.loc.gov/13th-amendment [https://perma.cc/7TKK-MK98].

164. See Eugene Gressman, *The Unhappy Experience of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1328 (1952), recalling the purpose and effect of the Civil Rights Act of 1866:

> The civil rights bill became the Act of April 9, 1866, being enacted over the veto of President Johnson. It wrote into law that persons born in the United States and not subject to any foreign power were citizens of the United States, thereby overruling the Dred Scott decision. It further

Andrew Johnson vetoed this legislation on March 27, 1866, revealing a minimalist view of the Amendment:

> It may be assumed that this authority is incident to the power granted to Congress by the Constitution, as recently amended, to enforce, by appropriate legislation, the article declaring that—
> Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction.
> It can not, however, be justly claimed that, with a view to the enforcement of this article of the Constitution, there is at present any necessity for the exercise of all the powers which this bill confers. Slavery has been abolished, and at present nowhere exists within the jurisdiction of the United States; nor has there been, nor is it likely there will be, any attempt to revive it by the people or the States.[165]

Johnson added that any additional legislation to enforce the Thirteenth Amendment would only impede a natural labor market adjustment for white and Black people.[166] While Congress overrode Johnson's veto,[167] the precise meaning of the amendment continues to be analyzed by courts in FLSA cases involving prisoners and detainees.[168]

B. Racialized Debt Labor: Peonage and Convict Leasing

Though the Thirteenth Amendment ended chattel slavery and the plantation system, emancipated Black people who worked in a wage economy could not advance because white landlords and overseers imposed harsh controls, including corporal punishment.[169] By 1880, most Black

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> provided that such citizens, without regard to color, were entitled in every state and territory to the same right to contract, sue, give evidence, and take, hold and convey property, and to the equal benefit of all laws for the security of person and property, as was enjoyed by white citizens; and any person who under color of law caused any such civil right to be denied would be guilty of a federal offense.

165. Andrew Johnson, *Veto Message on Civil Rights Legislation*, MILLER CTR., UNIV. OF VA. (Mar. 27, 1866), https://millercenter.org/the-presidency/presidential-speeches/march-27-1866-veto-message-civil-rights-legislation [https://perma.cc/99UT-8EU9].

166. *See id.* (stating that the bill "intervenes between capital and labor" and frustrates market "adjustment").

167. ALBERT E. CASTEL, THE PRESIDENCY OF ANDREW JOHNSON 71 (1979) (explaining that the Senate voted 33-15 on April 6 to override the veto and the House of Representatives overrode the veto 122-41 on April 9).

168. *See, e.g.*, *infra* notes 310-14 and accompanying text. *See generally* Jennifer McAward, *Defining the Badges and Incidents of Slavery*, 14 U. PA. J. CONST. L. 561, 630 (2012):

> Since the Civil Rights Cases in 1883, it has been widely accepted that Section 2 of the Thirteenth Amendment gives Congress the power to enforce that amendment by legislating regarding the "badges and incidents of slavery." There is, however, no similarly accepted understanding of what a badge and incident of slavery is.

169. Roger L. Ransom & Richard Sutch, *The Ex-Slave in the Post-Bellum South: A Study of the Economic Impact of Racism in a Market Environment*, 33 J. ECON. HIST. 131, 131 (2010). By 1880, one-third of Blacks in agriculture worked for wages. *Id*. at 138.

workers turned to sharecropping for a living.[170] Racial segregation, a severe tool of social control, was approved as constitutional in *Plessy v. Ferguson*.[171]

Debt labor in the South arose as a practical means to enforce segregation. Its forms were varied, taking on shades of voluntary, involuntary, and ambiguous servitudes owed by Black people to whites.[172] In sharecropping, white landowners extended credit to Black workers for raising crops and maintained a lien or other contractual claim for unpaid debt.[173]

170. James R. Irwin, *Farmers and Laborers: A Note on Black Occupations in the Postbellum South*, 64 AGRIC. HIST. 53 (1990) (estimating that a substantial majority of southern Black people worked one-family farms as share-croppers, or share or fixed-rent tenants, but rarely as owners).

171. Plessy v. Ferguson, 163 U.S. 537, 551-52 (1896).

172. Pete Daniel, *The Metamorphosis of Slavery, 1865-1900*, 66 J. AM. HIST. 88, 89 (1979), explains these shades of post-Civil War voluntary and involuntary labor in the South:

> Most agricultural laborers were free, moving about and selling their labor as best they could; but at the other extreme, at the bottom of the agricultural ladder, were peons, laborers who were bound in debt from year to year and who were coerced to work out what they owed. The third category was simply the twilight zone between freedom and involuntary servitude. It was in this middle ground between slavery and freedom that the post-Civil War labor system metamorphosed. For example, a worker who ended the year in debt and who voluntarily remained with a landlord and worked off his debt was free, but when any element of coercion entered, he became a peon. The line was that thin. No doubt many workers drifted from freedom to peonage often in their lifetimes, never realizing that they had crossed the line.

173. Joe M. Richardson, *Florida Black Codes*, 47 FLA. HIST. Q. 365, 366 (1969) ("Though Floridians were forced to accept emancipation many could conceive of Negroes as little more than subordinate laborers. Many planters hoped to keep the freedmen on the plantations in some form of servitude."). States enacted several types of laws to freeze Black people into servitude—for example, Georgia's enticement law. *See* Jonathan M. Weiner, *Class Structure and Economic Development in the American South, 1865-1955*, 84 AM. HIST. REV. 970, 981 (1979); *see also* DAVID M. OSHINSKY, "WORSE THAN SLAVERY": PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE 20-21 (1996).

On a more coercive scale, criminal codes nearly reconstructed the master-slave relationship.[174] A report on the convict leasing system shows how this abusive system benefitted businesses.[175]

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174. *See, e.g.*, OSHINSKY, *supra* note 173, at 35-36:

> Before convict leasing officially ended, a generation of black prisoners would suffer and die under conditions far worse than anything they had experienced as slaves. Few of them would spend much time in a state prison or county jail. They would serve their sentences in the coal mines, saw mills, railroad camps, and cotton fields of the emerging New South.

See also HASTINGS H. HART, SOCIAL PROBLEMS OF ALABAMA 53 (1918), recounting an interview with a prison official in Florida:

> The work of the turpentine camp is very severe. We do not employ white convicts at this work; they will not stand for it. If we have a long term prisoner we do not keep him on this work longer than ten years. At the end of this time, he is broken down, anyhow.

Two officers of Alabama prisons agreed with this view. *Id*. PROCEEDINGS OF THE NATIONAL ANTI-CONVICT CONTRACT ASSOCIATION 18 (L.D. Mansfield, ed., 1886), offers a comprehensive critique of the convict labor system in the late 1800s, including this account:

> There must be something radically wrong in the scheme of punishment, which converts the malefactor into an agent of ruin, merely that he may not become a burden to the money chest of the State. To save expenditure by hiring out convicts to perform services, which reduce the wages or destroy the business of law-abiding tax-payers, is a monstrous perversion of the function of government. . . .

See also REPORT ON EXPERIMENTAL ROAD CAMP IN FULTON COUNTY, GA., U.S. DEP'T OF AGRIC., BULLETIN NO. 583 4-6 (Mar. 7, 1918) (purporting to describe a more humane and efficient system of prison labor in a federally-operated prison labor system. From June 1, 2015 through May 31, 1916, the state prison system employed 3,170 Black felons and 412 white felons, and 3,072 Black misdemeanants and 217 white misdemeanants).

175. A. Elizabeth Taylor, *The Origin and Development of the Convict Labor System in Georgia*, 26 THE GA. HIST. SOC. 113, 122 (1942), recounted this example of cruelty:

> Cases of extreme cruelty were reported at the Cedar town camp. A Negro boy, who had escaped, hid under a pile of logs in order to avoid being recaptured. The guards, upon discovering his hiding place, set fire to the brush and the convict was smoked out and was badly burned.

More generally, Taylor provided a detailed account how businesses utilized the convict labor leasing system in Georgia:

> On October 20, 1886, all of the convicts under the control of Penitentiary Company, Number One, together with one-eighth of those held by both of the other companies, were working in the Dade Coal Mines. At that time, Penitentiary Company, Number Two was divided into two parts. W. B. Lowe owned seven eighths of that company and the Dade Coal Company owned one-eighth. Of the 613 convicts held by Penitentiary Company, Number Two at that time, 78 were worked in the Dade Coal Mines, 88 were mining iron ore at Cedartown in Polk County; 84 were engaged in making brick at Augusta; 60 were working at a saw mill in Dodge County; and the remainder were employed in the Chattahoochee Brick Yard or on the Georgia Midland Railroad Line. Georgia Penitentiary Company, Number Three was divided into four equal parts. The Dade Coal Company controlled one-fourth of that company and worked its share of the convicts at the Dade Coal Mines and at Rising Fawn. T. J. Smith, who also controlled a fourth of Penitentiary Company, Number Three, worked his prisoners on the Georgia Midland Railroad Line and at farming at Old Town.
>
> *Id*. at 125.

See also V. Camille Westmont, *Dark Heritage in the New South: Remembering Convict Leasing in Southern Middle Tennessee Through Community Archaeology*, 26 INT'L J. HIST. ARCHAEOLOGY 1, 3 (2022) (noting that during the five decades after the Civil War, Southern state prisons were mostly empty while convicts labored on farms, in coal mines and brickyards, and other large-scale workplaces); MATTHEW MANCINI, ONE DIES, GET ANOTHER: CONVICT LEASING IN THE AMERICAN SOUTH, 1866-1928 (1996).

Vagrancy and idleness laws led to arbitrary arrests of Black people.[176] In the post-Reconstruction South, bondsmen purchased the freedom of prisoners only to subject them to debt servitudes.[177] Law enforcement officers put prisoners to work in chain gangs,[178] leased convict labor to private

176. Jennifer Roback, *Southern Labor Law in the Jim Crow Era: Exploitative or Competitive?*, 51 U. CHI. L. REV. 1161, 1164 n.11 (1984) (detailing coercive vagrancy laws aimed at securing work from Blacks).

177. Comer v. Bankhead, 70 Ala. 136 (1881), presents evidence of this arrangement, where a surety sued to have the warden supply him more convicts by his view of the contract. The trial court denied the motion for a mandamus, and the surety appealed. In sustaining the demurrer, the Alabama Supreme Court explained:

> It is common knowledge, that convictions have been, and may be had, in different parts of the State. The hirer, under the terms of the contract, bound himself to receive the convicts assigned to him, either at the penitentiary, or at any county jail, where the convict might be confined. The record discloses that the warden made other contracts, by which he bound himself to deliver convicts to other hirers. . . . All these considerations suggest—nay, command—that the warden exercise a sound discretion, in properly distributing and placing the convicts.
>
> *Id*. at 142-43.

Winslow v. State, 97 Ala. 68 (1893) explained how the Alabama Supreme Court drew the line between bonded debt labor and involuntary servitude. Charles Winslow was indicted, tried, and convicted for violating a convict contract. The Alabama Supreme Court reversed, stating that:

> [T]he contract authorized to be made "does not extend beyond securing the fine and costs incident to the conviction. It cannot be made to embrace money loaned or advanced by the hirer to the convict, or articles of property advanced, whatever their character. The hirer becomes the transferee only of the right of the state to compel the satisfaction of such fine and costs, and nothing more, by exacting the involuntary servitude of the convict, who himself contracts to change masters for this purpose. To attempt to hold the convict for any contractual liability created for advances made, whether in money or property, is imprisonment for debt, within the meaning of the constitution, and unauthorized. If such contracts were permitted there would be no limit to the time for which one could be held to involuntary servitude, so long as the exigency of want or weakness of purpose on the part of the borrower prompted the acceptance of loans made to him under the form or color of advances."
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> *Id*. at 69.

178. Tessa M. Gorman, *Back on the Chain Gang: Why the Eighth Amendment and the History of Slavery Proscribe the Resurgence of Chain Gangs*, 85 CAL. L. REV. 441, 449-52 (1997) (describing the use of chain gang labor crews as criminal punishment from the post-Civil War period through the 1930s); Emily S. Sanford, *The Propriety and Constitutionality of Chain Gangs*, 13 GA. ST. U. L. REV. 1155 (1997); Comment, *The Georgia Chain-Gang for Petty Offenses*, 14 YALE L.J. 45 (1907). For a critical judicial view of one chain gang, see Jamison v. Wimbish, 130 F. 351, 355 (S.D. Ga. 1904):

> The most cursory view of the evidence in the record will convince the impartial that practically every ignominious mark of infamous punishment is stamped upon the miserable throng in Bibb County chain gang. . . . The sufferers wear the typical striped clothing of the penitentiary convict. Iron manacles are riveted upon their legs. These can be removed only by the use of the cold chisel. The irons on each leg are connected by chains. The coarse stripes, thick with the dust and grime of long, torrid days of a semitropical summer, or incrusted with the icy mud of winter, are their sleeping clothes when they throw themselves on their pallets or straw in the common stockades at night. They wake, toil, rest, eat, and sleep, to the never-ceasing clanking of the manacles and chains of this involuntary slavery. Their progress to and from their work is public, and from dawn to dark, with brief intermission, they toil on the public roads and before the public eye.

industry,[179] and punished prisoners with hard labor to benefit local jurisdictions.[180]

These oppressions were not as extreme as chattel slavery but constituted peonage.[181] *Clyatt v. United States* (1905) demonstrated how police authorities enforced debt servitudes.[182] This compulsory labor arrangement involved "barbarities of the worst kind against these negroes."[183] A state law implicated in *Bailey v. Alabama* (1911) showed how a criminal justice system enforced peonage.[184] *Bailey* disallowed a convict's sentence to hard labor for violating a labor debt bond because this violated the Thirteenth Amendment.[185] *United States v. Reynolds* (1914) decided whether a worker, who was convicted for failing to pay a work-related debt under a contract with his first employer, could be released from jail to work for a second employer without violating the peonage law.[186] In a second labor agreement

179. A detailed example of the law enforcement-private industry coerced labor arrangement is developed in Jerrell H. Shofner, *The Legacy of Racial Slavery: Free Enterprise and Forced Labor in Florida in the 1940s*, 47 J. S. HIST. 411, 418 (1981):

> In early February 1944 Sheriff Clark's deputies began enforcing his vagrancy edict. Eight men were arrested at Deerfield Beach on February 8. The following day Dewey Hawkins, mayor of Oakland Park and a large-scale farmer, picked up nineteen Negroes from the city to gather beans for sixty cents per hamper. Arriving at the Hawkins field, the eight women, six men, and five children discovered that the beans had been picked several times and that it was not profitable to work them again at that price. Thinking they might find a better field down the road, the nineteen people started to leave Hawkins's farm, only to find him threatening to shoot anyone who stepped out on the road. The mayor said they were all under arrest for vagrancy. In a short time, Chief Deputy Robert H. Clark, the sheriff's brother, and a highway patrolman arrived, loaded the Negroes into cars, took the children home and the adults to jail. Without trials or any other court proceedings each was fined either $25 or $35 by the deputy sheriff and jailer A. D. Marshall.

180. *See* Guin v. City of Tuscaloosa, 106 So. 64 (Ala. 1925) (conviction leading to fine and additional penalty of six months at hard labor for the city); *see also* Clark v. Town of Uniontown, 58 So. 725, 726 (Ala. 1912) (conviction leading to "hard labor on the streets of the town for a term of 60 days").

181. Under the Thirteenth Amendment, Section 2 provided: "Congress shall have power to enforce this article by appropriate legislation." In Clyatt v. United States, 197 U.S. 207, 221 (1905), two business owners in Georgia traveled to Florida and "caused the arrest of Gordon and Ridley on warrants issued by a magistrate in Georgia for larceny" arising out of what Clyatt and Tift believed was the obligation of these Black men "to work out a debt" claimed to be due to them.

182. *Id.* at 214, 221.

183. *Id*. at 223 (Harlan, J., concurring) (noting that the record disclosed "barbarities of the worst kind against these negroes" and clearly established that Gordon and Ridley were under compulsion to work to pay off a debt).

184. Bailey v. Alabama, 219 U.S. 219 (1911). An Alabama law presumed criminal intent to defraud where an indebted worker abandoned his job before paying off his debt. *Id*. at 219. Alonzo Bailey was sentenced to hard labor for twenty days in lieu of paying his fine, and an additional 116 days to pay for costs. *Id*. at 231. The Supreme Court ruled that the state law violated the Thirteenth Amendment and the federal law against peonage. *Id*. at 245.

185. *Bailey*, 219 U.S. at 244, addressing the scope of the slavery exception in the Thirteenth Amendment:

> The state may impose involuntary servitude as a punishment for crime, but it may not compel one man to labor for another in payment of a debt, by punishing him as a criminal if he does not perform the service or pay the debt.

186. United States v. Reynolds, 235 U.S. 133, 133 (1914).

for the convict, his bondsman paid the money in court needed to release him from his first debt. In return, he promised to work for the second employer for 14 months,[187] while repaying his bond.[188] The *Reynolds* Court ruled that this agreement resulted from coercion.[189] Although Supreme Court rulings appeared to prohibit forced labor arrangements, coerced labor continued, aided by state laws that trapped Black workers in the South by imposing strict limitations on labor recruiters from the North who could offer jobs to avoid these conditions.[190]

C. Post-Civil War College Athletics: Privilege and Race

While many Black people experienced job segregation, racial incarceration, and chain gangs during Reconstruction and the Jim Crow era, college athletics flourished as a nearly exclusive space for whites. This period was bookended by the Thirteenth Amendment in 1865 and Civil Rights Act of 1964.[191]

Part III.C.1 shows how college athletics reflected and reinforced deeply entrenched segregation. My evidence draws from archives and other records from Ivy League universities,[192] some of which had intercollegiate athletics before the Civil War.[193] These photographic records make no mention of race; and my effort to identify Black athletes is inevitably uncertain, a function of my subjective impressions. Complicating my efforts, the nation's mixed-race population in the 1800s—often a byproduct of a slaveholder

187. *Id*. at 140.

188. *Id*. at 139-40.

189. *Id*. at 146 ("This labor is performed under the constant coercion and threat of another possible arrest and prosecution in case he violates the labor contract which he has made with the surety, and this form of coercion is as potent as it would have been had the law provided for the seizure and compulsory service of the convict").

190. Jonathan M. Weiner, *Class Structure and Economic Development in the American South, 1865-1955*, 84 AM. HIST. REV. 970, 981 (1979) ("Enticement acts were revived in eight out of ten Southern states after Reconstruction and survived with amendments into the mid-twentieth century."). These laws may have originated from English laws in the early part of the eighteenth century, when English workers and manufacturers were enticed to emigrate for greater wages and other advantages. *See* WILLIAM O. RUSSELL, A TREATISE ON CRIMES AND MISDEMEANORS 1, 193 (1819) (noting that in response to labor market competition from American colonies, George I instituted a criminal law to prohibit "seducing artificers").

191. For a detailed account of college football at HBCUs, see Paul W.L. Jones, *Foot Ball in Negro Colleges in 1925*, THE CRISIS MARCH 1926, at 221.

192. For pertinent background, the Ivy League as it is known today was formed in 1954. *See* Mark F. Bernstein, *Harold Stassen and the Ivy League*, PENN. GAZETTE (Nov. 2, 2001), https://thepenngazette.com/harold-stassen-and-the-ivy-league [https://perma.cc/ZLV2-MFJQ]. Formation of the Ivy League as an athletic conference was rooted in Penn's controversial decision to sign the first college football TV deal, pitting Penn's aggressive push for playing against powerhouse football teams against more academically minded leaders of Yale, Princeton, Harvard and other elite schools. *Id*.

193. *See infra* note 282 and accompanying text.

father and an enslaved mother[194]—led to instances of mistaken racial identification,[195] and situations where light-skinned Black people lived with ambiguously defined racial distinctions.[196] To this point, the plaintiff in *Plessy v. Ferguson* was mostly white but treated as a Black person for purposes of enforcing a state law that led to the shameful separate-but-equal doctrine.[197] Part III.C.2 shows how universities formed the Intercollegiate Athletic Association of the United States (IAAUS).[198] From its inception, the IAAUS (renamed the National Collegiate Athletic Association) legislated rules for amateur competition.[199] Part III.C.2 demonstrates that this association built a racialized ideology of athletics around eugenics.[200] Part III.C.3 shows how collegiate players often received disguised payments for their athletic participation. Schools likely knew about many of these arrangements but allowed them to continue. I conclude in this section that the underground payment system, when coupled with the pervasive racial segregation in college sports, amounted to a racially defined labor market that paid wages to athletes.

194. *E.g.*, PETER S. CANELLOS, THE GREAT DISSENTER: THE STORY OF JOHN MARSHALL HARLAN (2021) (describing the justice's light-skinned half-brother, whose mother was enslaved).

195. *See* Walter Johnson, *The Slave Trader, the White Slave, and the Politics of Racial Determination in the 1850s*, 87 J. AM. HIST. 13, 16 (2000) (describing a white woman's claim that she was unlawfully sold into slavery: "slaveholders favored light-skinned women . . . to serve in their houses and that those light-skinned women sold at a price premium . . . . [I]n the slave market apparent differences in skin tone were daily formalized into racial categories—the traders were not only marketing race but also making it.").

196. Emily A. Owens, *Promises: Sexual Labor in the Space Between Slavery and Freedom*, 58 J. LA. HIST. ASS'N 179, 187 (2017), described arrangements made by enslaved women to win their freedom after a seven-year period of sexual servitude:

> The majority of people who gained freedom through coartación were women; women with lighter skin were more likely to be freed than those with darker skin and were more likely to be freed at a younger age than darker skinned women or enslaved men of any color . . . . "[N]early two and a half times as many adult women were manumitted as men," at least in part because they were more likely to participate in intimate relationships with the people who owned them.

See also Naurice F. Woods Jr., *White Slavery, the Abolitionists' Crusade, and the Painter's Canvas*, 15 NINETEENTH CENTURY ART WORLDWIDE 37, 40 (2016):

> The "one-drop rule," though widely accepted throughout America, often blurred upon scrutiny of certain "persons of color," and numerous reports surfaced from the South describing slaves indistinguishable from whites. As mulattoes begot quadroons and as quadroons begot octoroons, the defense of slave trading grew increasingly problematic.

197. Plessy v. Ferguson, 163 U.S. 537, 538 (1896) ("[P]etitioner was . . . of mixed descent, in the proportion of seven eighths Caucasian and one eighth African blood; that the mixture of colored blood was not discernible in him[.]").

198. *See infra* notes 282, 287 and accompanying text.

199. *See infra* notes 295 and accompanying text.

200. *See infra* notes 295-301 and accompanying text.

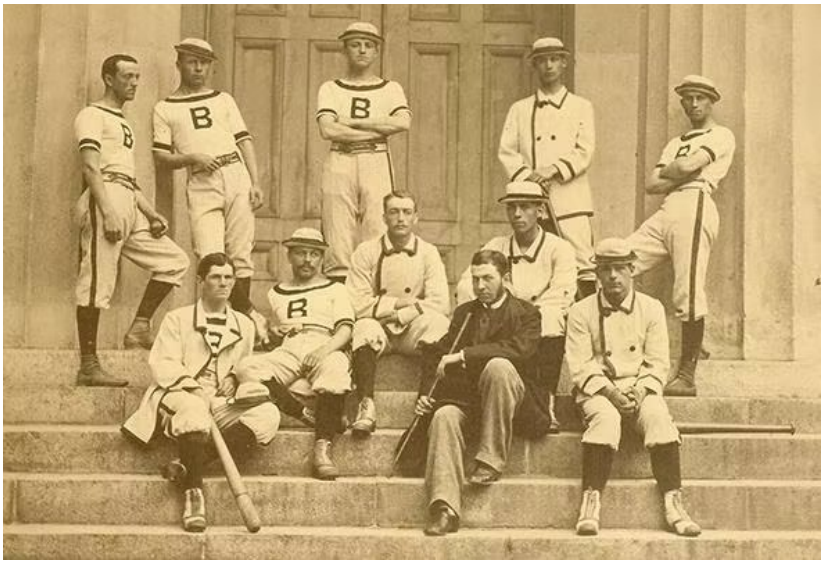
1. Ivy League Schools and Athletics

Brown University: Brown University's first Black students, Inman Page and George Washington Milford, graduated in 1877.[201] Commenting on the school's racially biased admissions process, an abolitionist lamented:

> The public schools of Rhode Island had, some years before this, after a severe and protracted struggle, been opened to colored children. And yet, about the beginning of the war, a lad of rare excellence and attainments was refused an examination for admission, by the authorities of Brown University, on account of the color of his skin.[202]

Nonetheless, Brown University reports that its first Black athlete was a white baseball player in 1879.[203] William Edward White was the son of a Georgia businessman and a mixed-race enslaved mother.[204] Although he was legally enslaved at birth, he was listed as white on his death certificate.[205] A Brown University baseball team photo shows him seated above a man in a suit (below).[206]

Figure 2: Brown University baseball team.
William Edward White seated above man in suit



201. *Martha Mitchell's Encyclopedia*, *supra* note 130.

202. LILLIE B. C. WYMAN & ARTHUR C. WYMAN, ELIZABETH BUFFUM CHACE, 1806-1899: HER LIFE AND ITS ENVIRONMENT 217 (W.B. Clarke Co. ed., 1914).

203. Peter Morris & Steven Fatsis, *Baseball's Secret Pioneer*, SLATE (Feb. 4, 2014), https://slate.com/culture/2014/02/william-edward-white-the-first-black-player-in-major-league-baseball-history-lived-his-life-as-a-white-man.html [https://perma.cc/WQ52-4CVD] (noting that White played a single game for the Providence Grays of the National League in 1879, the same year he appeared in this college photo).

204. *Id*.

205. *Id*.

206. *Id*.

Brown University fielded teams throughout the 1800s that appeared to be all-white. The school's yearbook, *Liber Brunesis,* showed possibly all-white teams in 1898 for football,[207] baseball,[208] track,[209] and hockey.[210] The YMCA Club in the same yearbook featured a sketch of a hooded horse rider with a shield bearing a cross, reminiscent of the Ku Klux Klan.[211] The school's first Black football player, Fritz Pollard, began his All-American career in 1915.[212]

Columbia University. Columbia's first football team, which began in 1870, appeared to be an all-white team.[213] *The Columbiad*, a yearbook, ran a football-themed cartoon that was racially derogatory.[214]

Figure 3: Racially derogatory Columbiad *cartoon*

207. *See* BROWN UNIV., LIBER BRUNESIS 197 (Vol. 40, 1898); Peter Mackie, *A History of Brown Athletics Facilities: The Beginning of Intercollegiate Competition—1859-1899*, BROWN BEARS (June 10, 2010), https://brownbears.com/sports/2018/4/27/general-facilities-history-1.aspx [https://perma.cc/NGG2-SPLK] (noting that Brown played its first football game in 1878 against Amherst).

208. BROWN UNIV., *supra* note 207, at 201.

209. *Id*. at 205.

210. *Id*. at 213.

211. *Id*. at 247.

212. Fritz Pollard played football for Brown in 1915 and 1916. In 1916, he became the first Black All-American football player, and first to play in the Rose Bowl. In 1954, Pollard became the first Black player to be named to the National College Football Hall of Fame. *About Fritz Pollard*, BROWN UNIV. LIBR., https://library.brown.edu/cds/pollard/aboutpollard.html [https://perma.cc/6D7H-3W94].

213. Horace Coon, *Columbia Football: Story of the First Game in 1870*, COLOSSUS ON THE HUDSON (1947), *reprinted in* GO COLUMBIA LIONS NEWS (Nov. 12, 2020), https://gocolumbialions.com/news/2020/11/12/columbia-football-the-first-game-in-1870 [https://perma.cc/R9R8-8N3F] (describing how a Columbia player jammed a lit cigar in a Rutgers player's face).

214. COLUMBIA UNIV., THE COLUMBIAD 67 (Vol. XXI, 1885).

Black students began to enroll in 1901, when graduates from Black schools entered Columbia's Teachers College.[215] In 1911, George W.A. Scott, a Black student, won a prestigious campus prize.[216] Manuel Rivero, a Black athlete at Columbia, played football and baseball from 1930 through 1933.[217] The school's football records mention this milestone involving Rivero:

> At the time, many college football coaches observed what they called the "gentleman's agreement," which meant if one team had a black player and the other didn't, then the "gentleman" coach wouldn't play his black player that game. On a train ride to a game earlier in his career, Rivero's Columbia teammates found out about it and told Little that they wouldn't play either.[218]

Cornell University: In 1869, Cornell admitted William Bowler, a Haitian, as its first student of African descent.[219] There is no early evidence, however, that Black athletes broke the color barrier on Cornell's teams. The 1898 yearbook had photos of seemingly all-white teams in baseball,[220] crew,[221] cross country,[222] football,[223] and track.[224] Some Cornell students were attracted to the Ku Klux Klan. A movie review in *The Cornell Sun* for the film "The Clansman" was headlined "Thrilling Scene."[225] The review cheerily described how a Black man, a "shrieking wretch," was accused in killing a white girl and summarily "dragged off to execution."[226] In the same year, the student newspaper reported that Cornell students, acting as "pseudo Klansmen," reacted to a professor's "radical prejudices and antipathy" to the Klan by marching across campus with lit torches while singing Klan songs, and "plant[ing] a flaming cross on (the professor's) lawn."[227] Jerome

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215. Hettie Williams, *Black Women at Columbia University Before Brown v. Board*, BLACK PERSPS. (Oct. 10, 2022), https://www.aaihs.org/black-women-at-columbia-university-before-brown-v-board [https://perma.cc/MK93-M93B].

216. THE CRISIS: A RECORD OF THE DARKER RACES 11 (Vols. 1-2, Nov. 1910-Oct. 1911).

217. *Columbia Trailblazer: Manuel Rivero '33ENG, '38HR,* COLUMBIA ATHLETICS COMMC'NS, COLUMBIA LIONS FOOTBALL (Feb. 9, 2021), https://gocolumbialions.com/news/2020/12/6/general-columbia-trailblazer-manuel-rivero-33 [https://perma.cc/JRC5-H7HZ] (emphasizing that Rivero was a "Columbia Trailblazer" and implying that this dual sport athlete also was the school's first known Black athlete).

218. *Compare id.*, *with infra* note 244 (explaining Harvard's similar experience).

219. *Diversity and Inclusion, Our Historic Commitment*, CORNELL UNIV., https://diversity.cornell.edu/our-story/our-historic-commitment?field_decade_value=1850-1899 [https://perma.cc/EUD3-YL7X] (last visited Feb. 23, 2024).

220. CORNELL UNIV., THE CORNELLIAN 211 (Vol. 30, 1898).

221. *Id*. at 218.

222. *Id*. at 217.

223. *Id*. at 221.

224. *Id*. at 213.

225. *Thrilling Scene in 'The Clansman' Tonight*, CORNELL DAILY SUN (Nov. 22, 1906), https://cdsun.library.cornell.edu/?a=d&d=CDS19061122.2.32.2&e [https://perma.cc/HPF8-D867].

226. *Id*.

227. *Student Frolic Resembles Klan Demonstrations*, CORNELL DAILY SUN (Nov. 9, 1923), https://cdsun.library.cornell.edu/?a=d&d=CDS19231109.2.8&e [https://perma.cc/B3VH-P9ZN].

Heartwood "Brud" Holland became Cornell's first Black All-American football player in 1938.[228]

Dartmouth College. In 1775, Dartmouth enrolled its first student of color, Caleb Watts.[229] For most of the 1800s, Dartmouth intermittently enrolled Black students.[230] While one Black alumnus advocated for abolition in a fiery political speech,[231] another acquiesced to dominant racial norms: "I am a colored man better fitted by nature to attend to the medical wants of colored men."[232] Although Dartmouth seemed willing to open its doors to Black students at an early time, its president during the Civil War held notoriously pro-slavery views.[233]

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228. *Celebrating College Football's Racial Pioneers: The Ivy League*, NAT'L FOOTBALL FOUND. (Feb. 2, 2016), https://footballfoundation.org/news/2016/2/2/_55556.aspx [https://perma.cc/Y8E9-DUGB] (discussing Holland, who earned a Ph.D. from the University of Pennsylvania and went on to a successful career).

229. *Blacks at Dartmouth 1775 to 1960*, BLACK ALUMNI OF DARTMOUTH ASS'N, https://badahistory.net/view.php?ID=117&sc=all&s=cl [https://perma.cc/Q7U4-ZHAN] (last visited Feb. 23, 2024) (describing Watts, who was classed as an Indian, though in fact he was mixed race, born to an English mother and raised by his illiterate grandfather, an enslaved person).

230. *Blacks at Dartmouth 1828 to 1960*, BLACK ALUMNI OF DARTMOUTH ASS'N Ex. Case 4, 5, https://badahistory.net/exhibit2022/exhibit-cases.php [https://perma.cc/5FAE-TC53] (last visited Feb. 23, 2024) (showing that Jonathan C. Gibbs graduated in 1852 and later became Florida's secretary of state; Edward G. Draper graduated in 1855 and passed the Maryland bar exam in 1857; W. Scott Montgomery graduated in 1877 and became a celebrated educator; and James J. Colson, graduated in 1883 and became a lawyer).

231. *Blacks at Dartmouth: A Timeline*, BLACK ALUMNI OF DARTMOUTH ASS'N Ex. Case 1, https://badahistory.net/exhibit2022/exhibit-cases.php [https://perma.cc/H6SX-KA29] (last visited Feb. 23, 2024) (referencing Thomas Paul Jr., Class of 1841). Paul condemned slavery and racial bigotry in this fiery speech to the Massachusetts legislature:

> But, sir, the great characteristic of American slavery, and that which distinguishes it from all other species of oppression, is that hatred of the free colored man which makes his condition little superior to that of servitude itself. The slave escapes from the southern to the northern States, and just begins to congratulate himself upon his good fortune as he beholds the same dreaded form, though dressed in different habiliments, baffling all his schemes and enterprises. Though his flesh is not bared to receive the lash, and his limbs are unfettered, yet he feels his immortal mind dragged to the dust by a weight far more galling than chains, and more torturing than fetters.

Paul Thomas, THE LIBERATOR 6 (Feb. 19, 1841) (on file with the University of Detroit Mercy Archive Center).

232. *Blacks at Dartmouth 1775 to 1960*, *William Baldwin Ellis,* BLACK ALUMNI OF DARTMOUTH ASS'N, https://badahistory.net/view.php?ID=11&sc=all&s=cl [https://perma.cc/8CUV-HZF4] (last visited Feb. 23, 2024) (reporting that Dr. Ellis was one of thirteen Black physicians in the Civil War and later worked at Freedman's Hospital in Washington D. C., the first public hospital for Black people in the U.S.).

233. Letter from Nathan Lord, President of Dartmouth, to J.M. Conrad, Esq. 2 (Dec. 1, 1859) (on file with the Library of Congress), https://tile.loc.gov/storage-services/service/rbc/rbaapc/16500/16500.pdf [https://perma.cc/DT49-FQSW]:

> Slavery is one of the constituted forms of government, and its powers and duties are accredited and described both in the Old and New Testaments. It is wisely adapted to the ruder portions of mankind, and, in some conditions of the social state, necessary to its best interests, or to its preservation, during the appointed time. The necessity grows out of the imbecility and untractableness of these ruder classes. Some hold it to be a judicial necessity entailed upon a particular disorderly race, as a sign of the Divine displeasure for peculiar wickedness, as

Dartmouth's football team, photographed in *The Aegis* in 1901, appeared to be all-white.[234] Matt Bullock, a member of the class of 1904, broke the athletics race barrier and later became a lawyer.[235] At least nine other Black athletes played for Dartmouth teams through 1928.[236] Fritz Alexander played football in 1947, eventually becoming a judge in New York City.[237]

Harvard University: Harvard graduated its first Black student, Richard T. Greener, five years after the Civil War ended.[238] Twenty years later, Clement G. Morgan gained national prominence for being the first Black student to deliver a senior class oration.[239] Harvard's first Black athlete was probably William Henry Lewis, who starred at Amherst and continued to play as a law student in 1892.[240] He was also the first Black All-American football player.[241] Shortly after *Plessy v. Ferguson* ruled that the Constitution did not prohibit states from segregating Black people in public transportation and accommodations,[242] Harvard's baseball team left its Black shortstop, William Clarence Matthews (photo, lower left), at home for its Southern tour to prevent the host team from forfeiting games at Navy, Virginia, Georgetown, and Trinity (now Duke).[243] Harvard reversed course in 1905,

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signified by the curse of Canaan, and having analogy in the judgments now for a long time inflicted upon the Jews.

234. DARTMOUTH COLL., THE AEGIS 140 (1901).

235. *Blacks at Dartmouth 1828 to 1960*, *supra* note 230, Ex. Case 1.

236. Rick Bender, *Black History Month: Pioneer Profiles*, DARTMOUTH ATHLETICS (Feb. 18, 2021), https://dartmouthsports.com/news/2021/2/18/black-history-month-pioneer-profiles-210217.aspx [https://perma.cc/KSB7-KJ8Q] (picturing Samuel Jenkins, Class of 1919, Cross Country; Forrest Whittaker, Class of 1928, Basketball; Leslie Pollard, Class of 1912, Football; William Grainger, Class of 1915, Track and Field; Thornton Wood, Class of 1919, Skiing; Robert Van Ness Johnson; Class of 1910 (Football); Brandon Weisiger, Class of 1925, Track and Field; and John Shelburne, Class of 1919, Football and Track & Field).

237. *Blacks at Dartmouth 1828 to 1960*, BLACK ALUMNI OF DARTMOUTH ASS'N Ex. Case 6, https://badahistory.net/exhibit2022/exhibit-cases.php [https://perma.cc/5FAE-TC53] (last visited Feb. 23, 2024).

238. Kris Snibbe, *A Window into African-American History*, HARVARD GAZETTE (Feb. 4, 2011), https://news.harvard.edu/gazette/story/2011/02/a-window-into-african-american-history [https://perma.cc/7MFW-M4GU] (Greener won prizes in writing and speaking as a student).

239. *Id*.

240. *See* Daniel G. Habib, *A Whiter Shade of Crimson in Athletic Dept.*, HARVARD CRIMSON (Sept. 15, 1998), https://www.thecrimson.com/article/1998/9/15/a-whiter-shade-of-crimson-in [https://perma.cc/HZS3-E8RQ].

241. *See id*.

242. Plessy v. Ferguson, 163 U.S. 537 (1896).

243. *See* Joseph W. Minatel, *Harvard Baseball's Complex Racial History: William Clarence Matthews and the Southern Road Trips*, HARVARD CRIMSON (Sept. 3, 2019), https://www.thecrimson.com/article/2019/9/3/wcm-feature [https://perma.cc/LME6-J9TN] (featuring this image of Matthews in an undated team photo).

standing with Matthews by refusing to play against segregationist college teams.[244]

Figure 4: Harvard University baseball team, circa 1902-1905. William Clarence Matthews seated front row, left side

University of Pennsylvania: In 1755, two Mohawk brothers enrolled in Penn's predecessor college, the Academy of Philadelphia.[245] The school enrolled its first Jewish student in 1772, and first Cuban in 1829.[246] However, the school did not enroll a Black student until William Adger, James Brister, and Nathan Mossell became students in 1879.[247] This racial barrier is reflected in Penn's baseball photo from 1873-1874, appearing to show an all-white team.[248] Penn's football team had a Black trainer from 1880 to 1894,

244. *Id*. *Compare id.*, *with* Columbia's similar experience, *infra* note 218 and accompanying text.

245. *A Timeline of Diversity at the University of Pennsylvania, Pioneers at Penn, 1740-1915*, UNIV. ARCHIVES & RECS. CTR., PENN LIBRARIES, UNIV. OF PA., https://archives.upenn.edu/exhibits/penn-history/diversity-timeline/1740-1915 [https://perma.cc/7LXR-569T] (last visited Mar. 4, 2024).

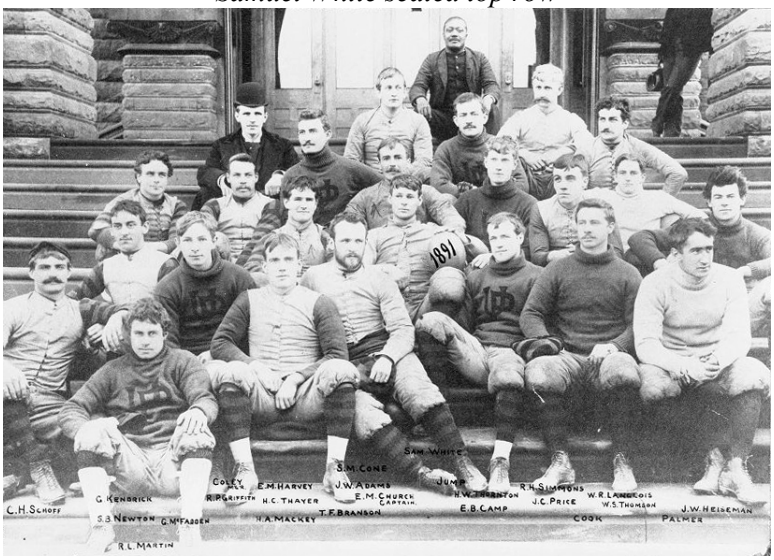
246. *Id*.

247. *Id*.

248. Mary D. McConaghy & Michael T. Woods, *Penn Baseball in the 19th Century, the Move to West Philadelphia, Emergence of the Athletic Association, and Other Changes, 1872-1884*, UNIV. ARCHIVES & RECORDS CTR., PENN LIBRARIES, UNIV. OF PA., https://archives.upenn.edu/exhibits/penn-history/baseball/west-philadelphia [https://perma.cc/4LJY-GSVE] (last visited Mar. 4, 2024).

Samuel White. Revered by the team, "Sun" (also named "Black Sam") appeared in a varsity team photo in 1891 (see below, top row).[249]

Figure 5: University of Pennsylvania varsity football team, 1891. Samuel White seated top row



But no Black students are identified as football players at Penn, though Black-appearing athletes are shown in photos for track and field and cross country.[250] John Baxter Taylor, Jr., perhaps Penn's first Black athlete, competed for the track team in 1903.[251] In 1908, he helped Penn win national championships.[252]

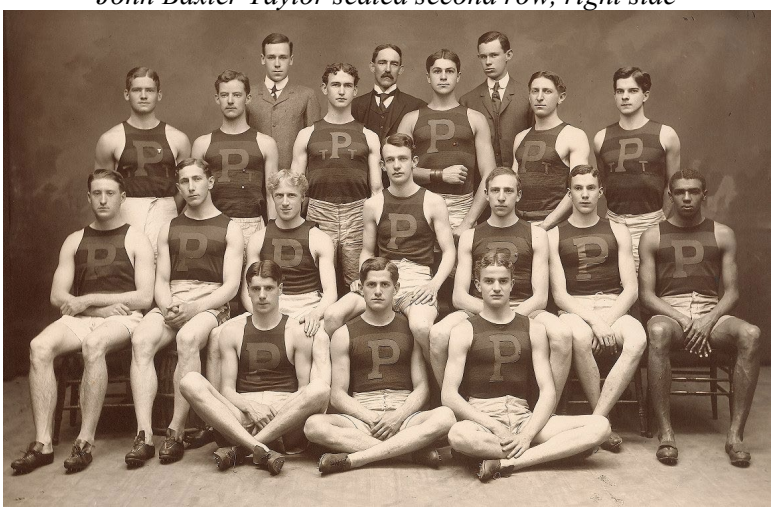
249. *Samuel White, c. 1845-1904*, UNIV. ARCHIVES & RECORDS CTR., PENN LIBRARIES, UNIV. OF PA., https://archives.upenn.edu/exhibits/penn-people/biography/samuel-white [https://perma.cc/AL2E-K3XT] (last visited Mar. 4, 2024). White appears at the top, indicating his status as an accepted part of the team.

250. *See, e.g.*, *John Baxter Taylor, Jr., 1882-1908*, UNIV. ARCHIVES & RECORDS CTR., PENN LIBRARIES, UNIV. OF PA., https://archives.upenn.edu/exhibits/penn-people/biography/john-baxter-taylor-jr [https://perma.cc/LW64-SZ29] (last visited Mar. 4, 2024). Taylor (second row, right side) is pictured here with the 1905 Penn track team. Marvin P. Lyon, Jr., *Blacks at Penn, Then and Now*, A PENNSYLVANIA ALBUM: UNDERGRADUATE ESSAYS ON THE 250TH ANNIVERSARY 43, 45 (Richard Slaton Dunn & Mark Frazier eds., 1990) https://archives.upenn.edu/exhibits/penn-history/pa-album/blacks [https://perma.cc/3TRH-4VF5].

251. PENN LIBRARIES, *supra* note 250.

252. *Id*. Taylor won a Gold Medal on the 1908 U.S. Olympic team while competing in the 1,600-meter relay race. John Baxter Taylor, *supra* note 250.

Figure 6: University of Pennsylvania track and field team, 1905. John Baxter Taylor seated second row, right side



Princeton University. Initially named College of New Jersey, Princeton University was racially segregated for two centuries.[253] Enslaved persons were a common sight on campus, where some of them worked at the President's House, while others were sold nearby.[254] In 1853, the school newspaper ran a cartoon with a racist dialogue between two white men who leered at a Black woman.[255]

The school's growing reliance on slaveowner support likely led to an educational setting that was in step with the Supreme Court's ruling in *Dred*

253. Joseph Yannielli, *African Americans on Campus, 1746-1876*, *reprinted in* PRINCETON & SLAVERY, https://slavery.princeton.edu/stories/african-americans-on-campus-1746-1876 [https://perma.cc/8Q9D-BJTQ] ("Princeton refused to admit undergraduates of African descent until the middle of the 20th century.").

254. *Id*. (noting that the first nine presidents of the college all owned slaves); Jonathan Seargeant & Samuel Breese, *To Be Sold*, PA. J. (July 31, 1766), https://slavery.princeton.edu/sources/two-women-a-man-and-three-children [https://perma.cc/8JHF-84CY] ("TO BE SOLD. At public vendue (sic), on the 19th of August next, at the presidents (sic) house in Princeton, all the personal estate of the late Revd. Dr. SAMUEL FINLEY, consisting of, Two Negro women, a negro man, and three Negro children").

255. T C Boyd, *Scene from Real Life,* NASSAU RAKE (June 29, 1853), *reprinted in* PRINCETON & SLAVERY, https://slavery.princeton.edu/sources/scene-from-real-life [https://perma.cc/PP2Z-D36X] (depicting two white men behind a dark-skinned woman on a sidewalk, captioned: "I'll be darned if there ain't some right good looking niggar gals here, ain't they?").

Scott.[256] Though Blacks were not banned from campus, they were treated like mascots.[257] The 1850 commencement speech lauded slavery.[258]

When Princeton started graduate degree programs, the school's first Black students began to enroll.[259] President James McCosh allowed a Black man to attend his psychology lectures in 1876, causing some white students to leave the school.[260] Matthew Anderson, a Black seminary student in the late 1870s, reported McCosh's response to objecting students: "That while he would be sorry to have them leave, still if their staying would depend on the expulsion of the Negro they would have to go, for under no circumstances would he exclude the Negro from his class so long as he wanted to attend."[261] Thomas McCants Stewart, born to free black parents in South Carolina, enrolled at the Princeton Theological Seminary in 1877.[262]

Princeton photographed its first football team, seemingly comprised of white appearing athletes, in 1869.[263] Black students at Princeton were rare for the rest of the century. Rev. Irwin William Langston Roundtree earned a

256. Yannielli, *supra* note 253. See also Ann M. Davison, *A Visit to the Colored People of Princeton* (May 1855) (on file with the Schlesinger Library, Radcliffe Institute, Harvard University, Cambridge, MA), *reprinted in* PRINCETON & SLAVERY, https://slavery.princeton.edu/sources/a-visit-to-the-colored-people-of-princeton [https://perma.cc/95WE-Q9XT], detailing an account from a woman visiting from New Orleans:

> I had observed my washerwoman at the Hotel to be respectable in her deportment, neat and clean in her appearance—also the waiter at the Hotel where I was staying, was polite and civil, and altogether a very decent man. I saw a seamstress of much intelligence and propriety of behavior, and in the street one day a group of some five or six colored children, as if just out of school dressed well, deporting themselves as well as white children, with their school bags on their arms, seeming to contain a goodly number of books.
> I wondered to myself how all this could be; and they such poor creatures, I formed the wish to see them at their homes, in this Negro town, and determined in my own mind, should an opportunity ever offer, I would do so. I made my intentions known to some southern students whom I knew and asked for direction to this said Negro Town. They told me if I went there I should disgrace myself, as no decent ladies ever went among such filthy low people.

257. Yannielli, *supra* note 253.

258. David S. Kaufman, *Address Before the American Whig and Cliosophic Societies of the College of New Jersey* (June 25, 1850), *reprinted in* PRINCETON & SLAVERY, https://slavery.princeton.edu/uploads/Kaufman-Whig-and-Clio-Address.pdf [https://perma.cc/8F4B-JA8N] ("Who does not see in the transplanting of the African to America, the means of restoring to the degraded descendants of Ham the benefits of civilization and Christianity?").

259. *See* Yannielli, *supra* note 253.

260. MATTHEW ANDERSON, A.M., PRESBYTERIANISM. ITS RELATION TO THE NEGRO 175 (John McGill White & Co. ed., 1897).

261. *Id*.

262. April C. Armstrong, *James McCosh and Princeton's First Integrated Classrooms*, PRINCETON AND SLAVERY, https://slavery.princeton.edu/stories/james-mccosh-and-princetons-first-integrated-classrooms **[**https://perma.cc/A6MP-XWFR**].**

263. Brett Tomlinson, *Chronicling Football's First Games*, PRINCETON ALUMNI WEEKLY (Nov. 4, 2019), https://paw.princeton.edu/article/chronicling-footballs-first-games [https://perma.cc/2KFB-73BF].

Master of Arts in 1895.[264] Bruce M. Wright, the first Black student admitted in the 1900s, abruptly left in 1935 when his "race became apparent, and he was promptly sent home."[265] Hayward Gipson, who enrolled in 1963, was the first Black athlete to earn a letter.[266]

Yale University: Yale paused its rowing contests with Harvard during the Civil War but resumed in 1865 before an estimated crowd of 10,000.[267] *Yale Alumni Magazine* recounted a rowing race gilded by a community dance:

> An observer noted that there was "enough at the annual race to make the sight at the Lake an enlivening one, whose counterpart can be found nowhere else in America. On the night preceding the race, there is a 'citizens' ball' in one of the large public halls of the town, in which the students to some extent take part. . . . The college colors are liberally and often tastefully displayed in the costumes of the lady dancers."[268]

Yale started a lawn tennis team in 1883, launching a fashion craze in town.[269] By 1906, a new form of social privilege took root when fans held the nation's first tailgate before a football game.[270] Organized around food, the social gathering was similar to current tailgates.[271]

During that era, the *Yale Class Book of 1904* offers hints about the segregated experiences of Blacks.[272] Photos portrayed only white teams for

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264. TAD BENNICOFF, *African Americans and Princeton University: A Brief History* (Mar. 11, 2005), http://www.princeton.edu/mudd/news/faq/topics/African_Americans.shtml [https://perma.cc/4CSZ-HR68].

265. *Id*. Princeton was then named College of New Jersey.

266. JAY GREENBERG, *Princeton Wins One for the Gip*, https://www.princetontigersfootball.com/2017/06/princeton-wins-one-for-gip [https://perma.cc/Z4EN-7HUY].

267. Judith A. Schiff, *Stroke of Genius*, YALE ALUMNI MAG. (July/Aug. 2021), https://yalealumnimagazine.org/articles/5330-stroke-of-genius [https://perma.cc/66H9-44CS].

268. *Id*.

269. Judith A. Schiff, *Splendor on the Grass*, YALE ALUMNI MAG. (July/Aug. 2022), https://yalealumnimagazine.org/articles/5516-splendor-on-the-grass [https://perma.cc/6S6V-A5GZ]. The new sport created a local craze for tennis shoes. *Yale Alumni Magazine* explained: "The new passion for tennis was part of a larger societal change. In the late nineteenth century, golf, bicycling, and lawn tennis became popular town and gown pastimes in private clubs and public parks." *Id*.

270. Judith A. Schiff, *Tailgating: A Century of Feasting Al Fresco*, YALE ALUMNI MAG. (Nov./Dec. 2011), https://yalealumnimagazine.org/articles/3300-tailgating-a-century-of-feasting-al-fresco [https://perma.cc/7YGQ-D2JS].

271. *See id*. (reporting that as spectators approached the football game, "few were able to get luncheon on the way, and these gazed with envious eyes as they neared the field at small parties of automobilists eating tempting viands that had been brought in hampers spread out in picnic fashion on a tablecloth laid upon the ground.").

272. HENRY L. FOOTE, YALE COLLEGE CLASS BOOK 1904 (June 1904). Near the end of the book, where advertising was published, William Hugo Hickman, a Black man, included his photo in an ad that billed him as "Barber to the University and 1904." *Id*. at 273. Douglas Bristol, Jr., *From Outposts to Enclaves: A Social History of Black Barbers from 1750-1915*, 5 ENTER. & SOC'Y 594, 596 (2004) ("Black barbers amassed substantial wealth in the nineteenth century through a feat unparalleled in the history of African American business: they competed against white barbers for white customers, and they won.").

football,[273] baseball,[274] and crew.[275] The book featured portraits and short biographies of approximately 260 male seniors in a nearly all-white class, except for two Black students.[276] By 1908, Yale enrolled a number of Black students, marking the first significant presence of this excluded race.[277]

In athletics, Yale was decades behind competitors in playing its first Black athlete. Jay Swift became Yale's first Black athlete as a basketball player in 1944.[278] Levi Jackson joined the Yale football team in 1946 after playing for the Army.[279] Jackson was one of only three Black students among 8,500 undergraduates.[280]

2. Formation of a National Athletic Association: Amateurism and Race

College football was a dangerous sport from its inception. After eighteen college players died in 1905 due to football injuries, President Theodore

273. FOOTE, *supra* note 272, at 190.

274. *Id*. at 163.

275. *Id*. at 216.

276. *Id*. at 219 (including reports by class statistician of spending by each person in the Class of 1904, based on results from 259 classmates).

William Pickens, born in 1880 "somewhere in South Carolina," seemed to have had the best experience of the two students. *Id*. at 111. Like his classmates, "Pick" had a nickname, an indication of social interaction. *Id*. (showing his nicknames were "Bill" and "Pick"). But he hinted at his social isolation in his recalling that his "pleasantest event" at Yale "was his meeting Dean Wright." *Id*. Reinforcing the impression of his racial isolation, the Yearbook reported that Pickens was planning to teach at Talladega, an all-Black college in Alabama from where he came. *Id.*

Stephen Alexander Bennett, born in 1876 in Uniontown, Alabama, seemed to be even more isolated. FOOTE, *supra* note 272, at 111. Bennett had no nickname. *Id.* at 18. In a class survey near the end of the yearbook, nearly every senior received votes for descriptive categories (e.g., "wittiest"). *Id*. Bennett was left off the list apparently because did not receive a single vote from any classmate. *Id*. at 209 (showing the omission of Bennett from the class roster). Bennett—the invisible Black student—planned to return to Talladega as well, where he had also previously studied. *Id.* at 18.

For more context, see *Our History*, TALLADEGA COLL., https://www.talladega.edu/our-history [https://perma.cc/6RZ7-BZ5H] (last visited Feb. 23, 2024) (describing that Talladega College was formed on Nov. 30, 1865 by two former slaves for "the education of our children and youths" and to "promote these blessings in our common country.").

277. *See* Judith A. Schiff, *A Banner Year for Black Students*, YALE ALUMNI MAG. (Jan./Feb. 2018), https://yalealumnimagazine.org/articles/4616-effie-grant-hardy [https://perma.cc/V3UE-ALCA].

278. Angela Perez, *"Amplified Voices" Panel Features Reflections from Four Black Former Yale Athletes*, YALE DAILY NEWS (Feb. 25, 2021), https://yaledailynews.com/blog/2021/02/25/amplified-voices-panel-features-reflections-from-four-black-former-yale-athletes [https://perma.cc/E74N-SKEZ] (stating Jay Swift became Yale's first Black athlete in 1944 when he played for the men's basketball team).

279. Judith A. Schiff, *Levi Jackson: Hometown Hero*, YALE ALUMNI MAG. (Oct. 1999), http://archives.yalealumnimagazine.com/issues/99_10/old_yale.html [https://perma.cc/EF4Z-72RL]; *see also* Richard Goldstein, *Levi Jackson, a Pioneer at Yale, Is Dead at 74*, N.Y. TIMES (Dec. 29, 2000) (reporting that Jackson was a team captain for the 1948 season).

280. Schiff, *supra* note 279.

Roosevelt prodded campus leaders to make football safer.[281] Spurred into action, they formed the IAAUS.[282]

From the start, IAAUS member schools disagreed about whether football could be played safely.[283] They also debated whether intercollegiate athletics and academics could be harmonized.[284] Prof. W.L. Dudley of Vanderbilt University decried not only the professionals hidden among college athletes but also a school's "professional spirit" at odds with academia.[285]

IAAUS schools forged ahead, agreeing that professional athletes on college teams subverted college sports.[286] At the first IAAUS convention, schools agreed on rules that conditioned a player's eligibility on amateur

281. *See* Kevin E. Broyles, *NCAA Regulation of Intercollegiate Athletics: Time for a New Game Plan*, 46 ALA. L. REV. 487, 489–90 (1995) (noting that in 1905 there were more than eighteen deaths in intercollegiate football).

282. *See* Rodney K. Smith, *A Brief History of the National Collegiate Athletic Association's Role in Regulating Intercollegiate Athletics*, 11 MARQ. SPORTS L. REV. 9, 12 (2000).

283. *See NCAA and the Movement to Reform College Football: Topics in Chronicling America*, LIBR. OF CONG., https://guides.loc.gov/chronicling-america-ncaa-college-football-reform [https://perma.cc/BEL6-MUHD] (last visited Feb. 23, 2024). On October 9, 1905, President Theodore Roosevelt met with college leaders for the purpose of reducing unsportsmanlike conduct in football. On March 31, 1906, the Intercollegiate Athletic Association of the United States (IAAUS) was established and renamed the National Collegiate Athletic Association (NCAA) in 1910. *Timeline—The 1900s*, AM.'S BEST HIST., https://americasbesthistory.com/abhtimeline1906m.html [https://perma.cc/SVR4-BTL6] (last visited Feb. 23, 2024).

284. *See* Luther Gulick, *Amateurism*, *in* PROCS. OF THE SECOND ANN. CONVENTION OF THE INTERCOLLEGIATE ATHLETIC ASS'N OF THE U.S. 43 (1907) ("The presence in our athletic competitions of a group of men who are peculiarly expert, so shuts out the chances of the average man that he will no longer compete."). Gulick elaborated:

> *The competition is no longer fair or even . . . . The professional in competition with the amateur throws out the amateur*. That has been already accomplished in American colleges and secondary schools and is being done even in the grammar schools of America.
>
> *Id.* (emphasis added).

285. *See* W.L. Dudley, *Third District*, *in* PROCS. OF THE THIRD ANN. CONVENTION OF THE INTERCOLLEGIATE ATHLETIC ASS'N OF THE U.S. 13 (1909):

> Spectators exhibit the professional spirit by their discourteous treatment of the team which does not have their sympathy, and by betting on the result of the contest. Alumni and students exhibit the professional spirit by attempting to secure players for their college teams by methods which are in violation of the principles of amateur sport.

286. *See* Palmer E. Pierce, *The International Athletic Association of the United States: Its Origin, Growth and Function*, *in* PROCS. OF THE SECOND ANN. CONVENTION OF THE INTERCOLLEGIATE ATHLETIC ASS'N OF THE U.S. 27-28 (1907) ("In a word it was claimed that many professional athletes were parading under false college colors. This sweeping condemnation of the prevalent ethics of college athletics inaugurated a strong movement to reform the manner of playing the leading intercollegiate sports."). Pierce added: "The Association . . . is endeavoring to disseminate . . . true ideas of what amateur sport really is, to establish . . . principles, and to obtain strict adhesion to them. . . . *This organization wages no war against the professional athlete, but it does object to such a one posing and playing as an amateur*." *Id*. at 30 (emphasis added).

status.[287] The athlete would be required to be enrolled as a fulltime student,[288] and ineligible if he were ever paid for athletic competition,[289] or played for more than one school.[290] He could play only after successfully completing one year of study.[291] A student's eligibility would end after participating for four consecutive years.[292] These rules reflected the association's amateurism ideals.[293]

Race was rarely discussed at conventions.[294] However, the association may have been influenced by contemporary eugenics literature.[295]

287. *See Constitution and By-Laws of the Intercollegiate Athletic Association of the United States*, *in* PROCS. OF THE SECOND ANN. CONVENTION OF THE INTERCOLLEGIATE ATHLETIC ASS'N OF THE U.S. 78-79 (1907) (describing how Rule 3 required a student who played in an athletic contest to have never been paid for this activity); *see also Penn Baseball in the 19th Century Intercollegiate Basketball Success and Greater University Involvement in Athletics, 1885-1900*, PENN LIBR., https://archives.upenn.edu/exhibits/penn-history/baseball/university-involvement [https://perma.cc/ZQS6-Z432] (last visited Feb. 23, 2024) (describing how Elwood Otto Wagenhurst and Mark McGrillis played professional baseball before joining Penn's varsity ball team, respectively in 1890 and 1891). By 1893, Penn's faculty instituted eligibility reforms relating to academic performance while banning professional players. *Id.* ("The Penn faculty took the lead in providing Penn with alternate reforms. The committee led by Simon N. Patten and George Wharton Pepper issued new eligibility rules in December of 1893 which lay the groundwork for the make-up of Penn varsity baseball teams to follow.").

288. *President's Football Reform Plan Started*, N.Y. TIMES (Nov. 27, 1905), https://timesmachine.nytimes.com/timesmachine/1905/11/27/120279811.pdf [https://perma.cc/T3SB-M6PW].

289. PROCS. OF THE SECOND ANN. CONVENTION, *supra* note 287.

290. *Id.*

291. *Id.*

292. *Id.* These rules are similar to the NCAA's challenged rules in Johnson v. NCAA. *Compare* PROCS. OF THE SECOND ANN. CONVENTION, *supra* note 287 (rules promulgated by Intercollegiate Athletic Association), *with* NAT'L COLLEGIATE ATHLETIC ASS'N, *supra* note 11.

293. Pierce, *supra* note 286, at 28 ("[T]his National Association was formed to . . . perpetuate the work of sane control of collegiate sports. . . . It studies the question of amateurism and endeavors to spread the knowledge of this important athletic subject. . . . It discourages commercialism and encourages true amateurism.").

294. *See, e.g.*, PROCS. OF THE SECOND ANN. CONVENTION, *supra* note 287, at 36 (describing how Col. Charles W. Larned, U.S. Military Academies, seemed to view amateur athletics through a lens of race and class when he extolled athletics as a character-building activity for the urban masses of "children of the poor—street Arabs, tenement bred, more or less stunted and perverted in body and morals.").

295. To explain the connection between the racism of some university and college leaders and the eugenics movement, I offer three examples of widely circulating ideas around the early years of the NCAA. An overview appears in Harold J. Laskie, *The Scope of Eugenics*, WESTMINSTER REV. (1910), *reprinted in* 48 MANKIND 191, 194 (2007) ("The science of Eugenics has been ably defined as the study of those social agencies that may improve or impair the mental and physical characteristics of the race. It is at once a study of national deterioration and of national progress"). Eugenics' preoccupation with breeding by a superior race is rationalized in SCOTT NEARING, THE SUPER RACE: AN AMERICAN PROBLEM 83-84 (1912) ("The best perish in war, leaving the less fit to . . . propagate. 'The man who is left holds in his grasp the history of the future,' and . . . is the one least fitted to survive; the race is constantly breeding from the unfit rather than from the fit."). *See also* HAVELOCK ELLIS, THE PHILOSOPHY OF CONFLICT 122 (1919) ("Thus we are called upon more urgently than ever before to carry out the racial policy, which is also the best social policy, of encouraging what remain of our fit stocks and discouraging from procreation the unfit stocks.").

Conference delegates never suggested that Blacks should be segregated. This social condition was a reality. But some delegates, including Dr. Paul C. Phillips, believed that their dominant race was at risk of replacement: "We are in the midst of an athletic age. Its athleticism is of vast importance in safeguarding the race from the physical, mental and moral dangers incident to our civilization."[296]

Prof. Clarence A. Waldo, exhorting his colleagues, urged: "[S]hall we not try to secure an athletic spirit throughout the whole student body, a spirit that thrives on . . . the mind, which . . . *contributes its share in the intellectual and moral progress of the race*?"[297] These ideas did not incubate in isolation at proceedings—they were part of a racialized ideology in the social sciences and education fields.[298] W.W. Hastings was listed in the NCAA convention roll in 1912,[299] two years after he published "Racial Hygiene and Vigor."[300] In a pseudo-empirical assessment of racial athletic traits, Hastings assessed the "The Negro":

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296. Paul C. Phillips, *The Length of Athletic Schedules*, *in* PROCS. OF THE SECOND ANN. CONVENTION OF THE INTERCOLLEGIATE ATHLETIC ASS'N OF THE U.S. 47 (1907). *See also* Dudley A. Sargent, *Competition in College Athletics*, *in* PROCS. OF THE FOURTH ANN. CONVENTION OF THE INTERCOLLEGIATE ATHLETIC ASS'N OF THE U.S. 45 (1909). Sargent depicted intercollegiate athletic contests as a Darwinian outgrowth:

> Now, through the efforts making in behalf of eugenics or race culture, our attention is once more being called to these fundamental factors in our development. A higher and better structure for all is what we are striving to attain, otherwise there could be no such thing as human progress. This is the standard by which all of our efforts towards individual or race improvement must be measured. . . . The interest in antagonistic games and personal encounters harks back to the primitive ages when life or death and the possession of all that was held dear depended upon the result, and the ordeals passed through by our ancestors have been engraved upon the memory of every nerve and muscle cell of our bodies.

297. Clarence A. Waldo, *The Proper Control of College Athletic Sports*, *in* PROCS. OF THE THIRD ANN. CONVENTION OF THE INTERCOLLEGIATE ATHLETIC ASS'N OF THE U.S. 47 (1909) (emphasis added).

298. *See*, *e.g.*, Elmer D. Mitchell, *Racial Traits in Athletics*, 27 AM. PHYS. ED. REV. 147, 152 (1922). Mitchell theorized how eugenics led to crude racial caricatures of athletes—in this case, "The Negro" athlete:

> Physically, he is large and inclined to be heavier in the upper than in the lower part of the body. Usually long arms, narrow hips, high placed calves, and flat feet are distinctive racial peculiarities. Quite often they are accompanied by a shuffling gait. Temperamentally, he is inclined to be lazy. The racial vitality is strong, quite the opposite from that of the Indian. Other minor traits are his susceptibility to superstition, his capability for self-devotion or hatred, his imitativeness, his love of frankness and especially his love of praise.

299. PROCS. OF THE SEVENTH ANN. CONVENTION OF THE INTERCOLLEGIATE ATHLETIC ASS'N OF THE U.S. 4 (1912) (listing Hastings as an Associate Member from the Normal School of Physical Education).

300. W.W. Hastings, *Racial Hygiene and Vigor*, 15 AM. PHYS. ED. REV. 515, 525 (1910). Hastings published a paper that was read at the meeting of the American Physical Education Association in 1910:

> We here to-day are mainly of English blood, practically all of Teutonic stock. Let us be frank without meaning to tread on the toes of less fortunate races. It is a nice, fine-spun theory that with the admixture in America of the rugged strength and honesty of the Teuton, the facile grace and emotional aesthetic nature of the Latin, the persistent conservatism of the Chinese, the enthusiastic eclecticism and dogged persistence of the Japanese, the vitality and emotional nature of the negro, there shall be evolved in this country one day a type of the all-round man. The theory is plausible but it contains some fatal flaws.

> The types produced by centuries of natural selection are both the most harmonious and the most permanent. They breed true. The immediate fruit of admixture of extreme types is the production of an unharmonious, unstable individual, a sort of a Dr. Jekyll and Mr. Hyde, who like the mulatto of the South and Mexican of mixed blood, has no positive, normal sphere and function, but often becomes a positive menace to society by his susceptibility to disease and to evil and criminal habits.[301]

3. A Black Market to Pay Wages to White College Players

By 1880, professional athletes were becoming more visible in college athletics, prompting strident criticism.[302] Before the NCAA was founded, major conferences enacted amateurism principles to combat the trend of professionalization.[303] These efforts seemed to fail.[304] In 1929, the Carnegie Foundation issued a lengthy analysis of college athletics, noting that many athletic departments "subsidized" the employment of good athletes.[305] For example, the report recounted: "An alumnus who has enquired concerning help for two promising athletes is answered thus by the university business manager: 'If you say these two boys can make the team then we sure want to take care of them.'"[306] The report showed that college boosters acted as straw employers for recruiting good players.[307]

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301. *Id*.

302. EDWARD M. HARTWELL, PHYSICAL TRAINING IN AMERICAN COLLEGES AND UNIVERSITIES 124 (1885) ("Professionalism has done much within the last five years to bring discredit upon college sports.").

303. HOWARD J. SAVAGE ET AL., AMERICAN COLLEGE ATHLETICS 27 (1929) (stating that amateurism rules were enacted by the Southern Intercollegiate Athletic Conference (formed in 1894), Western Conference (formed in 1895, also known as the Big Ten), and the Maine Intercollegiate Track and Field Association (formed in 1896)).

304. *See* C.A. Stewart, *Athletics and the College*, THE ATLANTIC 153, 155 (Apr. 1914) ("[E]very man who has lived among college athletes knows that many of them have at some time received money, directly or indirectly, for athletic competition. Actual proof of professionalism in any one case is as difficult as proof of bribe-taking among aldermen. Payments are not made by check, and are often disguised in more or less clever ways.").

305. SAVAGE ET AL., *supra* note 303, at 250-51, outlines this development:

> Hence, athletes at a number of universities have been subsidized under the guise of salesmen of insurance or bonds (Columbia, Wisconsin), clothing store clerks (California, Drake, Ohio State), agents for business firms (Chicago, Colgate, University of Iowa, Southern Methodist, Wyoming), sporting goods salesmen (Dartmouth, Drake, Texas, University of Washington, Wyoming), advertising solicitors (Michigan, Missouri, Northwestern, Pennsylvania), motion picture employees (Southern California), companions to children (Denver, Harvard), writers (Michigan), and otherwise out of all proportion to service rendered. These examples are especially noteworthy because "agents for business firms" correspond to current types of NIL paid sponsorships of college athletes, and "advertising solicitors" similarly correspond to NIL deals whereby college athletes promote a product or a service.

306. *Id*. at 244 (reporting on the university business manager's response to an inquiry for a good athlete: "'If he is an honest-to-goodness athlete, that is, one who can make our teams, we will, of course, do our best to help him with a job.' A director-coach, in writing to a recruiting agent that he can provide a fifty-dollar job for an athlete who is good enough, and referring to a particular young man asks, 'Is he worth it?' Regarding other athletes, he asks in the same letter, 'How much are they worth?'").

307. *See id.* at 244.

To sum up, these accounts, ranging in time from the mid-1880s to the early 1930s, roughly overlap with my examination of nearly all-white college athletics in Ivy League schools in Part III.C.1, and the early years of the NCAA in Part III.C.2, when the association was enacting amateurism rules. Part III.C.3 shows that amateurism rule was ineffective; and given the fact that mostly white athletes played college athletics, this black market for college wages had a marked racial bias.

IV. PRISON LABOR IN THE MODERN ERA: THE THIRTEENTH AMENDMENT "SLAVERY EXCEPTION" AND THE FAIR LABOR STANDARDS ACT

In Part II, I traced roughly parallel timelines for the emergence and evolution of the free labor principle, originating in the Ordinance of 1787, and the origins of college sports. These timelines stretched to the Dred Scott decision and onset of the Civil War. Part III continued those timelines after the Civil War, examining the growth of racially coerced labor practices such as peonage, sharecropping, and convict leasing. These oppressive conditions coincided with the early years of the NCAA. During this period, the association's embrace of amateur competition coincided with segregation in member schools, which was undergirded with some degree of eugenicist ideology. Here in Part IV, I bring these timelines forward through the present. My focus is on the Fair Labor Standards Act (FLSA)—the federal law implicated in *Johnson v. NCAA*. Part IV.A examines the enactment of the FLSA, and caselaw involving claims by prisoners for FLSA coverage of their work. Part IV.B analyzes *Vanskike v. Peters*, the case used by the Seventh Circuit in *Berger* to rule that some forms of work are too unusual to be covered by the FLSA. The timelines in this study that run from the past to present regarding free labor and college athletics merge in Part IV.B, in which I demonstrate that *Berger* erred in its legal reasoning by citing the prison labor case *Vanskike* to justify its ruling that the work performed by college athletes is outside the FLSA.

A. Prison Labor and the Fair Labor Standards Act

The Fair Labor Standards Act was enacted in 1938 to address the widespread problem of poverty wages.[308] The law was passed without language for prison labor or involuntary servitude, likely because Congress comprehensively restricted prison labor in the Ashurst-Sumners Act of July

308. *See* 29 U.S.C. § 202(a) (finding "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers"). The FLSA addresses Congress's concern that people earn at least a subsistence wage by requiring employers to pay their employees a minimum hourly wage.

24, 1935.[309] Eventually, however, prisoner lawsuits for unpaid labor cropped up after World War II. Shortly after the war ended, Michigan state prisoners in *Huntley v. Gunn Furniture Co*. sued under the FLSA over their work on war munitions because they were not paid minimum wage and overtime.[310] Michigan contracted with an outside employer to assign work to prisoners.[311] A federal district court ruled that plaintiffs were employees of the Michigan prison industries system, not the private firm.[312] One remarkable feature of the decision is that it never discussed the Ashford-Summers Act, and its restrictions on prison labor in interstate commerce. After all, the munitions being manufactured by prison workers in *Huntley* were almost certainly meant for use by the nation's armed forces, and likely would have been shipped across Michigan's border.[313] The *Huntley* decision demonstrates the court's unwillingness to extend wage protections to prison laborers.

Since then, most courts have dismissed FLSA lawsuits in which incarcerated persons claimed they were entitled to minimum wage. *Lindsey v. Leavy* expressed a clear rationale for this outcome, declaring in 1945 that "appellant was the sole author of his own misfortunes . . . [and] was duly tried, convicted, sentenced and imprisoned as a punishment for crime in accordance with law."[314] More recently, *Gilbreath v. Cutter Biological, Inc.* expressed an exaggerated view of prison labor:

> This is a category of persons—convicted murderers, rapists, burglars, armed robbers, swindlers, thieves, and the like—whose civil rights are subject to suspension and whose work in prison could be accurately characterized in an economic sense as involuntary servitude, peonage, or indeed slavery—all of which are prohibited by law—were it not for the exceptions carved out by the courts from these prohibitions for persons "duly tried, convicted, sentenced and imprisoned for crime in accordance with law."[315]

At the other extreme, some incarcerated persons have claimed that the Thirteenth Amendment shields them from every form of work.[316] Many

309. *Id*. *See also* Frank T. Flynn, *The Federal Government and the Prison-Labor Problem in the States. I. The Aftermath of Federal Restrictions*, 24 SOC. SERV. REV. 19, 20 (1950) (explaining that the Ashurst-Sumners Act of July 24, 1935 "prohibited the transportation of prison-made goods into states which barred them and required labeling of prison-made goods when shipped in interstate commerce." Passage of the law "practically drove prison-made goods from the market.").

310. Huntley v. Gunn Furniture Co., 79 F. Supp. 110, 112 (W.D. Mich. 1948).

311. *Id*.

312. *Id*. at 116.

313. *Id*. at 112 (noting that "their employment in connection with the manufacture of the shell casings continued until approximately two weeks after the cessation of hostilities in World War II." This would imply that the prison manufacturing facility sold weapons in interstate commerce to support the nation's war efforts).

314. Lindsey v. Leavy, 149 F.2d 899, 901-02 (9th Cir. 1945).

315. Gilbreath v. Cutter Biological, Inc., 931 F.2d 1320, 1325 (9th Cir. 1991).

316. Courts reject this sweeping exemption from required labor in prison. *See* Berry v. Bunnell, 39 F.3d 1056, 1057 (9th Cir. 1994); Mikeska v. Collins, 900 F.2d 833, 837 (5th Cir. 1990) ("All TDCJ inmates, unless specially classified, are expected to work."); Murray v. Miss. Dep't of Corr., 911 F.2d

courts dismiss FLSA lawsuits for work in a prison,[317] and occasionally for outside work.[318] One court expansively declared: "When a person is duly tried, convicted and sentenced in accordance with the law, no issue of peonage or involuntary servitude arises."[319] In an oft-quoted passage, the *Sigler v. Lowrie* decision said that paying incarcerated persons for their work is not constitutionally required; rather, it "is by grace of the state."[320]

1167, 1167 (5th Cir. 1990) (The "[T]hirteenth [A]mendment specifically allows involuntary servitude as punishment after conviction of a crime."); Plaisance v. Phelps, 845 F.2d 107, 108 (5th Cir. 1988); Craine v. Alexander, 756 F.2d 1070, 1075 (5th Cir. 1985); Piatt v. MacDougall, 773 F.2d 1032, 1035 (9th Cir. 1985); Omasta v. Wainwright, 696 F.2d 1304, 1305 (11th Cir. 1983) ("[W]here a prisoner is incarcerated pursuant to a presumptively valid judgment . . . the [T]hirteenth [A]mendment's prohibition against involuntary servitude is not implicated."); U.S. v. Drefke, 707 F.2d 978, 983 (8th Cir. 1983) (The "Thirteenth Amendment . . . is inapplicable where involuntary servitude is imposed as punishment for crime."); Ray v. Mabry, 556 F.2d 881, 882 (8th Cir. 1977); Jobson v. Henne, 355 F.2d 129, 131 (2d Cir. 1966); Blacher v. Dieball, No. CV 14-7985-GW(AGR), 2016 WL 10859781 (C.D. Cal. June 21, 2016) (rejecting prisoner's claim that an inmate should not have to work); Alexander v. Schenk, 118 F. Supp. 2d 298, 302 (N.D.N.Y. 2000) ("[T]he [Thirteenth] amendment, on its face, excludes involuntary servitude imposed as legal punishment for a crime."); Strong v. Elliott, No. 1:09-cv-00583 AWI JLT (PC), 2010 WL 4322620, at *3 (E.D. Cal. Oct. 26, 2010) (holding state did not violate the Thirteenth Amendment by requiring prisoner to pick up trash and perform related duties); Howerton v. Miss. Cnty., 361 F. Supp. 356, 364 (E.D. Ark. 1973) (holding that compelling prison inmates to work does not violate the Thirteenth Amendment).

317. Such cases generally involved inmates working for prison authorities or for private employers in the prison facility. *See, e.g.*, Villarreal v. Woodham, 113 F.3d 202, 204 (11th Cir. 1997); Gambetta v. Prison Rehab. Indus., 112 F.3d 1119, 1122 (11th Cir. 1997); Danneskjold v. Hausrath, 82 F.3d 37, 39 (2d Cir. 1996); McMaster v. Minnesota, 30 F.3d 976, 977 (8th Cir. 1994); Vanskike v. Peters, 974 F.2d 806, 809-10 (7th Cir. 1992); *Gilbreath*, 931 F.2d at 1322.

318. *See* Reimonenq v. Foti, 72 F.3d 472, 474 (5th Cir. 1996) (work release program outside prison); Henthorn v. Dep't of Navy, 29 F.3d 682, 684-87 (D.C. Cir. 1994) (prisoner worked at Naval air station); Hale v. Arizona, 993 F.2d 1387, 1390 (9th Cir. 1993) (en banc) (work performed at leased facility outside of prison); Miller v. Dukakis, 961 F.2d 7, 8-9 (1st Cir. 1992) (work in a civil detention treatment facility for sex offenders who were not released to freedom). Some FLSA cases suggest that location is not particularly relevant to the employment inquiry with respect to inmates. *See* Franks v. Okla. State Indus., 7 F.3d 971, 972 (10th Cir. 1993); Harker v. State Use Indus., 990 F.2d 131, 133 (4th Cir. 1993).

319. Wendt v. Lynaugh, 841 F.2d 619, 620 (5th Cir. 1988) (quoting Draper v. Rhay, 315 F.2d 193, 197 (9th Cir. 1963)) (relating to the intent of the Thirteenth Amendment).

320. Sigler v. Lowrie, 404 F.2d 659, 661 (8th Cir. 1968); *see* Mikeska v. Collins, 900 F.2d 833, 837 (5th Cir. 1990); *Wendt*, 841 F.2d at 621; Hrbek v. Farrier, 787 F.2d 414, 416 (8th Cir. 1986); Jordan v. Lanigan, Civ. No. 17-2015 (KM), 2018 WL 11475989, at *2 (D.N.J. Oct. 11, 2018); Sanders v. Kelley, No. 5:17-cv-306-JLH-BD, 2017 WL 1155001, at *1 (E.D. Ark. Nov. 27, 2017); Loyal v. Lanigan, Civ. No. 15-5769 (FLW), 2016 WL 4545308, at *4 (D.N.J. Aug. 30, 2016); Mix v. Rosalez, No. 1:15-cv-01060 DLB PC, 2016 WL 2907731, at *2 (E.D. Cal. May 18, 2016); Planker v. Christie, Civ. No. 13-4464 (MAS), 2015 WL 268847, at *28 (D.N.J. Jan. 21, 2015); Wofford v. Lanigan, Civ. No. 14-5723 (ES) (JAD), 2015 WL 9480016, at *4 (D.N.J. Dec. 28, 2015*);* Shabazz v. N.J. Comm'r of Dep't of Corr., Civ. No. 13-4968 (MAS), 2014 WL 2090688, at *2 (D.N.J. May 19, 2014); Williams v. Coleman, No. 1:11-cv-01189-GBC, 2012 WL 6719483, at *3 (E.D. Cal. Dec. 26, 2012); Harris v. Randle, Civ. No. 10-732-GPM, 2011 WL 132859, at *3 (S.D. Ill. Jan. 16, 2011); McNeal v. Mayberg, No. 1:07-cv-00851-GSA, 2008 WL 5114650, at *12 (E.D. Cal. Dec. 4, 2008); Northrop v. Fed. Bureau of Prisons, Civ. No. 1:08-cv-0746, 2008 WL 5047792, at *8 (M.D. Pa. Nov. 24, 2008); Carey v. Johnson, Civ. No. 06-1598, 2008 WL 724101, at *9 (W.D. Pa. Mar. 17, 2018); O'Connel v. Johnson, No. 3:05-163J, 2007 WL 906168, at *4 (W.D. Pa. Mar. 22, 2007); McMaster v. Minn., 819 F. Supp. 1429, 1438 (D. Minn. 1993); *Vanskike*, 974 F.2d at 809.

Some courts, however, are not so dismissive of prisoner claims for payment of work. They use *Bonnette v. California Health & Welfare Agency*'s four-factor test.[321] Others use the *Bonnette* test without referencing it.[322] Some federal appeals courts depart from *Bonnette*'s general test for employment in favor of one that is specifically tied to prison work.[323] With this institutional focus, they analyze the "economic reality" of how and for whom labor is performed.[324] When incarcerated persons work inside the prison for a private contractor who conducts business there, courts often rule that the FLSA does not cover their labor.[325] However, for work performed outside the facility, *Watson v. Graves* applied an economic reality approach in finding that Congress intended to protect wages of free labor from competition with incarcerated labor.[326]

Using the same approach, however, other courts rule against prisoner FLSA claims.[327] Moreover, the *Franks v. Oklahoma State Industries* decision

321. Bonnette v. California Health & Welfare Agency, 704 F.2d 1465, 1470 (9th Cir. 1983) ("[W]hether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records.").

322. *See* Carter v. Dutchess Cmty. Coll., 735 F.2d 8, 12 (2d Cir. 1984); Lyle v. Magnolia State Enter., Inc., No. 96-60317, 1996 WL 762823, at *2 (5th Cir. Dec. 12, 1996); Williams v. Henagan, 595 F.3d 610, 620 (5th Cir. 2010).

323. *Carter*, 735 F.2d at 12 (referring to the *Bonnette* factors, but also stating that "the court below erred . . . in giving undue weight to the control factor alone"). Other appellate courts have abandoned *Bonnette*'s four-factor test. *See* Danneskjold v. Hausrath, 82 F.3d 37, 40-41 (2d Cir. 1996); *see also Vanskike*, 974 F.2d at 809-12 (rejecting the *Bonnette* four factor standard in the prison context).

324. *Vanskike*, 974 F.2d at 807-12 (rejecting the *Bonnette* four factor standard in the prison context).

325. *See* Gilbreath v. Cutter Biological, Inc., 931 F.2d 1320, 1331 (9th Cir. 1991) (FLSA does not apply to inmates working in a private plasma center inside a prison); Alexander v. Sara, Inc., 721 F.2d 149, 150 (5th Cir. 1983) ("[T]here was no employer-employee relationship, because the inmates' labor belonged to the penitentiary[.]"); Sims v. Parke Davis & Co., 453 F.2d 1259, 1259 (6th Cir. 1971) (FLSA does not apply to inmates working at private drug clinic inside prison).

326. Watson v. Graves, 909 F.2d 1549, 1554 (5th Cir. 1990). Prisoners in a work-release program were assigned to work for a construction company owned by the sheriff's daughter and son in law and were paid $20 a day. *Id*. at 1555. The court determined that this work arrangement posed a competitive threat to the labor market, declaring: "Such a situation is fraught with the very problems that FLSA was drafted to prevent—grossly unfair competition among employers and employees alike." *Id*.

327. Murray v. Miss. Dep't of Corr., 911 F.2d 1167, 1168 (5th Cir. 1990) ("[A]n inmate is not entitled to damages for violation of his constitutional or civil rights on the basis that he was compelled to work on private property without pay."); Reimonenq v. Foti, 72 F.3d 472, 476 n.313 (5th Cir. 1996) (reasoning that the "categorical rule that prison custodians are not 'employers' of inmates in work release programs not only recognizes the practical realities of the custodian/convict relationship, but also is buttressed by the policy rationales underpinning the FLSA."); *Alexander*, 721 F.2d at 149-50 (5th Cir. 1983) (holding state prison inmates performing work on prison grounds for a profit-making private entity under contract with Department of Corrections are not employees entitled to minimum wage coverage under FLSA); Emory v. United States, 2 Cl. Ct. 579, 558 (Ct. Cl. 1983), *aff'd*, 727 F.2d 1119 (Fed. Cir. 1983) ("The plaintiff is not a government employee, and he has not asserted a claim . . . within the scope of the Fair Labor Standards Act of 1938."); Ray v. Mabry, 556 F.2d 881, 882 (5th Cir. 1977) ("Ray's contention that his work requirements constitute involuntary servitude in violation of the Thirteenth Amendment is without merit."); Wentworth v. Solem, 548 F.2d 773, 775 (8th Cir. 1977) (holding FSLA's minimum wage coverage does not extend to convicts working in state prison industries); Sims v. Parke Davis & Co.,

questioned *Watson*'s approach, concluding that "the economic reality test was not intended to apply to work performed in the prison by a prison inmate."[328] Expanding on this rationale, the *Reimonenq v. Foti* decision determined that "the 'economic reality' test, which is cast as a 'control' question designed to identify the responsible employer in a free-world work environment, is unserviceable, and consequently inapplicable, in the jailer-inmate context."[329] Applying this principle, *Reimonenq* explained that the "test has a natural bias that favors a finding that the prison custodian is the inmate's 'employer' because of the considerable control a jailer must exercise over inmates."[330]

B. Prison Labor and Racial Incarceration

Part III.B demonstrated some interconnections between racial incarceration and compulsory work in the context of peonage and convict leasing.[331] Moving forward in time, the internment of Japanese Americans from 1942-1945 offers a more recent and striking example of racial incarceration.[332] The problem of racial incarceration has shifted to Black people, especially Black men.[333] Research from 2021 shows that "Black Americans are incarcerated in state prisons at nearly 5 times the rate of white Americans."[334]

Inmates in state prisons earn nominal wages for their work.[335] One inmate recently explained:

> In my current program assignment, I earn $0.25 an hour. My duties consist of keeping up the facility lawns and grounds all year round. I pick up garbage, mow, weed whack, trim hedges, shovel snow, and salt. Not only is this work

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334 F. Supp. 774, 792 (E.D. Mich. 1971) (holding that work in a research clinic is not a form of involuntary servitude).

328. Franks v. Okla. State Indus., 7 F.3d 971, 973 (10th Cir. 1993).

329. Reimonenq v. Foti, 72 F.3d at 475.

330. *Id*.

331. *See supra* notes 172-91 and accompanying text.

332. Eric K. Yamamoto & Rachel Oyama, *Masquerading Behind a Facade of National Security*, 128 YALE L.J.F. 688, 688 (2019).

333. Mandala v. NTT, Inc., 975 F.3d 202, 218 (2d. Cir. 2020) (J. Chin, dissenting):

> [T]he national statistics set forth in the complaint show that "African Americans are arrested and incarcerated for crimes at higher rates than Whites, relative to their share of the national population." Joint App'x at 15. Those statistics include:
> • as of 2010, 40% of prisoners in the United States were African American, while African Americans represented only 13% of the overall U.S. population (Prison Policy Initiative study);
> • some 26.9% of arrests are of African Americans, double their percentage of the general population (FBI and Census statistics).

334. ASHLEY NELLIS, THE SENTENCING PROJECT, THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS 5 (2021). The research also showed that "one in 81 Black adults in the U.S. is serving time in state prison." *Id.*

335. Walter Ball, *Increasing Prison Wages to Dollars Just Makes Sense*, VERA INST. OF JUST. (Feb. 2, 2023), https://www.vera.org/news/increasing-prison-wages-to-dollars-just-makes-sense [https://perma.cc/6ZDE-9NUT].

> labor-intensive, it also often requires having to work in harsh weather conditions including humidity, the hot sun, rain, snow, and frigid temperatures. We must awaken at 4:30 a.m., even during the winter months. Yet, my weekly income is $10.33.[336]

Incarceration adversely affects wage earnings of former inmates.[337] A recent court tersely suggested "that the legislature may wish to consider paying inmates a wage less consistent with that paid by plantation owners to their slaves."[338] For young men, the stigma of conviction and the deterioration of job skills in prison appear to result in their accepting low-wage employment.[339]

In short, this section demonstrates that prison labor cannot be discussed in the abstract without reference to its racial disparities that severely affect Black men. This is the main demographic of NCAA athletes upon whom the NCAA and its large athletic programs rely for most of their immense revenues.[340] These empirical certainties underscore *Berger*'s misplaced analogy of the NCAA amateurism model to prison labor.

C. Vanskike v. Peters*: Impact of the FLSA Cases on NCAA Athletes*

In *Berger*, the NCAA relied on the Seventh Circuit's opinion in *Vanskike* to argue that the FLSA does not apply to its athletes.[341] Like prisoners in other FLSA cases, Daniel Vanskike filed a *pro se* complaint against his prison.[342] He characterized his work as a janitor, kitchen worker, gallery worker and knit shop worker as "forced labor."[343] He sought the same hourly wage provided to "any normal employee."[344] The court dismissed his complaint.[345]

The Seventh Circuit's affirmation of this ruling delved into the institutional character of prison work. The Illinois legislature authorized prison labor to develop "marketable skills" and promote "habits of work and responsibility."[346] Lawmakers also required prisoners to pay toward their incarceration.[347] The Department of Corrections' (DOC) use of prisoner

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336. *Id*.

337. Bruce Western, *The Impact of Incarceration on Wage Mobility and Inequality*, 67 AM. SOC. REV. 526, 542 ("The low wages earned by ex-inmates may thus be associated with further crime after release from prison.").

338. People v. McTerrell, 66 Misc. 3d 1210, 1210 (N.Y. Sup. Ct. 2020).

339. Haeil Jung, *The Long-Term Impact of Incarceration During the Teens and 20s on the Wages and Employment of Men*, 54 J. OFFENDER REHAB. 317, 333 (2015).

340. *See* Vanskike v. Peters, 974 F.2d 806, 809 (7th Cir. 1992).

341. Berger v. NCAA, 843 F.3d 285, 291-93 (7th Cir. 2016).

342. *See Vanskike*, 974 F.2d at 807.

343. *Id*. at 806.

344. *Id*.

345. *Id*. at 813.

346. *Id*. at 809.

347. *Id*. at 811-12.

services was consistent with the Ashurst-Sumners Act, a federal law prohibiting prison labor from competing with free labor.[348] Finally, the prison work program in Illinois mirrored FLSA's broader policy aim of removing "unfair competition" from labor markets.[349] To this point, the court observed that "it is not at all clear whether Vanskike works to produce goods that are distributed outside the prison."[350]

Vanskike also considered the interplay of compulsory labor and an incarcerated person's loss of freedom. Like other appellate courts,[351] *Vanskike* persuasively reasoned that *Bonnette*'s employment factors poorly fit prison work because a supervisor's control of an employee's time, pay, and work conditions is not comparable to a prison's control of an incarcerated person's environment, subsistence, and privileges.[352] This analysis led *Vanskike* to comment on the lack of a bargained-for exchange in prison labor: "Put simply, the DOC's 'control' over Vanskike does not stem from any remunerative relationship or bargained-for exchange of labor for consideration, but from incarceration itself."[353]

When Gillian Berger, a University of Pennsylvania track and field athlete, sued for minimum wages under the FLSA, the Seventh Circuit relied on *Vanskike* to affirm the district court's dismissal of her claim.[354] The *Berger* court accepted *Vanskike*'s rationale that, although the definitions of employee and employer are expansive, the definition of '"employee' does have its limits."[355] *Berger* cited *Vanskike* to apply a more flexible approach, while rejecting a multifactor test under the FLSA.[356] However, apart from saying that multifactor tests failed "to capture the true nature of the relationship"[357] for Illinois prison workers, as well as college athletes, *Berger*'s primary rationale for this strained comparison was the NCAA's "revered tradition of amateurism in college sports."[358]

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348. *Vanskike*, 974 F.2d at 811.

349. *Id*.

350. *Id*.

351. *Id*. at 809 (internal citations omitted).

352. *Id*. ("[T]he Bonnette factors fail to capture the true nature of the relationship for essentially they presuppose a free labor situation."). The court also noted that "the relationship between the DOC and a prisoner is far different from a traditional employer-employee relationship, because (certainly in these circumstances) inmate labor belongs to the institution." *Id.*

353. *Id*. (declaring that the "Thirteenth Amendment excludes convicted criminals from the prohibition of involuntary servitude, so prisoners may be required to work" and that convicts enjoy "no Constitutional right to compensation for such work").

354. Berger v. NCAA, 843 F.3d 285, 290-91, 294 (7th Cir. 2016).

355. *Id*. at 290 (quoting Tony & Susan Alamo Found. v. Sec'y of Lab., 471 U.S. 290 (1985)).

356. *Id*. at 291.

357. *Id*. (quoting *Vanskike*, 974 F.2d at 807).

358. *Id*. (quoting Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 120 (1984)).

After the Seventh Circuit's ruling, *Vanskike* has played a smaller part in FLSA litigation. The Ninth Circuit's opinion in *Dawson v. NCAA* indirectly relied on *Vanskike* for the idea that a multifactor test in a FLSA case should be limited to cases where there is an actual employer.[359] The opinion used circular reasoning to conclude that the NCAA was not Dawson's employer, so it could not be any college athlete's employer.[360] In the Eastern District of Pennsylvania, *Livers v. NCAA* dismissed a college athlete's FLSA lawsuit because he filed his action beyond the FLSA's two year statute of limitations, and did not plead sufficient facts to plausibly conclude that his school and the NCAA willfully violated this law.[361] The *Livers* court tersely noted, however, that "*Vanskike* is not controlling on this Court."[362]

Summing up Part IV, a comprehensive analysis of FLSA court opinions involving prison labor shows no rational connection to amateur athletics in college. Most cases have involved convicted inmates, not college athletes.

V. EMANCIPATING COLLEGE ATHLETES FROM AMATEURISM: CONCLUSIONS

My research presents new evidence to support the emancipation of college athletes from the NCAA's amateurism model. Using parallel timelines from the nation's founding and the start of football in 1800, I demonstrate that involuntary labor and college athletics were—and remain—racialized socioeconomic systems. I use these timelines to debunk the NCAA's prison labor theory in *Berger* that college athletics falls outside a traditional FLSA test. My framing of two socioeconomic systems—one with Black incarcerated labor in slavery, peonage, and convict leasing—and the other with white athletic privilege in universities and colleges, including athletics—adds more evidence that *Berger* mistakenly relied on *Vanskike* and prison labor comparisons. However, *Berger* stands as an obstacle to striking down the amateurism model in Trey Johnson's lawsuit against the NCAA.

Part V explains how these divergent but intertwined timelines for the free labor principle and the NCAA's amateur athletics worlds have collided in the *Johnson* case. This case exposes paradoxes on both timelines.

The timeline for the free labor principle embeds the current paradox of racial disparity for incarcerated Black people. The Ordinance of 1787 was specifically intended to prohibit slavery and all other forms of involuntary labor, while carving out a then-narrow exception for criminal punishment.[363] By the late 1700s, slavery operated as a form of Black incarcerated labor,

359. Dawson v. NCAA, 932 F.3d 905, 911 (9th Cir. 2019).

360. *Id*. at 908-09.

361. Livers v. NCAA, No. CV 17-4271, 2018 WL 2291027, at *8-*9 (E.D. Pa. May 17, 2018).

362. *Id*. at *15.

363. The Northwest Ordinance, *supra* note 53.

albeit with differences. Unless enslaved persons committed a criminal act that was prosecuted, the criminal justice system had no bearing on their confinement and forced labor. They were chattels, occasionally if not often sold to new owners. But they experienced bondage and confinement in ways that compare to imprisonment with compulsory labor.

The narrow exception for compulsory labor in 1787 likely applied to white and Black convicts alike. In 1865, the Thirteenth Amendment codified Section 6 of the Ordinance.[364] However, within a short time Black people, particularly in former Confederate states, were subject to incarcerated labor penalties, either from breached debt contracts[365] or vaguely defined offenses[366] that amounted to mingling near white people in public spaces. While the Supreme Court intervened to address some of the most egregious uses of incarcerated labor,[367] other practices lived on for the first half of the Twentieth Century.[368]

Modern racial disparities in convictions and prison sentences have cast a paradoxical light on the Thirteenth Amendment.[369] The Amendment was primarily intended to free enslaved Black persons while preserving the narrow compulsory exception from the Ordinance of 1787; but currently, it imposes nearly wageless labor on a vastly disproportionate share of Black people.[370] No data can be found to determine how many prison-plaintiffs in FLSA lawsuits are Black, but one can reasonably assume that these plaintiffs mirror that racial disproportion. Thus, to the extent that this disparity reflects ongoing vestiges of the "badges of slavery," the intent of the Thirteenth Amendment has been lost. The *Vanskike* decision, and numerous others like it, institutionalize this lost meaning. Summing up the free-labor timeline, the American criminal justice system has paradoxically inverted the framers' intent to maximize free labor in the Ordinance of 1787 and the Thirteenth Amendment, for Black people who were highly vulnerable to compulsory labor systems.

Turning to the college athletics timeline, the first intercollegiate contest in 1852 offered "prizes" to the winning team of students.[371] By the dawn of

364. A Bill to Maintain and Enforce the Freedom of the Inhabitants of the United States, S. 55, 39th Cong. (1865).

365. Daniel, *supra* note 172.

366. Roback, supra note 176.

367. *Id.* at 1167.

368. *See, e.g.*, Mandala v. NTT, Inc., 975 F.3d 202, 218 (2d. Cir. 2020) (J. Chin, dissenting).

369. *See* Berger v. NCAA, 843 F.3d 285, 291 (7th Cir. 2016).

370. *See Mandala*, 975 F.3d at 218 ("[A]s of 2010, 40% of prisoners in the United States were African American.").

371. Richard Johnson, *Even the First College Sporting Event in the United States Involved Cheating*, SB NATION (Feb. 24, 2018), https://www.sbnation.com/college-basketball/2018/2/24/17042498/first-ncaa-college-sporting-event-cheating [https://perma.cc/U735-3PMA].

conferences in the 1890s,[372] the mania for athletics was so engrained in the nation's premier schools that amateurism never had a chance to be anything more than an illusion. All the while, these bastions of privilege barricaded racial spaces, enclosing the pretense of amateurism with whiteness. During this time, when college sports were becoming popular, a one-eighth Black man in Louisiana was criminally prosecuted for sitting in a white train coach.[373] With the Supreme Court ruling that separate but equal was constitutional in *Plessy v. Ferguson*,[374] it would be impossible to imagine how a Black athlete could go many places with his white teammates.

Race had nothing to do with the NCAA's adoption of its amateurism principles and rules. But white racial superiority and privilege suffused its culture, with justifications to compete athletically to improve the race.[375] This culture built on the white-only experiences for college students throughout the 1800s and early 1900s. Amateurism rules were framed, first, to curtail the violence of football resulting from paid professionals who were not enrolled in their schools,[376] and second, to induce high-minded schools to join intercollegiate athletics for the betterment of sports.[377]

Within the past 60 years, as Black college athletes have overcome segregation to play a prominent role in college sports—especially in the revenue-rich sports of football and men's basketball—the amateurism rule has withered on the vine of academic justifications.[378] Now, these antiquated rules transfer immense wealth from unpaid Black people to whites[379]—a

372. Savage, *supra* note 303, at 27 (describing conference formation).

373. Plessy v. Ferguson, 163 U.S. 537, 538-39 (1896).

374. *Id.* at 548.

375. *See generally* Mitchell, *supra* note 298.

376. Broyles, *supra* note 281, at 491-92.

377. *See generally* Pierce, *supra* note 286, at 28-32.

378. Garthwaite et al., *supra* note 10, at 28 (reporting that "[n]early 60 percent [of] all black athletes in Power Five schools take part in revenue sports. By contrast, only 14 percent of white athletes participate in revenue sports while the remainder take part in non-revenue sports.").

379. *See* Edwards, *The Black "Dumb Jock": An American Sports Tragedy*, 131 COLL. BD. REV. 8 (1984) ("But Black student-athletes are burdened also with the insidiously racist implications of the myth of 'innate Black athletic superiority,' and the more blatantly racist stereotype of the 'dumb Negro' condemned by racial heritage to intellectual inferiority.").

More recently, a steady stream of scholarship has exposed racial biases and disparities in the experiences of Black college athletes. *See, e.g.*, SHAUN R. HARPER, BLACK MALE STUDENT-ATHLETES AND RACIAL INEQUITIES IN NCAA DIVISION I COLLEGE SPORTS (2018); Akuoma C. Nwadike, et al., *Institutional Racism in the NCAA and the Racial Implications of the 2.3 or Take a Knee Legislation*, 26 MARQ. SPORTS L. REV. 523, 535-39 (2016); *see also* Albert Y. Bimper Jr., *Game Changers: The Role Athletic Identity and Racial Identity Play on Academic Performance*, 55 J. COLL. STUDENT DEV. 795 (2014); Eddie Comeaux, et al., *Purposeful Engagement of First-Year Division I Student-Athletes*, 23 J. FIRST-YEAR EXPERIENCE & STUDENTS TRANSITION 35 (2011); Brandon Martin, et al., *"It Takes a Village" for African American Male Scholar-Athletes: Mentorship by Parents, Faculty, and Coaches*, 4 J. FOR STUDY SPORTS & ATHLETES EDUC. 277 (2010); Eddie Comeaux & C. Keith Harrison, *Faculty and Male Student Athletes: Racial Differences in the Environmental Predictors of Academic Achievement*, 10 RACE ETHNICITY & EDUC. 99 (2007); Krystal Beamon & Patricia A. Bell, *Academics Versus Athletics: An Examination of the Effects of Background and Socialization on African American Male Student*

much kinder and gentler form of racializing the space of college athletics compared to a century ago, bounded by the NCAA's rules.

That is the paradox of the NCAA's unbending adherence to its amateurism rules. While college athletics is not comparable to chattel slavery, the NCAA cannot move past an exploitative model that does not allow Black athletes to earn wages.

The timelines for the Thirteenth Amendment's slavery exception and NCAA amateurism rules merged in *Berger*, where this first FLSA opinion relating to college athletics relied extensively on *Vanskike*. The NCAA's brief before the Seventh Circuit in *Berger* cited *Vanskike* for the proposition that "Congress did not intend FLSA to cover work performed by prisoners."[380] Again, the brief cited *Vanskike*, urging the court to consider "that the 'economic reality' of the relationship between a university and its student-athletes is one of an educational institution and student, not employer and employee."[381] Furthermore, the NCAA brief repeated its citation to *Vanskike* to make a strained argument about interpreting the meaning of work covered by the FLSA.[382] This passage suggested that college athletic labor is a unique type of work, similar in its special nature to prison labor.[383] Yet again, the NCAA's brief returned to *Vanskike* to make the point that collegiate athletic labor differed fundamentally from the FLSA's expansive definition of compensable work: "This Court has explained that status as an employee for purposes of the FLSA depends on the totality of circumstances rather than on any technical label and that courts must examine the economic reality of the relationship."[384]

The *Berger* court was significantly influenced by these arguments. Judge Michael Kanne's decision to affirm the dismissal of the athletes' FLSA complaint cited *Vanskike* seven times. While this decision did not equate collegiate athletic labor and prison labor, a key passage implied that the two types of work are kindred:

Athletes, 43 SOC. SCI. J. 393 (2006); Tamara M. Eitle & David Eitle, *Race, Cultural Capital, and the Educational Effects of Participation in Sports*, 75 SOCIO. OF EDUC. 123 (2002); Kirsten F. Benson, *Constructing Academic Inadequacy: African American Athletes' Stories of Schooling,* 71 J. HIGHER EDUC. 223 (2000); Herbert D. Simons, et al., *Academic Motivation and the Student Athlete*, 40 J. COLL. STUDENT DEV. 151 (1999); Jeff Stone, et al., *Stereotype Threat Effects on Black and White Athletic Performance*, 77 J. PERSONALITY AND SOC. PSYCH. 1213 (1999).

380. Appellees' Brief for NCAA & Certain Schools at *27, Berger v. NCAA, Case No. 1:14-cv-01710-WTL-MJD, 2016 WL 3438089 (7th Cir. June 14, 2016).

381. *Id*. at *7-*8 (quoting Vanskike v. Peters, 974 F.2d 806, 809 (7th Cir. 1992)).

382. *Id*. at *8 ("Classifying college student-athletes as 'employees' strains the 'common linguistic intuitions' which serve as the 'best guide' to the meaning of that term under the FLSA." (quoting *Vanskike*, 974 at 809)).

383. *Id*.

384. *Id*. at *23 (citing *Vanskike*, 974 F.2d at 808) (citations omitted) (internal quotation marks omitted).

> In Vanskike, we considered whether an inmate at a state prison was an employee under the FLSA (citation omitted). *Like Appellants here, the inmate in Vanskike urged us to apply a multifactor test to determine whether an employment relationship existed.* We rejected the application of that test because it was "not the most helpful guide in the situation presented."[385]

The opinion culminated by analogizing the NCAA's tradition of amateurism with the nation's longstanding practice of requiring prisoners to work:

> The multifactor test proposed by Appellants here simply does not take into account this tradition of amateurism or the reality of the student-athlete experience. *In short, it "fail[s] to capture the true nature of the relationship" between student athletes and their schools and is not a "helpful guide."*[386]

In sum, *Vanskike* and *Berger* are precedential pillars that undergird college amateurism. Today, *Johnson v. NCAA* is a significant effort to address this racialized economic imbalance. My study shows that the free labor principle, which has never been fully realized since its inception in 1787, has lost some of its intended meaning with various systems of Black incarceration; and the NCAA's amateurism rules, which have never been fully realized, have lost their legal meaning as Black athletes have been barred from earning wages by arbitrary rules. When Lincoln declared an end to slavery in the Emancipation Proclamation he advised: "And I hereby enjoin upon the people so declared to be free . . . and I recommend to them that, in all cases when allowed, they labor faithfully for reasonable wages."[387] In *Johnson v. NCAA*, the time has come to for judges to emancipate NCAA athletes from the amateurism model and allow them to labor faithfully for their schools for minimum wage under the Fair Labor Standards Act.

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385. Berger v. NCAA, 843 F.3d 285, 291 (7th Cir. 2016) (quoting *Vanskike*, 974 F.2d at 809) (emphasis added).

386. *Id*. (quoting *Vanskike*, 974 F.2d at 809) (emphasis added).

387. National Archives, Transcript of the Proclamation (Jan. 1, 1863), https://www.archives.gov/exhibits/featured-documents/emancipation-proclamation/transcript.html [https://perma.cc/JYP5-H6EK].