Compensating Collegiate Athletes in "Store Credit"

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I. INTRODUCTION

This paper tackles fair remuneration to amateur athletes competing at, and for, America’s postsecondary schools. Recent “progress” in this matter starkly contrasts with the NCAA’s adoption in 1948 of the “Sanity Code,” under which, first, financial aid to athletes was strictly limited to tuition and fees and, second, pay-
ments could not be made based on athletic ability alone but by reference to the athlete’s financial need.\(^1\) By the 1950s, the NCAA amended those rules to compensate athletes based on their ability, and member schools were allowed to award tuition, fees, and added a “living stipend.”\(^2\) In 2015, the NCAA voted to give the “Power 5” conferences—the Southeastern Conference, Atlantic Coast Conference, Big Ten, Big 12, and Pacific-12—and their 65 member schools the prerogative of paying thousands of dollars to athletes annually in stipends to cover these schools’ “allowable cost of attendance.” But another three dozen Division 1 conferences, which incorporate approximately 285 additional schools, have the same option, whether they can afford paying these stipends or not. The NCAA plans to distribute $200 million of its assets to Division I member schools in 2017 to help them pay for athlete benefits and services, including covering athletes’ true cost of attendance (via

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1. See Lawrence M. Kahn, Markets: Cartel Behavior and Amateurism in College Sports, 21 J. ECON. PERSP. 209, 211 (2007), http://www.cas.unt.edu/~jhauge/Teaching/Sports/Collusion_Kahn_2007.pdf. The “sanity” aspect of the financial aid rule responded to forms of insanity pervading college football for decades. See, e.g., infra note 46. Whether and how to pay college athletes has troubled Americans for at least 85 years. In 1931, George Barton Cutten, a former football star at Yale and then-President of Colgate University, wrote in the New York Times about the “big business” of football and how football players should be subsidized. See George Barton Cutten, Dr. Cutten Defends Football of Today, N.Y. TIMES, Jan. 18, 1931, at 59. In 2011, an aborted “experiment” allowed the payment of $2,000 to athletes to cover non-tuition necessaries that were part of the true cost of attendance, but the member institutions rescinded the recommendation, partly because members felt gender equitable distribution of same would be prohibitively expensive. See Erin E. Buzuvis, Athletic Compensation for Women Too? Title IX Implications of Northwestern and O’Bannon, 41 J. C. & U.L. 297, 307–08, n.51 (2015). Historically, a “full scholarship” to an athlete covered his tuition and obligatory school fees, along with the cost of room and board on campus during the school year and, sometimes, the cost of books but little else. Kahn, supra note 1, at 211. The often-used expression “true cost of attendance” includes outside expenses beyond the reach of a full scholarship, requiring “gap” moneys such as from Pell Grants. See Study: Free Ride Still Costs Athletes, ESPN (Oct. 26, 2010), http://espn.go.com/college-sports/news/story?id=5728653.

2. See Kahn, supra note 1, at 211.
guaranteed scholarships and otherwise) and funds for food for athletes out-of-season. Some predict that traveling this road will change collegiate athletics permanently, but not in a good way. One skeptic’s anxiety is that just 24 of 125 member schools in the highest-division athletic programs, Division I-A, were profitable as recently as fiscal year 2014. For unprofitable schools, the balance was subsidized by their “universities.” In fact, three principal sources for recurring subsidies are: the existing operating budgets of athletic departments; mandatory student fees in which students subsidize directly college athletics; and school athletics “booster” groups.

The NCAA’s decision to afford the cost-of-attendance stipend option to all conferences is a means of providing equity while sidestepping antitrust lawsuits. The stipend, ranging from $1,400

3. See Jake New, NCAA to Distribute $200 million to Division I Programs, INSIDE HIGHER ED (Mar. 11, 2016), https://www.insidehighered.com/quicktakes/2016/03/11/ncaa-distribute-200-million-division-i-programs (referencing Brian Hendrickson, Board of Governors Approves $200 Million Distribution to DI Members, NCAA (Mar. 10, 2016, 2:53 PM), http://www.ncaa.org/about/resources/media-center/news/board-governors-approves-200-million-distribution-di-members). This is a one-time distribution of funds. Id. In 2015, the NCAA distributed $18.9 million to Division I institutions, or about $55,000 per receiving institution.” Id. The 65 institutions in Division I’s wealthiest conferences therefore are allowed to increase aid amounts by about $2,500 per athlete. Id.


6. See Michael McCann, In Denying O’Bannon Case, Supreme Court Leaves Future of Amateurism in Limbo, SPORTS ILLUSTRATED (Oct. 3, 2016), http://www.si.com/college-basketball/2016/10/03/obannon-supreme-court (noting the Supreme Court’s implicit reasoning in denying certiorari to plaintiffs that by allowing colleges to offer student-athletes additional compensation up to their full costs of attendance, the NCAA cured antitrust harm stemming from its otherwise unlawful amateurism rules; as the cost of attendance measure already is in place, the Ninth Circuit’s O’Bannon opinion compels no additional actions by the NCAA or its member schools, conferences or other af-
to $5,666 among the Power 5 conferences in the 2015–16 academic year, is based on a federal formula used for all students and is calculated by each college. It represents the difference between a tra-

iliated organizations). Of course, schools implemented this plan for cost of attendance stipend increases in rapid response to the injunction entered by U.S. District Judge Claudia Wilken that, had it not been reversed on appeal, would have allowed deferred payments of $5,000 per year to athletes. Cf. Michael T. Jones, Real Accountability: The NCAA Can No Longer Evade Antitrust Liability Through Amateurism After O’Bannon v. NCAA, 56 B.C. L. REV. E-SUPP. 79, 86, n.53 (2015) (noting the trial court injunction bars the NCAA from prohibiting stipends tied to athletes’ publicity rights to a maximum amount representing the full cost of attendance). Ninth Circuit Judge Jay Bybee wrote in the Court of Appeals panel’s opinion in O’Bannon v. NCAA, 802 F.3d 1049 (9th Cir. 2015) that the 1984 Supreme Court case of NCAA v. Board of Regents of the University of Oklahoma, 468 U.S. 85, 102 (1984), “did not approve the NCAA’s amateurism rules as categorically consistent with the Sherman Act. Rather, it held that, because many NCAA rules (among them, the amateurism rules) are part of the “character and quality of the [NCAA’s] ‘product’ . . . no NCAA rule should be invalidated without a Rule of Reason analysis.” O’Bannon, 802 F.3d at 1053.


7. The federal government’s Department of Education (“DoE”) provides guidance to schools and tracks these figures. See U.S. DEP’T OF EDUC., STUDENT FINANCIAL AID HANDBOOK, Vol. 3, Ch. 2, Cost of Attendance (Budget) [hereinafter COA Handbook], https://ifap.ed.gov/sfahandbooks/attachments/0607Vol3Ch2.pdf. But DoE allows college financial aid officers to determine what an appropriate estimate is for their institution’s cost of attendance, though colleges must justify those amounts in some way. See Jake New, More Money . . . If You Can Play Ball, INSIDE HIGHER ED (Aug. 12, 2015), https://www.insidehighered.com/news/2015/08/12/colleges-inflate-full-cost-attendance-numbers-increasing-stipends-athletes. This enables schools to provide several thousand more dollars in stipends for scholarship athletes; and it creates greater loan eligibility for all students. Id.

8. See Joe Rodgers, Fifteen Power 5 Institutions to Offer Extra $4,000-Plus for Scholarship Student-Athletes, SPORTING NEWS (Apr. 9, 2015),
ditional “full” scholarship that includes tuition, room, board, sometimes books and miscellaneous fees, and the full cost of attending college. The extra cash can be used for a variety of expenses ranging from transportation between the athlete’s home and campus, postseason (tournament and playoff) travel for athlete friends and family members, summer pre-enrollment costs for recruits, computers and cell phones, clothing, and healthcare insurance. While each conference may decide whether to pay the stipends, most conferences allow their members to choose for their separate institutions whether to participate and at what level.

The proposal contained in this paper allows roughly 350 college programs to participate, affordably, in the stipend program. The concept is “store credit” for athlete purchases of all these goods and services through university or “partner” vendors. The proposal likely solves the Title IX “obstacle” since gender equity requires that women’s sports scholarship athletes receive proportional stipend payments to male scholarship athletes, and all athletes on scholarship who participate according to the standards described below will


9. Specifically, Title IX regulations require that athletic scholarships or grants in aid be allocated in rough proportion to the total numbers of male and female athletes participating in intercollegiate sports. 34 C.F.R. § 106.37(c) (2015). The proportion is calculated by totaling scholarship funding provided to each gender and dividing that amount by the number of male and female participants in the entire athletic program., A Title IX Primer, WOMEN’S SPORTS FOUND. https://www.womenssportsfoundation.org/home/advocate/title-ix-and-issues/what-is-title-ix/title-ix-primer (last visited Feb. 23, 2017) (noting Title IX’s “dollar for dollar expenditure” requirement applying to the athletic financial assistance area, under which schools are required to spend dollars proportional to their gender participation rates). The guiding principle is that access to higher education from financial assistance cannot be skewed in favor of either gender. See Dept. of Health, Education and Welfare, A Policy Interpretation, Title IX and intercollegiate athletics, 44 Fed. Reg. 71,413 (Dec. 11, 1979) [hereinafter 1979 Policy Interpretation]. Admittedly, the higher costs of tuition for out-of-state residents may cause an uneven distribution between scholarship aid to men’s and women’s programs. See Requirements Under Title IX of the Education Amendments of 1972, U.S. DEP’T OF EDUC., OFF. FOR C.R. [hereinafter OCR Memo] http://www2.ed.gov/about/offices/list/ocr/docs/interath.html (last updated Oct. 15, 2015). For instance, at the University of Alabama, stipends are $5,386 each year to out-of-state athletes and $4,172 to in-state athletes. Play Ball, supra note
have much the same, albeit not identical, entitlements. This proposal makes unionization unnecessary but more convenient should

7. A premier public institution’s football program will sign large numbers of out-of-state students as players, as opposed to another non-revenue sport’s participants that consist of mostly in-state students, such as women’s soccer, since in-state students better can afford the cost of attendance with no or only partial financial aid. Cf. Fred Bastie, Recruiting Column: 10 recruiting facts most recruits don’t know, USA TODAY HIGH SCH. SPORTS (June 22, 2016), http://usatodayhss.com/2016/recruiting-column-10-recruiting-facts-most-recruits-dont-know (noting that in “equivalency sports” that depend in no manner upon attendance at contests, partial scholarships ranging from 25% to 75% are the norm). As stated by the DoE, “[t]hese differences are nondiscriminatory [in violation of Title IX] if they are not the result of limitations on the availability of out-of-state scholarships to either men or women. See OCR Memo, supra note 9. Other disparities besides non-resident status in awarding financial assistance may be justified by legitimate, nondiscriminatory (sex-neutral) factors or explained by professional decisions that college and university officials make about program development. Id. The OCR Memo states, “[a]n institution beginning a new program, for example, may spread scholarships over a full ‘generation’ (four years) of student athletes, thereby, awarding fewer scholarships during the first few years than would be necessary to create proportionality between male and female athletes.” Id. Some scholars allege that disregard for this grant-aid proportionality is rampant at schools that satisfy one or more of the other criteria demonstrating equal opportunity for females in intercollegiate athletics. See, e.g., Marc Edelman, When It Comes To Paying College Athletes, Title IX Is Just A Red Herring, FORBES (Feb. 4, 2014, 9:30 AM), http://www.forbes.com/sites/marcedelman/2014/02/04/when-it-comes-to-paying-college-athletes-is-title-ix-more-of-a-red-herring-than-a-pink-elephant/#264fe84d63fd (noting that Title IX does not directly address whether there is a requirement of equal financial terms for all student-athletes, above and beyond their athletic scholarships, and that Courts rarely analyze Title IX from the perspective of compensation). However, Edelman concurrently acknowledges NCAA member schools historically fix the value of student-athlete “pay” at zero dollars. Id. Ellen Staurowsky argues that “pay-for-play” systems, compensating athletes for working in commercial athletic entertainment, fall outside the ambit of Title IX altogether. Ellen J. Staurowsky, “A Radical Proposal”: Title IX Has No Place in College Sport Pay-For-Play Discussions, 22 MARQ. SPORTS L. REV. 575, 594–95 (2012). But outside the realm of a few revenue-generating sports, lucrative as they are for some, the balance of college athletes (a majority of the total number of intercollegiate athletes at individual universities) are students during the academic year, albeit many of their playoff matches and championship games are commercially broadcast.
the right of athletes to unionize be recognized, as there is uniformity of treatment and a clear baseline of compensation against which collective bargaining is benchmarked. If transparency makes clear that there are no further resources available to the school to

10. In August, 2015, the National Labor Relations Board (“NLRB”) declined to rule on whether Northwestern University’s football team had the right to form a union, or whether the football scholarship players were employees under the NLRA. NORTHWESTERN UNIVERSITY DECISION, OFFICE OF CONG. AND PUB. AFFAIRS, https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-3034/Northwestern%20Fact%20Sheet%202015-08.pdf. This declination resulted in dismissal of the representation petition filed by the union. Id. Part of the justification for this result was the view that NLRB’s asserting jurisdiction would not promote labor stability due to the nature and structure of NCAA Division I Football Bowl Subdivision (FBS). Id. By statute the Board does not have jurisdiction over state-run colleges and universities; these constitute 108 of the roughly 125 FBS teams. See id. In addition, every school in the Big Ten Conference, except Northwestern, is a state-run institution. See About the Conference, Big10, http://www.bigten.org/school-bio/big10-school-bio.html (updated July 2015). As the NCAA and conference maintain substantial control over individual teams, the Board held that asserting jurisdiction over a single team would not promote stability in labor relations across the conference. See NORTHWESTERN UNIVERSITY DECISION, supra note 10. It also held that its ruling was limited to the unique facts of that case. Id. While another school’s athletes could attempt unionization, the parties must satisfy the NLRB’s issue of promoting labor stability in so doing. Cf. Marc Edelman, The Future of College Athlete Players Unions: Lesson Learned from Northwestern University, and Potential Next Steps in the College Athletes Rights Movement, 38 CARDOZO L. REV. (forthcoming, 2017) (noting labor stability concerns might be overcome by convincing the NLRB that the NCAA is the “joint employer” of athletes). The NLRB ruled on August 23, 2016, in NLRB Case No. 02-RC-143012 that graduate students and some undergraduate students (“student assistants,” collectively) who teach or do research (even via external grants) at private, “Ivy League” schools are employees. See Trustees of Columbia University, 364 N.L.R.B. No. 90, 2 (2016) [hereinafter Columbia University Case] (Decision on Review and Order). Undergraduates number among the members of the Columbia University bargaining unit. See Melanie Trottman & Melissa Korn, Graduate Students Can Unionize at Private Colleges, US Panel Rules, WALL ST. J. (Aug. 23, 2016, 1:42 PM), http://www.wsj.com/articles/graduate-students-can-unionize-at-private-colleges-u-s-labor-panel-rules-1471972147. Unionization will not blunt the reach of Title IX, however; even considering athletes as employees for labor law purposes does not limit Title IX’s application to equity in athletic financial aid. See Buzuvis, supra note 1, at 329–30 (stating that a “functional” test considers whether a participant receives “institutionally-sponsored support normally provided to athletes competing at the institution . . . .”) (emphasis added); see also 1979 Policy Interpretation, supra note 9.
pay its athletes, there is no reason for the athletes’ union to make demands that cannot be satisfied, for example. Conversely, if there is substantial equity remaining in the athletic department’s budget, or if boosters are willing to pay greater sums toward the stipend, then movement in favor of the athletes’ union is feasible. Finally, the proposal is far more sustainable than the abstract and unrealistic calls for college athletes to be compensated according to vague formulas and “lockbox mechanisms” that do not recognize that a significant majority of athletic programs at major institutions are operating at deficits and cutting back on spending, even if booster programs are propping up a few of their athletic directors’ preferences. The proposal thus encourages movement toward putting postsecondary schools’ athletic programs on a sounder and more equitable financial footing, as urged by sports economist Andrew Zimbalist and others.

II. LETTING THE MARKET RULE PAYMENT, RECRUITMENT, AND ATHLETIC EXCELLENCE

A. Laissez-Faire Approaches and Laments

1. Budget Constraints

The more progressive-minded among academics, sports pundits, and many fans of college sports advocate dropping the “façade” of amateurism by allowing postsecondary institutions to pay
athletes whatever the market price for their services is from time to time. Of course, myriad problems attend such a notion when stage two thinking is applied, seeking answers to this question: “now that we’ve established a marketplace for college athletes, what happens next?”

14. See, e.g., In re Nat’l Collegiate Athletic Ass’n Grant-in-Aid Cap Antitrust Litig., 311 F.R.D. 532, 536, 547 (N.D. Cal. 2015) (seeking a class injunction to eliminate all caps on compensation on antitrust grounds where each plaintiff class has been certified by Judge Claudia Wilken); Maurice Clarett, Vince Doria, Lawrence Funderburke, John Holman, Matthew Mitten, Joe Nocera, Marscilla Packer, Shawn Springs, Jim Treleaven, Kelly Trent, Kristin Watt[,] & Andrew Zimbalist, Panel Discussion at The Ohio State University: Paying College Athletes (Apr. 15, 2016), https://u.osu.edu/sportsandsociety/ (discussing the merits of paying college athletes).

15. THOMAS SOWELL, APPLIED ECONOMICS: THINKING BEYOND STAGE ONE 6 (rev. ed. 2009). One lament of sports pundits is that freshman basketball athletes are forced to participate in this college-level marketplace because the NBA requires its players either to reach 19 years of age or to have completed a year of college before their draft eligibility—thus, the league compels a year of college play from talented male basketball players, they argue. See Allen Barra, Both the NBA and the NCAA Want to Keep Athletes in College for Too Long, ATLANTIC (Apr. 6, 2012), http://www.theatlantic.com/entertainment/archive/2012/04/both-the-nba-and-the-ncaa-want-to-keep-athletes-in-college-for-too-long/255535/ (citing sitting NCAA President’s comment that the rule “forces young men to go to college who have little or no interest in going to college”); Paul Wachter, The ESQ&A: Sonny Vaccaro, ESQUIRE (Mar. 18, 2013), http://www.esquire.com/sports/interviews/a20670/sonny-vaccaro-nba-eats-its-young/?src=social-email (quoting an interviewee and noting that NCAA and NBA are “forcing these kids to go to school”). The same “compulsory” marketplace exists because of the NFL draft eligibility rules. A full scholarship, coupled with an opportunity to learn socialization skills and a few insights into adulthood, combined with free publicity toward brand-building and public adulation, undermines an otherwise compelling narrative of servitude. Granted, in the instance of a scant minority of elite 18 year-old players, the college’s basketball program is benefitted when such athletes compete fiercely during that single college year to improve their draft positions—so long as, in the process, these athletes do not adversely impact team harmony or the collective quality of team play. The notion that no alternatives exist to playing one year of college basketball is unsupportable; for example, athletic college preparatory institutions exist. See Kurt Voigt, Texas High School Administrator Warns of Recruiting by Athletic-Prep Private Schools Like IMG, U.S. NEWS (Feb 24, 2016, 6:36 PM), http://www.usnews.com/news/sports/articles/2016-02-24/texas-administrator-warns-of-athletic-prep-schools-like-img. Other alternatives include: European professional leagues, affordable American community/junior commuter colleges and other,
tape of secondary student-athletes, determine who the best revenue-sport athletes are at each position, then let the bidding begin! But what happens downstream may be undesirable, unless there is some system capping compensation. Consider just these few ramifications of an unbridled system of athlete compensation. Schools with the largest athletic budgets, “labor cost allocations,” in each sport will have the most resources to lure superior high school performers. Winners and losers will be self-selecting if high-rolling alumni are included in the equation. In turn, the “winners” schools’ athletics departments will return no revenue to the general operating funds of their institutions, since (one presumes athletic boosters will require that) profits must be banked for future investment. Boards of Trustees eventually will cap subsidies to their schools’ athletic departments or risk a downward spiral of academic mediocrity as faculty quality diminishes.

less athletically-skewed, preparatory high schools offering a fifth year of secondary school preparation and incorporating athletic programs and financial aid for those of modest means. See Neill Ostrout, Prep Schools Can Provide Avenue to College Basketball Opportunities, CTPOST (June 6, 2010, 12:34 AM), http://www.ctpost.com/basketball/article/Prep-schools-can-provide-avenue-to-college-512963.php. The real argument candidly distills to this: the NBA’s age restriction policy constitutes a violation of an athlete’s right to move directly to the NBA from high school; and a similar complaint applies to the National Football League’s Draft Eligibility Rule. See generally Steve E. Cavezza, Can I See Some ID?: An Antitrust Analysis of NBA and NFL Draft Eligibility Rules, 2010 U. DENV. SPORTS & ENT. L.J. 22, 25–6, text at notes 31–50 (2010). Except that no such right exists in law or logic. Were it so, Clarett v. Nat’l Football League, would long since have been reversed or discarded. 369 F.3d 124, 125–6, 142 (2d Cir. 2004), cert. denied, 544 U.S. 961 (2005).

16. Wealthy alumni boosters typically are not bovine writers of large, blank checks on an annual basis just to secure a luxury box or premium seats at the stadium as Rutgers University’s football stadium expansion program’s disastrous fund-raising illustrated. See Hobson & Rich, supra note 5 (noting an unsuccessful alumni appeal that resulted in heavy athletic department debt). Athletics administrators must assume, therefore, that boosters will take (or at least demand) a more active role in overseeing “management” of labor costs than they presently possess, including insisting that athletic department revenues play an increasingly substantial role in the underwriting of labor costs. Most boosters are savvy business persons in their own rights.

17. There is no evidence that brilliant teachers are lured to schools merely by the success of their athletic programs, if grant funds availability and other in-
In the following chapters of bidding wars chronicles, a disproportionate amount of dollars will be allocated to each sport’s “first string,” and specifically a subset of that group, referred to as “skill-position players.” Those outside the first-string players rarely will be drafted by professional leagues and will divide the remaining labor budget of the team. Since presumably the bidding will have to include guaranteed compensation to the “star players,” the labor cost budget balance will afford only marginally above the true cost of attendance compensation, or potentially less, to the remaining players. The resulting “caste system” raises an interesting dilemma surrounding players’ attitudes.

18. While that is harder to define in basketball, in football that will include the quarterback, the running back, the wide receivers and sprinkled other positions such as “inside” linebackers and the “left” tackles who protect right-handed quarterbacks. These position players are usually the highest in numbers of persons drafted in the early rounds of the NFL draft. Another way of thinking about these football positions is that they require the greatest hand-eye coordination, an ability to anticipate what the other team is doing next while a play is in progress (sometimes “seeing the whole field/court”), or blazing foot speed, as opposed to more common traits like physical mass and playing with abandon. In any event, clearly all players do not, in a market-based approach, have identical value. Cf. Theodore Ross, Cracking the Cartel, NEW REPUBLIC (Sep. 1, 2015), https://newrepublic.com/ (commenting that if a player is essentially replaceable by another team-mate, likely his contribution to the financial success of the program is marginal, diminishing his market value).

19. Professor Buzuvis acknowledges the “wedge that money would drive between athletes and other students.” See Buzuvis, supra note 1, at 315 (2015). Jay Bilas counters that this concern is nonsensical. But see Grenardo, supra note 6 (manuscript at 39) (citing his personal interview with Bilas, an attorney and ESPN analyst). In this age of narcissistic minor celebrities, utter lack of jealousy among competitive male teammates relating their self-worth to their “paycheck” size seems like an immense stretch of credulity. See Ashley Stahl, How Self-
that subset of suddenly wealthy freshman class of new hires—position themselves before their upper-class, usually far lower compensated, teammates? Will the stars inspire their upperclassmen teammates to sacrifice themselves physically in practices and games to protect the prize recruits? If compensation is deemed the highest social value among athletes within the school’s sports program, will schools have to offer bonuses to the entire player squad for winning championships and achieving additional post-season successes? What sources of funds will those bonuses come from—sales of tee shirts and imitation jerseys bearing the elite players’ names on the back? Funds would have to be “banked” for payment of these bonuses instead of being invested presently in improving the educational experience of students, including athletes.

*Worth Affects Your Salary*, FORBES (May 11, 2016, 10:00 AM), http://www.forbes.com/sites/ashleystahl/2016/05/11/how-self-worth-affects-your-salary/#63fb183e777a (noting a correlation between self-worth and salary). In all likelihood, numbers of jealous teammates will inquire about transferring to schools where they feel properly “respected.” Such behavior is consistent with a fluid “marketplace” concept when the labor force possesses special skills. See, e.g., Vivian Giang, *You Should Plan on Switching Jobs Every Three Years for the Rest of Your Life*, FASTCOMPANY (Jan. 7, 2016, 5:47 AM), http://www.fastcompany.com/3055035/the-future-of-work-you-should-plan-on-switching-jobs-every-three-years-for-the-rest-of-your- (noting employees who stay with a company longer than two years are said to get paid fifty percent less).

20. For example, consider the circumstances at Northwestern University. Walk-on athletes at Northwestern receive only need-based aid available to the general student body. *See Northwestern University Decision*, supra note 10, at 20.

21. This has, of course, Title IX implications since every sport (either gender) has conference or league (and often national) championships. Bonuses will have to be offered to both genders in all sports for championships. But there has to be some compensation ceiling at every college and university engaged in competitive sports. Perhaps coaches will appeal instead to the pride of their workerbee athletes, spurring them on to glory without remotely equitable compensation or recognition to that received by the elite few. This does not seem to be sufficient inspiration in other dimensions of the world of work, where average employees will not perform optimally unless they receive some form of extrinsic motivation. *See Doug White & Polly White, Money Is Nice, But It’s Not Enough to Motivate Employees*, ENTREPRENEUR (June 23, 2015), https://www.entrepreneur.com/article/247333.

22. It is not an entirely facetious question. Andrew Zimbalist has proposed allowing athletes to keep all revenues generated from an athlete’s name, image and likeness, along with lifetime medical care, disability benefits, and a lifetime
2. Media Exposure and Team Loyalty

How will college teams fare when sharing television markets with competing professional teams? Should professional teams in those markets decide they have “had enough” of in-market direct competition, they may stage games during time slots when “audience-poaching” universities play their contests. Will spectators prefer the Minutemen to the Patriots? If not, how will that affect advertising revenue to the network that is the main source of funding to the schools through the conference’s treasury? Worse still, professional leagues might revoke their regulations governing how soon after leaving postsecondary school players can sign with professional sports franchises, thereby diluting the pool of top-flight college-level talent. Ultimately, professional teams control the supply of that truly superior talent performing at lower echelons of a professionally-played sport because they have the capacity to buy that talent with higher pay.

What becomes of chronic “have-nots” among schools engaging in bidding wars? One must wonder what the incentives are for those schools to continue participating in a conference where they perennially appear at the bottom of the league standings. Pun- dits will argue that a school with a chronically under-performing educational scholarship—all elements of the store credit I propose in Part IV below. See B. David Ridpath, Panel on Paying College Athletes Enlightening and Informative–But Will There be Changes?, FORBES (Apr. 16, 2016, 12:02 PM), http://www.forbes.com/sites/bdavidridpath/2016/04/16/panel-on-paying-college-athletes-enlightening-and-informative-but-will-there-be-changes/2/#3f0fdca196a (discussing Andrew Zimbalist’s proposal).

23. See Ross, supra note 18 (noting not all colleges will be able to compete in an open market and some will fail or opt out by reclassifying themselves in Division II of the NCAA). More consequentially, some believe that one fallout from a reduction in programs from open-market competition will be a drop-off in the number of athletic scholarships—ironically, most likely to impact persons from low-income circumstances who cannot qualify to attend on the basis of academic merit. See id.

24. See Grenardo, supra note 6 (manuscript at 44); Joe Nocera, Notre Dame’s Big Bluff, N.Y. TIMES (Sept. 11, 2015), https://www.nytimes.com/2015/09/12/opinion/joe-nocera-notre-dames-big-bluff.html?_r=0 (showing that Notre Dame and Northwestern Universities Presidents Jenkins and Bienen are posturing when they decry calls for payment of athletes at their institutions). A bit of imagination may create some options, although NCAA Division
team will receive a share of television revenues so vast as to secure its loyalty to its competitive conference, preventing schools from forming new leagues with smaller television-market-based schools, such as institutions with higher academic standards with lower investments in athletics. It is not clear that Vanderbilt University, for instance, would agree in perpetuity to serve as a “punching bag” for other SEC teams if it decides not to dip into its endowment to compete for elite players, preferring other investments, or if it decides to cap the total amount it will pay in labor costs for premier players.25

I and II age limits erect some barriers. One year after the average athlete’s high school class graduates is when a NCAA member school’s athlete’s eligibility is impacted in all sports except for hockey, skiing, and tennis. Generally, the athlete’s eligibility ends between four and five years thereafter; in other words, the athlete has five calendar years to play up to four seasons. See NCAA 2015–16 Division I Manual 80 (2015) [hereinafter NCAA Manual], http://www.ncaapublications.com/productdownloads/D116.pdf. The primary option is to recruit from abroad; and younger players are being brought along in basketball, especially across Europe, as they have been groomed to do since the 1980s. See Sam Toperoff, Italy’s Talented Basketball Bambini Are Among the Country’s Prize Exports, SPORTS ILLUSTRATED (Nov. 20, 1985), http://www.si.com/vault/1985/11/20/638198/italys-talented-basketball-bambini-are-among-the-countrys-prize-exports. Australia’s youthful ruggers—or Australian Rules Football school leavers—appear coachable college football players as well. See Martin Rogers, Aussies Getting Their Kicks in College Football, USA TODAY (Jan. 4, 2016, 6:20 PM), http://www.usatoday.com/story/sports/ncaaf/2016/01/04/australian-kickers-prokick-school-michigan-blake-oneill/78023852/. New Mexico won the women’s cross country championship in 2015 spurred by eight runners who reside in the United Kingdom. See Bill Bradley, British Invasion: How New Mexico Won the NCAA XC Crown, EXCELLESPORTS (Dec. 12, 2015), http://www.excellesports.com/news/british-invasion-new-mexico-won-an-ncaa-xc-title/. This concept of using myriad foreign athletes competing in American college sports for domestic schools, principally to reduce an athletic department’s labor cost budget, illustrates how bankrupt the entire system may yet become.

How will bidding wars affect transfers between institutions of a team’s better, but not elite, athletes? If media exposure is paramount to young men who believe—unrealistically—that such exposure separates them from becoming highly-compensated full-time professional athletes, then marketplace-driven payments should induce greater numbers of transfers to other schools. These athletes likely will pursue “raises,” by transferring, with attendant effects upon team cohesion. This tendency will be aided by (a) injuries sustained by other highly-compensated athletes playing for targeted transfer institutions and (b) agents of the elite athletes.

and coaching salaries and curtailing scouting. Id. Physical education became a minor course of study instead of the athlete’s “major” of choice, and for a time, Tulane athletes were required to follow academic tracks actually leading to conventional B.A. or B.S. degrees. Id. Of course, these administrative tactics rendered Tulane having inferior teams to those of its counterparts. See id. Apparently, President Harris adopted the spirit of the recommendations of the American Council on Education’s Special Committee of 1951-52 on college sports. See WATTERSON, supra note 25, at 387.

26. Of course, an athlete could realistically assess his chances of becoming a professional but still conclude that his college years are the last opportunity to “make bank” in the prime of his limited postsecondary athletic career. See DEBORAH L. BRAKE, GETTING IN THE GAME: TITLE IX AND THE WOMEN’S SPORTS REVOLUTION 161–62 (2010) (stating that lucrative contracts are rare and “former college athletes will look back on their college days as the primes of their athletic career(s”)’. So he might transfer to another school just for the few years of higher compensation. With big data and the web, a lucrative startup opportunity creates an online marketplace for defensive tackles or second-string basketball players—a “matchmaker” site. If he or she really does not care about formal academic learning, an athlete should feel free to transfer frequently while eligibility remains. See NCAA MANUAL, supra note 24, at 170–80. Lately, nearly 500 men’s basketball players annually transfer to new teams at another NCAA school, without the aid of specialized job-hunting software and despite complicated restrictions on athlete free transferability. See Greg Bishop, Want to Play at a Different College? O.K., but Not There or There, N. Y. TIMES Jun. 8, 2013, A1. The NCAA, as of 2015, will no longer allow men’s basketball players who transfer from one Division I institution to another to apply for a waiver and become eligible immediately (except for graduated student transfers). See NCAA, TRANSFER 101 32–33 (2014), http://www.ncaapublications.com/productdownloads/TGONLINE2014.pdf (stating that only the school can seek a waiver today for an athlete).
3. College Athletes as Employees or Contractors

Three other dilemmas must be addressed. First, these paid players are employees under any rational definition of any state’s law if they remain students and attend practices and games while receiving salaries and benefits from the school—here, athletes are not legally different persons than any other college staff member. In state university settings, this means that the athletes are eligible to receive workers’ compensation and are entitled to rely on many aspects of employment law pertaining to hiring and firing conditions. In private universities, however, scholarship athletes are arguably entitled to unionize, while the walk-on (non-scholarship) athletes cannot participate in the bargaining unit, creating another divide. The only way to avoid employment law issues is to treat compensated athletes as independent-contractor mercenaries with one mission—winning games—accompanied by Form 1099 IRS reporting. These contractors will not be enrolled in school, but as non-students, public schools cannot allow them to use the school’s services except on a pay-as-you-go basis for training, therapy,

27. Interestingly, in In re NCAA Athletic Grant-In-Aid Cap Antitrust Litigation, the plaintiff classes suggested that athletic conferences, not member schools, could pay college athletes. Declaration of Daniel A. Rascher in Support of Motion by Antitrust Plaintiffs for Class Certification at 25, In re NCAA Student-Athlete Name & Likeness Licensing Antitrust Litig., 37 F.3d 1126 (N.D. Cal. 2014) (No. C 09-1967 CW). The implications of having athletes employed by athletic conferences are beyond the scope of this article.

28. One can dictate the outcome, without imposing the means and methods of achieving that outcome and still not be deemed an employer of a contractor. But see Browning Ferris Indus. of Cal., Inc., 362 N.L.R.B. 186 (2015) (explaining that controlling the hours of services rendered is among essential terms and conditions of employment relevant to finding a worker is an employee in a joint-employer situation).

29. Cf. Ross, supra note 18. Ross believes that many current college athletes do not desire to do schoolwork and resent its requirement, along with mandatory study sessions. See id.; Stephen K. Figler & Howard E. Figler, The Athlete’s Game Plan for College and Career xx1 (1984) (noting some college athletes find it is too much hassle “to get wrapped up in schoolwork”). Ross expects, in an open market environment, that “laborers” would not be forced to “buy an education” or otherwise behave like students, since admission standards become irrelevant. See Ross, supra note 18.
coaching, and, possibly, for meals and lodging. Their compensation will be fully taxable, unlike scholarships and related student grants-in-aid. This means that the school’s football field and basketball arena floor will be populated with non-students, divorced from academic and social environments of the school except for occasionally shared physical spaces.

Even if the resulting on-field performance with this tranche of contractors is outstanding, such segregation represents a new model for the athletes and the students currently enrolled at the school, in part because it affords a slim basis for personal connection. The resulting lack of even marginally functional relationships may, ironically, make winning titles more difficult psychologically. In effect, it creates a minor league or semi-professional team, using the institution’s athletic fields and arenas in exchange for the independent contractors’ agreement to wear the institution’s

30. See Ross, supra note 18. Of course, the independent contractor status more likely is established if mercenaries live away from the campus, further alienating them from the balance of the persons performing in the stadium or the arena.

31. See JUSTIN B. BRYANT, THE FEDERAL TAX RAMIFICATIONS OF PAYING STUDENT-ATHLETES: HOW O’BANNON V. NCAA MAY BE COSTLIER THAN EVERYONE ENVISIONS, https://www.sportslaw.org/docs/Federal_Tax_Ramifications_of_Paying_Student_Athletes_JustinBryant.pdf. Northwestern University argued before the NLRB and in its post-hearing filings in the NLRB proceeding in 2014 that the tax treatment of scholarship dollars is a persuasive reason not to classify the student-athletes as employees; the NLRB regional director did not address that claim. Brief to the Regional Director on Behalf of Northwestern University at 61, Northwestern University and CAPA, No. 13-RC-121359, 59 (Mar. 17, 2014); Patrick T. Harker, Student Athletes Shouldn’t Unionize, N.Y. TIMES (Apr. 1, 2014), https://www.nytimes.com/2014/04/02/opinion/student-athletes-shouldnt-unionize.html?_r=0; see also Northwestern University’s Brief to the Board on Review of Regional Director’s Decision and Direction of Election at 29–30, Northwestern University and CAPA, No. 13-RC-121359. The NU football players did not address taxes and presumably have not considered the full effect of the interaction of these federal regulatory structures. See Brief for College Athletes Players Association, Northwestern University and CAPA, No. 13-RC-121359.

32. See Craig Heynen, The Richness of Building Character in College Athletics, IN ALL THINGS (Sep. 21, 2015), http://inalthings.org/the-richness-of-building-character-in-college-athletics/ (noting that “members of a team can rarely operate smoothly if there is any dysfunction in the relationships between the athletes”).
“colors” and logos on the players’ uniforms. These contractors will not be bound in any manner by student codes of conduct or any other bylaws regulating student behavior (other than laws and local ordinances applying to any citizen of a jurisdiction). Finally, the contractor-athletes will cease to hold amateur status for any athletic purpose.

B. Title IX Hurdles to an Open Market and Independent Contracting

Title IX issues impinging upon payment to college athletes are unavoidable, and federal legislation is unhelpful to those seeking routine outright cash payments to male athletes in revenue sports. Initially, it should be conceded that in the conversation about paying players, the athlete described implicitly is male; there is little advocacy for treating female players likewise, except occasional nods to a few female basketball stars at the “perennial contender” universities like Connecticut. Title IX requires gender equity in the availability of resources to student-athletes from those educational institutions receiving federal funds. One prong of the Title IX equality analysis examines the overall quality of the two genders’ programs, while another is the comparability of scholarship dollars awarded to athletes of each gender. In the aggregate, “equal treatment” within men’s and women’s programs requires examining all of these items: the quality of facilities, equipment, and uniforms; the schedule of games and practices; the quality of coaching and of academic and medical resources; and equivalency of program publicity and promotion.

33. Cf. Ross, supra note 18 (noting that the most substantial programs may be spun off as university-branded private corporations).
34. “[B]y the NCAA’s own standards, student-athletes remain amateurs as long as any money paid to them goes to cover legitimate educational expenses.” O’Bannon v. NCAA, 802 F.3d 1049, 1075 (9th Cir. 2015).
35. See Brake, supra note 26, at 162.
37. See Buzuvis, supra note 1, at 322–23.
38. Erin Buzuvis & Kristine Newhall, Inequality, Discrimination and Sexual Violence in US Collegiate Sports, in GLOBAL CORRUPTION REPORT: SPORT 300, 300–01 (Gareth Sweeney & Kelly McCarthy, eds. 2016). For readers inclined to believe that Title IX can be tossed aside by a court under the right set of facts, here’s a scorecard. Since adoption of the 1979 Policy Interpretation, that
In terms of financial aid offers, Title IX’s regulation relating to the principle of “substantial proportionality” requires the dollar amounts of financial aid to be awarded in proportion to the ratio of male to female student participation in intercollegiate athletics. Title IX does not permit inferior treatment of women’s sports programs merely because consumers prefer watching or learning otherwise about men’s revenue sports. With any increase in financial aid available to male student-athletes stemming from the O’Bannon v. NCAA litigation, therefore, it is likely that proportional stipend payment increases will need to be available to female student-athletes to comply with Title IX. This is because institutions must

interpretation and the regulations promulgated under Title IX have survived constitutional challenges in at least eight federal Circuit Courts; a compendium of decisions is available in National Wrestling Coaches Ass’n. v. U.S. Dept. of Educ., 263 F. Supp. 2d 82, 94–96 (D.C. Cir. 2003). The National Wrestling Coaches Ass’n. v. U.S. Dept. of Educ. court noted that federal judges “accord considerable deference to DoE’s interpretation of the statute, as manifested in the 1975 Regulations and 1979 Policy Interpretation.”

39. See Buzuvis, supra note 1, at 324 (citing 34 C.F.R. § 106.37 (c)); Mary Frances O’Shea, Dear Colleague Letter: Bowling Green State University, U.S. DEP’T OF EDUC., OFF. FOR C.R. (July 23, 1998) [hereinafter 1998 OCR Letter], http://www2.ed.gov/about/office/list/ocr/does/bowlgrn.html (noting that any athlete stipend payment disparity between genders of greater than 1% would be clear evidence of a conscious decision by the school to provide an inequitable amount of scholarships to male and female student-athletes). Linda Bunker, et al., Check It Out: Is the Playing Field Level for Women and Girls at Your School?, NAT’L WOMEN’S LAW CENTER (Sep. 14, 2011), http://www.nwlc.org/resource/check-it-out-playing-field-level-women-and-girls-your-school. It does not matter that football generates revenue while women’s field hockey does not, as a source of revenue in a sports program does not justify unequal treatment. See Otter v. Sweetwater Union High Sch. Dist., 858 F. Supp. 2d 1093, 1112 (S.D. Cal. 2012). The Washington Supreme Court rejected Washington State University’s argument that since its football program is operated like a for-profit business, it should be excluded from the analysis whether equity in programs exists. Blair v. Wash. State Univ., 740 P.2d 1379, 1383 (Wash. 1987). The logic appears to be that if women received the equivalent support, their sports (or at least a few of them like volleyball or basketball) might also generate revenue. See Buzuvis, supra note 1, at 331.

40. See Buzuvis, supra note 1, at 301.

41. Cf. 1998 OCR Letter, supra note 39. But see Edelman, supra note 9. Deborah Brake believes that in theory, inequality is overcome by extending the payment model to equal numbers of female athletes. See BRAKE, supra note 26. Of course, institutions may comply with the “proportionality prong” by shrinking
demonstrate equality between men’s and women’s programs in three categories: numbers of athletic opportunities provided to each sex; comparability of scholarship awards to athletes of each sex; and overall programs’ quality between men’s and women’s offerings.42

Dodging institutional gender proportionality treatment obligations will require that the mercenaries not be enrolled as students; instead, they will be engaged purely as independent contractors of a school’s for-profit athletic affiliated company.43 Since market-compensated players will work for a for-profit affiliate of the university

42. Buzuvis, supra note 1, at 323. Readers may wonder whether equality may be skirted (under Title IX analysis) by funneling stipends through private channels such as booster (whether individual or group) contributions; the answer is “no,” because once a university accepts private donations, it is legally obligated to use the donated portion of funds for financial aid pursuant to Title IX requirements. Chalenor v. Univ. of N.D., 291 F.3d 1042, 1048 (8th Cir. 2002). If a school were allowed to act otherwise, Title IX’s equal treatment mandate “could routinely be routinely undermined.” Erin E. Buzuvis & Kristine E. Newhall, Equality Beyond the Three-Part Test: Exploring and Explaining the Invisibility of Title IX’s Equal Treatment Requirement, 22 MARQ. SPORTS L. REV. 427, 443 (2012).

instead of attending classes, Title IX does not apply, and no gender equity principle requires the mercenaries’ compensation to be matched by similar-magnitude payments to women student-athletes in usually non-revenue sports. Nor will Title IX be implicated in disciplinary measures following any altercation between genders involving the coercive independent contractor, reducing school monitoring of numerous athlete perpetrators of sexually-oriented abuses. The contractor-athlete accused of sexual violence will be compensated by an athletic conference or by the NCAA, this act would violate Title IX, since those organizations are not higher education institutions receiving federal aid. Id. at 461–62.

44. See Buzuvis, supra note 1, at 340. The “equity” tests relate to “interest and ability within the student body.” See BRAKE, supra note 26, at 80–82 (emphasis added). Some writers contend that Title IX does not apply if the NCAA simply allows athletes to negotiate licensing agreements independently with vendors of jerseys and other merchandise or services. See, e.g., Editorial, Pay for Play and Title IX, N.Y. TIMES (Mar. 22, 2014), http://www.nytimes.com/2014/03/23/opinion/sunday/pay-for-play-and-title-ix.html?_r=1). Money would flow to athletes directly, so the schools (therefore, Title IX) never would be implicated. Id. Here, proceeds the argument, a substantial majority of athletes would earn nothing, but at least a few elite players would receive sizable licensing fees for use of their names and images. Id. The problem arises, however, in conflicts with the NCAA’s definitions of amateurism pertaining to income generated from participation in intercollegiate sports; exceptions to such earnings appear limited to Olympic medal awards from the U.S. Olympic Committee. See Steve Berkowitz, Olympics Offer Rare Chance for NCAA Athletes to be Paid, USA TODAY (Aug. 2, 2016, 7:10 PM), http://www.usatoday.com/story/sports/olympics/rio-2016/2016/08/02/paying-ncaa-college-athletes-at-rio-olympics-kyle-snyder-katie-ledecky/87709714/. The licensing concept raises practical issues as thorny as regulatory ones, such as who will keep the athlete from being taken advantage of by licensees, how will these athletes’ “advocates” (agents) be compensated (and vetted by naïve athletes), and how substantially will the athletes’ focus be diverted from student-based activities and sports obligations while the elite athlete chooses representation and then weighs offers for use of, and does the work to market (with selected vendors), his or her name and image? As sports activities are what drive the value of the athletes’ name and image, student-based functions will be short-changed, separating the athlete further from student obligations which, ironically, jeopardizes his or her continuing eligibility to compete. The better result is for these few to become “ringers.” See infra Part II.C.

45. See generally Melissa Korn, University of Tennessee Settles Sex Assault Claims for $2.48 Million, WALL ST. J. (July 6, 2016, 11:44 AM), http://www.wsj.com/articles/university-of-tennessee-settles-sex-assault-claims-
subject to local police inquiry and civil or criminal justice processes instead, which could include jailing pending disposition, removing that athlete from intercollegiate competition.

C. Ringers—Recruiting Fewer Non-Student Athletes as Independent Contractors

If the open marketplace proposed in Part A above seems too difficult or costly to implement, especially with the school’s administrative costs of complying with Title IX, intermediate approaches that are palatable and likely less expensive include allowing each institution’s football program to hire up to six independent contractors (“ringers”) annually. These are not student-participants in a sport; consequently, there need be no restrictions on age or otherwise relevant “admissions standards” applicable to students. Conferences could impose across-the-board caps on payments by position to highly talented persons who, for whatever reason, cannot

for-2-48-million-1467819848 (explaining how one plaintiff alleged the school kept a basketball player on the UT Knoxville team after he was found to have violated its code of conduct, allowing him to transfer after the season without facing disciplinary action, while a second plaintiff claims she was intimidated by football players seeking to keep her from filing an assault claim; the UT settlement is being paid from UT athletic department funds); Belinda-Rose Young et al., *Sexual Coercion Practices Among Undergraduate Male Recreational Athletes, Intercollegiate Athletes, and Non-Athletes*, 22 *VIOLENCE AGAINST WOMEN* 1, (2016) (noting differences between intercollegiate and recreational athletes on attitudes toward women and frequency of sexual coercion of partners); *Athletes and Sexual Assault*, PACT5, http://pact5.org/resources/prevention-and-readiness/athletes-and-sexual-assault/ (last visited Feb. 28, 2017) (noting that sexual aggression among athletes arises from the culture in college sports of a sense of entitlement and a tradition of impunity, along with celebration of aggression in sports culture); Walter S. DeKeseredy, *Athletes/Athletics and Sexual Violence*, 1 *ENCYCLOPEDIA OF INTERPERSONAL VIOLENCE* 42–43 (Claire M. Renzetti & Jeffrey L. Edleson eds., 2008) (discussing male bonding among aggressive college sport participants leads to objectification of women and resulting sexual violence).

46. This concept is hardly new to college football. *See Andrew Zimbalist, Unpaid Professionals: Commercialism and Conflict in Big-Time College Sports* 7 (1999) (“In 1896, Lafayette College enrolled tackle Fielding Yost, a student at West Virginia University, in time to play in the game against . . . [rival] University of Pennsylvania, which had won thirty-six consecutive games. With Yost’s assistance, Lafayette beat Penn, 6 to 4; then Yost . . . [reenrolled in] West Virginia [University].”). This likely set a record for student-athlete transfer facilitating. *See Watterson, supra* note 25, at 55, 152.
then participate on a professional team. Illustrating this opportunity, each team could procure the services of a single quarterback by an amount not to exceed $250,000 per season; a single running back for an amount not greater than $150,000 per season; one wide receiver for no greater than $100,000 per season; and so on, to a maximum number of six players per football squad (or perhaps a greater number, allowing for a capped total payroll for all player hires). The vast majority of football players, and the simple majority of basketball players, would not be ringers under this proposal.

The immediate danger of limiting the number of hired athletes to a handful or so is that this “franchise tag” places a target on the backs of the anointed elites. Opposing teams will recognize and have incentives to damage these few players, removing them from play in order to hobble their adversaries’ chances. The likelihood that any ringer cares to participate in the life of the students at the institution is scarcely improved over the Part A alternative—indeed, the emphasis on the ringer’s separateness may exaggerate the current lack of interest in academics felt by many athletes on campus.

47. This might lead to antitrust litigation against the conferences alleging a contract or conspiracy in restraint of trade; but two thoughts occur. Cf. Buzuvis, supra note 1, at 339 (affiliate enterprises are subject to antitrust law); Grenardo, supra note 6 (manuscript at 42–45) (asserting that Rule of Reason analysis would disfavor a total team salary cap favors it as means of maintaining “competitiveness”). Notably, other viable “markets” exist for college-aged players, such as playing in NCAA Division II, or at a school that is a member of the National Association of Intercollegiate Athletics. See NAT’L ASS’N OF INTERCOLLEGIATE ATHLETICS, http://www.naia.org/. Alternatively, playing professional basketball abroad in countries with robust leagues such as those in Spain, Italy, Greece, or Turkey—or the Gatorade League of the National Basketball Association. Second, a “win” in that litigation might lead to erosion in the compensation available when some schools cease competing for the best players by lowering their compensation, thereby assenting to inferior access to the talent pool.

48. See, e.g., Blake Williams, Paying College Athletes Is Complicated, Educating Them Shouldn’t Be, FORBES (Apr. 16, 2016, 9:20 AM) http://www.forbes.com/sites/blakewilliams3012/2016/04/16/paying-college-athletes-is-complicated-educating-them-shouldnt-be/2/#70108960202a (stating that “elite athletes banking on a professional future . . . focus [] on eligibility, not education . . .”—and athletes fail to take academics seriously while seeking exposure for improving their draft positions, citing comments of Lawrence Funderburke). The downfall of the current system is that academic institutions, including historically excellent academic schools like UNC Chapel Hill, facilitate the athlete’s choice (if one exists in fact) not to overextend oneself in academic pursuits. See
Because these elites are on the campus but typically not of the campus, coaches and athletic administrations will likely have to induce the remaining small or non-scholarship players on the team to strive to protect and assist the elite players in winning on the school’s behalf. On the other side of the ledger, there should be greater bonding among the majority of players not separated by caste in compensation, constrained to accept their respective true costs of attendance.

III. DETERMINING THE ANNUAL TRUE COST OF ATTENDANCE AND SETTING STORE CREDIT

A. How It Works

Under the proposal promoted here, the true cost of attending the institution is recalculated annually based on the current federal

See O’Bannon v. Nat’l Collegiate Athletic Ass’n, 7 F.Supp.3d 955, 980 (N.D. Cal. 2014), aff’d in part, rev’d in part, 802 F.3d 1049 (9th Cir. 2015), cert. denied (Mar. 14, 2016), cert. denied, 137 S. Ct. 277 (2016) (noting the wedge that payment creates between elite athletes and other students on the campus). “Deferring” those payments until the completion of the athlete’s eligibility does not ensure better integration of the elite athlete with the balance of his fellow students, although waiting to be paid impedes flaunting of one’s status in material regards — until lenders like “settlement funding” sources insert themselves into the athlete’s lives. Cf. id. at 984.

Cf. Ross, supra note 18 (explaining that the current compensation system penalizes the best players of significant money, not the lesser-skilled performers). If Ross is correct, then the “ringer” system proposed here addresses the few hundred of the best players, spread across the 120 colleges, for instance in the FBS division of major college football, when one considers that between 200 and 250 football players are drafted into the NFL annually. See id.
When that cost is determined for the first-year scholarship athlete, those athletes are issued debit cards with a sum, or spending limit, equal to that year’s cost of attendance; the sum available to the athlete is increased by a percentage for each year of their school attendance and for maintaining his or her competition eligibility. For example, in hypothetical “Athlete Stevens’” first year of attendance, her debit card will be issued with a spending limit equal to her full cost of attendance (“COA”). In Stevens’ second year of school, her debit card will have a spending limit of 115% of the first year’s COA; while in her third year her card will have a limit of 130% of the first year’s COA. In her fourth year the debit card will have a spending limit of 150% of the first year’s COA. The purpose of the percentage escalation in store credit is to induce Ms. Stevens to stay in school at her initial institution affording her financial aid. Another factor suitable to include in the computation of appropriate store credit during each year of enrollment is the required hourly commitment of the student to athletic endeavors. For example, for revenue sports that require more from athletes than forty hours of time weekly expended, per seven-day week, a premium of twenty percent over the annual increases proposed above seems appropriate. It is not unusual for football players to spend extensive amounts of time on football activities—forty to fifty hours per week during training camps and an equal number of hours per week during the football season. Above forty hours per week engaged in an intercollegiate sport, the athlete of either gender should be deemed to have a full-time job in addition to being a full-time student; and in


that event, the athlete should receive greater spending credit. This store credit premium today would involve most Division I FBS football players and FCS football players and many Division I men’s basketball players, and some baseball players. The mere fact that

53. Accord, Sack & Gurney, supra note 52 (noting a 2015 NCAA study finding that those participating in revenue-producing sports at the most competitive levels exceed the forty-hour-per-week limit set for actual workers by the Fair Labor Standards Act, and a Pac-12 conference study revealing that athletes are spending on average fifty hours a week on athletics during the season). But see Berger v. Nat’l Collegiate Athletic Ass’n, 162 F. Supp. 3d 845, 856–57 (S.D. Ind. 2016) (citing 1993 Labor Department position in its Field Operations Handbook § 10b03(e) that interscholastic athletics activities are not “work” under the Fair Labor Standards Act (“FLSA”), as such effort falls among those education opportunities afforded by the school that students elect to expend). This Labor Department position and the Berger opinion have not prevented another class lawsuit’s filing, this one seeking minimum wage and overtime compensation under the FLSA for athletes. See Dawson v. Nat’l Collegiate Athletic Ass’n, No. 3:16-cv-05487, 2016 WL 5405638 (N.D. Cal. Sep. 26, 2016); Cara Bayles, Ex-USC Football Player Sues NCAA, Seeking Unpaid Wages, LAW360 (Sep. 28, 2016, 9:31 PM), http://www.law360.com/articles/845920/ex-usc-football-player-sues-ncaa-seeking-unpaid-wages.

54. See Nat’l Collegiate Athletic Ass’n, NCAA Division I Results from the NCAA Goals Study on the Student-Athlete Experience, 17 (Nov. 2011), https://www.ncaa.org/sites/default/files/DI_GOALS_FARA_final_1.pdf. The NCAA is sensitive enough to the issue of “overtime demands” that the “Power Five” Conferences have agreed upon a new proposal to reduce the demand for sport-related activity among student-athletes. See Changes Proposed for Student-Athlete Time Balance, SOUTHEASTERN CONFERENCE (Jul. 7, 2016), http://www.secsports.com/article/16859604/changes-proposed-student-athlete-time-balance. The author’s proposal for a premium violates the convention that all scholarship athletes must receive the same stipend. See Shannon Scovel, Student-Athletes Surprised, Excited to Receive New Cost of Attendance Stipends, USA TODAY COLLEGE, (May 9, 2015, 8:53 AM) http://college.usatoday.com/2015/05/09/student-athletes-surprised-excited-to-receive-new-cost-of-attendance-stipends/. The proposed increase is not due, however, to the questionable assumption that the highest skilled individual athlete in a revenue sport is selling (based on his own performance) increased numbers of seats. See supra, note 20. Instead, it is based upon the premise that Division I football and men’s basketball programs will observe these new rules in the breach, unless uniformly-enforced regulations carefully delineate what constitutes athletically-related activity and create predictability in scheduling, for instance by releasing team practice and competition schedules in advance of participation—and monitoring compliance. See Jackie Hobson, Division I SAAC Addresses Time Demands, NCAA NEWS (July 20, 2016, 2:37 PM),
the “job” is playing a revenue sport is not justification for greater store credit. Instead, that supplemental entitlement substitutes for his or her loss of income-generating opportunity — because the heavily time-committed athlete has no chance to attend classes, study, rest and participate in the workforce outside school.

Ms. Stevens and her fellow athletes will be permitted to retain the unexpended balance of her debit card for the duration of her life, so long as (and only for so long as) Ms. Stevens does not (a) transfer to another school, (b) get expelled from her institution for other than academic performance reasons, or (c) academically become disqualified for student status.55 Those are the lone factors

http://www.ncaa.org/about/resources/media-center/news/division-i-saac-addresses-time-demands. The Mid-American Conference already embraced a scheduling-in-advance element by adopting a requirement that its teams share with members its practice schedules weekly and, should changes be required, inform athletes of the change at least twenty-four hours in advance of implementation. See MAC Adopts Four Proposals to Decrease Time Demands For Athletes, ESPN (Sept. 8, 2016), http://www.espn.com/college-sports/story/_/id/17496278/mac-adopts-four-proposals-decrease-demands-athletes.

55. See LOPIANO, supra note 52, at 2. No uniform standard for continuing qualification once a student is admitted for her first year is based solely upon grades; the NCAA standards for Division I athletes focuses instead upon “progress” toward graduation, so that the athlete must complete 40 percent of the coursework required for her degree by the end of her second year, 60 percent by the end of her third year and 80 percent by the end of her fourth year. See Division I Progress Toward Degree Requirements, NCAA, http://www.ncaa.org/about/division-i-progress-toward-degree-requirements (last visited Feb. 29, 2017). Student-athletes are currently allowed five years to graduate while receiving athletically related financial aid. See id. All Division I student-athletes must earn at least six credit hours each term to be eligible for the following term and must meet minimum grade-point average requirements that are related to an institution’s internal GPA standards for graduation. See id. In Division II, athletes must maintain a 2.0 cumulative grade-point average when entering the second year of collegiate enrollment, as well as each year of collegiate enrollment through the fifth year, to remain eligible. See Division II Progress Toward Degree, NCAA, http://www.ncaa.org/division-ii-progress-toward-degree (last visited Feb. 29, 2017). In contrast, Division I athletes must achieve 90 percent of the institution’s minimum overall grade-point average necessary to graduate (1.8) by the beginning of year two, 95 percent of the minimum GPA (1.9) by year three, and 100 percent (2.0) by year four. See Division I Progress Toward Degree Requirements, NCAA, http://www.ncaa.org/about/division-i-progress-toward-degree-requirements (last visited Feb. 29, 2017). Division II athletes are given 10 semesters
that determine whether she keeps the balance on her card, unless it is “hacked into” by a third party who depletes the balance as a result of Stevens’ carelessness. If she does not report for the initial practice in her first or any subsequent school year, her card is canceled by her school on the day following her non-attendance. If Stevens transfers to another school, her debit card balance is zeroed out by her first school. If she disgraces her school’s reputation or her program’s standing in the athletics community by being expelled from the intercollegiate athletics program or her school, her balance is zeroed out or the balance is suspended for a protracted period if the school so chooses to consider her readmission at a future date. If the student is academically disqualified from her school, her balance will not be eliminated; but she may not accrue any increase in spending limit until (if ever) she is readmitted and resumes participating as an athlete. If she plays only in three of the four years of her eligibility, her card is not canceled, but she does not receive the fourth year of COA credit and the spending balance is capped at the third year’s level. Additionally, if Ms. Stevens is injured and cannot of full-time enrollment in which to use their four seasons of competition, provided they maintain academic eligibility. See Division II Progress Toward Degree, NCAA, http://www.ncaa.org/division-ii-progress-toward-degree (last visited Feb. 29, 2017). Finally, Division II student-athletes must complete their four seasons of competition within the first 10 semesters or 15 quarters of full-time enrollment. See id. The reasons for disparate treatment between the Divisions are not transparent; there is a suggestion that bigger time sports consume more of the athletes’ time in Division I, rendering it harder to make grades. Waivers of many of these rules are available, including for the progress-toward degree standards. See Student-Athlete Academic Waivers (PTD/Two-Year Transfers), NCAA, http://www.ncaa.org/compliance/waivers/student-athlete-academic-waivers-ptd/two-year-transfers (last visited Feb. 29, 2017).

56. Transferring has become an epidemic, especially in men’s basketball; there, roughly 20% of all freshman players leave their initial school after one year, while about 40% in total are gone by the end of enrollment year two. See Tracking Transfer in Division I Men’s Basketball, NCAA (Nov. 17, 2016, 9:00 AM), http://www.ncaa.org/about/resources/research/tracking-transfer-division-i-mens-basketball; The True “One-and-Done” Problem in Division I Men’s Basketball, NCAA (Apr. 1, 2015, 1:30 PM), http://www.ncaa.org/about/resources/research/true-one-and-done-problem-division-i-mens-basketball/about/resources/research/tracking-transfer-division-i-mens-basketball.

57. Student forfeiture of tuition and fees after lapse of a short interval at the front of an academic term is standard policy among America’s public and pri-
compete during her fourth year, her card balance would be adjusted downward, prorated on the basis of the number of weeks remaining in the season compared to the number of weeks she participated in her sport’s practices and contests. This proration is equitable, considering that when a non-athlete student is injured or becomes ill, and ceases attending class in mid-term, her prepaid tuition and fees frequently are not refunded for any portion of the term remaining.

Stevens may use her debit card for any number of goods and services offered through the school from time to time, subject to changes in variety, until she dies. This means Ms. Stevens can enroll in classes later in life, travel in alumni-travel environments, stay in her school’s campus hotel or eat in its food service facilities, and use other services offered in the student union. A school looking to limit its exposure may implement a program under which the balance on the card, at the election of the former athlete, is redeemable for cash for some fraction of the remainder. If she does not redeem the full balance for cash during her life, she may gift the remainder back to the school as a charitable donation and take the appropriate charitable deduction on her taxes.

B. The Economic Reality

The economics of this financing mechanism may seem head-swimming in complexity given the number of scholarship athletes per year, but consider some basic facts. First, many young athletes are not well-prepared academically for the rigors of college, and without substantial tutoring (one service to be provided) most of the unprepared ones will not last at their initial school for four or five years, the period of their eligibility in a single sport. Second, many self-absorbed young athletes believe that imminent wealth awaits them following the first professional sports draft for which they are
eligible; however, statistically, we know these prospects are minimal. As a result, many college athletes leave school or cease studying after the applicable intercollegiate competition season in anticipation of being chosen in the draft or being signed as free agents. Third, numbers of young athletes are injured during their college careers and, discouraged about their futures in sports, do not complete four years of eligibility at their place of initial matriculation. No one can predict accurately how many athletes will finish their entire eligibility period with their cohort of entering freshman students; but one logically concludes that in the “revenue sports,” primarily football and men’s basketball, many athletes will not receive four or more years of debit card “loading.” If that is true, schools need not panic contemplating the functional equivalent of an “unfunded pension obligations”-debt crisis involving its former athlete population.

IV. RECRUITING AND REWARDING ATHLETES THROUGH SUPERIOR INSTITUTIONAL SERVICES AND GOODS PROVISION

The proposed use of debit card cost of attendance funding has interesting ramifications in recruiting athletes. Schools can compete for elite athletes not just on price and athletic program

59. See, e.g., Estimated Probability of Competing in Professional Athletics, NCAA, http://www.ncaa.org/about/resources/research/estimated-probability-competing-professional-athletics (last updated Apr. 25, 2016). To the end of aiding these athletes, if this program was implemented, the athlete can use his debit card balance to return to his campus to seek more credits or a degree. Cf. Coby McDonald, Back in the Game: Cal Program Helps Former Student-Athletes Graduate, CAL. MAG. (Spring 2015), http://alumni.berkeley.edu/california-magazine/spring-2015-dropouts-and-drop-ins/back-game-cal-program-helps-former-student.

amenities but also by offering a rich catalog of goods and services that adults want—and can provide those services for those students’ lifetimes. Athletes who do not really seek learning, preferring to showcase their talents prior to reaching draft eligibility (age or years following the date of high school leaving), may not be seduced by suites of goods and services, but they can be delivered the message that they are well taken care of prior to the target professional draft. Those athletes who demand cash will matriculate elsewhere—until direct payment compensation systems disappear in the storm brewed by Title IX “agitators.” Ample alternatives for male athletes’ services exist, such as skipping college and playing their sports professionally abroad or in some American “minor league” in the same or a different sport, or playing in the NAIA or at a community college. Consequently, finding a Sherman Act-related contract or conspiracy in restraint of trade is unlikely to occur even if all postsecondary schools participate in this proposed system. Matriculated athletes have no constitutional or common law entitlement to be paid in cash for performing their sports at the postsecondary level. Further, for the vast majority of American postsecondary institutions, there is no sustainable source of funds for cash payments. Andrew Zimbalist, who spends much time thinking about college sports as a professor of economics, finds that the median Division I athletics program loses $11 million a year on an operating basis—and far more than that sum when capital and indirect costs are included in calculating profitability. With state legislatures cutting

61. The belief that these athletes will become well-compensated professionals is pervasive in the college ranks. See NAT’L COLLEGE ATHLETIC ASS’N, supra note 54, at 30 (analyzing responses to the following question: “How likely do you think it is that you will become a professional and/or Olympic athlete in your sport?”).


back appropriations to public universities and student backlash rising against the costs of education, modest annual increases in tuition and fees are not going to create a treasury from which salary checks can be cut.

350 athletic departments in Division I make a profit before including capital expenses; throwing in those capital expenses, the number shrinks by half. See Andrew Zimbalist, Paying College Athletes: Take Two, HUFFINGTON POST: ENT. BLOG (Mar. 28, 2015, 12:17 PM), http://www.huffingtonpost.com/andrew-zimbalist/paying-college-athletes-take-two_b_6961314.html [hereinafter Zimbalist HuffPost] (last updated May 28, 2015). While one might argue that the money should come from the overpaid coaches’ salaries, winning games depends on having competent coaching staffs, which must be compensated according to market dynamics. Zimbalist responds by saying that coaches end up being paid for the economic value of the athletes they help to recruit but this disparity is not quickly or easily repaired by shifting the compensation to the athletes. See Zimbalist HuffPost, supra note 63. Likely additional sums may be freed up from reducing waste and inefficiencies, but Title IX requires roughly equal compensation to college women’s sports scholarship athletes, in this respect: The total amount of assistance awarded to men and women must be substantially proportionate to their respective participation rates in athletic programs. In other words, if 60 percent of an institution’s intercollegiate athletes are male, the total amount of aid going to male athletes should be approximately 60 percent of the financial aid dollars the institution awards. It seems unrealistic to assert that belt-tightening alone will be sufficient to pay men’s football and basketball players. And cash, once paid to the athlete, is likely irretrievable no matter what the proceeds are used for. Dropping all non-revenue men’s sports does not seem to be an answer; nor does cutting back on athletic scholarships to non-revenue sports participants (non-revenue including all women’s sports with one or two infrequent exceptions: basketball and volleyball). Those programs produce most of America’s Olympic athletes in sports other than basketball; and participants in those sports have proven to have substantial leadership potential. Andy Schwarz, a staunch advocate for paying elite college athletes, concedes (understatedly) that “Title IX makes it more expensive to pay male athletes.” Andy Schwarz, Excuses, Not Reasons: 13 Myths About (Not) Paying College Athletes, in JOE NOCERA & BEN STRAUSS, INDENTURED: THE INSIDE STORY OF THE REBELLION AGAINST THE NCAA 301, 335 (2016). Schwarz is convinced that the federal government would not terminate funding to schools that began paying athletes. See id. at 336, although he does not defend this position, other than suggesting schools actually would comply with Title IX strictures more fully—except, of course, in violating wholesale the principle of proportional equality in academic grants in aid. See 34 C.F.R. § 106.37 (c)(1); Haffer v. Temple Univ., 678 F. Supp. 517, 537–38 (E.D. Pa. 1987) (stating that inequitable athletic scholarships violate Title IX if they are administered as part of the university’s financial aid program, which receives federal funding).
A. Familiar Categories of Goods and Services

Without availability of biweekly cash payments, athletes and their schools must innovate in creating opportunities for in-kind compensation using store credit. Of course, debit cards have many conventional applications today on campuses already exploited by most college students. Laundry, food service, dormitory, and other forms of school-branded housing are not novelties in accepting student payment by debit card. Progressive postsecondary schools have travel agency partnerships, managed dormitories, and other services, often operated under a joint venture format. It is not difficult to get some food vendors off campus to agree to accept school debit cards and to have other merchants accept the card for purchases like discounted movie and other attractions’ tickets. At some campuses, a student even can use the debit card as an ATM card to withdraw cash. Schools, therefore, are limited only by their administrators’ imaginations in developing a suite of services and goods students can acquire via applying store credit.

With ingenuity, sports conferences can form medical systems where member university medical schools joint venture with private healthcare providers in the model of an ACO. Signifi-

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65. See, e.g., About the CaseOneCard, Case Western Res. Univ., https://www.case.edu/dining/howtopay/caseonecard/ (noting a single card is usable to pay for textbooks, recreation, photocopies, dining hall, and vending machine food on campus and eating at campus-area restaurants).


67. An ACO, or accountable care organization, is an innovation brought about by the Affordable Care Act. See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010). To a degree, creators of the Affordable Care Act devised the concept “to improve quality and lower costs for Medicare patients, but the concept is expected to spread to others [throughout] the healthcare system.” See John Dorschner, Cheaper, Better Healthcare: Yes, It Is Possible, Miami Herald (Apr. 8, 2013, 7:47 AM), http://www.miamiherald.com/news/local/in-depth/article1948919.html#storylink=cpy. Generally, an ACO is an organization of health care providers that agrees contractually to be
cantly, these organizations can be structured to accommodate athletes and former athletes retired from their college sport through their geriatric years. This is an undertaking that cannot be as easily accountable for the quality, cost, and overall care of enrollees in the traditional fee-for-service program assigned to the organization; providers are paid a lump sum to see and treat a predetermined or at least finite number of patients. See Jenny Gold, Accountable Care Organizations Explained, KAISER HEALTH NEWS (Sept. 14, 2015), http://khn.org/news/aco-accountable-care-organization-faq/. In this proposed higher education marketplace model, an institution’s athletes and former athletes become the patient-population beneficiaries. Current and former athletes are both countable and identifiable. The key is for physicians and other health care professionals to improve health care while lowering costs, partly by inducing professionals to limit duplication of services and exploit the tools of digitalization of medicine. See Dorschner, supra note 67; Gold, supra note 67. ACO formation is designed to improve a multitude of healthcare areas such as: Access to care, early diagnosis, reducing unnecessary testing, lowering treatment costs, promoting health and reducing emergency room visits. (Reducing emergency room visits is an immense issue throughout the healthcare industry because across the United States, about 70% of emergency room visits are deemed unnecessary.) ACO patients are not required to stay “in network,” as has been the case in Health Maintenance Organizations. See Gold, supra note 67. The latter requires referrals to see any doctor beyond a member’s family physician; and that referral must be for a provider within the member’s HMO network. See id. As insurance companies began to ensure compliance with Obamacare, ACO formation was promoted as a centerpiece of coverage reform. See H.E. Frech III et al., Market Power, Transactions Costs, and the Entry of Accountable Care Organizations in Health Care, 47 REV. INDUS. ORG. 167, 168–69 (2015). Insurance companies break their market into various categories and it can vary from company to company. For example, in Arizona, territorial information may be analyzed by city or county. While this may appear to be effective, some provider groups are far too large to qualify as an ACO program because a high physician concentration within a market site reduces costs of informal coordination, which discourages ACO entry into a marketplace. See Frech, supra note 67, at 188.

68. An individual school has student health insurance, but it applies only to currently-enrolled students. With larger numbers of covered individuals, employers like Lowe’s and WalMart Stores, Inc., are able to negotiate “bundled rates” for health coverage, including items such as joint replacements. See Michael Tomsic, Some Firms Save Money by Offering Employees Free Surgery, NPR SHOTS (Apr. 20, 2016, 3:55 PM), http://www.npr.org/sections/health-shots/2016/04/20/474413496/some-firms-save-money-by-offering-employees-free-surgery. There is no reason why the combined purchasing power of schools in an athletic conference could not negotiate such prices with a hospital system. If conferences can negotiate television rights, they can negotiate health services
managed on a per-school basis, as few individual schools have the needed “purchasing power” due to the limited number of currently-enrolled athletes. But on an athletic conference-wide (or wider) basis, individual schools will be able to offer far more sophisticated healthcare services immediately than the “student infirmary” model offerings of two generations past. ACOs may provide an answer because these alliances pass through savings to enrollees and provide a network of stability. When forming an ACO, insurance companies ensure there are no gaps in provider types; accordingly, the ACO network is filled with a variety of specialists and family doctors in order to service the members who belong to the particular coverages for current and former athletes in its participating schools. All that remains is to ensure that those athletes remain enrolled in the plan secured.

For example, Banner Health, a system of twenty-three hospitals and specialized facilities, has integrated the University of Arizona into its ACO network, but the mashup has presented challenges. See Bob Herman, Banner’s ACO, University of Arizona Acquisition Drag Down Bottom Line, MODERN HEALTHCARE (Apr. 4, 2016), http://www.modernhealthcare.com/article/20160404/NEWS/160409955.

To be fair, the NCAA today pays millions for catastrophic insurance premiums that pay seriously injured or disabled former athletes whose medical bills exceed $90,000. See NCAA CATASTROPHIC INJURY INSURANCE PROGRAM BENEFIT SUMMARY FOR THE PERIOD 8/1/16 THROUGH 7/31/18, http://www.ncaa.org/sites/default/files/MC28428_0816_NCAACatastrophicBenefitSummary_20160719.pdf; Jon Solomon, NCAA ADs Consider Pooling Athletes for Cheaper, Better Health Insurance, CBSSPORTS.COM (May 9, 2016), http://www.cbssports.com/collegefootball/writer/jon-solomon/25581803/ncaa-ads-consider-pooling-athletes-for-cheaper-better-health-insurance. Since there is a $90,000 “deductible,” de facto, the NCAA expects member schools to provide insurance that covers the initial $90,000 of athlete expenses. See Solomon, supra note 70. In the Pacific 12 Conference, member schools must pay the medical expenses incurred by scholarship athletes from competition injuries for at least four years after a student leaves (or graduates) from the institution. See Chelsea L. Dixon, When Student-Athletes Get Injured, Who Pays?,oodle (Oct. 7, 2015), https://www.noodle.com/articles/when-student-athletes-get-injured-who-pays134. Oddly, “[s]tudent-athletes who participate in NCAA-sponsored championship events are fully covered by NCAA insurance policies through the Participant Accident Program,” with “first dollar” coverage. Id. Of course, Title IX requires the federally-supported college or university to provide the commensurate number of female athletes (based upon athletics participation fractions) with the same benefit, even though female athletes are not as susceptible to serious injury. See Buzuvis, supra note 1, at 327–28.
network. Doctors are also incentivized to maintain patients’ good health; by having patients complete preventative procedures such as physicals, pap smears, bone density scans, and vaccinations, doctors will get paid bonuses from insurance carriers. The reasoning behind these incentives is that early diagnosis and unnecessary emergency room visits save large insurance companies money. Student-athletes who are part of an ACO would have various kinds of physicians available to them at an affordable cost, which will not strain the budget of the university providing the care. Furthermore, ACO networks for collegiate athletes may assist in early diagnosis and prevention of chronic conditions (such as Repetitive Head Injury Syndrome), as the ACO network is based on preventative care and routine maintenance-style visits. These sorts of visits may disclose matters such as congenital heart defects that could portend tragedy for a college athlete’s life during or following school enrollment.

Another initiative in this line is spearheaded today by the Division IA Athletic Directors’ Association, which attempts to make a contract with Marsh, an insurance brokerage and risk management company, to provide a proposed benefits plan that will include group insurance for athletes. The coverage will provide treatment for athletes through the age of twenty-six, including medical expenses related to sports injuries, without any out of pocket expense to the student or her family.

B. Unconventional Opportunities for Store Credit Application

Athletic conferences until recently had television network contracts for sporadic broadcasts (national game of the week-style)

71. See Gold, supra note 67.
72. See id.
73. See Solomon, supra note 70.
74. See id. (“The benefits plan proposed is based on a trust structure that allows [self-funding] . . . .”). The benefits plan intends to realize better rebates from premiums, thereby generating funds to reinvest into the plan. Id. One wonders if this initiative is being partly animated by the State of California that in 2012 passed legislation, The Student-Athletes Bill of Rights, CAL. EDUC. CODE § 67450 (West 2012), requiring colleges to provide medical care or insurance for athletes involved in sports-related injuries for up to two years after an athlete ceases to enroll at the university or college. See Solomon, supra note 70. This is why Pac-12 schools are required today to cover medical expenses for at least four years after an athlete separates from the member university, whether by graduation or otherwise. See id.
with legacy networks like ABC and CBS Television; today, most conferences have created their own networks or negotiated season-long network packages. The Southeastern Conference (“SEC”) generated $347 million from TV deals with CBS and ESPN during the 2014–15 fiscal year. Nearly $300 million of that total came from ESPN between rights fees and the conference’s share of SEC Network profits, and $34 million per SEC member school’s share was followed by the second-place Big 10 Conference’s haul of $28 million per member school. Revenue pipelines clearly are big business and produce good results for colleges’ and universities’ finances. Entrepreneurial schools can turn the business model of securing conference-shared television revenues to group purchasing of services for athletes, especially those items that generic college students may not require. As stated by Andrew Zimbalist, this would include:

a “benefits package” consisting of: (a) year-round health insurance; (b) lifetime health insurance for injuries related to playing their sport (including concussions, where the athlete may not exhibit obvious symptoms until after college competition); and (c)

75. See Andy Staples, The Future of College Sports Media Rights: How Will Deals Evolve with the Landscape? Punt, Pass & Pork, SPORTS ILLUSTRATED CAMPUS RUSH (Mar. 28, 2016), http://www.campusrush.com/college-sports-media-rights-deals-punt-pass-pork-1692890873.html. The ownership and revenue-sharing arrangements are of three general types: full and shared ownership and profits-sharing only. Id. The SEC network is owned by ESPN, Inc., but the conference receives a percentage of the profits; the Big 10 Conference owns 49% of The Big Ten Network, while the Fox Entertainment Group owns the balance; and the Pac-12 Network is owned entirely by the Pac-12 Conference. See Andy Staples, Wild Success of SEC Network Creating Titanic Two of Conference Finances, SPORTS ILLUSTRATED (May 29, 2015), http://www.si.com/college-football/2015/05/29/sec-network-big-ten-revenue-gap.


77. Id.

78. See supra note 74 and accompanying text.
disability insurance that covers lost income resulting from a compromised professional career.\textsuperscript{79}

It also might include travel services to and from the campus for out of academic year training periods. Group purchasing organizations ("GPO") have partnered with athletic enterprises in the past; for instance, Essensa is the GPO with the American Hockey League.\textsuperscript{80} If the college athletic conference was the party procuring the GPO’s services, it would not be subject to procurement laws and regulations that govern state educational institutions.

Athletes will pay the full cost of their education using their store credit at their actual retail prices based on the annually recalculated full cost-of-attendance for the athlete.\textsuperscript{81} Room, board, and tuition/fees are deducted automatically by auto-pay, a pre-authorized debit by the athlete, at the beginning of each semester once the student has registered for classes and selected his preferred housing accommodation. Student dining facilities and bookstores will deduct from the pending balance by the athlete’s swiping of her card in the checkout lines, as is the case at the student health clinic and the other retail campus opportunities. Athletes will pay for individually tailored strength and fitness training and support from athletic trainers and physical therapists, as well as academic tutoring, services worth thousands of dollars per year to the elite athlete.\textsuperscript{82}

\textsuperscript{79} Zimbalist HuffPost, supra note 63; see Marc Tracy, Insurance Doesn’t Eliminate Risk for Top College Athletes Who Forgo Draft, N.Y. TIMES (May 8, 2015), http://www.nytimes.com/2015/05/09/sports/ncaafootball/insurance-doesnt-eliminate-risk-for-top-college-athletes-who-forgo-draft.html (“Loss-of-value insurance has been available to any college athlete who could afford it, but colleges have just recently begun paying for the premiums out of their student assistance funds . . . .”).


\textsuperscript{81} See supra notes 7–8 and accompanying text.

V. CONCLUSION

Store credit may build institutional loyalty through an athlete engaging with the school over a period of decades. Athletes will learn budgeting beginning in their first year of school—or perhaps will learn to “do without.” Schools will be more transparent in reporting their financial behavior to athletic regulators at the conference and national levels by creating verifiable summaries of debit card balance amounts available to their athletes during each term of their attendance. This system may even help increase athlete persistence to graduation, especially among those who, lacking illusions of professional playing opportunities, seek a degree or other certification from their schools. Even those athletes who desired but cannot pursue playing careers due to chronic injury may have some balance of credit remaining to augment their educations.

Some will argue that this program is too restrictive and that players need cash sums at their disposal, especially athletes who sire or bear children during their school enrollments. If schools are able to meet the athletes’ basic needs for housing, food and beverage, uniforms, books, and other academic and athletic necessaries, many of these resources can be shared with offspring. By contrast, desires for cash to purchase “off-menu” items apart from the suite of goods and services provided by schools to students, using store credit for that purpose, exposes temptations to engage in other realities of college life like drug use, entertainment-club visits, or other off-campus recreational opportunities. Schools should not be sup-

83. See E. Woodrow Eckard, NCAA Athlete Graduation Rates: Less Than Meets the Eye, 24 J. SPORT MGMT. 45, 46 (2010) (concluding that major college football and men’s basketball student-athletes “graduate at rates significantly lower, relative to the general full-time student body, than is commonly believed.”). Graduation Success Rate reports are published by the NCAA, taking certain data from institutional reporting to the U.S. Department of Education. See id. But this reporting resonates with Benjamin Disraeli’s condemnation of “lies, damned lies, and statistics.” MARK TWAIN, MY AUTOBIOGRAPHY: “CHAPTERS” FROM THE NORTH AMERICAN REVIEW 208 (1999).

84. Additionally, calculation of actual cost of attendance under federal education guidelines includes an allowance for anticipated costs of dependent care. See COA Handbook, supra note 7, at 3–18.
porting lifestyles inconsistent with a rational postsecondary academic education mission. This suggestion that cash payments to athletes are optimal especially grates in the current “one and done” sports environment, where athlete persistence to graduation seems progressively less likely.

Others argue that some athletes are exceptional and require special treatment because they are valuable assets to the school as the main source of athletic ticket revenue. There seems to be little

85. See, e.g., Louisville President Resigning Amid Shakeup At Scandal-Plagued School, INDIANAPOLIS BUS. J. (June 17, 2016), http://www.ibj.com/articles/59070-louisville-president-resigning-amid-shakeup-at-scandal-plagued-school (discussing how President James Ramsey is resigning as the President of the University of Louisville and how an NCAA investigation of the school’s basketball program is ongoing, related to allegations that an ex-coach arranged female escorts for players’ entertainment in an athletes’ dorm on the UL campus).

86. See FULKS, supra note 4; see also ONE & DONE/BEN SIMMONS (Showtime 2016), http://www.sho.com/titles/3437256/one-and-done-ben-simmons (following a former LSU basketball player who acknowledges that his attending classes was a waste of time, as was learning study habits and skills, since his true purpose at college was to improve his professional basketball draft position). Alas, while Mr. Simmons was drafted as the first selection in the NBA draft by the Philadelphia 76ers, he was injured seriously during that team’s 2016 preseason play and will miss the entire regular season. Id. His future in the league following his rehabilitation is not guaranteed—a fact that “one and done” athletes are unprepared to process in most instances.

87. See Andrew Zimbalist, Reforms Offer Bigger Payoff than Salaries, SPORTS BUS. J. (May 15, 2000), http://www.sportsbusinessdaily.com/Journal/Issues/2000/05/20000515/No-Topic-Name/Reforms-Offer-Bigger-Payoff-Than-Salaries.aspx?hl=Andrew%20Zimbalist&s=0. But Zimbalist notes that “only five to seven basketball players and ten to fifteen football players” on their own merit generate revenue at their schools above the value of their scholarship; thus, if players were paid a market wage based on their skill exhibited in their positions played, most basketball and football male players would not receive sums equal to the true cost of their attendance. See id.; see also infra note 88. This creates a substantial “pay gap” between those few elite athletes and the “central casting” balance of team members impacting morale and the bonding of team members crucial to successful programs. Not everyone on a team has the natural charisma of Billy Sims, who could joke successfully about his relative prosperity with his Detroit teammates as a new player. See Dave Brady, Sims Keeps Teammates in Stitches and Inspired, WASH. POST (Aug. 5, 1980), https://www.washingtonpost.com/archive/sports/1980/08/05/sims-keeps-teammates-in-stitches-and-inspired/70e96123-c483-4130-841c-dcef4b71a5b0/.
empirical evidence of the fact that, in a team sport, a team’s profitability is attributable to one individual’s performance.\(^8\) Researchers instead have shown some twenty-three discreet determinants, such as promotional efforts, time and season of the contest’s play, winning percentage of the team, ticket prices, alumni affiliation with the school, whether the school sponsors a sports marketing paid position, student enrollment, and the existence of booster clubs factor into the profitability of a sport program’s equation.\(^9\) Sustained winning is vital to fan attendance, although the presence of professional

88. Compare Richard Borghesi, *Play for Pay: The Financial Value of NCAA Football Players* 13 (2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2825281 (arguing that the annual salaries of individual elite football players, in addition to their athletic scholarship, is in the range of $776,000) with Zimbalist, *supra* note 87. Thus, some studies of the “marginal revenue product” of a “draft-quality player” seem fantastical in their value conclusions. See Richard Borghesi, *The Financial and Competitive Value of NCAA Basketball Recruits*, 15 J. SPORTS ECON. 1527002515617510 (Dec. 10, 2015) (positing salaries for basketball recruits at five-star, four-star, and so forth performance levels); Kahn, *supra* note 1, at 211–12 (estimating rents “extracted” from athletes by not paying them); Peter K. Hunsberger & Seth R. Gitter, *What is a Blue Chip Recruit Worth? Estimating the Marginal Revenue Product of College Football Quarterbacks*, 16 J. SPORTS ECON. 664, 664, 672, 682 (2015) (noting that ex ante measurements suggest that expected player value may be closer to value of college scholarships than earlier research suggests because of the inherent uncertainty in predicting which high school quarterbacks will excel in college, even if offensive-side teammate quality bias is removed from analysis; yet other team factors outside of offense may affect the marginal revenue product but have not been accounted for sufficiently in the model for calculating marginal revenue produce (“MRP”)). Accord, Robert Scott Lemons, *Amateurism and College Athletics*, 68–76 (2014), https://economics.stanford.edu/sites/default/files/publications/robertlemonshonorsthesis-may2014.pdf (summarizing many of the recent MRP studies while making the same ex ante observation). A lawsuit in the Northern District of California contends that Division I star football players generate more than $400,000 in MRP annually. See Plaintiff Trial Pleading, Dawson v. Nat’l Collegiate Athletic Ass’n, 2016 WL 5405638, (N.D. Cal. Sept. 26, 2016). Significantly, the number of “draft quality players” in college football, which drafts only about 250 players annually, is miniscule compared to the general collegiate football population. Ross, *supra* note 18, observes that 30,000 men play Division I football and basketball, while about one percent of these players are drafted professionally; these drafted players are not distributed evenly among the collegiate athletes’ population.

89. See Alan Brokaw, George W. Stone & Michael A. Jones, *A Model of the Factors Contributing to Fan Support at Small-College Athletic Events*, SPORT
teams in the same marketplace hurts college contest attendance. The “novelty effects” of new facilities also factor into attendance statistics.

J. (Sept. 1, 2006), http://thesportjournal.org/article/a-model-of-the-factors-contributing-to-fan-support-at-small-college-athletic-events/. In 2011, the University of Arizona’s baseball team generated about $69,000 in ticket sales revenues. Scott Morgan, How Much Money Do College Sports Generate?, ZACKS, http://finance.zacks.com/much-money-college-sports-generate-10346.html. A year later, having ascended to the College World Series the prior spring, the same program generated $350,000 in revenues. Id. Winning is not the only thing, but in postsecondary team sports, it is crucial to an athletic department’s fiscally rising trajectory.

90. See Alex Koenig, What Factors Contribute to Attendance in College Football?, HARVARD SPORTS ANALYSIS COLLECTIVE (Jan. 17, 2011), https://harcardsportsanalysis.wordpress.com/2011/01/17/what-factors-contribute-to-attendance-in-college-football/. When a single individual’s participation putatively is the prime determinant in interest in and revenue generation for a school, sometimes this is dubbed “The Flutie Factor,” named for former Boston College quarterback Doug Flutie (this “factor” has been debunked in recent years). See, e.g., DONNA M. DESROCHERS, ACADEMIC SPENDING VERSUS ATHLETIC SPENDING: WHO WINS? 2, 11 (Jan. 2013), http://www.deltacostproject.org/sites/default/files/products/DeltaCostAIR_AthleticAcademic_Spending_IssueBrief.pdf (noting that a winning team generates some new students and donors, that result comes at a very high price, paid largely by the students’ benefactors); Russ Roberts, The Flutie Factor, CAFÉ HAYEK (Mar. 30, 2006), http://cafehayek.com/2006/03/the_flutie_fact.html. Simply summarized, one athlete conclusively cannot be the source of dramatically increased attendance in any college sport, nor for alumni or donor contributions to an institution. Id. Credit for attendance upward spiking more likely belongs to the recruiting and management skills of a legendary coach such as Paul “Bear” Bryant, John Wooden, or Dale Brown. See Don DeShazier, Dale Brown’s Imprint on LSU Basketball Goes Deeper than Shaq’s, TIMES-PICAYUNE (May 22, 2011, 8:02 AM), http://www.nola.com/lsu/index.ssf/2011/05/dale_browns_imprint_on_lsu_bas.html.

91. See Dennis Coates & Brad R. Humphreys, Novelty Effects of New Facilities on Attendance at Professional Sporting Events, 23 CONTEMP. ECON. POLICY 436 (2005), http://economics.umbc.edu/files/2014/09/wp_03_1011.pdf. This effect explains why franchise owners in the major sports clamor for new facilities paid by taxpayer funds and threaten to relocate to another community willing to indulge their demands should the franchise’s current town fail to deliver a new competition venue. See Bill Slane, Team Owners Starting to Demand New Stadiums Sooner, CRONKITE NEWS ARIZONA PBS (Apr. 29, 2016), http://cronkitenews.azpbs.org/2016/04/29/team-owners-starting-to-demand-new-stadiums-sooner/.
As evidenced by the 2016 Democratic Party Platform, the entire controversy shortly may be mooted by taxpayers affording nearly-free postsecondary education for all America’s public university students— or will it? Will some athletes argue they deserve to earn more than most faculty and all part-time working or stipend-supported students on their campuses, regardless of their respective work responsibilities? Athletes believing they should live in great comfort during their postsecondary stays cannot be satisfied with their compensation unless, perhaps, schools create an open marketplace for athletes’ services with limitless compensation ceilings.

Some may be offended by reference to “store credit,” recalling company towns, many of them engaged in mining and blue collar hard labor, where housing and other amenities sold at the company store were afforded employees of the town, an environment perhaps reminiscent of indentured servitude or inferior social


93. Economist Zimbalist warns against participating in Shubik’s “entrapment game.” See Zimbalist, supra note 12, at 9–10. Consider the absurdity of this hypothetical: One source recommended in 2011 that college athletes receive a stipend increase of $3,222, enough to free athletes from poverty and discourage them from breaking NCAA rules to “make ends meet.” See HUMA & STAUROWSKY, supra note 11, at 4–5. Will the revenue sports athlete be satisfied to make ends meet, when he or she believes himself or herself to be more able, hence more “valuable,” than the worst-paid players making the league’s minimum salary in the NBA or the WNBA? What will sports agents tell them in this regard? Some warn of salary disputes. See, e.g., WATTERSON, supra note 25, at 388. A final consideration here is that since a very-well compensated athlete’s remuneration is directly tied to skill, presumably his compensation will be zero in the event of bad performance, including as a result of disability or protracted injury. Cf. id. Therefore, systems of short- and long-term disability insurance must be implemented in concert with compensation scales.
Should student-athletes instead possess substantial influence over administrations of colleges and universities they attend?


95. See, e.g., Patrick Redford, *The Fight Between Berkeley’s Academics And Its Football Team Is Getting Ugly*, DEADSPIN (Jul. 6, 2016, 10:10 PM), http://deadspin.com/the-fight-between-berkeleys-academics-and-its-football-1783216738 (noting players criticized both journalists at the *San Francisco Chronicle* and UC-Berkeley faculty for their investigation and condemnations of
This notion raises fundamental issues about what underpins the idea of a higher education enterprise in America. Is college merely a “way station” providing shelter and occasional intellectual stimulation, including entertainment, for its “consumers”—or is a college a place of self-reflection, growth, safe(r) experimentation, and improvement? If it is the latter, then is handing cash out to adolescents the optimal vehicle to inculcate adult maturation and self-sufficiency? If not, then paying college athletes more than their actual certain coaches of the Bears’ football team; some players threatened to quit the team if the criticized coaches were disciplined).

96. Once, under the guidance of academics, an undergraduate could become scholarly, learning to think critically, above all. But in today’s consumer-focused society, transformation is sublimated to confirming students as consumers, pushing them toward the “end product” of receiving a degree with little emphasis on the difficulty of the journey itself. See Mike Molesworth et al., Having, Being and Higher Education: The Marketisation of the University and the Transformation of the Student into Consumer, 14 TEACHING IN HIGHER EDUC. 277, 277 (2009). Lamentably, the college athlete’s participation has become just another market procurement exercise for one cost center.

97. The answer here is “no,” not due to an athlete’s native intelligence deficits but to the failure of his or her longer-term judgment—in short, his tendency toward first stage thinking. See Sowell, supra note 15. The sudden acquisition of prosperity, especially among those growing up in economically-deprived circumstances, leads to inrushing demands for nuanced choices about how to deal with “friends” and family members, especially that proverbial “crew from the old neighborhood.” See, e.g., Anwar S. Richardson, Question of Loyalty, TAMPA BAY TIMES (Oct. 21, 2007), http://www.tbo.com/sports/bucs/question-of-loyalty-172482 (updated Mar. 27, 2013, 2:33 AM). Unambiguously stated, these choices are beyond the maturity of too many 18- to 22-year old athletes to expect many successful outcomes. Consider the illustration of former NFL Quarterback Johnny Manziel’s circumstances over the preceding two years. See Leadership Development: 6 Reasons Why Johnny Can’t Lead, BETTERBOSSU (Jan. 23, 2016), http://www.betterbossu.net/leadership-development-6-reasons-why-johnny-cant-lead/ (specifically, items two through four). Moreover, decisions about associates ought not be made while engaging in a time-demanding postsecondary experience. Arguing that athletes’ payment in store credit “is in their best interests” sounds undemocratic, even patronizing, to some, but that doesn’t make the argument less compelling. For many athletes in college today, their lifestyles are the best they’ve enjoyed to that point, even without cash. See B. David Ridpath, Thelin’s Op-Ed on Paying College Athletes Mostly Misses the Mark, FORBES (Mar. 8, 2016, 4:35 PM), http://www.forbes.com/sites/bdavidridpath/2016/03/08/thelins-op-ed-on-paying-college-athletes-mostly-misses-the-mark/print/. Without ready cash, these athletes will have only small retinues of
costs of attendance and sustenance is both absurd and unnecessary—unless, perhaps, the tender is Bitcoin. If the athletes have groupies who “hang” with the athlete to receive gifts or jobs from their “friend.” Those believing that large cash payments to athlete matriculants is a fine idea should see to those athletes’ immediate education in the reality that sycophants, and other negative influences who “hang around,” adversely impact their ability to perform on the field, in the arena and in class—and, therefore, those athletes should separate from their pasts, and quickly, no matter how difficult distancing may be given their historical peer and parental influences. See Richardson, supra note 97. Actor Bryan Cranston neatly recalls the young athlete’s “stardom dilemma” in a 2016 Wall Street Journal interview, reflecting on his own success journey and the current culture of celebrity in the entertainment realm:

If you’re in your late teens and 20s and you find great fame, it’s difficult to navigate . . . to always know what’s the best way to keep a level head about that stuff . . . it’s being able to say, ‘Wow, what a lucky break.’ . . .


98. Bitcoin, a form of tender launched in 2009, is a digital currency existing on a decentralized network of computers neither controlled by a government nor backed by precious metals; the computer platform independently confirms transactions in the currency through block chain technology. See Paul Vigna,
needs addressed in reasonable campus comfort,\textsuperscript{99} without distraction (from things they may want but don’t need),\textsuperscript{100} they can focus more on schoolwork and class attendance where learning occurs. In such an environment, the athletes’ fellow students identify more with elite athletes and their less impressive teammates, resulting in mutually increased enthusiasm for their schools (a jointly-experienced endeavor), a condition preferable to celebrity-worship from afar. This communal opportunity to associate everyday students with athletes is a key distinction between the spirit underlying the “college game” and a professional contest.\textsuperscript{101}


\textsuperscript{99} \textit{See} John Powers, \textit{Paying Stipends to College Athletes Remains a Divisive Issue}, \textit{BOS. GLOBE} (Sept. 2, 2015), https://www.bostonglobe.com/sports/2015/09/01/paying-stipends-college-athletes-remains-divisive-issue/eQV4hEW5A0wbTfw3S1KgKO/story.html. Understanding the difference between what one needs and what one desires is unfamiliar to many youths who are badly taught (if at all) this distinction by adults dialed into consumerism.

\textsuperscript{100} \textit{See, e.g.}, Vivina Vishwanathan, \textit{Indian Banks Seek Artificial Intelligence}, \textit{LIVE MINT} (May 30, 2016, 7:10 PM), http://www.livemint.com/Money/jQEQNXyfLkW1kY5FihFBHM/Indian-banks-seek-artificial-intelligence.html (describing how artificial intelligence operates in such situations). An advantage of implementing a debit card, with a dose of imbedded artificial intelligence in these devices, is that the athletes can be reminded of their obligations to the school; for instance, a message delivered to Ms. Stevens as she tries to withdraw $50 from a nightclub ATM: “Joan, you’re trying to withdraw $50 from your account after Midnight, but your curfew (according to Coach Driver) is 11:00 p.m. Before proceeding, please call Coach Driver at this phone number [at her residence] and confirm it’s fine for you to be withdrawing money now?” Such “virtual assistance” technology in banking is not far away from implementation. \textit{See id.} Those troubled by this \textit{loco parentis} monitoring of her debit card should recall that rules for each athlete’s out-of-competition conduct allow them to be fit to attend class as well as to practice and compete. Another artificial intelligence approach simply could block the card’s usability at one or more times, allowing Coach Driver her rest.

\textsuperscript{101} \textit{See} Eric Sobocinski, \textit{College Athletes: What is Fair Compensation?}, \textit{7 MARQ. SPORTS L.J.} 257, 289 (1996). However clichéd it may sound, displays of
An athlete-payment “imperative” does not guarantee profound, long-term institutional advantages. First, touting a substantial athletes’ payroll at a college is unlikely to result in an increase in admissions applications or alumni giving in the same way that winning college championships does. If paying out cash to participants is the ideal scenario for the athlete, why not acknowledge that the college revenue sports’ programs constitute football and basketball professional “minor league” teams? In this scenario, professional sports leagues should lease college stadia and arenas, assign their selected paid coaches and referees, and otherwise compensate athletes who work for these “development” leagues, sporting the colors of their “farmed-out to” schools—like thoroughbred jockeys wearing stables’ silks—without attending class or otherwise mimicking student behaviors. Professional leagues can allocate youthful athletes as they choose on an annual

genuine school spirit, versus attending a spectacle where fans behave like rabble, are different. See Gregg Doyel, Serious Fan Violence Taking on Life of its Own: Can it be Stopped? CBS SPORTS (Sept. 23, 2014), http://www.cbssports.com/general/writer/gregg-doyel/24722022/serious-fan-violence-taking-on-life-of-its-own-can-it-be-stopped. For Example, the Euro 2016 soccer tournament displayed loutish spectator conduct. See Ian Herbert, Euro 2016: French Police Step in to Stop Local Hooligans’ Attack on England Supporters in Saint Etienne, INDEPENDENT (June 20, 2016), http://www.independent.co.uk/sport/football/international/euro-2016-french-police-step-in-to-prevent-local-hooligans-attack-england-supporters-in-saint-a7091086.html; Euro 2016: The Big Story of Euro 2016 is the Hooligan War in the Streets, N.Y. POST (June 13, 2016, 1:51 PM), http://nypost.com/2016/06/13/english-hooligans-jailed-russian-hooligans-seen-as-paramilitary-mob/. The author recently attended an NFL game, observing that fewer than two minutes elapsed in the contest before the home fans began heaping verbal abuse upon and obscenities at home-team players whose performance was deemed unacceptable. It’s a different spectator reaction when fans will see the players in their classes or at the student union the following week.


basis, see to their physical maturation and strength/speed/coor-
dination development,\textsuperscript{104} determine desired levels of competition among
the participating schools, and extract athletes participating in these
sports from the time-wasting remainder of educational institution
life, such as attending class, reading, or studying. The professional
leagues can bear the appropriate production costs of, and keep all
licensing revenues received from, broadcast networks and from
sales of clothing, drink cozies, and other paraphernalia. University
athletic departments in such event are freed to administer their insti-
tutions’ non-revenue sports, complying fully with Title IX in the
process.\textsuperscript{105} Is the athlete-compensation dilemma resolved employ-
ing this formula to the benefit of all stakeholders engaged in this
conversation?

\textsuperscript{104} See Grenardo, supra note 6 (manuscript at 44).

\textsuperscript{105} It must be said that arguments in favor of, or advancing a solution to,
substantially modifying Title IX are supported by persons largely not paying at-
tention to present political or social climates. Gender discrimination hasn’t dis-
appeared since Title IX was adopted; and equal pay remains a seminal topic in
postsecondary coaching circles. See, e.g., James K. Gentry & Raquel Meyer Al-
exander, \textit{Pay for Women’s Basketball Coaches Lags Far Behind That of Men’s
Coaches}, N.Y. TIMES (Apr. 2, 2012), http://www.ny-times.com/2012/04/03/sports/ncaabasketball/pay-for-womens-basketball-
coaches-lags-far-behind-mens-coaches.html; Dave O’Brien et al., \textit{Pay Equity
Among College Coaches: A Summary Of Case Law Since Stanley And Adminis-
trative Guidance}, 6 WILLAMETTE SPORTS L.J. 29 (2009). This means that the
compensation issue remains on the forefront of Civil Rights enforcement agendas
because the obligation to pay female athletes is born of the application of a civil
rights law. See Buzuvis, supra note 1, at 300. The U.S. Women’s Soccer Team
members’ fight for equal pay keeps parity in gender treatment on the media’s front
burner. See United States Soccer Fed’n v. United States Women’s Nat’l Soccer
Team Players Ass’n, No. 15–3402, 2016 WL 5239838 (7th Cir. Sept. 22, 2016);
Gabriella Levine, \textit{Analysis: The Law and Legal Standing of U.S. Woman’s Na-
tional Team EEOC Complaint, Explained}, EXCELLESPORTS.COM (Apr. 1, 2016),
http://www.excellesports.com/news/analysis-unique-legal-standing-underpin-
ing-u-s-womens-national-team-eioc-complaint/. The federation’s lawsuit
against the players’ association, filed in response to the EEOC complaint, was
dismissed on its second count but survived on its claim that the players anticipa-
torily breached their agreement to perform under a Memorandum of Understan-
ding. See United States Soccer Fed’n v. United States Women’s Nat’l Soccer
Meanwhile, the United States Senate passed a non-binding resolution supporting
the women’s national team. See S. Res. 462, 114th Cong. (2016).
Most consequentially, paying college student-athletes in cash will not curb exploitation of their time by institutions seeking elite sports status at the expense of education. Even tens of thousands of dollars in pay is insufficient compensation to most college athletes, exchanged for compromising their opportunity to receive meaningful postsecondary education. The bizarre twist in this conversation is that paying athletes is just cosmetic redress for the profound ethical bankruptcy of the higher education enterprise when male college athletes play revenue sports. Player payments may relieve institutional guilt, but the current model of athlete education in

During 2014, the NCAA reported that in Divisions I and II, 55% of NCAA college athletic scholarship dollars went to men. See Women’s Sports Foundation, Pay Inequity in Athletics, WOMEN SPORTS FOUNDATION (July 20, 2015), https://www.womenssportsfoundation.org/research/article-and-report/equity-issues/pay-inequity/. Men still represent approximately 54% of all participants in championship sports in Division I during recent academic years. See NAT’L COLLEGiate ATHLETic ASS’N, ERIN IRICK, NCAA SPORTS SPONSORSHIP AND PARTICIPATION RATES REPORT, 1981–82 – 2015–16, 8 (2016), http://www.ncaapublications.com/productdownloads/PR1516.pdf. But men today are the gender minority among postsecondary undergraduate students by numbers enrolled. See NAT’L CTR. FOR EDUC. STAT., THE CONDITION OF EDUCATION: UNDERGRADUATE ENROLLMENT, http://nces.ed.gov/programs/coe/indicator_cha.asp (last updated May 2016) (“In fall 2014, female students made up 56 percent of total undergraduate enrollment at 9.7 million, and male students made up 44 percent at 7.6 million.”). In this environment, Title IX is not going to be radically modified by federal regulators to enable cash payments to elite college-level male athletes since Title IX reflects society’s preference for equality over allowing unconstrained market choices about compensation. See Buzuvis, supra note 1, at 300. It seems unlikely that the first female President of the United States, or (alternatively) a President seeking to avoid allegations of rampant misogyny, will endorse a material change to gender discrimination law in this realm. Nonetheless, even scholars like Professor Grenardo, avoid addressing regulatory impediments to direct cash compensation to male athletes. Grenardo’s lengthy paper contains no references to Title IX or to civil rights implications of paying some but not others among college athletes. See Grenardo, supra note 6. Neither does a recent paper by Professor Roger M. Groves. See Roger M. Groves, A Solution for the Pay for Play Dilemma of College Athletes: A Novel Compensation Structure Tethered to Amateurism and Education, 17 TEXAS REV. ENT. & SPORTS L. 101 (2016).

college revenue sports will not prepare players for lives post-matriculation—for their futures after sports. Paying elite male football and basketball players in college mimics prepaid compensatory damages, justifying universities’ abdications of their responsibilities in higher education. These are obligations embedded in the athlete’s National Letter of Intent and other institutional documents. Abandoning the role of education would be entirely tragic, except that

107. See Brake, supra note 26, at 162. If a reader argues “but paying an athlete a lot while he’s still in school compensates those elite performers,” then the reader isn’t aware of the lack of financial sophistication of young athletes, borne out in the histories of many former professional athletes who blow through substantial fortunes. See, e.g., Adonal Foyle, Winning the Money Game: Lessons Learned from the Financial Foils of Pro Athletes xvi, xix, xxiii (2015) (discussing that more than half of NBA players are insolvent within a few years of retirement; frequently they had never been taught anything about handling personal finances); Maureen Callahan, How Pro Athletes Lose Everything, N.Y. POST (June 14, 2015, 8:31 AM), http://nypost.com/2015/06/14/how-pro-athletes-lose-everything-buying-cars-jewels-and-pet-tigers/. No favor is done by paying the college athlete without an accompanying education in how to manage their assets. See Jon Solomon, The 2016 State of College Basketball: Michigan’s “Jail Food” to Paying Players, CBSSPORTS.COM (Oct. 27, 2016), http://www.cbssports.com/college-basketball/news/state-of-college-basketball-in-2016-experts-have-concerns-on-off-court/ (quoting David Robinson, former NBA star, on colleges assuming responsibility to help players take advantage of access to an education: "I don't think a lot of kids are either being counseled or steered to take advantage of everything that the university has on the table. If we did a better job of that, this whole idea of paying students would be a lot less of an issue."). Ironically, the NCAA recently announced that it would commence disbursing a portion of Division I revenue based upon student-athlete academic achievement (including graduation success rates), starting in the 2019–20 academic year. See Michelle Brutlag Hosick, DI to Distribute Revenue Based on Academics, NCAA (Oct. 27, 2016, 12:36 PM), http://www.ncaa.org/about/resources/media-center/news/di-distribute-revenue-based-academics.

108. See Ross v. Creighton Univ., 957 F.2d 410, 416–17 (7th Cir. 1992) (holding that a contract claim is cognizable if a specific promise was observed in the breach, and documents like college catalogs, bulletins, circulars, and regulations of the institution made available to the enrolled athlete may become a part of a contract in law); Timothy Davis, An Absence of Good Faith: Defining a University's Educational Obligation to Student-Athletes, 28 Hous. L. Rev. 743, 768–75 (1991); Timothy Davis, College Athletics: Testing the Boundaries of Contract and Tort, 29 U.C. Davis L. Rev. 971 981–88 (1996); Derek Quinn Johnson, Note, Educating Misguided Student Athletes: An Application of Contract Theory, 85 Colum. L. Rev. 96, 114 (1985) (asserting that “the financial aid statement, the
complicit athletes who do not attend (or demand) to take advantage of educational opportunities are partly to blame.\textsuperscript{109} Their complicity does not justify the undergraduate education enterprise’s shirking its stated mission to ready youth for life after schooling and to build communities of citizens in the process. An early-childhood education \textit{bon mot} is that “two wrongs don’t make a right”—especially if one perpetrator is comprised of learned faculty, putative stewards of the postsecondary education enterprise,\textsuperscript{110} who know better.

letter of intent, the university bulletin, the general catalogue, and the various brochures and pamphlets, as well as the negotiations between the parties,” manifest the existence of a contract); Michael N. Widener, Note, \textit{Suits by Student-Athletes Against Colleges for Obstructing Educational Opportunity}, 24 ARIZ. L. REV. 467, 468–69 (1982) (reaching same conclusion before Ross v. Creighton University was decided).


\textsuperscript{110} See \textit{SPECIAL COMMITTEE ON ATHLETICS, AM. ASS’N OF Univ. Professors, The Role of the Faculty in the Governance of College Athletics, Conclusion} (Dec. 1989), https://www.aaup.org/report/role-faculty-governance-college-athletics (“[R]esponsibility for the academic welfare of student athletes is not an extracurricular or departmental obligation of a few faculty members and administrators; it is a fundamental responsibility of the faculty as a whole.”). America’s professorate and administrators of postsecondary institutions are well-aware of educational-outcome deficiencies in preparatory education. See, e.g., Juan Williams, \textit{The Scandal of K-12 Education}, WALL ST. J. (July 4, 2016, 7:03 PM) (stating that minority students are disproportionately impacted by education system shortcomings but Anglo students in significant numbers do not perform at grade level, as they are accountable for the training of teachers at K-12 levels). Administrators actually know that ignoring the education of any student is unethical and wrong-headed. See, e.g., PETER A. FRENCH, ETHICS AND COLLEGE SPORTS: ETHICS, SPORTS, AND THE UNIVERSITY 46–50, 93–94, 97–99 (2004); JAMES J. DUDERSTADT, \textit{INTERCOLLEGIATE ATHLETICS AND THE}
The gains of a few well-paid college athletes are less socially consequential than institutionalizing rigorous postsecondary academic training for every athlete enrolled (according to the same rigor metrics as non-athletes); universities should support all athletes by addressing their deficiencies upon entering the academy and shepherding their persistence to graduation.