

EXCUSES, NOT REASONS: 13 MYTHS ABOUT (NOT) PAYING COLLEGE ATHLETES

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The NCAA and its member universities in the six major conferences¹ are generating over a billion dollars in football profits and over \$300 million from basketball² on revenues of about \$2.9 billion across those same schools. These seventy-three³ schools earn these profits because, *inter alia*, they have made a collective agreement, along with the other 272 Division I schools, on the maximum compensation⁴ they offer to the college athletes who in large part drive consumer demand for the product.

In any other industry, allowing all 345 employers to form a nationwide wage cartel, while generating nearly 45% profit margins would be an instant target for a Department of Justice or Federal Trade Commission investigation and private litigation.⁵ Instead, the BCS AQ conference schools are allowed to generate these profits based on the rarely challenged assumption that the collusion⁶ among the 345 schools in Division I is somehow procompetitive. However, there is little or no procompetitive justification for this collusion. The question is often phrased as “Should we pay college athletes?” but that misses the point. The real question is “Why do we allow nationwide collusion on player compensation?”

If the current collusion wants to be justified under our antitrust laws, that system should have to make the case that it helps create a product that could not exist in the

¹ By this, I mean the BCS AQ conferences: the SEC, Big Ten, Big XII, Pac-10, ACC, and Big East, including their eight non-football schools (which thus includes Notre Dame, a Big East member that competes in football as an independent). Note that this analysis does not include Utah, which joined the new Pac-12 in 2011, or TCU, which will join the Big East in 2012. See *2010-2011 Division I School Affiliations*, RPIRatings.Com (last visited August 2, 2011) <http://www.rpiratings.com/schoolaffiliations.html>.

² *EADA Survey 2009-2010*, <https://surveys.ope.ed.gov/athletics/>. I derived these figures from the EADA figures for 2009-2010, summing the difference between revenues and expenses for football and men’s basketball for the seventy-three schools discussed in Footnote 1. For the purposes of looking at a true profit numbers, the EADA numbers have several deficiencies. They fail to capture a good deal of revenue generated by football and basketball, either by assigning it to the athletic department as a whole (e.g., television profits from a conference network may be considered all-sports revenue despite being driven by football and basketball), or to other parts of the campus (e.g., profits from the sale of football sweatshirts can be credited to the bookstore). They also tend to overstate expenses, the best example being in the treatment of the cost of athletic scholarships, where cost on the books is often in excess of the actual cost. These all tend to make the profit numbers too low. On the other hand, these numbers do not charge the teams for the capital costs of facilities, which may cause the profit numbers to be overstated. Some of these facility costs are driven by the school’s inability to use salary as a means of attracting recruits, so those costs may be higher than they would otherwise be. On balance, as a first approximation, the numbers presented here for the seventy-three schools in question probably gets the profit about right. I would eagerly co-author a study with any scholars interested in working on the definitive answer to the accounting questions raised in this note.

³ Sixty-six with BCS AQ football and seven just for basketball as of the 2010 college football season. Based on conference realignment, these six conferences now have seventy-four because Utah has joined the expanded Pac-12. And in 2012, it will grow to seventy-five when TCU joins the Big East.

⁴ This compensation comes in the form of athletic scholarships, officially known within the NCAA as “Grants-in-Aid” [hereinafter, GIAs].

⁵ And possibly also an investigation by the NLRB under the nation’s labor laws.

⁶ Throughout this paper I will refer to this agreement as “collusion” or as a “cartel” though others might prefer the terms “collective agreement” and “joint venture.” Feel free to use the more neutral terms; I believe in this case neutrality comes at the expense of accuracy.

true competitive environment in which each school (or conference)⁷ offers each athlete a level of compensation it deems to be appropriate, without a national agreement. Deviations from this competitive baseline are justified only if the product cannot otherwise exist as a popular product with healthy consumer demand.

Through a century of public relations work,⁸ the NCAA has stitched into the national sports fabric a series of myths that purport to provide these procompetitive justifications for the collusive agreement on athlete compensation. The myth making powers of the NCAA are mighty, on par with the ancient Greeks. Through a century of hearing these tall tales, you already “know” why paying athletes will never work. Perhaps you’ve admitted to yourself that college athletes have a raw deal, but then shrugged your shoulders because, of course, college football couldn’t exist any other way. Or perhaps you blame Title IX. But whatever your reason is, recognize that what you are telling yourself is almost certainly an unproven myth based in NCAA assertions rather than fact. It feels true because you’ve heard it so much, but repetition is not the same as truth. What follows are the thirteen most commonly repeated but false arguments why only collusive-compensation college sports can work and why market-compensation college sports cannot. If you believe any of them unquestioningly, you’ve fallen for a myth.

1) Myth 1: It’s too hard to figure out how to pay players fairly.

This myth rests deeply in the assumption that if we deign to allow college players to be paid, there would have to be a nationwide agreement by all 345 Division I schools (or perhaps just the 122 in FBS, the football bowl subdivision⁹) as to what each student would get, and it would be a nightmare, with committees meeting annually to review compensation to make sure it was fair to schools and athletes, and endless debates over the optimal pay level.

It makes you wonder how the Software Industry Wage Committee ever decides how much to pay computer programmers and how the Law Firm Pay Commissariat decides on associate and partner compensation each year.

The solution, of course, is just to pay them. There is no need for a central committee to make this decision. Since 1776, with the publication of Adam Smith’s “The Wealth of Nations,” we’ve understood that markets generally find their way to efficient outcomes without the need for a committee, NCAA or otherwise, acting as a wage politburo. No centralized commission or study group is needed to decide what we should pay the athletes. Let schools make offers, and let incoming high school athletes and their parents decide which to accept. Competition is a wonderful thing,

⁷ Daniel A. Rascher & Andrew D. Schwarz, *Neither Reasonable nor Necessary: “Amateurism” in Big-Time College Sports*, Antitrust Magazine, Special Sports Issue, Spring 2000, at 6. As Professor Daniel Rascher and I argued in the Spring 2000 issue of “Antitrust,” in the context of multiple regional conferences, a collective cap at the individual conference level may be procompetitive and thus survive a rule of reason review.

⁸ One might use the term “propaganda.”

⁹ The NCAA has rebranded Division-IA as the football bowl subdivision, or FBS. The old Division IAA is now called FCS, the football championship subdivision.

on the playing field and in the marketplace. This is how salaries are set across the world. This is probably how your pay was set.

At first it might be a little messy, just as when a firm prices its stock in an IPO. The initial price may end up higher or lower than the right value, but the company picks a price, sells its stock, and then the market adjusts. For example, Linked-In went public on May 19, 2011 and closed up 107% from its initial offering after two days of trading.¹⁰ The following month, Pandora went public but closed down 20% two days after its launch.¹¹ Opening up the market for student-athletes would not be much different. At first, many schools might continue to offer the Grant in Aid (“GIA”) package without additional cash. A few programs might want to set the gold standard and offer \$10,000 stipends. A few up-and-comers might make a play for some talent and offer \$25,000 to see if they could jump-start their programs at a higher level. The following year, maybe a few more schools would up the ante, and maybe some of the Old Guard might start matching offers to avoid losing talent. Just as water finds its own level, so too do prices in a liquid market. A decade in, everyone would have a great sense of what a blue chipper is worth to a program and what it takes to land him. Problem solved.

2) Myth 2: A market system will kill cohesion.

Often, commentators point out that it would not be fair to pay some athletes on a team and not others, and that the result will be lack of team cohesion. In this view of the world, if a team had stars making more than role-players, blockers would stop protecting better-paid quarterbacks, unpaid power forwards would refuse to throw outlet passes to compensated point guards, and it would become impossible to play college sports.

I wonder how many of these commentators have ever watched the college baseball world series, or NCAA hockey, or most any other college sport, including football at the Division I FCS level. Under NCAA scholarship rules, most schools provide very unequal compensation to their athletes in most sports.¹² In most NCAA teams, some of the athletes are on “full-rides,”¹³ some on are on half or quarter-

¹⁰ Ari Levy & Lee Spears, *LinkedIn Retains Most Gains Second Day After Surging in Initial Offering*, Bloomberg News, May 20, 2011 <http://www.bloomberg.com/news/2011-05-18/linkedin-raises-352-8-million-in-ipo-as-shares-priced-at-top-end-of-range.html>.

¹¹ Lee Spears, *Pandora Plunges Below IPO Price, Reversing Yesterday's Gains*, Bloomberg News, June 16, 2011 <http://www.bloomberg.com/news/2011-06-16/pandora-plunges-below-ipo-price-reversing-yesterday-s-gains-3-.html>. See also Jennifer Saba and Charlie Baldwin, Update 1-IPO VIEW-Profitless Pandora Picks the Tech Bubble, REUTERS.COM, June 17, 2011 <http://www.reuters.com/article/2011/06/17/markets-stocks-ipo-idUSN1728751420110617>.

¹² There are six sports where the NCAA rules treat a partial scholarship as a full one for purposes of the agreed-upon scholarship quota. This has the effect of making it less common to provide partial scholarships. These six sports are women's tennis, women's volleyball, women's gymnastics, women's basketball, men's basketball, and FBS (Division I-A) football, but not FCS (Division I-AA) football.

¹³ Left for another day is the myth that the full ride is actually full. The maximum NCAA Division I GIA is prohibited by NCAA rules from actually covering the full cost of attendance, and instead falls about \$3,000 short. Every few years, talk of fixing this problem arises, and this year the talk seems particularly promising. There is still plenty of time however, for this proposal to die in committee like the last time the NCAA took on this issue.

scholarships, and some get no scholarships at all.¹⁴ These teams very rarely dissolve into chaos because some players are earning four or more times what others are getting. Even in football and basketball, scholarship and non-scholarship players work together cohesively to win games and championships.

Across the country, based on talent, baseball GIAs can range from a full scholarship to no scholarship at all. As one example, one of the schools in the West Coast Conference has thirty-four players on its 2011 baseball team. Three of them receive at least a 75% scholarship and another thirteen get a half-scholarship or more. Another five get some aid, but less than a half-scholarship, and thirteen get no scholarship at all. This disparity in compensation is fairly typical for college baseball, and it is not a secret that better players get better compensation. At the University of California, Berkeley (“Cal”), one baseball player is on an 75%+ scholarship, ten more are over 50%, fourteen got some aid but less than half, and eleven walk-ons get no aid at all.¹⁵ Nevertheless, there is little evidence that cohesion disintegrated because athletes with different levels of talent received different levels of compensation. The WCC team made the college post-season this year and Cal reached the 2011 College World Series in Omaha. According to all accounts, everyone is still on speaking terms.

So if team cohesion depends critically on each team member receiving perfectly identical scholarship offers, it’s hard to explain the success of college baseball and softball teams, men’s gymnastics, men’s and women’s lacrosse, etc., where stars sometimes earn full scholarships and most players are on partial scholarships or none at all.

This ability of teams to cooperate successfully despite different levels of pay shouldn’t be surprising, since professional sports teams have succeeded since the nineteenth century with pay that varies among the players on a team. Dirk Nowitski earned over \$17 million this year, J.J. Barea earned a little more than 10% of that, and Ian Mahinmi earned less than half of what Barea earned.¹⁶ Yet somehow the Mavericks were able to gel as a team and win this year’s NBA championship despite Nowitski earning almost twenty-three times Mahinmi’s salary.¹⁷ Aaron Rodgers threw nine completions to Jordy Nelson in the 2011 Super Bowl, despite the fact that Rodgers was earning \$6 million to Nelson’s \$475,000, and Rogers was able to hand the ball to James Starks, Green Bay’s leading rusher, despite the fact that Starks

¹⁴ Recently, the NCAA has required an athlete on baseball scholarship to get at least 25% funding. See Minimum Equivalency Value, Division I Legislation Display Cite 15.5.4.1 available at <https://web1.ncaa.org/LSDBI/exec/bylawSearch?bylawSearchSubmit=Get%20Selected%20Items&multiple=19576&division=1&adopted=0>. For all other sports, scholarships can be in the single digits, meaning that some scholarship athletes paid 90% or more of their own costs of attending school. Walk-ons continue to pay 100%.

¹⁵ As an official at Cal stated in private correspondence, “The money is usually distributed based on talent (i.e. the best player will get 85% scholarship, mediocre player will get a stipend + books paid).”

¹⁶ *Dallas Mavericks Salaries*, HoopsHype.com (last visited July 21, 2011), <http://hoopshype.com/salaries/dallas.htm>.

¹⁷ Ian Mahinmi earned \$762,195. *Id.*

earned only 5.3% of Rodgers salary.¹⁸ Somehow the Packers overcame this income disparity to win the Super Bowl.

When a team loses, no one even thinks to point to pay disparity as the driver, and when a team wins, no one is shocked by the team's success in the face of seemingly insurmountable lack of cohesion driven by disparities in pay. It's just not an issue because our capitalist society embraces the idea that people making different incomes based on merit work together better than if everyone earns the same amount. In every virtually every American industry, different workers earn different pay and yet companies are able to pull together as teams. Think of how equal pay for all worked out for Eastern Europe's cohesiveness. There isn't something special about college football players that make them too fragile to handle what the rest of us deal with on a daily basis.

On the other hand, if we really think equal pay is needed for team cohesion, I'd say we pay the players exactly what we pay the head coach. Coaches would probably make less as a result, and players more. I mean, how can a team pull together knowing their coach is making millions and they are not? I'm surprised they even go on the field at all.

- 3) Myth 3: Paying players will mean that schools cannot afford to play football or basketball anymore. After all, almost all Athletic Departments are losing money now, so they would all go out of business if they were forced to pay athletes.

In terms of myths, this one is a two-headed hydra. It combines the idea that there has to be some sort of wage schedule set by a committee (i.e., Myth One) with the idea that the result will be that the committee would pick a number that some school can't afford. But a market system of pay will not impose a one-size-fits-all solution, mandatory minimum wage on all colleges.

As an example, currently the University of Texas ("Texas") has a choice whether to pay its head football coach Mack Brown \$5 million per year in base salary. Texas negotiated with Brown, and when the dust settled decided it was in their interest to offer him \$5 million (plus bonuses), all without asking permission of the other NCAA schools. Grants to college athletes would be set the same way – each school (or conference) should be allowed to offer each student what it sees fit and let the market sort things out. Across American industries, there are high-paying and low-paying firms, and so there would be high-paying and low-paying schools. Schools that earn less money from football and basketball will make smaller offers, but they will still be able to field teams.

¹⁸ Starks earned \$320,000 for the 2010-2011 NFL season. *Green Bay Packers Players Salaries*, SportsCity (last visited July 21, 2011), <http://www.sportscity.com/NFL/Green-Bay-Packers-Salaries>.

The second head of this myth is the very pernicious idea, which has gained currency since Mark Emmert took the helm of the NCAA,¹⁹ that because the Athletic Department at most of the thousand-plus schools in the NCAA lose money as a whole, almost no school can afford to pay their football and basketball players. In essence, the money that should go to pay players is being spent elsewhere, so we're very sorry players, but we're broke.

Of course, this is ridiculous on several layers. The simplest myth to dispatch is that we don't need to lump together the thousand-plus NCAA schools when talking about athletes who will end up being paid in a market-base system. Division II and Division III, the FCS level of Division I, and even a good chunk of the FBS would basically not change in the world where schools can choose to pay their college athletes. Most of those schools are hosting sports on their campus in a much more traditional amateur sense, for the benefits of the athletes, with some level of on-campus interest, and with very little outside fanfare or television coverage. In rare cases, a small school might want to add some cash to their current scholarship offer, but that's unlikely. In the real world outside the NCAA myth bubble, the changes we're talking about are going to take place at the approximately seventy-five schools in the six major conferences.

Just to give this some perspective, these are the football and basketball revenues from all 345 Division I schools, broken down into key categories.²⁰

Football and Men's Basketball	Number of Schools	Revenue	Profit	Average Profit per School
Six BCS AQ Conferences	73	\$2.9 billion ²¹	\$1.4 billion ²¹	\$19 million
FBS non AQS	56	\$515 million	\$39 million	\$0.7 million
All Other Division I	215	\$638 million	\$18 million	\$0.1 million

What we call the NCAA or even what we call Division I, consists of two or three entirely different economic animals. Seventy-five or so schools are housing massive profit centers on their campuses in their football and basketball programs.²² For the much larger groups of schools that are running their sports teams as much smaller, break-even activities,²³ sports are just not the same thing at all, and whenever the

¹⁹ Tom Farrey & Paula Lavigne, *Selling the NCAA*, ESPN.Com, March 13, 2011, <http://sports.espn.go.com/espn/otl/news/story?id=6209609>.

²⁰ I created this chart based on data obtained from the EADA website - <http://ope.ed.gov/athletics/>.

²¹ That's Billions with a B. The other cells are in millions.

²² Victor A. Matheson, Debra J. O'Connor & Joseph H. Herberger, *The Bottom Line: Accounting for Revenues and Expenditures in Intercollegiate Athletics*, College of the Holy Cross, Department of Economics Faculty Research Series, Paper No. 11-01, available at http://college.holycross.edu/RePEc/hcx/Matheson-OConnor_CollegeAccounting.pdf. See also Goff, B. L., *Effects of University Athletics on the University: A Review and Extension of Empirical Assessment*, JOURNAL OF SPORT MANAGEMENT, 2000, 14, 85-104, who found that over 70% of the schools in major D-I conferences earned over \$1 million in profit from their combined football and basketball programs.

²³ Again, here EADA accounting can mislead whether schools really break-even or not, since some schools will force their books to balance by an accounting entry. The impact of this accounting is much more important for the small schools, some of which may actually be losing money, because those schools simply have fewer off-the-books revenues to even things out. Where

NCAA asks you to think about college sports economics and tries to talk about Division II and Division III, or even the lower two-thirds of Division I, they are playing hide the ball.

Even when we keep the focus on the six BCS AQ conferences, the NCAA still wants to obscure the debate. Mark Emmert, NCAA president, has said that only fourteen NCAA schools make money on sports and so most schools can't afford to pay their athletes.²⁴ That seems hard to believe given that the seventy-three schools in the AQ conferences earned \$1.4 billion in aggregate. But the trick is that the NCAA is throwing in all of the non-revenue sports, and then asking you to believe that when college football players get paid, so too will college wrestlers, even though football players are bringing in over a billion dollars and wrestlers aren't bringing in anything. That's just not how markets work.

More broadly though, the myth is that the Athletic Department as a whole is the right unit of analysis and that spending on football compensation will only occur when a school's entire program earns a profit. In other words, if the department loses money, no one gets paid.

But campuses abound with money-losing departments that nevertheless pay the talent. Traditional colleges and universities do not exist to make money, and in general, most of the departments on a campus simply cannot make money. Instead, departments like Classics, Anthropology, History, and Psychology spend more than they bring in, and the school covers the cost of professors, of secretaries, of graduate students, and of academic scholarships with money from donors, with tuition money received, and in the case of public universities, with tax-payers' money.

Schools do this because having a History Department (that has no real source of revenue) is part of the university's mission. If having big-time sports on a BCS AQs school's campus is also part of the total mission of the schools (a statement I think the

Matheson et al. found that almost all BCS AQ schools had profitable football and basketball programs, they found only three to sixteen non-AQs made profits in football and nine to twenty in men's basketball. See MATHESON ET AL, *supra* note 21. On the other hand, there have been more in-depth studies of individual small schools (in fact, all of the good studies are of small schools) and they generally show that once all of the off-the-books revenues are added in and all of the overstated expenses are taken out, football is profitable for small schools despite these break even accounting numbers. See Clifford R. Skousen & Frank A. Condie, *Evaluating a Sports Program: Goalposts vs. Test Tubes*, MANAGERIAL ACCOUNTING, 60, 43-49 (1988); see also MELVIN V. BORLAND, BRIAN L. GOFF & ROBERT W. PULSINELLI, *College Athletics: Financial Burden or Boon?*, ADVANCES IN THE ECONOMICS OF SPORT, Volume 1, 215-25 (GERALD W. SCULLY ed., 1992). See also Jeremy Howell & Daniel Rascher, *An Analysis and Assessment of Intercollegiate Athletics at the University of San Francisco*, University of San Francisco, CSRI Conference (2011), available at http://www.csriconference.org/docs/2010%20Presentations/Thursday%20PM/Rascher_2010_ThuPM.pdf, which focuses on sports other than football. See also BRIAN GOFF, *Effects of University Athletics on the University: A Review and Extension of Empirical Assessment*, ECONOMICS OF COLLEGE SPORTS 82, 66-85 (JOHN FIZEL & RODNEY FORT eds., 2004), who estimates that when small schools lose money on football and basketball, it's "likely less than \$1 million." In my own research, I found that the University of Nebraska-Omaha's Division II football team probably was earning a small profit on the order of \$100,000 but the school claimed to be losing \$1.3 million on football alone. See Paula Lavigne, *Wrestling with the Truth in Nebraska*, ESPN Outside the Lines, May 11, 2011 <http://sports.espn.go.com/espn/otl/news/story?id=6488960>. In the end, these schools are choosing to keep these programs. So in total, when they add up all of the money and non-money reasons for having football and basketball, schools are acting as if they are coming out in the black.

²⁴ Tom Farrey & Paula Lavigne, *Selling the NCAA*, ESPN Outside the Lines, March 13, 2011 <http://sports.espn.go.com/espn/otl/news/story?id=6209609>.

NCAA would support),²⁵ then the entire college community should support the program, just as it supports History and Psychology and the like.²⁶

The idea that before we pay student-athletes, the Athletic Department must make money is a false argument. We do not ask History professors to work solely for room and board because the History Department doesn't make money, and in particular, we do not allow colleges to collude on the salaries of History professors in order to help History Departments break even. Similarly, we don't ask college sports coaches to work for a price-fixed wage just because the Athletic Departments don't earn money, although in the past the NCAA has tried to do just this and lost in court.²⁷

The profitability (or lack thereof) of the Athletic Department as a whole should not be an excuse to collude on player compensation. Such an argument would never withstand rule-of-reason scrutiny. Indeed, under the antitrust rule of reason, cost cutting is not a valid justification for otherwise anticompetitive conduct.²⁸

But if the NCAA is right that almost everyone is losing money, then why are all of these money-losing schools spending millions on athletic programs now? Why are schools clamoring to get into Division I if it's a money-losing venture? There are now 345 Division I schools; in 1985 there were only 282.²⁹ Demand to move to Division I has been so great that in 2007, the NCAA imposed a four-year moratorium on new schools from moving up to Division I. This moratorium has only just ended, and immediately new schools are seeking to join.³⁰ Running a Division I program is much more expensive than Division II. When economic actors are clamoring to spend more, it means that spending is profitable. Either hundreds of universities are irrational, or, after looking at the total benefit of having great sports on campus, these schools are making a rational decision that paying the current cost of scholarships is actually worth the cost.

²⁵ This question has actually been examined in the sport management literature. Even though most college and university mission statements do not address particular sub-units (like sports), one study showed that about 10% of schools with big-time athletics do explicitly list athletics in the mission statement. Charles T., Clotfelter *Big-Time Sports in American Universities*, 28-29 (Cambridge University Press, 2011).

²⁶ My point is not that providing high-quality sports opportunities is as equally central to the mission of the university as providing a high-quality education. Instead, my point is that if it is the case that the university community is unwilling to spend any of its own money on minor sports, then they should cancel those sports. If instead they do value the minor sports, they should spend university money to support them, not dock the pay of their revenue producers to cover it. The fact that football and basketball may be generating a profit is a bad reason to divert those profits to pay for something that no one on campus would pay for if that money weren't just sitting there.

²⁷ *Law v. NCAA*, 134 F.3d 1010 (10th Cir. 1998).

²⁸ "The NCAA next advances the justification that the plan will cut costs. However, cost-cutting by itself is not a valid procompetitive justification. If it were, any group of competing buyers could agree on maximum prices. Lower prices cannot justify a cartel's control of prices charged by suppliers, because the cartel ultimately robs the suppliers of the normal fruits of their enterprises." *Id.* at 1022. See Phillip E. Areeda, *Antitrust Law*, 1504, at 379.

²⁹ *Big 12 Coaches Favor Expanding NCAA Tournament*, CBS Sports.Com (last visited July 27, 2011) <http://www.cbssports.com/collegebasketball/story/10056974>.

³⁰ Doug Lederman, *NCAA Freezes Division I Membership*, InsideHigherEd.Com, August 10, 2007 <http://www.insidehighered.com/news/2007/08/10/ncaa>. The University of Nebraska-Omaha will enter Division I for 2011-2012. Paula Lavigne, *Wrestling with the Truth in Nebraska*, ESPN Outside The Lines, May 11, 2011 <http://sports.espn.go.com/espn/otl/news/story?id=6488960>. The University of North Alabama has announced it will begin a six-year transition to Division I in 2011-12. *UNA Board Approves Resolution to Pursue NCAA Division I Status*, *University of North Alabama Lion Athletics* (last visited July 27, 2011), http://www.roarlions.com/General_News/2011_DIVote.html.

Schools want to move to Division I because, taken as a whole, the school thinks Division I is more profitable, in money and in non-pecuniary benefits, than Division II. Maybe the accounting that shows schools losing money is riddled with problems that understate revenues and overstate costs, so they are more profitable than they look.³¹ Maybe fielding a quality sports program helps attract better scientists and poets. Maybe donations go up after a March Madness win. Maybe it just feels better to have a Saturday football tradition and the university wants to offer its community that experience. Those are all great reasons to be in Division I, but they are bad reasons to collude with other schools just to keep the down cost of the on-field and on-court talent.

A market system would let us test the NCAA's claim that further spending is impossible. End the collusion for a few years and let's see whether schools think they are too poor to pay for that star recruit, or instead if they decide, on the margin, the benefits of that athlete continue to exceed his (increased) cost.

- 4) Myth 4: If we set up a system where rich schools make larger scholarship offers than poor schools, there will be no competitive balance. Only the big "Have" programs will get talent and the "Have Nots" will be left outside looking in.

There are two problems with this argument. The first is that it assumes that currently the "Have Not" schools somehow grab an equal share of talent. They do not. "Haves" recruit great players and consistently win. Have-Nots get the leftovers and occasionally luck into hidden gems who gel as seniors and win.

Kentucky started its 2010-2011 men's basketball season against Eastern Tennessee State University ("ETSU"). I would like to see evidence that Eastern Tennessee State has ever successfully recruited an athlete who was also offered a scholarship by Kentucky. Alabama started its 2010 football season against San Jose State and will start the 2011 season against Kent State, but what top recruit would spurn an offer from Alabama to attend San Jose or Kent?

The current collusive cap on wages has not in any way created a level playing field with respect to the distribution of talent. We don't need to speculate; the proof is in the numbers. Over the last ten years, more than 99% of the Top 100 high school prospects chose BCS AQs.

³¹ See, *supra* note 2 and accompanying text, for a discussion of some of the problems with NCAA accounting.

**Conference Choice of Top-100 Football Recruits
2002-2011
(1000 in total)³²**

Conference	Recruits	Percent of Total
SEC	303	30.3%
ACC	173	17.3%
Big XII	171	17.1%
Pac-10	164	16.4%
Big Ten	129	12.9%
Notre Dame	36	3.6%
Big East	17	1.7%
Mt. West*	5	0.5%
Junior College	1	0.1%
MAC*	1	0.1%
Conf. USA	0	0.0%
WAC	0	0.0%
Sunbelt	0	0.0%
<i>BCS AQs</i>	<i>993</i>	<i>99.3%</i>
<i>non AQs</i>	<i>7</i>	<i>0.7%</i>

The myth then points to the successes of Cinderellas and asks “What about Butler and VCU?” How could that happen if we let Duke and UConn buy up all the talent? But again, we already do let Duke and UConn, and their brethren, buy up all the talent. The amazing and wonderful thing about college sports (basketball in particular) is that despite this massive imbalance in who gets the most talented players, sometimes a bunch of athletes who were overlooked or underrated in high school can find a home at a less prestigious athletic program and turn it into a Cinderella, like the great George Mason Final Four team of 2005-06 or the back-to-back Butler Bulldog teams of 2009-10 and 2010-11.³³ But those schools achieved greatness despite having second choice of talent. If a player is looking at a school primarily as a place to play very high level college sports, Duke doesn’t need to offer cash to win a recruiting war with George Mason, it just has to make a scholarship offer. It doesn’t take money for a “Have” to steal talent from a “Have Not” – it just takes interest.

On the other hand, if George Mason wants to win a recruiting war with Duke, it’s probably doomed under the current system. Letting Have-Nots use cash is actually the best way to overcome the current unlevel playing field. If we allowed schools to choose how much to offer a player, a current “Have Not” college could use money to steal a player or two from the “Haves” and help begin the climb to the ranks of the elite. If the alumni of ETSU want to fund a powerhouse basketball program,

³² I created this chart from based on data obtained from Rivals.com - <http://footballrecruiting.rivals.com/>.

³³ Notice that my examples of Cinderellas both come from basketball. Basketball lends itself better to scrawny seventeen-year-olds blooming into excellent twenty-one-year-olds such that diamonds in the rough can shine at lesser schools. Also the sport needs only five active players at a time, so one impact player can change the fortunes of a school in a way that rarely happens in football. As our current system shows, the best teams get the best players and the best players perform the best. There is no way for a football team to become a powerhouse without spending money to get better players, whether that’s under the current system, where the money is spent on coaches and fancy facilities, or under a market system, where some of the money would be spent on the talent.

currently they have no dimension on which they can outshine Kentucky. But if they could offer Kentucky recruits \$50,000 a year to come to ETSU, they might start winning those recruiting battles frequently enough to become more, not less, competitive with Kentucky.

Finally, it's important to note that the comparative parity of men's basketball is achieved despite the current compensation system, not because of it. The reason we see men's Final Fours with VCU and Butlers is because the U.S. produces an amazing amount of high school boys with basketball talent, so that even after all of the big schools get the all the stars they can handle, there are still plenty of almost-stars to go around. Contrast this with women's basketball where there is a greater disparity between the talent among the top tier of recruits and the rest, such that once UConn, then Tennessee, and then Stanford are done, and then once their big conference companions like Notre Dame and Texas A&M finish, there are basically no great women's players left for Butler. For the last ten years, no school from outside the BCS AQ conferences has made the Women's Final Four. Since women's basketball also involves the same national collusion on athlete compensation, but does not achieve even the slightest level of nationwide competitive balance, it can't possibly be the agreement itself that is generating men's parity.

And let's remember that even in men's basketball, the parity in outcomes is somewhat illusory. Over the period 1985-2006, 91% of the final AP Top 25³⁴ in football consisted of schools in the six power conferences. 83% of the teams in the men's basketball Sweet Sixteen from 1985-2006 and 92% of the teams in the Final Four were from those same six conferences.³⁵ It seems we are not getting very much competitive balance from our nationwide collusion and not much bang for the athletes' sacrificed buck.

5) Myth 5: We can't pay them or else we'll have to cancel other sports.

This may only be a half myth, in the sense that in a market system, as the costs of putting on football and basketball rise, such that the profits from those programs decline from astronomical to merely sky-high, it may be the case that some schools, in their budgeting priority, choose to drop some (most likely men's) non-revenue sports. It is true that currently, those football and basketball profits are being spent, in part, on subsidizing all of the other sports on campus. And so if those programs are of so little value to the campus community as a whole, that with the reduction of the subsidy from football and basketball, no one values them enough to pay for them if the subsidy is reduced, they will probably go away.

When the cost of one essential input (e.g., football players) increases without a change in the total money available, the college has less money to spend on other

³⁴ Or Top 20 for years prior to 1989 where ranks 21-25 were not officially assigned. See Patrick L. Dunn, *Past Final AP Polls*, RSFC (last visited June 24, 2011), <http://homepages.cae.wisc.edu/~dwilson/rfsc/history/APpolls.txt>.

³⁵ See Mark Nagel, Matt Brown, & Chad McEvoy, *Exploring the Myth that a Better Seed in the NCAA Men's Basketball Tournament results in an ex ante Higher Payout*, Sport Management Association of Australia and New Zealand, November 2007.

things. It has less money to spend on coaches' and administrators' salaries³⁶ and on weight rooms and practice facilities,³⁷ but it also has less money to spend on the drama club, on professors and graduate students, on parking enforcement, trash collection, painting campus buildings, and on all of the other things it takes to run a university. When it's time to cut the budget to adjust to lower football profits, schools will have to prioritize spending from most important to least, and then cut from the bottom up.

If men's lacrosse is the absolutely lowest priority, that's what we should cut. But if it is the case that men's lacrosse is already the least-wanted activity on campus, then giving money to those least-wanted lacrosse athletes is a horrible justification for diverting money from the athletes whom we do want on campus, whom people are eager to see. If lacrosse and other sports are valuable, let's fund them ourselves without using it as a justification to deny the football and basketball players a chance to earn what they are worth. If lacrosse and other sports are not valued enough to be funded without a massive subsidy, let's not ask the football players to give up a market wage to finance these apparently unwanted activities. Better still, if the campus doesn't value the lacrosse team enough to pay for it, we could ask the lacrosse players and parents to pay their own tuition costs, rather than forcing the students who play football and basketball to pay it via collusion. And we could ask the lacrosse fans and interested alums to pay the expenses of lacrosse coaches and travel, rather than colluding to force the students who play football and basketball to cover those costs as well.

Of course, I think the campus as a whole does want lacrosse. Schools want it enough that if we didn't have football revenues to subsidize it, we'd still keep it, much like schools that have lacrosse in Division III,³⁸ where there are no football

³⁶ Of the fifty-eight head football coaches in the six major conferences for which salary information was available (eight private schools did not provide data), fifty-two Head Coaches earned more than \$1 million dollars per year in 2010. *Football Bowl Subdivision Coaches Salaries for 2010*, USATODAY.com, December 9, 2010, <http://www.usatoday.com/sports/college/football/2010-coaches-contracts-table.htm>. Among the six head coaches that didn't reach the threshold, Washington State's Paul Wulff was employed for a full year and did not have the potential to exceed \$1 million after considering bonuses, Baylor's Art Briles earned \$878,315 (with no bonus information reported), and the rest had the potential to earn over \$1 million after bonuses. *Id.* Seven non-AQ schools also paid their coach over \$1 million. *Id.* Even assistant coaches have broken beyond six figure salaries; for example, Will Muschamp was recently offered \$1 million a year to be Mack Brown's defensive coordinator at Texas. Seth Wickersham, *Is Gordon Gee Serious?*, ESPN.go.com, available at http://espn.go.com/college-football/story/_/id/6843627/college-football-ohio-state-president-gordon-gee-recent-football-scandal-espn-magazine. Four of the six BCS AQ conference commissioners earned over \$1 million in 2009, and a fifth, Larry Scott of the Pac-10 earned over \$700,000 in his first six months on the job. *Four BCS Conference Commissioners Earned \$1M*, SI.COM, June 20, 2011 <http://sportsillustrated.cnn.com/2011/football/ncaa/06/20/commissioner-pay.ap/index.html>. Interestingly, athletic directors, who are neither responsible for attracting talent like head coaches or negotiating television contracts like conference commissioners, earned much less. A 2009 study of 51 BCS AQ schools found that no athletic director earned more than \$1 million (Florida's Jeremy Foley was tops at \$965,000) and only ten earned \$500,000 or more. See Curtis Eichelberger, *Florida Enters BCS Title Game with Top-Paid Athletic Director*, Bloomberg.com, January 6, 2009 http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aYYY_mDwYMKY.

³⁷ With Oklahoma State's announcement of construction of a \$16-million project, now all teams in the Big XII have built indoor football practice facilities. See *Oklahoma St. to Start Work on \$16M Practice Site*, SI.com, June 21, 2011 <http://sportsillustrated.cnn.com/2011/football/ncaa/06/21/okla.st.complex.ap/index.html>.

³⁸ There are more Division III lacrosse schools than Division I and II combined. *Men's Division III Conference Standings*, Inside Lacrosse (last visited August 4, 2011) <http://games.insidelacrosse.com/standings/league/3/DIII>.

profits to spread around.³⁹ If profits were needed to have men's sports, the entirety of Division III would have vanished long ago.

Instead in Division I, what we have now is a subsidy by young African-American men (who comprise a disproportionate number of scholarship athletes in FBS football and the majority of scholarship athletes in basketball throughout Division I⁴⁰) going to support the country-club sports of middle-class whites, all the more shameful if it's done to support activities that are at the absolute bottom of our list of priorities. The current system imposes an involuntary subsidy on students coming from the poorest elements of our society to pay for the activities of the broad middle and upper-classes. NCAA President Mark Emmert calls this "a terrible argument" as if somehow his derision can erase these economic facts.⁴¹ But as Nobel-prize winning economist, Gary Becker put it:

"A large fraction of the Division I players in basketball and football, the two big money sports, are recruited from poor families; many of them are African-Americans from inner cities and rural areas. Every restriction on the size of scholarships that can be given to athletes in these sports usually takes money away from poor athletes and their families, and in effect transfers these resources to richer students in the form of lower tuition and cheaper tickets for games."⁴²

So we really might, in a few cases, decide some of the non-revenue sports we have on campus really are unwanted given all of the other priorities on campus, and as a result, some schools might cancel some programs. But again, recognize that if we did allow football and basketball players to earn a market-level of compensation, other inputs would probably become less expensive. This is a very important concept that people often ignore. When economic competition is restricted on a given dimension, it flows into other, less-efficient avenues. By allowing the NCAA cartel to dictate the maximum amount each school can pay for talent while allowing that talent to generate excessive profits, we create incentives for schools to find other (expensive) ways to attract that talent.

³⁹ "According to an annual survey by the N.C.A.A., every program in Division III loses money. And because of their low profiles, teams in the division have limited cachet among some donors and alumni." Jim Naughton, *In Division III, College Sports Thrive with Few Fans and Even Fewer Scandals*, Netfiles.UIUC.edu, November 21, 1997 https://netfiles.uiuc.edu/hschein/www/readings/athletics/athletics-div_iii.html. Of course, this analysis likely suffers from many of the problems of Division I NCAA accounting, but compared to Division I, Division III has fewer revenues to misallocate and no athletic scholarship costs to overstate.

⁴⁰ As of 2009, 46% of all FBS football players were African American. In the same year, 60% of all Division I men's basketball players were African-American. Floyd A. Keith, *BCA Executive Director Statement to C. Keith Harrison, Protecting Their Turf: The Head Football Coach Hiring Process, and the Practices of FBS & FCS Colleges and Universities 11, 11-12* (2009), available at http://grfx.cstv.com/photos/schools/bca/genrel/auto_pdf/09-football-hrc.pdf. The stars of these sports are even more likely to be African American; the NBA is over 80% African American, *NBA Gets High Marks for Diversity in New Study*, NBA.com, June 10, 2009 <http://www.nba.com/2009/news/06/10/NBA.diversity.ap/index.html>, and the NFL is approximately two-third African American., Travis Reed, *Study: NFL has Slightly More Latino, Asian Players*, USA Today.com August 27, 2008 http://www.usatoday.com/sports/football/2008-08-27-1555250552_x.htm.

⁴¹ *Outside the Lines: Selling the NCAA*, (ESPN television broadcast March 13, 2011) available at <http://sports.espn.go.com/espn/otl/news/story?id=6209609>.

⁴² Gary Becker, *The NCAA as a Powerful Cartel*, The Becker-Posner Blog, April 3, 2011 <http://www.becker-posner-blog.com/2011/04/the-ncaa-as-a-powerful-cartel-becker.html>.

For example, the University of Oregon built the Jaqua Academic Center for Student Athletes, which is a glass palace, combining a Duck Hall of Fame with an exclusive tutoring facility for student athletes and a fancy eatery, all aimed at attracting the best players to Oregon. Millions are spent on lavish facilities like this because the efficient method to attract talent, simply offering a higher compensation package, is not allowed.⁴³ The so-called “arms-race” in college sports to build bigger and better facilities would be dampened by allowing schools to compete by directly paying those whom the race is trying to influence. If the money is going to be spent anyway, let’s direct it to the people generating the revenue, not large construction firms. If schools could sweeten their offers with cash, they might also be able to spend a little less on the female escorts they currently use as enticements.⁴⁴

The ban on paying players also creates a tremendous windfall for coaches and athletic directors. Recruiting is the lifeblood of a college sports program. If money were an available recruiting tool, it would go to the players. Instead, the money flows to those who are most responsible for getting star players to enroll and play at that school. As discussed above, Mack Brown earned over \$6 million in 2009 (after bonuses) because Texas knows he can bring in talent better than other coaches.⁴⁵ In the market-compensation world, Texas would not need to pay as much for Brown’s ability to charm athletes and their parents; they could show interest in athletes by offering a large annual grant in excess of the cost of attendance. Mack Brown would still be worth millions in this new world, just not six of them per year.

And then some of those millions would be there if we decide we still want a lacrosse team. Or we could spend it on more science courses, or however the university wants to allocate its money, but now we would not be imposing an involuntary subsidy on the eighty-five football and thirteen men’s basketball players, asking them to support the rest of the Athletic Department on their backs.

6) Myth 6: We can’t pay them or else we’d violate Title IX.

In the analysis above, I focused my examples on men’s sports because there is an important government program with the laudable goal of ensuring proper funding for women’s sports. Title IX has been one of the great success stories of government-driven social change. So it’s a great program, and yet a lot of sports people want to blame Title IX for why America can’t do right by the men who play college football and basketball. It’s not just a myth, it’s a frame-up! We need to stop blaming women for what colleges, through collusion, are doing to male athletes.

The popular misconception is that that Title IX mandates equal funding for men’s and women’s sports programs, with some believing that Title IX requires that each

⁴³ Oregon is not alone. Another classic example is The University of Michigan. See *Stephen M. Ross Academic Center*, MGoBlue.com (last visited August 3, 2011) <http://www.mgoblue.com/facilities/ross-academic-center.html>.

⁴⁴ See e.g. Brooks, *Auburn Payroll: Tens of Thousands to Hostesses*, Sports by Brooks, June 20, 2001 <http://www.sportsbybrooks.com/auburn-payroll-tens-of-thousands-to-hostesses-29756>.

⁴⁵ It’s not just because he is a good recruiter. Great coaches like Brown also need to do a great job with the talent once they have it, in order to earn their millions. However, excellence in recruiting is a *sine qua non*.

man and each woman get an identical scholarship. It does not do these things, though in theory Title IX does require a rough equivalence in spending on scholarships. In practice this requirement is more commonly violated than met.

Title IX actually aims for gender equity in *participation* and the regulations offer three ways to comply, none of which speak directly to equal funding. One is meeting the needs of all of the under-represented gender, the second is a subjective concept of progress towards equity, and the third and most common is actual equity in participation.⁴⁶ The regulations on participation test whether the number of women playing sports, relative to the number of men, is about on par with the gender splits of the undergraduate population:

“Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments;”⁴⁷

The regulations then explain what this participation requirement means for spending:

“This section does not require a proportionate number of scholarships for men and women or individual scholarships of equal dollar value. It does mean that the total amount of scholarship aid made available to men and women must be substantially proportionate to their participation rates.”⁴⁸

So, in theory, if there are more women than men on campus (which is the norm⁴⁹), the participation prong of Title IX requires that more women than men participate in intercollegiate sports. It does not require that the women’s programs as a whole spend as much or more as men’s programs, nor does it require that any individual female athlete get the same level of aid as any individual male athlete. However, it does require, at least in theory, that the proportion of spending on women’s scholarships be “substantially proportional” to women’s rate of participation, which has been interpreted to mean that the ratio of spending on women athletes’ financial aid be within one percentage point of the ratio of women’s participation.⁵⁰

⁴⁶ See Letter from Gerald Reynolds, Assistant Sec’y for Civil Rights, United States Dep’t of Educ. (Jul. 11, 2003) available at <http://www2.ed.gov/about/offices/list/ocr/title9guidanceFinal.html>.

⁴⁷ *A Policy Interpretation: Title IX and Intercollegiate Athletics*, Office for Civil Rights, Fed. Register, Vol. 44, No. 239, December 11, 1979 available at <http://www2.ed.gov/about/offices/list/ocr/docs/t9interp.html>.

⁴⁸ *Id.*

⁴⁹ As of 2005, the national male/female ratio for undergraduates was forty-three to fifty-seven. Mary Beth Marklein, *College Gender Gap Widens: 57% are Women*, USAToday.com, October 19, 2005 http://www.usatoday.com/news/education/2005-10-19-male-college-cover_x.htm. Forty-three of the seventy-three schools in the BCS AQ conferences have more women than men on campus. College Rankings & Lists, USNEWS (last visited August 4, 2011) <http://colleges.usnews.rankingsandreviews.com/best-colleges>.

⁵⁰ This interpretation is according to the National Women’s Law Center: “the percentages of athletic scholarship money awarded to male and female athletes should be within **one percent** of their respective participation rates, unless the school can show why a bigger gap is not discriminatory.” Linda Bunker, Neena Chaudhry, Peggy Kellers, Deborah Slaner Larkin, & Verna Williams, *Check It Out: Is the Playing Field Level for Women and Girls at Your School?*, National Women’s Law Center, September 14, 2011, available at <http://www.nwlc.org/resource/check-it-out-playing-field-level-women-and-girls-your-school>. I have not seen this specific one-percent language from the Department of Education, but I assume it to be true in my analysis that follows.

So, how does this hold out in practice? In 2009-2010, twenty-two of the seventy-three BCS AQ programs had more women participants than men, but all seventy-three of the BCS AQ conference schools spent more in total on men's sports than on women's sports.⁵¹ All but three of those with FBS football spent more on men's scholarships than women's.⁵² Using the "one percent" test, of the fifty-one schools with more male than female athletes, only seven kept the ratio of spending on women's scholarships within one percent of their participation ratio.⁵³ And of the twenty-two schools in which women comprise the majority of participation, seventeen of those schools nevertheless spent more on men's scholarships (all outside the one-percent threshold). So, sixty-one of the seventy-three major sports programs are in violation of the (theoretical) requirements of Title IX. From this, I conclude that in practice, Title IX does not actually mean that colleges spend the same on men's and women's sports – not at the program level, not at the individual athlete level, not at the aggregate scholarship level, and not even with a one-percent cushion relative to participation ratios.

Title IX is also not being applied as a strict rule on equal compensation with respect to coaches. The regulations state that the requirement that schools "provide equal athletic opportunities for members of both sexes" extends to "...compensation of coaches" Despite this, all seventy-three of the BCS AQ programs spend more on head coaches for their men's teams than for their women's teams.⁵⁴ All seventy-three also spend more on assistant coaches for men's teams than for women's teams.⁵⁵ For example, in 2009-2010, Rick Barnes, the men's basketball head coach at Texas, earned \$1.7 million more than Gail Goestenkors, his counterpart with Texas's women's basketball team.⁵⁶ Yet, rarely is it claimed that Title IX prevents schools from paying their men's teams' coaches – either at all or more than they pay women's coaches. But if you insist on misreading Title IX to say you can't play players, that same misreading would mean you can't pay men's teams' coaches more than you pay women's coaches. And we know this just isn't what Title IX means in practice.

Thus, if colleges were to implement a market-based compensation system for athletes along the lines of the market-based compensation for coaches, it is not at all

⁵¹ *The Equity in Athletics Data Analysis Cutting Tool*, Office of Postsecondary Education (last visited August 2, 2011) <http://ope.ed.gov/athletics/GetDownloadFile.aspx>.

⁵² *Id.* Of schools with FBS football, only the books of Syracuse, Georgia, and UCLA show a higher value for women's athletic scholarships than men's. Interestingly, six schools of the seven non-FBS Big East schools provide more funding to women for scholarships than men. For DePaul, Seton Hall, St. John's, Providence, and Marquette this task is substantially easier because they do not give football scholarships at all (because they either have no varsity football or compete in Division III). Georgetown and Villanova both play FCS football, with Villanova funding men's scholarships more than women's and Georgetown funding women's scholarships more than men's.

⁵³ Among the fifty-one schools with higher male participation, twenty-three had a spending ratio more than one percentage point higher than their participation rate, seven were within one percentage point (plus or minus) and twenty-one had a spending ratio more than one percentage point lower than their participation rate.

⁵⁴ The average difference across all sports for head coaches was \$2.8 million per school, (or \$438,000 per full-time equivalent coach per school).

⁵⁵ The average difference across all sports for assistant coaches was also \$2.8 million per school. The average difference per full-time equivalent per school for assistant coaches was \$87,000 for each assistant coach position.

⁵⁶ University of Texas at Austin Information for the Reporting Year: 2010 (last visited August 3, 2011) This data was gathered through my own independent research.

clear that they would have to pay women athletes any more equally to men athletes than they currently do with coaches.

Despite all of this empirical evidence, let's assume that with a market-based compensation system for athletes, enforcement of the letter of Title IX would suddenly emerge to force a stricter standard on schools than currently exists, so that every dollar spent paying male athletes would require an equal new dollar to be spent on women's sports. Or instead, assume that some enlightened schools would choose to undertake this burden voluntarily and would simply commit on their own that spending money to pay male athletes a market rate would also result in equal increases in women's funding, dollar for dollar, even though they currently do not have this intense commitment to spending equity.

Wonderful! Indeed, this might be the greatest boon to women's sports since Title IX itself.

If each new dollar of spending went equally to men and women, the system would function like a 100% payroll tax on male college athlete's pay. If a star quarterback is worth \$50,000 to a school, and they knew that for every dollar they spent on him, they would also need to allocate a dollar to women's sports, then the most they could afford to offer him would be \$25,000, knowing the other \$25,000 had to go to meet their (theoretical) Title IX pay-equity burden. As every school would have this same tax burden, competition for those athletes would be fair, but muted.

Economics teaches us that a high payroll tax will keep salaries down, but not eliminate them.⁵⁷ In this extreme interpretation of Title IX's mandate, the system would take advantage of the high demand for male athletes to funnel a lot more money into women's sports (which is the point of Title IX, after all). Title IX doesn't stop male athletes from getting receiving market-based compensation any more than cigarette taxes have eradicated smoking in this country.

And so, regardless of whether Title IX mandates that every new dollar of spending must be spent equally on men's and women's sports, nothing about Title IX makes paying male athletes impossible. The idea that we can blame women for the collusive injustice colleges impose on male basketball and football players is a myth that needs to go the way of Bobby Riggs.

⁵⁷ For example, when social security or Medicare payroll taxes go up, unemployment doesn't jump to 100%. Phillip Morris estimates that cigarette taxes in the United States exceed 50% of the final purchase price (http://www.philipmorris.usa.com/en/cms/Responsibility/Government_Affairs/Legislative_Issues/Cigt_Excise_Tax/default.aspx?src=search), which is effectively a tax in excess of 100%. Cigarette sales are obviously still occurring in the United States. In Denmark cars are sold with a 180% tax, see Finn Skovgaard, *The Danish Page*, (last visited July 30, 2011) <http://skovgaard.org/europe/denmark.htm>, and while this does lower demand, nevertheless Danes buy hundreds of thousands of cars every year, *From The Economist Intelligence Unit*, THE ECONOMIST, January 1, 2011 http://www.eiu.com/index.asp?layout=ib3Article&article_id=88773073&pubtypeid=1112462496&country_id=1330000133&category_id=775133077&rf=0.

- 7) Myth 7: The NCAA sells amateurism and if we allow players to get paid, the popularity of the sport will decline.

This is an oft-heard assertion for which I think there is no evidence and where we can see a lot of counter-evidence.

From 1953 until 1973, in addition to all of the in-kind payments players receive today, college athletes also got “laundry money” which when adjusted for inflation would be over \$100 a month today. No one boycotted college sports over laundry money.

Major sports like Tennis, Golf, and the Olympics all used to be scrupulously amateur for fear of losing viewers. The tide has shifted so much that the PGA tour now uses money earnings to rank golfers, Wimbledon pays out a £1 million to its champions, and the idea of an amateur-only tennis or golf tournament is quaint.⁵⁸ The idea that no one would watch professional Olympians was shattered when the (professional) Dream Team, led by Michael Jordan, Michael Johnson, and Larry Bird, captivated the world; all are now part of the U.S. Olympic Hall of Fame.⁵⁹ Other sports around the world have also gained revenue after abandoning amateurism.⁶⁰ I have to question the dire predictions that college sports will die if true students at real colleges also get paid for their athletics, all while continuing to go to class and to play great sports. There just isn't a lot of evidence that says sports are more popular when the athletes are unpaid or under-paid.⁶¹

If it is amateurism that drives the popularity of college sports, why are Division III⁶² stadiums so small? If you had two fifty-yardline tickets for next year's BCS championship game, and you found out the players for both teams were being paid, would you give away your tickets? Would you sell them for less than face value?

⁵⁸ Generally speaking, the one amateur invited to the U.S. Open each year is treated as a cuddly curiosity. *Prize Money at Wimbledon (1968-2011)*, The All England Lawn Tennis and Croquet Club (last visited June 22, 2011) <http://aeltc.wimbledon.com/heritage/history/prize-money>.

⁵⁹ Jeff Kalafa, *Michael Jordan's '92 Olympic Dream Team*, BLEACHER REPORT (August 11, 2010), <http://bleacherreport.com/articles/433371-jordans-92-olympic-dream-team-was-it-best-basketball-team-ever>.

⁶⁰ 20th century examples include Rugby in Australia, New Zealand, and the U.K. In 19th century British soccer, the Football Association (FA) was originally amateur until it absorbed a rival professional soccer league, which led eventually (in 1992) to the Premier League, the most watched sports league in the world. *Premier League History*, Premier League (last visited July 30, 2011) <http://www.premierleague.com/page/History/0,,12306,00.html>. Baseball's origins began with amateur teams, then with players being given non-sports fictitious jobs to maintain the illusion of amateurism, until 1869 when the Cincinnati Red Stockings formed as the first professional team, and thereafter the modern Major Leagues emerged. Toru Mihara, *Labor Negotiations in the Major League Baseball History*, ATHLETE'S DREAM MANAGEMENT, available at <http://www.admsports.biz/PDF/lnitmh.pdf>.

⁶¹ Athletes in the major U.S. professional sports like the NFL and MLB used to receive a very small share of the revenues that they generated, but once a truly free market was introduced through free agency, the athletes began receiving much more money. For example, in MLB in 1950 during the era of the reserve clause, player payroll was 17.6% of total team revenue. In 1994, it reached a peak of 60.5% and has remained over 50% since then. Despite the increased pay, demand for the sport, as measured in total league television team revenue, increased ten-fold from 1964 to 2001, after adjusting for inflation (without that adjustment, revenues have increased 60 times over). See Michael J. Hauptert, *The Economic History of Major League Baseball*, University of Wisconsin-La Crosse, Tables 1 and 5, available at <http://eh.net/encyclopedia/article/hauptert.mlb>.

⁶² Division III colleges do not give any athletic scholarships, just academic or need-based grants. Lynn O'Shaughnessy, *Why Athletes Have an Edge at Elite Colleges*, CBS Money Watch, June 2, 2009 <http://moneywatch.bnet.com/saving-money/article/why-athletes-have-an-edge-at-elite-colleges/307433/>.

Would you swap them even-up for the Division III Championship? Or would you go and watch a great football game played by the (paid) college superstars?

What matters isn't the pay scale; it's the quality of the football and the loyalty to the school. If the University of Florida ("Florida") pays its players, will Gator fans switch their allegiance to the University of Central Florida ("UCF") Knights? Can anyone credibly make this claim? And yet the NCAA's theory argues that collusive amateurism is a reasonable and necessary practice without which the product could not exist. This theory says that Florida fans would choose UCF, because the NCAA sells amateurism and that's what fans want.

Of course, I disagree, and in fact I have trouble believing that anyone other than those paid by the NCAA could argue with a straight face that what makes the product popular is the unpaid status of the players. But we don't need to trust my intuition; we can just end the collusion and let each school decide on its own what its fans want. If it's amateurism that drives demand, the few schools that try paying athletes will quickly lose popularity and have to revert to the old scholarship system. The rule against pay will have been proven unnecessary, but the sport will continue on in the current amateur form. If those schools don't lose popularity, or if they gain popularity as they start to attract more talent, then the claim that amateurism was needed to protect fan interest will be proven false. Look deep inside yourself and ask which scenario you think will hold say in Tuscaloosa, Alabama, Austin, Texas, or Columbus, Ohio.

Instead, if we let each school choose its own appropriate level of compensation, fans of college sports would have more choice, not less. Most college athletes (at approximately one thousand schools across Divisions I, II, and III) would continue to receive the same level of scholarship support as they do (or do not) receive now, and would continue to play sports with just as little fanfare while generating virtually no revenue. And for the small percentage of athletes who drive the billions of dollars, fan interest would remain high, even as the players started getting a market level of compensation for their popular product: big-time college football.

8) Myth 8: If student-athletes earn anything more than they currently get, they stop being students.

As part of the NCAA's claim that it sells amateurism, it's often heard that if college athletes were to be paid, they would stop being students. Mark Emmert, the new NCAA President advanced this argument on an ESPN story in March.⁶³ But regular students earn money all the time. Ask your Bursars office if having a paying job disqualifies you for being a full-time student. It doesn't.

⁶³ See Tom Farrey & Paula Lavigne, *Selling the NCAA*, ESPN Outside the Lines, March 13, 2011, <http://sports.espn.go.com/espn/otl/news/story?id=6209609>. I presented a dissenting view in the same article.

James Franco was a paid actor while majoring in English at UCLA, other English majors were paid to work at the library, and still others got money from their families and didn't have to work at all. They were all students.

Northeastern is known for its co-op education program, where undergraduates alternate between the classroom and paying jobs, while remaining full-time students. Northeastern has not lost its accreditation, and no student has been stripped of a bachelor's degree because news leaked that a "Northeastern student in a co-op position works full-time (five-days a week) for a period of six-months and is usually paid" and yet "Students on co-op are still considered full-time students."⁶⁴

Foregoing pay is not what turns football players into real college students. Attending college is what does that. Being a college student means being enrolled in real courses at a real school. College athletes are students for all of the non-sports things they do: going to class, joining a study group, and falling asleep in the library. Getting paid when they play football would not change their student status at all, just as a computer science major who creates a successful iPhone app and earns \$100,000 from downloads doesn't have to leave the university in shame for having "gone pro."

I guarantee you there is no amateurism test for students who are not athletes. So why do we allow one for students who are athletes in the name of making them more like other students?

If done right, a system where college athletes get paid could easily be crafted to enhance, not diminish their "studentness." It's easy to imagine athlete's pay packages containing sizable bonuses for graduation instead of (or in addition to) for reaching bowl games.⁶⁵ For students with real financial need, a paying job as a football or basketball player could mean passing on a summer job and taking classes instead, allowing them to graduate before they run out of eligibility and the school loses interest in them. On the other hand, schools with a real interest in their athlete will be able to offer a compensation package that includes guaranteed tuition until the student graduates, unlike the current system in which the NCAA limits scholarships to renewable one-year deals so schools cannot guarantee they will pay an athlete's way until he graduates. And of course, well-paid college athletes might be in a much better position to pay for an extra year if they need it out of their earnings from their four or five years of college athletics.

⁶⁴ All quotes in this paragraph come from Parents, Northeastern University Cooperative Education (last visited July 31, 2011) <http://www.northeastern.edu/experiential-learning/coop/parents/index.html>.

⁶⁵ Another option schools might choose to offer is low (or no) annual pay combined with a deferred payment into a trust fund, which only becomes available upon graduation.

- 9) Myth 9: If we pay them, inevitably they will all just become mercenaries. Alternately, if we pay them, we might as well give up the charade of academics and just make them into mercenaries.

The opposite of “college” is not “professional.” As discussed above, there is nothing about paying a college student that causes him to lose his status as a full-time student. Convincing us all that college and amateur are synonyms is one of the NCAA’s greatest sleights of hand. Thus paying students doesn’t immediately turn them into faithless mercenaries with no connection to their college or university. We could have that system if we wanted, but it’s not required, and if we went in that direction, the popularity of the sport likely would suffer. College Sports is great for both reasons, College and Sports. I can utter those words without mentioning whether the college students playing sports were paid or not.

We are not limited to a choice between the current system (students paid collusive, in-kind wages) and a system based on pure mercenaries playing for any school regardless of their educational status. We can have a debate over whether college sports could also be professional (i.e., paid a market level of compensation) or if, by their very essence, college sports must always maintain the NCAA’s approximation of amateur (i.e., a collusively-decided maximum level of cash and in-kind compensation⁶⁶) without assuming that a change in pay will also require a change to the other dimension, college vs. no college. We have four choices, not two:

	Capped In-Kind Payment (“Amateur”)	Market Rate Payment (“Professional”)
College	Current NCAA <i>Popular</i>	My proposal <i>Likely to be Popular</i>
Non-College	True Amateurs playing in the park, Club Ultimate Frisbee, post-collegiate Rugby, etc. <i>Not Popular</i>	NBA D-League and other minor leagues. <i>Not Popular</i>

There are good, economically pro-competitive reasons why college sports should involve college students, and not just college-aged players who work for, but do not study at, the school for which they play. While NCAA argues that it sells amateurism, I think what the NCAA sells is high-quality sports played by college kids.

A special, demand-enhancing connection develops between alumni and college athletes when those athletes walk onto campus and put on the uniform. Sports fans from that school and the region feel a bond -- I went there too, I lived in those dorms, I took those classes or I’ve been there and seen them in the library, etc. There really

⁶⁶ Generally, a student living on campus with an on-campus eating plan will be paid only in-kind, but students living off-campus or without a campus eating plan typically get a monthly paycheck. In total, these payments (whether in cash or in kind) are set collusively at about \$3,000 less than the expenses the students incur attending college. So we’re really not comparing amateur vs. pro, we’re comparing collusively low pay to market pay. But for the purposes of this paper, I will follow the common parlance that college players are currently amateur even though that too is a myth.

is a special quality to college sports because of the link between college and athlete. The rules designed to keep college sports from being filled with non-collegiate ringers are in a completely different realm than the rules designed to help colleges save money by not paying players. Requiring that athletes also be students is pro-competitive because it strengthens demand for the product (as opposed to the cap on payment, which merely saves costs). Similarly, rules against transfers that prevent students from being traded or from becoming weekly free agents also serve to reinforce that these are real college students⁶⁷ and thus also serve a procompetitive role.

The reasonableness and necessity of the collective agreement on ensuring that college athletes really go to college is an excellent contrast with the lack of reason for or necessity of the NCAA's collective agreement on athlete compensation. When the NCAA argues that if the college sport became just a normal minor league, it would be less popular, they are entirely correct. But that would happen only if the athletes lose their true connection to the university, not because they would get paid. What makes college sports so popular is the unique combination of high-quality athletics combined with the notion that the athletes attend school and truly represent the school in competitions. This makes the NCAA rule that college athletes be college students procompetitive, in the same way that the lack of necessity for the rule on pay leaves that rule unjustified and anti-competitive.⁶⁸

The 1984 Supreme Court *Board of Regents*⁶⁹ decision may be the worst thing that ever happened to college athletes, because, despite the NCAA's arguments to the contrary,⁷⁰ it enshrined (in *dicta*) the disastrous idea that for the NCAA to sell a product connected with college also required that "athletes must not be paid."⁷¹ But the *dicta* got the main story correct: "the NCAA seeks to market a particular brand of football -- college football. The identification of this 'product' with an academic tradition differentiates college football from and makes it more popular than professional sports to which it might otherwise be comparable, such as, for example, minor league baseball."⁷² The NBA's Development League (the "D-League") also pits young, talented, not-quite-ready-for-the-NBA athletes against each other in high-quality basketball. Its lack of popularity might stem from the fact that those athletes are paid. But it's hard to imagine that if you stopped paying D-League players, that fans would suddenly flock to see those games and networks would clamor to

⁶⁷ As would rules allowing them to earn money from their schools just like other real college students can and do.

⁶⁸ It's not as if college sports is the only business where there are many jobs that have rules of eligibility. Elected officials and some public employees must reside in the city they serve. Many jobs require a specific degree; to be a doctor you must be an M.D., and to cut hair you need a cosmetology license. Such requirements, even across an entire industry are not akin to price fixing. The NCAA already has academic eligibility requirements, and if the compensation rules change, there is no natural reason to end the requirement that student-athletes be students.

⁶⁹ *National Collegiate Athletic Ass'n v. Board of Regents of University of Oklahoma*, 468 U. S. 85 (1984).

⁷⁰ In the oral argument before the Supreme Court in *Board of Regents*, the NCAA argued that paying the athletes would increase demand for the product. "When the NCAA says, we are running programs of amateur football, it is probably reducing its net profits. It might be able to get more viewers and so on if it had semi-professional clubs rather than amateur clubs." See Oral Arguments of National Collegiate Athletic Ass'n v. Board of Regents of University of Oklahoma, March 20, 1984 available at http://www.oyez.org/cases/1980-1989/1983/1983_83_271.

⁷¹ "In order to preserve the character and quality of the " 'product,' athletes must not be paid, must be required to attend class, and the like." *Id.* at 102.

⁷² *Id.*

broadcast them throughout the season. It's easier to imagine those same players being more popular than now if they were on a college team, but still paid. With that in mind, can it really be amateurism that drives interest in sports played by college age kids just below the NBA or NFL's level of talent? If not, why do we allow schools to collude to enforce it?

The D-League isn't popular because no one is an alumnus or alumna of the Rio Grande Valley Vipers and because those Vipers aren't college students. Students and alumni who are fans of a team connect with the team because the players represent them directly. When I asked whether Florida fans could switch allegiance to UCF over the issue of pay, it seemed ridiculous, because who could abandon a beloved alma mater for someplace else? Do Stanford students living in Berkeley suddenly bleed blue and gold? How can we imagine them abandoning the Farm simply because Stanford's college athletes started getting paid?

We could get rid of the college in college athlete,⁷³ but it would not help the athletes and it would not help the fans.⁷⁴

10) Myth 10: What they get is very valuable, it should be enough. How can you say what they get is unfair? I wish my kid got that deal!

A commonly cited NCAA canard is that because the average college graduate earns \$1 million more over the course of the average lifetime, that a GIA is worth \$1 million. Of course that's ridiculous. The right way to value an asset that is sold in a marketplace is to look at the price at which that asset is sold. If a year at Louisiana State University ("LSU") is worth \$250,000, why is out-of-state tuition set at \$13,800.

⁷³ Or if you prefer, the student in student-athlete.

⁷⁴ On March 25, 2011, Ralph Nader proposed doing away with all athletic scholarships. *Ralph Nader: Replace Scholarships*, ESPN, April 4, 2011 <http://sports.espn.go.com/ncaa/news/story?id=6254572>. I believe this was primarily an attention-grabbing way of highlighting the plight of college athletes, because Nader offered an alternative to ending scholarships, which was to pay the athletes. But as a thought exercise, it's interesting to imagine what would happen if a law were passed that specifically banned a college or university from giving athletic scholarships. I am certain almost nothing would change. Currently boosters donate to athletic departments, which in turn transfer the money to the university to pay for the athletic scholarships. In Nader's world, those boosters would give money to private foundations that would spring up to pay the way of each school's chosen athletes through special scholarships that look a lot like today's Rotary Club scholarships, except they would go just to athletes. The NCAA would find a way to bless this arrangement as amateur and we'd be right where we are now, except boosters would have a tighter control over athletes, with the threat of a lost scholarship coming not from the coach, but the wealthy fans who control the foundations.

Perhaps it is Nader's intent to actually end college sports. His proposal won't do that, but as it stands, each university currently has a right to do that. In 1939 the University of Chicago, worried at the undue influence of intercollegiate sports on its mission, abandoned big-time sports. See *University of Chicago in the Big Ten*, HistoryKB.Com, May 13, 2004 <http://www.historykb.com/Uwe/Forum.aspx/what-if/3673/University-of-Chicago-in-the-Big-Ten>. The Ivy League has never given out scholarships based solely on athletic prowess. See Bill Pennington, *Ivy Football and Academics Strike an Uneasy Balance*, NYTimes.com, November 17, 2006 <http://www.nytimes.com/2006/11/17/sports/ncaafootball/17ivy.html?pagewanted=print>. This choice is available to any school now, but almost all of them choose to stay in the business of college sports. The Nader plan is the opposite of a free market solution, because it imposes a single rule on all schools, treating Universities like children, rather than letting the campus community makes its own choice whether to have athletics on campus or not.

That said, a GIA is in fact, very valuable and of course any parent would love to have the school pick up the tab for one of the most expensive investments they will ever make in their child. Plus, to the extent a student gets into a school that their grades and test scores might not otherwise merit, it's hard to place a specific dollar value on that entrée.⁷⁵ But that misses the point entirely. The point is not that college athletes get no value in exchange for playing sports for their schools, since they clearly are getting compensated with a valuable scholarship.⁷⁶ If the NCAA did not collude to limit how much each school can offer to incoming high school football and basketball players, those athletes destined for the major conferences would get everything that they currently get and far, far more. The idea is not that the GIA isn't valuable (although the million dollar claim is laughable), but rather that it is far less than the value of what the schools would gladly pay in a free market, if the NCAA didn't cap compensation.

In 1929, legend has it that Babe Ruth was asked why he deserved to earn more than then-President Herbert Hoover. His answer? "I had a better year."⁷⁷ The reason that athletes get better scholarships than your kid is that they generally are going to have a much better year, financially, for the school they represent. Sure, I'd like my brainy but non-athletic kid (who will bring no revenue to his college despite having won on Jeopardy! before he turned thirteen) to get free tuition, room and board, and required books. Who wouldn't? A few schools give their most desired academic recruits a (true) full ride that is even better than their full athletic scholarship,⁷⁸ but generally speaking college athletes get the best deals a college offers because they are the most valuable. And if the schools were operating in a market system where they could give more, they would, because even at the current "full ride" price, college athletes are cheap relative to the profits they bring in, and competition would force schools to pay more to get the most-prized recruits.

The critical difference between your high schooler and the incoming athlete is that schools do not (and legally cannot) collude on how much they offer to your kid or mine. In the past when some schools tried to do this, the Department of Justice made them stop.⁷⁹ So if your kid didn't get a sweet offer, it's not because of collusion; instead, it's probably because he or she just isn't going to generate millions. And that's the difference – your kid gets what he or she earns, college athletes get only

⁷⁵ Even still, remember, the economic value of that entrée is really just the difference between the value of the school the athlete wouldn't otherwise merit, and the school he would have attended.

⁷⁶ And again, this also makes clear they aren't really amateurs, all the more so since the NCAA requires that schools make their scholarship one-year renewals rather than allowing them to commit to give the scholarship even if the athlete leaves the team.

⁷⁷ *Babe Ruth Quotes*, Baseball-Almanac.com (last visited July 31, 2011 <http://www.baseball-almanac.com/quotes/quoruth.shtml>), "What the hell has Hoover got to do with it [his contract being bigger than the President's]? Besides, I had a better year than he did."

⁷⁸ One such example is North Carolina's Morehead-Cain scholarship, which is a higher value scholarship than the maximum allowable GIA because it truly covers all six costs of costs of attendance as well as providing a laptop computer and "Discovery Funds" above and beyond normal travel and living expenses. See *The Morehead-Cain* (last visited July 31, 2011 <http://moreheadcain.org/about/>).

⁷⁹ It also preemptively prohibited price fixing on tuition and faculty salaries. See Sharon Lafraniere, *Ivy League Schools Settle Government's Price-Fixing Suit*, THE SEATTLE TIMES, May 23, 1991 <http://community.seattletimes.nwsources.com/archive/?date=19910523&slug=1284840>.

what a cartel allows them to get, even though without that collusion, they would get everything they get now and much more.

11) Myth 11: We can't pay them or else we'd violate NCAA rules. These people are not employees!

Although the circularity of this argument should be clear, nevertheless this argument is made all the time by otherwise intelligent people, including the NCAA's Mark Emmert.⁸⁰ The primary reason that college athletes are not employees is because the NCAA doesn't pay them. So they aren't employees because they don't get paid and they can't get paid because they are not employees. Amazingly, this completely irrational argument appears to be the new centerpiece of the current NCAA defense. Indeed, if it were not so central to the NCAA's new public relations blitz, I would have hesitated to include it as myth because it's really too inane to be worthy of discussion.

However, since it is the current NCAA position, here goes. This argument is the equivalent of banning airplanes from leaving the ground and then saying air travel is physically impossible because after all airplanes don't fly. Other than in name, college athletes are like employees. They perform a service for the school and are compensated via a GIA. For many college athletes, a GIA includes a monthly amount in cash. The school reserves the right to "fire" them at the end of every year, because all scholarships (by NCAA mandate) are one-year-only, and must be renewed each year,⁸¹ and so many athletes have had their scholarships terminated when the school found a better "non-employee" to do their "non-job" that there is pending litigation over the practice.⁸²

Colleges used to argue that graduate students who serve as teaching assistants on campus were "amateur," but many states have recognized that teaching assistants perform a service like any other employee. Many schools treat graduate instructors as employees, and even the ones that refuse to grant them employee status still pay them. The IRS taxes all of them as employees, whether the schools call them that or not.⁸³ The only reason that the NCAA is able to say that athletes are not employees is

⁸⁰ Tom Farrey & Paula Lavigne, *Selling the NCAA*, ESPN: Outside the Lines, March 13, 2011 <http://sports.espn.go.com/espn/otl/news/story?id=6209609>.

⁸¹ A survey by The Sporting News in 1994 found that 25% of juniors and seniors playing college sports had their coach threaten to terminate their scholarship at some point during their playing career. Gene Wojciechowski, *Player Survey Reveals Flaws in the System*, The Sporting News, April 25, 1994 http://findarticles.com/p/articles/mi_m1208/is_n17_v217/ai_15355821/.

⁸² See Hagens Berman, Class-Action Lawsuit filed October 25, 2010 <http://www.hbsslaw.com/cases-and-investigations/ncaa-antitrust> and <http://www.hbsslaw.com/file.php?id=663&key=99b3ce7829575cf94aacb1a6dae9decc>.

⁸³ There are at least twenty legally recognized graduate student unions. *Recognized Graduate Employee Unions in the USA*, CGEU Contact List (last visited July 31, 2011) <http://cgeu.org/contacts.php>. From 2000 to 2004, it was the position of the Federal Government that all graduate students were employees under the NLRA and thus able to unionize. Now, the Federal position is mixed, with the NLRB stating graduate students are not employees with respect to the right to unionize (which, very well might apply to paid college athletes as well), but the IRS stating that they are employees with respect to whether their pay is taxable. *Taxable Income for Students*, Internal Revenue Service (last visited July 31, 2011) <http://www.irs.gov/individual/s/students/article/0,,id=96674,00.html> "Payment for Services" example: "Gary Thomas receives a scholarship of \$2,500 for the spring semester. As a condition of receiving the scholarship, he must serve as a part-time teaching assistant. Of the \$2,500 scholarship, \$1,000 represents payment for his services. Gary is a degree candidate, and his tuition is \$1,600. He can exclude \$1,500 from income as a qualified scholarship. The remaining \$1,000, representing payment for his services, is taxable." *Id.*

because the NCAA forbids schools from paying them – it’s not the reason we can’t pay them, it’s the result of not paying them (and indeed, we could pay them like graduate teaching instructors and still not call them employees). But whether we do or do not call them employees, the reason they are not paid is because of a collusive agreement among the NCAA Division 1 schools. End the collusive agreement and this argument goes away too.

12) Myth 12: It would be dangerous to have students on campus with that much money. They aren’t old enough to know how to manage it. Athletes will just blow it all on bling and drugs.

The previous myth was deeply illogical, and it’s embarrassing that the NCAA, a group of highly educated people, puts it forward as fact. But I am more ashamed by this myth, which I believe is deeply rooted in racism. If our concern were really with college kids having too much money on campus, we would pass a law prohibiting the children of the wealthy from coming to college unless their parents agreed not to provide them with any money. We would have stopped Natalie Portman from going to Harvard with her Star Wars riches.

Face it. What the proponents of this argument are really saying is that they are uncomfortable with poor African-American adult men, suddenly earning more money than they’ve ever had before, and facing tough decisions about how to spend or save that money. The images of concern people raise are not of someone blowing the money on trips to Paris to see art in the Louvre. It’s Cadillac Escalades, jewelry and tattoos, or guns and drugs that are conjured up as the perils of pay for play.⁸⁴ And while sometimes the examples given are white,⁸⁵ that’s not the stereotype most likely put on display when this argument is trotted out.

We need to stop saying that we do not trust young adults of any race with money and that we’re colluding on pay for their own good. We especially need to stop almost-saying that we feel that way because we do not like how young African-American males decide to spend their money. If we are really worried about the

⁸⁴ Some examples from the internet:

“Despite Coach Williams defense of the idea of paying student-athletes salaries, these same students are continuously making poor irresponsible decisions. Society cannot afford to pay athletes who are being looked up to by countless children across the nation who are indirectly led to believe that student-athletes’ behaviors are acceptable. Four University of Tennessee men’s basketball players’ (Tyler Smith, 23, junior point guard Melvin Goins, 22, junior center Brian Williams, 22, and sophomore guard Cameron Tatum, 21) reputations were all left tainted after they were all arrested during a traffic stop for speeding near campus on guns and weapons charges. Police reported that officers found a handgun with an altered serial number, a bag of marijuana and an open container of alcohol while Tatum was the player driving. Some of the most envied students on campus who play basketball on national television each week, and do not have to pay for a thing in their free time, are found playing with drugs and weapons. Their behavior is childish and irresponsible and should not be tolerated let alone rewarded with additional salaries.” *Quoting* Kevin Doran, *Should College Athletes be Paid?*, *SLAM*, March 23, 2011 <http://www.slamonline.com/online/college-hs/college/2011/03/should-college-athletes-be-paid/>. “Now they want street money AND a \$200,000 scholarship? One or the other, not both. I have paid more money to universities than I care to remember, including payments for my wife and three kids. So now you want to pay some chicken shit black or white football player so he can buy bling, ink and a car plus a cell phone, iPod, etc. We all know most, not all, but most, will waste that precious scholarship.” John Taylor, *Seven SEC Coaches Would Pay Players - Out of Their Own Pockets*, NBC SPORTS, June 1, 2011, <http://collegefootbaltalk.nbcsports.com/2011/06/01/seven-sec-coaches-would-pay-players-out-of-their-own-pockets/>.

⁸⁵ “The Naismith College Basketball Player of the Year for 2006 Duke guard J.J. Redick was arrested on a DUI charge the summer after graduating from Duke University right before he was about to enter the NBA Draft. *Quoting* Kevin Doran, *Should College Athletes be Paid?*, *SLAM*, March 23, 2011 <http://www.slamonline.com/online/college-hs/college/2011/03/should-college-athletes-be-paid/>.

financial wisdom of the college athletes who would suddenly find themselves much better off than they are now, then by all means, let's have offer financial education classes for all scholarship athletes.⁸⁶ Let's end the NCAA rules that prohibit college athletes from having paid financial advisors, agents, or lawyers to guide them with their careers and their money. Instead, the NCAA could provide free financial advisory services and could run an agent clearinghouse to prevent scam artists from exploiting college athletes. Rather than deny athletes a fair market wage because they might waste the money, let's help them invest it wisely.

13) Myth 13: Because a few college athletes are good enough to play in the major leagues or Europe, or because college athletes could choose to take a non-sports job directly out of high school, trying to change the system is anti-capitalist or anti-American.

This myth is often phrased as something like “No one is putting a gun to these guys’ heads.” “It’s a free country, so if they don’t like what the NCAA is offering, get a job elsewhere.” “Go to Europe.” “Pump gas.” “Just stop whining if you don’t like the offered wage.”⁸⁷

Antitrust laws exist for a reason, as do labor laws. A capitalist society should recognize that collusion is damaging to a free-market economy. Indeed, the irony of this myth is that it is designed to prop up the current collusion in the name of capitalism, but the current collusion is basically socialist. The cartel’s argument for this collusion is that because some schools may not survive in a competitive market (a questionable premise), that all schools should agree to spend the same (artificially low) amount. And like the Soviets, the NCAA creates the legend of students who play football and basketball living together as comrades in a workers’ paradise of low- or no-pay equality.

The NCAA maximum allowable athletic scholarship is not a free market offer. It is a take-it-or-leave it offer by a monopsonist.⁸⁸ The smattering of high schoolers who can do better outside the NCAA does not mean the NCAA can escape from the fact that it is the sole option for the vast majority of college aged athletes. The Hobson’s choice they offer (my scholarship or no scholarship) is no choice at all.

Conclusion

The NCAA myths laid out here are, in essence, a laundry list of potential pro-competitive defenses for what, on the surface, is naked price fixing. Several of the

⁸⁶ I’m torn over whether making such education mandatory would itself racist. I think not. I think it’s fair to say that eighteen-year olds of every background would benefit from the NCAA insisting that with new-found riches comes a new-found need for financial savvy and that the presumption that they all need some help to avoid making dumb choices cuts across racial lines.

⁸⁷ See e.g., Bob Frantz, *Scholarships are More Than Fair Compensation for College Athletes*, THE EXAMINER, April 17, 2011 <http://www.sfexaminer.com/sports/college/2011/04/scholarships-are-more-fair-compensation-college-athletes>.

⁸⁸ A monopsonist is the buying analogue of a monopolist, i.e., a single purchaser (here, of talent). See *monopsony defined*, “single-customer market: a situation in which a product or service is only bought and used by one customer,” available at <http://www.bing.com/Dictionary/search?q=define+monopsony&FORM=DTPDIA>.

myths⁸⁹ can be boiled down to a concern that without collusion, costs would rise. This includes *inter alia* the claim that schools are too poor to pay, that some schools cannot afford to keep up with others, that schools might have to use non-football money to support other sports, and even, when properly analyzed, that Title IX makes it more expensive to pay male athletes. It also includes the concern about making students into employees, which in some sense is really a concern about the increasing cost of workers' comp insurance or payroll taxes. But cost savings is a poor antitrust justification for the NCAA's collusion, as *Law v. NCAA* makes clear.⁹⁰

A few of the myths⁹¹ speak to a claim that the NCAA does not have market power, such as when the NCAA posits that anyone who doesn't like their GIA can go play in Europe or pump gas. This seems easily dispatched with a simple analysis of the NCAA's market share in a relevant antitrust market.

A few myths essentially question whether the market is an appropriate or efficient tool for setting prices.⁹² I would hope the antitrust laws would not find in favor of an argument that markets are bad vehicles for setting prices.

Finally, what remains is the dubious claim that but-for the collusion, the product would not exist. Increasingly, this seems ridiculous. Does anyone feel that next year's BCS championship would have lower ratings or lower attendance if the NCAA stops enforcing a maximum cap on athletic compensation? Of course, this is also an empirical question, which could be answered with data. One way is by natural experiment where some conferences could try paying their athletes and as the quality players gravitated to those schools, we could determine if fans gravitated away towards lower quality, but unpaid teams. Another is with a well-crafted, unbiased survey that got at what drives fan interest in the game. It's hard to imagine a fan, when asked what the best thing about college football is, who responds, "because they are unpaid!" But again, this is an empirical question that can be resolved with further research.

As it stands now, we have an NCAA assertion that the unpaid status of the player drives the popularity of the sport balanced against a wealth of circumstantial evidence that fans love high-quality college sports and that when sports of all sorts in the past have "gone pro," the fans did not shift away to more amateur endeavors.

When the myths are stripped away, what's left? We could have a vibrant college athletics system where the elite programs pay competitive wages to their athletes and continue to dominate the sports as they do now. Other schools would pay less, get lesser talent, and win less often, just like they do now. Fans would still attend and watch on television. The government would not cut off schools for violating Title IX because they would comply as much or more than they do now. Costs would rise, but

⁸⁹ See Myths 3,4, 5, 6, and 11 *supra*.

⁹⁰ "[C]ost-cutting by itself is not a valid procompetitive justification." *Law v. NCAA*, 134 F.3d 1010, 1022 (10th Cir. 1998).

⁹¹ See myths 10 and 13 *supra*.

⁹² See myths 1,2, and 12 *supra*.

not as much as you might think because other costs would decline. Coaches would earn a little less, weight rooms would be a little less lavish. And some fairer portion of the billions in revenue would flow to the college athletes who generate them. And that's no myth.

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