The Case for Reviving the Four-Year Deal

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The Case for Reviving the Four-Year Deal*

Ray Yasser†

Even the most avid sports fan may well not realize that the modern athletic scholarship is no longer a "four-year deal." A quiet evolution has occurred and the traditional four-year deal has been consigned to the dust bin in the athletic director's office. The modern athletic scholarship is now a one-year deal, renewable at the sole discretion of the university. The hypothesis of this Essay is that a viable antitrust cause of action exists on behalf of a scholarship recipient whose scholarship is not renewed, either because he or she has disappointed the coach or is no longer able to play due to an injury. The antitrust theory posits that NCAA member schools have agreed to limit athletic scholarships to one-year renewable awards and that this agreement is an unreasonable restraint of trade in violation of section 1 of the Sherman Act. The gist of the claim is that a highly recruited athlete would have been able to negotiate for a two-, three-, or four-year deal had the market not been artificially constrained by the illegal agreement. Abundant case law supports the viability of this theory. This Essay fully examines the theory, which, if successful, would fundamentally alter the way business is conducted in big-time intercollegiate athletics.

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* [Editor's Note: On October 15, 2011, Professor Yasser submitted this Essay for publication as part of the Tulane Law Review's Symposium Issue. On October 27, 2011, the NCAA Board of Directors approved a plan to allow for multiyear scholarships, rather than requiring all scholarships to be "one-year renewable contracts." The initiative, which was pushed by NCAA President Mark Emmert, has been met with resistance. On December 27, 2011, more than seventy-five universities expressed their desire to override the multiyear scholarship plan. As of this Essay's publication date, President Emmert's plan has not been approved, meaning athletic scholarships are still "one-year renewable contracts."]

† © 2012 Ray Yasser. Ray Yasser is the lead coauthor of Sports Law: Cases and Materials, a sports law casebook widely used in law schools around the country, and has published widely in the area of sports law. Yasser has served as plaintiffs' counsel in more than seventy Title IX cases, and he has also represented numerous athletes in eligibility disputes. He teaches torts, sports law, and antitrust law at the University of Tulsa, where he has won numerous teaching awards. Most recently, his scholarly focus has been on the possibility of using the courts to reform the NCAA, and he has been actively involved in the effort to reform the BCS to establish a bona fide national playoff in Division I-A football.

Professor Yasser wants to express appreciation for the superb contributions of his research assistant, Josh Mozell. Josh exhaustively researched and then pieced together the largely untold (and unknown) story of how the once commonplace "four-year deal" came to be replaced by athletic scholarships that by rule can only be one year in duration. He also provided yeoman's service in preparing the manuscript and getting those pesky footnotes into shape.

Professor Yasser would also like to thank his long-time faculty assistant and all-purpose enabler Cyndee Jones for all of her kind assistance during the production of this Essay.

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I. INTRODUCTION

The four-year deal is dead.¹ It was quietly killed by the National Collegiate Athletic Association (NCAA), which now mandates that the only permissible athletic scholarship is a one-year deal renewable scholarship at the sole discretion of the school.² The legal premise of this Essay is that the mandate for a one-year deal violates section 1 of the Sherman Act. The policy position taken is that a successful attack upon the “one-year renewable” will be beneficial to the overall health of big time intercollegiate sports.

Part II of the Essay tells the story of how the once customary four-year deal was killed and replaced by the mandatory one-year renewable. Part III lays out the not-so-hypothetical facts of a potential plaintiff—a student-athlete “run off” either because he or she suffered a performance-reducing injury or just simply did not “pan out” as the coaches had hoped.³ In this Part, the student-athlete’s section 1 claim

¹. While I have no empirical research to back this up, my anecdotal observation is that even avid sports fans do not know that the four-year deal has been replaced by the one-year renewable. The NCAA’s killing of the four-year deal was something of a quiet execution; the story is told in Part II, herein.

². The one-year deal is somewhat analogous to the notoriously oppressive but once commonplace option clause in professional baseball. Under the terms of the traditional option clause, which was part of the standard one-year contract used throughout the industry, if the “club” and the “player” could not agree on terms for the subsequent year, the club could exercise its “option” to renew the contract for an additional year, under the same terms and conditions of the previous year (in some incantations, the option year contract reduced the salary). And for years, until ultimately overturned by a famous arbitration decision, Major League Baseball contended that the option clause itself was renewed, thus tying a player to a club in perpetuity at the club’s option (this rather bizarre interpretation constituted the so-called “reserve system”). The demise of this regime is another story. See Flood v. Kuhn, 407 U.S. 258, 291 (1972). Note that the reserve clause was ultimately undone by the Messersmith/McNally arbitration decision affirmed in Kansas City Royals Baseball Corp. v. MLB Players Ass'n, 532 F.2d 615, 631 (8th Cir. 1976).

³. The hypothetical plaintiff that I chose to present is based on the plaintiff in Agnew v. NCAA, a case that was filed as a class action in October of 2010. Complaint, No.
is examined, and a result favorable to the plaintiff is anticipated. Part IV explores the likely consequences of such a finding, concluding that a successful attack on the four-year deal will have positive effects on intercollegiate sports.

II. THE DEATH OF THE FOUR-YEAR DEAL

On Saturday, January 13, 1973, NCAA president Earl Ramer stepped to the podium at the Sixty-Seventh Annual NCAA Convention held in Chicago, Illinois. The first amendment of the day had been handled and he was ready to move to the next. “We move now to consideration of Proposal No. 39, a Constitutional revision proposal concerning the one-year awards.” The stated intent is “[t]o limit financial aid awards to a period of one year.” After Ramer spoke, a short discussion followed. A vote was taken by a show of hands and the amendment was approved. From start to finish the proposal and vote took less than ninety seconds. The banal brevity of the process did not jibe with the significance of the proposal. The customary “four-year deal” was unceremoniously buried, replaced by a one-year renewable, radically altering the landscape of intercollegiate sports to this very day.

3:10-cv-04804-JSW (N.D. Cal. filed Oct. 25, 2010). The hypothetical plaintiff’s biography is presented in Part III as a prelude to the discussion of his case.

4. NCAA, PROCEEDINGS OF THE 67TH ANNUAL CONVENTION 122 (1973) [hereinafter 67TH ANNUAL CONVENTION].

5. Id. at 123. Proposal 39 amended article 3, section 4-(b). The amendment was proposed and approved as follows:

(b) Where a student’s athletic ability is taken into consideration in any degree in awarding him unearned financial aid, such aid shall not be awarded for a period in excess of one academic year, and such aid combined with that received from the following and similar sources may not exceed commonly accepted educational expenses as defined in Section 1-(f) of this article.

Id. at A-20.

6. Id. at A-20.

7. Id. at 123.

8. WALTER BYERS WITH CHARLES HAMMER, UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES 164 (1995). Walter Byers served as the NCAA’s first executive director from 1931 to 1987. He is widely considered the man who brought college athletics into the mainstream. He signed over fifty television contracts with major networks as the NCAA’s basketball tournament became “March Madness.” See Unsportsmanlike Conduct, U. MICH. PRESS, http://www.press.umich.edu/titleDetailDesc.do?id=14486 (last visited Feb. 23, 2012). His book provides an insider’s view of the NCAA and in many parts provides a scathing report about the NCAA’s operation. For the purposes of this Essay, Byers’s book opened the NCAA’s doors and provided unique insight into the operation of the organization.
The saga of the one-year scholarship starts where major college sports began: college football in the late nineteenth century. By the 1890s, football had made its way into the heart of the American sports fan and was second only to Major League Baseball in popularity. The Thanksgiving Day Game, usually pitting Princeton against Yale, was drawing 40,000 people per contest with gate proceeds exceeding $25,000 (over $600,000 in 2010 dollars). Within a matter of years, stadiums with capacity in excess of 50,000 seats were popping up across the country. Harvard spent $300,000 in 1903 to build the nation's first noteworthy stadium. Yale constructed a stadium with 75,000 seats, followed by the University of California at Berkeley with a stadium that holds 76,000. There was money to be made, and schools did not want to miss out on the potential windfall. So, it was not at all surprising that colleges recruited and subsidized players, who may or may not have been interested in being students too.

College football was fiercely competitive in the early days, rugged, violent, and deadly. With brutal formations that encouraged...
high-impact collisions and common practices like gang tackling, the 1905 football season alone saw 18 deaths and 149 serious injuries. In the preceding fifteen years, 312 football players had been killed. In 1905, in the midst of the public's outrage over the game's violence, Theodore Roosevelt's son broke his nose while playing in a freshman football game at Harvard; the President intervened. He called the college athletic leaders from Harvard, Yale, and Princeton to the White House and urged them to reduce the brutality in the game. The result was the formation of the Intercollegiate Athletic Association of the United States (IAAUS), the precursor to the modern NCAA. The new organization's goal was to implement rules to protect the participants from the dangers of play and exploitation. By eliminating dangerous facets of the game like the flying wedge, hurdling, clipping, and spearing, the organization sought to reduce the number of serious injuries.

As a result of Roosevelt's influence, his strong belief in the importance of amateurism became a fundamental principle for the organization. Roosevelt called it a perversion to make athletics an end in life instead of a means and said, "[T]it is a very poor business indeed for a college man to learn nothing but sport." A basic principle was adopted by the NCAA: "No student shall represent a college or university in any intercollegiate game or contest . . . who has at any time received, either directly or indirectly, money, or any other consideration." And the first president of the NCAA said, "This organization wages no war against the professional athlete, but it does

16. See Byers with Hammer, supra note 8, at 38. The 1904 season was even more deadly. Twenty-one players were killed and over two hundred were injured. See Sack & Staurowsky, supra note 12, at 32.
17. See Zimbalist, supra note 10, at 8. From 1890 to 1905, 330 players were killed playing college football.
19. See Byers with Hammer, supra note 8, at 38-39; see also History, NCAA, http://www.ncaa.org/wps/wcm/connect/public/ncaa/about+ncaa/who+we+are/about+ncaa+history (last updated Nov. 8, 2010).
20. History, supra note 19. IAAUS took the present name, NCAA, in 1910.
21. Id.
23. See Byers with Hammer, supra note 8, at 40.
24. Id. at 39.
25. Id. at 40.
object to such a one posing and playing as an amateur." Amatuerism was built solidly into the foundation of the NCAA.

As college football continued to grow in the early twentieth century behind stars like Red Grange and iconic coaches like Knute Rockne, it became increasingly apparent that the ideal of amateurism would be stressed. Successful teams created a revenue base, strong ties to their communities, willing investors, and media coverage. Pressure to succeed increased as colleges and universities came to believe that academic prominence could be achieved on the coattails of a winning football team. To compete and win, colleges openly subsidized college athletes using alumni, boosters, and college officials. In the first few decades of the twentieth century, it was common practice for a booster or alumnus to take an athlete, build a relationship, and help the athlete pay his way through school. Under-the-table compensation took the form of loans that had no expectation of repayment, cash, sham jobs that required little or no work, and preferential treatment when competing for jobs. Additionally, many universities, mainly in the South, instituted outright "athletic scholarships." After three years of researching the subsidization and recruitment of college athletes, the Carnegie Foundation published a

26. Id.
28. See ORIARD, supra note 11, at 129.
29. See SACK, supra note 27, at 68.
30. See SACK & STAUROWSKY, supra note 12, at 31. Sack and Staurowsky describe Notre Dame in 1913 as an unknown Midwestern college. Yet with a victory in that year over Army, Notre Dame was thrust into the national spotlight. Sack and Staurowsky continue that Notre Dame's victories over Harvard and Yale were victories for millions of ethnic working people over their bosses. Id. at 151 n.1. The University is now the second most valuable football program in the nation and has the country's nineteenth highest ranked undergraduate program. See also National University Rankings, USNEWS, http://colleges.usnews.rankingsandreviews.com/best-colleges/rankings/national-universities/page+2 (last visited Feb. 23, 2012); In Pictures: College Football's Most Valuable Teams, FORBES (Dec. 22, 2011, 11:43 AM), http://www.forbes.com/pictures/emdm45el/2-university-of-notre-dame-fighting-irish/#gallerycontent.
31. SACK & STAUROWSKY, supra note 12, at 36-37. Part of the difficulty in enforcing the principles of amateurism at this point was in the fact that college officials, including college presidents, were part of the system of compensation and cover-up.
32. See BYERS WITH HAMMER, supra note 8, at 65.
33. See SACK & STAUROWSKY, supra note 12, at 36-37; see also LAWRENCE, supra note 18, at 33. Some of the benefits to athletes included inflated wages or sham jobs like monitoring how the stadium's grass was growing.
34. SACK & STAUROWSKY, supra note 12, at 41.
landmark report in 1929. Although the NCAA staunchly opposed subsidization (whether it be under the table or in the form of athletic scholarship), the Carnegie report found that subsidization was taking place at 81 of the 112 schools studied.

In the mid-1940s, the so-called Ivy Group schools (Yale, Harvard, and Princeton) attempted to back away from commercialized sports. The schools emphasized their opposition to athletic scholarships and eliminated burgeoning components common to college athletics like spring practice and the endorsement of commercial products by members of the athletic department. The Ivy Group sought to have athletes represent the student body as a whole and aimed to pull college athletics back into the "essential educational mission of the universities." The Big Ten joined the Ivy Group in this attempt to return college athletics to the place Teddy Roosevelt envisioned.

For years a battle waged between the Southern schools, which sanctioned athletic scholarships, and the Northern schools, which opposed compensation for athletes. The South's practice of wide-open financial aid raised the talent level. Better teams yielded financial returns. For this reason, if the NCAA wanted to travel the path back to true amateurism, the Southern conferences were not to follow.

The NCAA's attempt to straddle the line was named the Sanity Code. While gesturing to the North, the NCAA strode South in

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35. See id. at 36. The report, conducted by visiting 130 schools and spending up to six days at each, took three years to complete.

36. Id.

37. Id. at 42, 49. The Ivy Group became the Ivy League Conference in 1956.

38. Id. at 42. This change in the Ivy Group's stance created a wider gulf than there ever had been. The Ivy Group now stood as close to honest amateurism as any had been since before the turn of the century. The Southern conferences, however, came close to embracing professionalism.

39. See id.

40. Id.

41. Id. at 41.

42. Id. at 43.

43. See id. at 45. At the 1949 NCAA National Convention, three Southern conferences engaged in the "Southern Revolt." These conferences had been offering scholarships since the 1930s and were not going to stop. The Southern, Southeastern, and Southwestern conferences met not only to discuss ways to loosen the Sanity Code's restrictions, but also possible secession from the NCAA.

44. ZIMBAUST, supra note 10, at 10. The rule's odd name is derived because it was allegedly the mechanism by which the NCAA would remove those who violated the rules and would return sanity to college sports. Some economists maintain the Sanity Code marks the beginning of the era when the NCAA began to operate like an effective cartel. The colleges joined hands to set rules to limit the price they pay for student-athletes. In this way, they conspired to reduce cost and increase profit.
redefining amateurism. The Sanity Code authorized financial aid based on athletic prowess so schools could recruit and pay tuition for athletes. To insulate itself from claims of “pay-for-play,” the Code required that the aid be tied to financial need, and the amount of aid could not exceed tuition and expenses. Further, recipients were required to meet the schools’ regular entrance requirements and could not be deprived of the aid because of nonparticipation. In creating the Code, neither the North nor the South was fully satisfied. The Ivy Group wanted pure amateurism and the NCAA moved further from it than ever before. The Southern schools wanted unrestrained financial aid practices, but the Code constrained them.

The South continued the fight against limitation on financial aid and in 1950, seven schools, nicknamed the “Seven Sinners,” admitted abuses of the Sanity Code. The schools were identified as flagrant violators of the rules, and NCAA leadership asked for expulsion. To expel, a two-thirds majority was required. With a vote of 111-93, the expulsion failed. The attempted show of strength by the NCAA had weakened its legitimacy and authority. Power over financial aid and recruiting returned to the conferences. In 1951, the Sanity Code was dropped from the NCAA Constitution, and the previous restraints on financial aid vanished along with it. Laissez-faire returned, and each school was free to offer aid as it saw fit. The Southern schools had their victory.

45. See Sack & Staurowsky, supra note 12, at 44.
46. Id.
47. Id.
48. Id; see also Byers with Hammer, supra note 8, at 67. The Code also allowed for some academically qualified athletes to receive aid exceeding the tuition and fees.
49. See Sack & Staurowsky, supra note 12, at 42.
50. See Byers with Hammer, supra note 8, at 53-54.
51. See Lawrence, supra note 18, at 44; see also Byers with Hammer, supra note 8, at 54. The “Seven Sinners” include these schools: University of Maryland, The Citadel, Virginia Military Institute (VMI), Virginia Polytechnic Institute (VPI), Villanova, University of Virginia, and Boston College. Maryland was charged with providing excessive aid to football players. Boston College, Virginia, and Villanova were giving extra financial aid to student-athletes as well. The Citadel, VMI, and VPI were giving athletes room and board in addition to what the Sanity Code allowed: tuition and incidental fees.
52. Dunnavant, supra note 22, at 19.
53. Byers with Hammer, supra note 8, at 54.
54. See Dunnavant, supra note 22, at 18.
55. Id. at 19.
56. Byers with Hammer, supra note 8, at 68; Sack, supra note 27, at 46-47.
57. Sack & Staurowsky, supra note 12, at 47. At this point, each school had total freedom to determine how it wanted to administer aid. The only restriction was that the aid had to come from the school itself.
58. Id. at 46.
However, within just a few years, a new threat on the horizon galvanized the schools under the NCAA. Such courts and state industrial commissions were proposing identifying athletes as employees. This happened when injured football players filed workers’ compensation claims. Courts that considered these cases came to opposite conclusions, but the threat was real. In 1956, as a vehicle to clean up sports and establish “true amateurism,” the NCAA created the four-year athletic scholarship. It paid room, board, tuition, fees, books, and $15 a month for nine months. The NCAA recognized this was payment, but called it amateurism by reasoning that “if a player received only expenses, even though it was more than other students received, he was not being paid to perform.”

To further this idea, the NCAA embarked on a comprehensive public relations campaign to display its commitment to amateurism to the courts and the general public. The term “student-athlete” was created and replaced the words “player” and “athlete” in all the rules and interpretations. The word “club,” commonly used in professional basketball or football, was replaced by “college teams.” Walter Byers, executive director of the NCAA at the time, admitted that the campaign had nothing to do with the noble ideal of amateurism, but rather was about the practical consequences of litigation involving worker’s rights.

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59. See Oriard, supra note 11, at 130.
61. Sack, supra note 27, at 69.
62. See Byers with Hammer, supra note 8, at 70-71. The first claim was filed in 1953 by a University of Denver player named Nemeth who was injured during practice. Univ. of Denver v. Nemeth, 257 P2d 423 (Colo. 1953) (en banc). The second suit was filed by a widow of Ray Dennison. Dennison was killed as the result of a head injury suffered while playing football at Fort Lewis A&M. State Comp. Ins. Fund v. Indus. Comm’n, 314 P2d 288 (Colo. 1957) (en banc).
63. See Byers with Hammer, supra note 8, at 69. Byers felt the threat so real that he called the idea of athletes being described as employees “the dreaded notion.” He recounts the issue of workers’ compensation for players being agonized over behind closed doors.
64. Id. at 72.
65. Id.
66. Id.
67. Sack, supra note 27, at 70.
68. Id.
69. Id.
70. Oriard, supra note 11, at 130.
convenience for the NCAA—it made the whole arrangement "legal." It also set the stage for the dismemberment of the four-year deal.

As the NCAA continued to commit to its version of "amateurism," it simultaneously thwarted economic competition by controlling production costs. Recruiting practices were curbed. Payment to the "student-athletes" was limited to tuition, fees, room and board, books, and $15 a month in "laundry money." The NCAA's scholarship practices amounted to cost-cutting behavior. Throughout the 1960s, the NCAA continued to reduce the costs associated with scholarships. In 1961, the membership passed the Five-Year Rule, which limited the practice of redshirting by cutting off a player's eligibility at five years. After a 1962 study showed that some schools were paying fees in addition to the standard scholarship, the NCAA banned that practice. The NCAA imposed limits on when and how a school could transport an athlete in an attempt to reduce costs. And fearful that an athlete might be overpaid, the NCAA created a rule limiting how a player could be compensated for officiating a game. Each of these rules was designed to restrain competition among member schools and to cut the costs associated with putting on athletic contests.

The demise of the four-year scholarship began at the NCAA convention of 1965, and it, too, was driven at least partially by a desire to cut costs. Earl Sneed, the University of Oklahoma's representative at the convention, expressed frustration with players who quit athletics

71. Id.
72. Id.
73. LAWRENCE, supra note 18, at 56.
74. See id. at 57-59. To limit what was done behind closed doors, and therefore reduce the temptation to engage in prohibited conduct, the NCAA restricted recruiting visits to two days and two nights, prohibited excessive entertainment and transportation of family, and mandated that only the school could administer the recruiting funds.
75. Id. at 60.
76. Id.
77. Id. at 111-12.
78. Id. Prior to this rule, a school could redshirt a player; this would allow the player to practice but not play in games to preserve eligibility. This created an older and more experienced team and a more expensive athletic program.
79. See id. at 112. The study found schools were paying for admission fees, dorm deposits, summer school tuition—and if the athlete was enrolled in ROTC—uniform fees.
80. Id.
81. Id.
82. See id. at 111.
83. See id. at 113-14. Lawrence recounts severe budget pressures mounting from ever-expanding sports programs.
but kept their scholarships.\textsuperscript{84} He came to the NCAA convention floor and proposed a one-year scholarship, which was already the practice in the Big Eight Conference.\textsuperscript{85} Questions of abuse by coaches were raised on the convention floor: Would coaches use the one year as a trial period for athletes, disposing of those who did not make the grade?\textsuperscript{86} Sneed assured his fellow delegates that this rule would not be abused.\textsuperscript{87} Coaches were teachers after all, and if a player gave an honest effort, a coach would not take his scholarship.\textsuperscript{88}

This claim by Sneed was either naïve or disingenuous. It had long been the case that coaches would dispose of "deadwood" through brutal practice schedules.\textsuperscript{89} Charlie Bradshaw, the coach at Kentucky when \textit{Sports Illustrated} profiled him in 1962, ran off fifty-three of his eighty-eight players between spring practice and the first game in September.\textsuperscript{90} Bradshaw was not alone. It was by no means a new problem: Bear Bryant had done the same thing at Kentucky, Texas A&M, and Alabama.\textsuperscript{91} The tactic was viewed as a winning strategy and it spread throughout the South.\textsuperscript{92} According to one account, Coach Bradshaw would fail to inform his players they were entitled to their scholarship, and then he would have them sign a waiver releasing the school from its obligation.\textsuperscript{93} Despite Earl Sneed's assurances and the fact that for all practical purposes coaches like Bradshaw were creating their own one-year scholarship, the proposal at the 1965 convention failed.\textsuperscript{94}

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\begin{itemize}
  \item \textsuperscript{84} \textit{Oriard}, \textit{supra} note 11, at 133.
  \item \textsuperscript{85} \textit{Id.}
  \item \textsuperscript{86} \textit{Id.} at 134.
  \item \textsuperscript{87} \textit{Id.}
  \item \textsuperscript{88} \textit{Id.}
  \item \textsuperscript{90} \textit{Id.}
  \item \textsuperscript{91} \textit{Id.} at 17. Paul "Bear" Bryant was one of the most successful college football coaches in the history of the sport. During his twenty-five-year reign at Alabama, he won six national championships and thirteen conference titles. He was the national coach of the year three times and Southeastern Conference (SEC) coach of the year eight times. He finished his career as the Alabama football coach, but he also coached at Maryland, Kentucky, and Texas A&M before arriving in Tuscaloosa. At the time of his retirement, his 323 wins were the most of all time. \textit{See Bear Bryant, WIKIPEDIA, http://en.wikipedia.org/wiki/Bear_Bryant} (last visited Feb. 23, 2012); \textit{Paul W. Bryant MUSEUM, http://bryantmuseum.com} (last visited Feb. 23, 2012).
  \item \textsuperscript{92} See Sharnik & Creamer, \textit{supra} note 89, at 14.
  \item \textsuperscript{93} \textit{Id.} at 17, 63.
  \item \textsuperscript{94} See \textit{Oriard}, \textit{supra} note 11, at 135-36. The proposal to amend required a two-thirds vote but received only a 131 to 112 majority.
\end{itemize}
But the four-year deal continued to frustrate coaches who found it hard to compete with "deadwood" and scholarships taken by players who quit. The NCAA maintained its stance that a scholarship was for a "scholar," a student first, and not for athletic performance. Moving to a one-year scholarship would threaten this balance and open the doors to more litigation. Nonetheless, David Swank, the new University of Oklahoma representative, made the same proposal in 1967, which passed by a larger majority but failed to receive the required two-thirds.

However, the 1967 convention was noteworthy for other reasons. New interpretations of the rules allowed for the reduction or cancellation of scholarships for nonparticipation and "serious misconduct." Schools could now use more subtle means to "run kids off" without having to resort to the ham-handed approach of Bradshaw and Bryant. Control was slipping away from athletes into the firm grasp of coaches and athletic departments.

Prior to the 1967 convention, the scholarship amendment proposals were about competition, removing "deadwood," and not allowing student-athletes a free ride. When Swank proposed a new interpretation of "serious misconduct" at the 1969 convention, a new rationale drove the request. The 1968 Mexico City games offer the iconic visual of the bowed heads and raised fists of Tommie Smith and John Carlos. In the same year, Muhammad Ali defied the government and avoided the draft. In July of 1968, a powerful article published in *Sports Illustrated*, "The Black Athlete—A Shameful Story," chronicled the black athlete's unrest. College athletics and campuses were by no means immune to the upheaval. From Berkeley

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95. See id. The term "deadwood" refers to a player who is undesirable to the coaching staff but retains a scholarship. Such a player takes up a scholarship that counts against a team's total but is no longer useful to the coach.
96. See id. at 134.
97. See id. The vote was tallied at 136.
98. SACK & STAROWSKY, supra note 12, at 83. Serious misconduct had previously been defined by the university's conduct code as applied to all other students. Now, with the rule change, the athletic department could create its own set of standards. For example, an athlete could be guilty of serious misconduct, and thus a scholarship could be cancelled if he or she did not follow the direction of a coach.
99. See ORIARD, supra note 11, at 135.
100. Id. at 136.
102. Id. at 106.
to Princeton, black athletes were changing sports programs. In 1968, some thirty-seven racially tinged events occurred across the country on predominantly white campuses. More came in 1969 and on larger campuses. Oregon State, Wyoming, Indiana, Washington, and Iowa all made national news with their conflicts in the months following Swank's proposal. Athletes were more willing to challenge coaches and "across the country made life miserable for administrators and support personnel."

In February of 1969, Dee Andros, a highly respected coach at Oregon State University (OSU), told junior linebacker Fred Milton that his beard was against team rules and must be shaved. Andros said that in over twenty years not a single player had defied him, but Fred Milton refused to shave and was kicked off the team. The Black Student Union (BSU) took the matter to the administration. The school's president declined to intervene but asked a school committee to investigate. Angered that the president would not take a stand, the BSU asked that all black students withdraw from school. Classes were boycotted and the faculty and community divided.

By the time the committee ruled that some mustaches would be allowed and that facial hair should only be regulated during the season, more than two-thirds of the school's African-American population had left OSU. During the basketball season, three OSU players sat out the final games in protest. Four black players from the University of Oregon refused to play the game against OSU. Washington, Washington State, and Oregon refused to play against the OSU Beavers.

104. See WIGGINS, supra note 101, at 110.
105. Id.
106. See id.
107. ORIARD, supra note 11, at 137.
108. WIGGINS, supra note 101, at 110.
110. Id.
111. See ORIARD, supra note 11, at 94. Oregon State's president had the Committee on Minority Affairs investigate the issue.
112. Id.
113. Id.
114. Id. at 93, 97-102 (describing the divided response of the area newspapers and community members).
115. Id. at 94.
116. Id. at 96.
118. Id.
Disturbances continued throughout the summer, dividing campuses and communities. At the University of Wyoming, the Black Student Alliance announced a demonstration against Brigham Young University. Coach Lloyd Eaton told one of his captains, Joe Williams, a black player, that anyone who wore an armband for the game would be kicked off the squad. The next day, when fourteen Wyoming players walked into coach Lloyd Eaton’s office and asked to wear armbands, Eaton refused to let them speak and dismissed them from the team. Neither side backed down and the community outside of the football team was divided. The president and alumni aligned themselves with Eaton, while the student and faculty senate aligned with the players. Seven of the faculty members threatened to resign if the players were not reinstated. The local media was solidly in the coach’s corner, but when the student newspaper’s editor spoke out against Eaton, he resigned, citing the wishes of the student body.

Confrontations continued throughout the year. At Indiana, fourteen black players boycotted practice. Black faculty and staff called for an investigation of football coach John Pont’s actions, and black members of the marching band and cheerleading squad boycotted the game against Iowa. The booster club gave Pont a standing ovation and local papers were divided on the appropriate response. Jim Owens of Washington suspended four players for unsatisfactory answers to questions he asked about commitment to the football program. Protests were ignited in Seattle, and the administration forced Owens to reconsider his decision. Owens reinstated three of the players.

119. ORIARD, supra note 11, at 104.
120. Id.
121. Id.
122. Id. at 105.
123. Id. at 106.
124. Id.
125. Id. at 107-08.
126. Id. at 111.
127. Id.
128. Id. at 111-12.
129. Id. at 104.
130. Id. at 114.
131. Id.
Racially tinged conflicts emerged at Iowa, Maryland, and San Francisco State. Disturbances arose at Michigan State University, the University of Oklahoma, the University of Texas at El Paso, and the University of Kansas, among others.

Coaches and administrators quit at an alarming rate, and at the time Sports Illustrated's "The Desperate Coach" was written, there were seventy vacant university presidencies. The article quoted Steve Belko of Oregon: "This is the worst thing that has ever happened. . . . We are facing the greatest crisis in sports history [and] nobody seems to realize how critical this situation is."

With this climate to consider, David Swank proposed the new interpretation of "serious misconduct" at the 1969 NCAA convention. Approval would grant athletic departments the power to create their own rules and dismiss whomever they pleased for whatever reason they pleased. Immediately questions were posed about the impact this interpretation would have on black athletes. Swank responded that the faculty committees would protect the black athletes from any improper treatment. Fear of abuse was a concern, but the fear of the loss of control over athletes was greater, and the latter won the day. The measure passed. What was the result? "[W]e don't have to put up with troublemakers anymore," said Ray Graves, the head football coach at Florida.

Graves's assessment was correct. The standard was no longer the university's definition of serious misconduct that applied to all students, but now included disobedience of "established athletic

132. Underwood, supra note 117, at 68.
133. Wiggins, supra note 101, at 110.
134. Underwood, supra note 117, at 68.
135. Id. at 70.
136. NCAA, PROCEEDINGS OF THE 63RD ANNUAL CONVENTION 99-105 (1969). Extensive discussion was conducted on the floor on the proposed new interpretation. C.D. Henry, from Grambling College, a historically black institution, was the first to follow David Swank. He spoke eloquently on the difficulties he and those he knew faced during his collegiate career. Acknowledging the times were different, he contended African-American athletes were still living in a predominantly white world and faced special challenges. He was concerned that black athletes would be too easily excluded. Swank countered that the NCAA council would be the safety net for abuses. Tuskegee Institute's representative also questioned the policy, and the debate continued with nine additional speakers. In the end, Swank's proposal passed 181 to 86.
137. See Oriard, supra note 11, at 137.
138. Id.
139. Id. Swank's proposal passed 167 to 79.
department policies and rules. At their own discretion, coaches and athletic departments could strip a player of his scholarship. "Serious misconduct" was whatever the coach wanted it to be. The pendulum of control swung further in the direction of coaches and athletic departments. They no longer had to worry about protest or racial discontent; they had "almost total control over athletes' behavior both on and off the court and playing field."

The NCAA's commitment to amateurism and the four-year deal had given the student-athlete a modicum of control. He was free to sign on and then walk away. He was free to defy the coach. He was able to grow a beard, oppose racism by protest, and wear a wristband in solidarity with teammates. In January of 1973, institutions and coaches asserted their authority by doing away with the four-year deal. On that Saturday morning in Chicago, a show of hands approved proposal number thirty-nine and the four-year scholarship was reduced to one. Control in college sports shifted dramatically to athletic departments and coaches, and away from athletes, who were now clearly being paid to play, with their performance reviewed annually by their bosses.

The current NCAA rule mandates that athletic scholarships be awarded for no more than one academic year. The scholarship covers the cost of tuition, fees, room, board, and books. The National Letter of Intent commits the athlete to a full four years and makes it difficult to transfer. The school, however, may revoke the

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141. *Id.* (quoting NCAA Const. of 1969, art. III, § 1 official interpretation 2).
142. *Sack & Staubowsky, supra* note 12, at 83.
144. *See Oriard, supra* note 11, at 139-40.
145. *See 67th Annual Convention, supra* note 4, at 123. The proceeding itself was only noteworthy because of its length. The change was monumental, doing away with four-year scholarships, and yet only two men spoke (compared to the twelve who spoke during 1969 proceedings to change the interpretation of "serious misconduct"), and only eleven lines are taken in the convention proceedings book. Quietly, the change had been made.
146. *NCAA, 2010-11 NCAA Division I Manual,* art. 15.3.3, at 203 (2010), available at http://www.ncaapublications.com/p-4180-2010-2011-ncaa-division-i-manual.aspx [hereinafter NCAA Div. I MANUAL]. Although four exceptions exist to the rule that the scholarship be no less than a year, interestingly there are no exceptions to the rule that it shall not be for more than a year.
147. *See id.* art. 15.2.1-3, at 196-98 (explaining each component of the three financial aid prongs: tuition and fees, room and board, and books).
148. *See id.* art. 14.5, at 175-84. The so-called antitransfer rules pose formidable obstacles for student-athletes who seek to transfer. Being forced to ask first for a release risks losing eligibility; the rules contain numerous traps for the unwary. It is not entirely clear that these rules are legally defensible, but a full-blown discussion of their legality is best left to another day.
scholarship immediately and at any time for fraudulent misrepresentation, serious misconduct, voluntary withdrawal from a sport for personal reasons, or if the athlete is rendered ineligible for competition. There are some protections against a revocation before the one-year renewable has expired, but once the full academic year is completed, the school has the power to retain or discard athletes as it pleases. An athlete who is injured or falls ill, one who does not play well enough or is replaced by a superior recruit, or one who simply does not fit the school’s model because of a coaching change or a “bad attitude” may be released from the team and stripped of a scholarship without further justification. The transition to the one-year renewable was in a sense a cost-cutting measure by the NCAA. No longer would a school be forced to waste a scholarship on a player it did not want around. The school’s only obligation to an athlete who gives his or her blood, sweat, and tears is to notify promptly the athlete of the nonrenewal decision and of the athlete’s right to appeal.

The scholarship was instituted in 1956 to shield the NCAA from potential litigation and claims of professionalism. The NCAA wedded its scholarship system to an amateurism ideal. But the amateurism model gave the athletes immense freedom to act as they desired, and in some cases, not act at all. The NCAA’s response—as we have seen—was a quiet morphing from the four-year “full-ride” to the one-year renewable. Although the one-year deal has also been cloaked in the garb of amateurism, the stage is set for an antitrust attack based upon section 1 of the Sherman Act.

III. BOOMER’S CASE

A. All About Boomer

The plaintiff Boomer Suner enrolled at the University of Oklahoma (OU) on an athletic scholarship two years ago. Prior to

149. See id. art. 15.3.4.2, at 204 (explaining the reduction or cancellation policy).
150. See id. art. 15.3.5, at 205 (explaining scholarship renewal process). The NCAA does prohibit a school from reducing or cancelling a scholarship during the period of the award (the academic school year) on the basis of athletic ability, illness, injury, a mental condition, or any other athletics reason. Id. art. 15.3.4.3, at 204.
151. See ORIARD, supra note 11, at 141.
152. NCAA DIV. 1 MANUAL, supra note 146, art. 15.3.5.1, at 205. The NCAA requires that the institution decide on renewals by July 1 for the following semester and notify promptly in writing each athlete affected.
153. The Boomer Suner character is loosely based on the real Joe Agnew, whose lawsuit provided the impetus for this Essay. See Complaint, supra note 3. Though the case was filed in the Northern District of California, the NCAA succeeded in getting the case
enrolling at OU, Boomer was a highly sought-after high school quarterback at Booker T. Washington High School in Tulsa, Oklahoma, having garnered all-state honors and being named Oklahoma State Player of the Year by both major newspapers in the state. As a four-year starter at Booker T. Washington, he led his team to state championships in both his junior and senior years. Boomer’s stellar academic record made him a particularly attractive recruit. He had grades and standardized test scores that placed him in the upper echelon of college applicants generally. Boomer received scholarship offers from Stanford, Vanderbilt, Baylor, the University of Tulsa, and OU before settling on OU.

Boomer’s freshman year at OU did not go well. While he was able to earn his way into the starting lineup midway through the season, he suffered a severe concussion in only his second game. Upon the advice of his personal physician, he did not play the rest of the year, although OU’s team physician cleared him to play a week before OU’s bowl game in early January. OU renewed his scholarship for his sophomore year, but again, acting on the advice of his physician, Boomer decided that his football playing days were over. At the conclusion of Boomer’s sophomore year, OU informed him that his scholarship would not be renewed. Boomer exhausted OU’s internal appeal process, and the decision not to renew his scholarship was affirmed. He now brings this section 1 antitrust lawsuit.

B. The Threshold Issue: Is the NCAA Vulnerable to This Section 1 Attack?

The gist of Boomer’s antitrust claim is that the market in which he sought to participate was unreasonably restrained by the “one-year-only” mandate. Boomer alleges that in an openly competitive market, he would have been able to negotiate for and receive a significantly
better deal than the one-year renewable. Given his position in the marketplace, Boomer contends that in an unconstrained market he would have been in a position to secure a two-, three-, four-, or perhaps even a five-year deal with injury protection. The fact that he did not receive a multiyear athletic scholarship is directly attributable to the NCAA rule prohibiting its member schools from offering any deal more favorable to market participants like Boomer.

In a section 1 case, the threshold issue is whether the defendant has entered into a “contract, combination . . . or conspiracy, in restraint of trade.” This is the so-called “duality” requirement imposed upon plaintiffs in section 1 cases. From the defense perspective, a defendant that is a “single entity” is off the hook—a single business entity acting on its own is invulnerable to section 1 attack because it has not entered into a contract, combination, or conspiracy with anyone.

So the question is whether the NCAA rule mandating one-year deals only is “concerted action” or the act of a “single entity.” According to the United States Supreme Court’s most recent guidance on this issue in a sports context, the meaning of “contract, combination . . . or conspiracy” in section 1 of the Sherman Act turns on the “‘basic distinction’ in the Sherman Act ‘between concerted and independent action.’” Concerted action threatens free markets because it “‘deprives the marketplace of the independent centers of decisionmaking.’” In American Needle, Inc. v. NFL, the Supreme Court held that the NFL’s conduct relating to the licensing of intellectual property (licensing for hats, of all things) constituted concerted action. In other words, the NFL was treated as thirty-two separate business entities for section 1 purposes insofar as their marketing of intellectual property rights was concerned.

Interestingly, the NCAA filed an amicus brief in American Needle, siding with the NFL on the single-entity defense theory. It should have known better. In its own landmark antitrust case, NCAA v. Board of Regents of the University of Oklahoma (the so-called television rights case), the NCAA learned that it is vulnerable to a section 1 attack. And modern case law in the interim has supported the view that, at least insofar as the threshold determination is

156. Id. at 2211 (quoting Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 769 (1984)).
157. Id. at 2215.
concerned, the NCAA will not prevail on the single-entity defense. Quite simply, there is little disputing the fact that for section 1 purposes, NCAA rules reflect the concerted actions of its member schools, which effectively include over 1000 colleges and universities that play intercollegiate sports. Each member school is an “independent center of decisionmaking.” The NCAA mandate that athletic scholarships must all come in the form of a one-year renewable constitutes the concerted action of its scholarship-granting members.

Now this is not to say that Boomer’s case is by any means over. It is just that he is very highly likely to get past the threshold of showing a “contract, combination ... or conspiracy.” The next order of business is to show that Boomer has standing as an antitrust plaintiff in a section 1 suit.

C. Boomer’s Standing as a Plaintiff

The oft-repeated nostrum is that to state a claim under the Sherman Act, the plaintiff must show injury to “competition.” The Act, crafted for the business world, requires that plaintiffs demonstrate commercial injury to themselves along with injury to consumers in the marketplace. According to the 1955 Report of the Attorney General’s National Committee To Study the Antitrust Laws: “The general objective of the antitrust laws is promotion of competition in open markets. This policy is a primary feature of private enterprise. Most Americans have long recognized that [the] opportunity for ... market rivalry [is a] basic tenet[] of our faith in competition as a form of economic organization.” The Sherman Act is the Magna Carta of free enterprise. Is Boomer the type of plaintiff the Sherman Act is designed to protect? Has he shown that he has suffered harm in the marketplace along with other consumers?

The relevant marketplace to consider here is the market for the opportunity to pursue a bachelor’s degree while playing an intercollegiate sport. Boomer has suffered economic harm as a direct

161. See, e.g., Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1434 (9th Cir. 1995).
162. ATTORNEY GENERAL’S NAT’L COMM. TO STUDY THE ANTITRUST LAWS 1 (1955) (footnote omitted).
result of his inability to bargain about the overall cost of his attendance with the degree-granting institution that recruited him. In order to make the call on whether a given restraint is unlawful, courts generally ask the plaintiff to define a "relevant market"; this market determination necessitates an inquiry into both the "product market" and the "geographic market." "Product" in the term "product market" is not some magic antitrust incantation—it is simply a way of saying that if a service or thing is exchanged in "transactions that are commercial in nature," a relevant market is shown. The opportunity to pursue a bachelor's degree while participating in an intercollegiate sport is the product or service here. The sale of this product or service brings the transaction within the ambit of the antitrust laws. As the United States Court of Appeals for the Third Circuit in United States v. Brown University observed: "The exchange of money for services . . . is a quintessential commercial transaction. . . . Therefore, the payment of tuition in return for educational services constitutes commerce." In Boomer's case, and for other student-athletes similarly situated, the NCAA and its member schools are restraining competition in connection with this transaction. The opportunity to pursue a bachelor's degree while playing an intercollegiate sport is a distinct product. The geographic market is the United States. While there is indeed an educational component to all this, it is still "commerce" within the meaning of the Sherman Act.

If not for the rule barring multiyear athletic scholarships, coming out of high school, Boomer surely was in a position to negotiate for and secure a tuition discount better than the one he received. It is clear that Boomer was situated to get a multiyear discount, given how heavily he was recruited. In antitrust parlance, the NCAA and its members conspired to maintain the price of the opportunity they were providing for high-achieving athletic applicants by agreeing never to offer multiyear athletic scholarships. In an unconstrained market, member schools would compete with one another by offering athletic scholarships of different (and often longer) duration. As a result of this "contract, combination . . . or conspiracy, in restraint of trade," student-athletes overpay for the opportunity, while the member schools are unjustly enriched. After all, athletic scholarships bring substantial

165. Id.
166. Id. at 665.
167. Id. at 666.
collateral benefits to member schools through the enhanced publicity, ticket sales, licensing revenue, increased donations, and television dollars. It is not for nothing that schools conduct recruiting wars. The NCAA and its member schools are engaged in a highly commercialized venture when they sponsor intercollegiate sports. The NCAA and its member schools restrain the market by fixing its costs on the backs of a substantial group of consumers: student-athletes.

Still, this does not yet mean that Boomer will succeed in his section 1 claim. But it is clear that he has standing and that the NCAA is at least vulnerable to a section 1 attack. But what about the substance of the actual restraint; can it withstand antitrust scrutiny under section 1?

D. Is the Alleged Restraint Illegal Under Section 1?

1. Is It a Per Se Violation?

Case law interpreting section 1 makes it abundantly clear that price fixing is both abhorrent and liberally defined. In United States v. Trenton Potteries Co., Justice Stone stated:

The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow. Once established, it may be maintained unchanged because of the absence of competition secured by the agreement for a price reasonable when fixed. Agreements which create such potential power may well be held to be in themselves

169. The television deal in 2011 between the Pacific 12 Conference, ESPN, and Fox is a good example of the enhanced publicity and dollars brought in by athletic scholarships. In the spring of 2011, Fox and ESPN contracted to a twelve-year, nearly $3 billion television deal with the Pacific 12 Conference. The networks will annually televise forty-four football games and sixty-eight basketball games nationally. The revenue will be shared equally by the twelve schools who will receive $21 million each year. See Diane Pucin, Pac-12 To Feast on New TV Deal, LATIMES (May 4, 2011), http://articles.latimes.com/2011/may/04/sports/la-sp-pac-10-fox-espn-20110504.

unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed and without . . . the burden of ascertaining from day to day whether it has become unreasonable through the mere variation of economic conditions.\textsuperscript{170}

And in \textit{United States v. Socony-Vacuum Oil Co.}, Justice Douglas cited \textit{Trenton Potteries} and went further:

But the thrust of the rule is deeper and reaches more than monopoly power. Any combination which tampers with price structures is engaged in an unlawful activity. Even though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces. The Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference.\textsuperscript{171}

Abundant case law supports the view that \textquotedblleft\textit{Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate commerce is illegal per se.\textsuperscript{172}}\textquotedblright

The policy justification for this harsh treatment of any kind of price-fixing scheme was described in \textit{Northern Pacific Railway Co. v. United States}:

However, there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of per se unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken.\textsuperscript{173}

So, the rule of per se illegality furthers basic antitrust goals by promoting business certainty in the interest of judicial economy.

\begin{quote}
\textsuperscript{170} 273 U.S. 392, 397-98 (1927).
\textsuperscript{171} United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 221 (1940).
\textsuperscript{172} \textit{Id} at 223.
\textsuperscript{173} 356 U.S. 1, 5 (1958).
\end{quote}
The question, then, in Boomer's case is whether the NCAA's ban on multiyear athletic scholarships fits with the broad definition of price-fixing, worthy of condemnation as a per se violation. If the product market is the opportunity to pursue a bachelor's degree while playing an intercollegiate sport, can it not be said that the conspiracy "tampers" with the price structure? The fact that this tampering does not affect all consumers (just the recruited athletes) would not get the NCAA conspirators off the hook. In price-fixing cases, it is clear from the previously cited cases that the plaintiff need not show harm to all the participants in the market to make a case. Courts routinely find that harm to competition can be demonstrated without showing harm to each and every consumer in the marketplace. Boomer is a consumer and there are many others like him. As a result of the conspiracy manifested by the NCAA rule against multiyear scholarships, student-athletes pay more for the opportunity than they would pay in an unrestrained market. A reasonably good case can be made that the NCAA is guilty of a classic per se violation.

The odds are, however, that even though the case for per se violation is solid, the courts will evaluate the NCAA mandate under the rule of reason. Both the sports cases and the pervasive trend in antitrust jurisprudence support this conclusion. In Board of Regents, the Supreme Court elucidated the rationale for the rule-of-reason treatment in sports cases even in a situation where price fixing was implicated (the NCAA had through its elaborate television plan both fixed prices and limited output). Although the Court ultimately condemned the plan, it did acknowledge that the proper mode of analysis was the rule of reason and not a per se approach:

Horizontal price fixing and output limitation are ordinarily condemned as a matter of law under an "illegal per se" approach because the probability that these practices are anticompetitive is so high; a per se rule is applied when "the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output." In such circumstances a restraint is presumed unreasonable without inquiry into the particular market context in which it is found. Nevertheless, we have decided that it would be inappropriate to apply a per se rule to this case.

174. See id.; Socony-Vacuum Oil, 310 U.S. at 221; Trenton Potteries, 273 U.S. at 397-98.
176. Id. (citation omitted) (quoting Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 19-20 (1979)).
The Court went on to explain that one reason for not applying a per se rule is that the Court lacks judicial experience with the particular type of arrangement. But the overriding reason for not applying the per se rule to sports law cases is that the sports business is a unique business enterprise: "[W]hat is critical is that this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all." The Court waxed eloquently about the nature of the sports business, and of amateur sports in particular:

What the NCAA and its member institutions market in this case is competition itself—contests between competing institutions. Of course, this would be completely ineffective if there were no rules on which the competitors agreed to create and define the competition to be marketed. A myriad of rules affecting such matters as the size of the field, the number of players on a team, and the extent to which physical violence is to be encouraged or proscribed, all must be agreed upon, and all restrain the manner in which institutions compete. . . . And the integrity of the "product" cannot be preserved except by mutual agreement . . . .

The Court's conclusion was that NCAA-imposed restraints are better suited to a rule-of-reason analysis. So the final question in Boomer's case, then, is whether the NCAA rule prohibiting multiyear athletic scholarships is a reasonable restraint under the rule of reason. Under the analysis, the critical criterion to be used in assessing the legality of a restraint is its impact on competition.

2. Does the Restraint Pass Muster Under the Rule of Reason?

The classic formulation of the rule-of-reason analysis harkens back to Justice Brandeis's opinion in Board of Trade of Chicago v. United States:

Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was applied. 

177. *Id.*
178. *Id.* at 101.
179. *Id.* at 101-02.
180. *Id.* at 103.
imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences. ¹⁸¹

The modern articulation of the rule-of-reason analysis, jettisoning much of the elegance of the Brandeis formulation, adopts a nuanced balancing test that weighs the anticompetitive effects of the restraint against its procompetitive justifications. ¹⁸² The purpose of the analysis is to facilitate a court's ability to form a judgment about the competitive significance of the restraint. ¹⁸³ This is all because the Sherman Act reflects a strong national policy that business competition is desirable as "[t]he heart of our national economic policy long has been faith in the value of competition." ¹⁸⁴ Unnecessary harm to free and robust business competition is the harm to be avoided.

So how does the one-year-only restraint fare under the rule-of-reason analysis?

There can be no doubt that the challenged restriction limits the ability of NCAA member schools to negotiate and enter into scholarship arrangements of their own choosing. In fact, had the restraint not arisen in a sports context, it likely would be condemned as a matter of law under an "illegal per se" approach. The anticompetitive consequences of this regulation are obvious and apparent. Student-athletes and schools are entirely prevented from entering into pricing agreements which both parties might prefer. This interference with the setting of price by free market forces is strongly disfavored by well-established antitrust doctrine. ¹⁸⁵ It is not in the least chimerical to suggest that a significant number of member schools would choose to alter the price of the opportunity being sold by offering multiyear scholarships in order to compete more effectively for talented players against schools that choose to offer only one-year deals. And the ability of a student-athlete to negotiate for more than a one-year deal is entirely thwarted by the one-year-only mandate. As a factual matter, the NCAA's market power is evident. Their member schools are

¹⁸¹. 246 U.S. 231, 238 (1918).
¹⁸². Bd. of Regents, 468 U.S. at 103.
clearly engaged in “transactions that are commercial in nature” when it comes to offering for sale the opportunity for a student-athlete to pursue a bachelor’s degree while playing a sport intercollegiately.\(^{166}\)

What are the NCAA’s procompetitive justifications for the one-year-only mandate? Under this prong of the rule-of-reason analysis, the NCAA must demonstrate that its prohibition on multiyear athletic scholarships has procompetitive effects that outweigh the anticompetitive ones.

Given the history of the NCAA as an antitrust defendant, the organization will likely attempt to justify the restraint by arguing that the one-year-only mandate preserves amateurism and helps to maintain competitive balance. These two justifications have been offered up in just about every antitrust case in which the NCAA has been a defendant.\(^{187}\) However, it does appear that the NCAA has learned that any justification based on cost reduction is not a valid procompetitive justification in a section 1 case.\(^{188}\)

Can it be fairly argued that the one-year-only rule helps to maintain amateurism? As noted earlier, the NCAA had for many years maintained its amateur system under a regime where four-year scholarships were the norm. In fact, it might be observed that the previous regime represented something of a “heyday” for amateurism. The lifting of the limitation would appear to have no effect whatsoever on amateurism; student-athletes would continue to receive no wages in connection with their playing of a sport. Amateurism as we know it is entirely consistent with athletic scholarships of longer duration. In fact, the NCAA acknowledges:

The idea of a five-year scholarship reflects the fact that college scholarships are fundamentally academic, even if the merit basis is sports skill. Under the current structure of athletics scholarships, athletes may be legitimately concerned that their continued access to


\(^{187}\) Bd. of Regents, 468 U.S. at 96.

\(^{188}\) In Law v. NCAA, the NCAA sought to justify its rule restricting compensation for certain coaches by arguing that it would reduce costs. The United States Court of Appeals for the Tenth Circuit made it clear that in the context of section 1, the cost reduction was unavailing:

[C]ost-cutting by itself is not a valid procompetitive justification. If it were, any group of competing buyers could agree on maximum prices. Lower prices cannot justify a cartel's control of prices . . . . [C]ost savings have not qualified as a defense under the antitrust laws. . . . We are dubious that the goal of cost reductions can serve as a legally sufficient justification . . . .

134 F.3d 1010, 1022-23 (10th Cir. 1998).
education depends on sports success. This can create a conflict of incentives that may lead to an emphasis on athletics at the cost of academics. 189

Rather than protecting and fostering amateurism, the NCAA's one-year-only mandate serves to reduce costs and to provide an increased level of control that coaches and athletic departments have over athletes. To say that the mandate fosters and protects amateurism is a conjured-up rationale with no basis in fact. As the Court observed in In re NCAA I-A Walk-On Football Players Litigation, "[T]he NCAA's attempt to frame this case as challenging . . . amateurism . . . is a mis-characterization of the issues raised..."

Can it be fairly argued that the one-year-only mandate helps to promote competitive balance? As Justice Brandeis so presciently observed:

To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. 191 The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. 192

Once again, it should be noted that prior to 1973, multiyear athletic scholarships were the norm. Moreover, the impetus for the change to the one-year-only scholarship had nothing to do with competitive balance. While more empirical data would certainly be helpful, knowing what we know now, it is hard to say that the overall competitive balance in intercollegiate sports has been well served by the ban on multiyear athletic scholarships. Rather, it seems that a reasonably good case can be made that the world of intercollegiate sports had better competitive balance in the years preceding the ban. And common sense suggests that many schools are severely disadvantaged in the recruiting wars by the ban on multiyear discounts. 193 Four-year deals would also be much more likely to lead to increased graduation rates. 194

189. Complaint, supra note 3, at 8.
191. As discussed earlier in this Essay, the change to one-year-only scholarships was driven by a variety of factors (like controlling costs and controlling the behavior of athletes), but maintaining competitive balance was not among the factors considered.
193. In Boomer's case for example, the University of Tulsa might have been able to offer a four-year deal to Boomer to compete against OU's one-year deal. Because of the depth of OU's recruiting pool, OU might view it as in its best interest to stick firmly to a one-
In sum, rule-of-reason analysis suggests rather persuasively that the one-year-only mandate violates section 1 of the Sherman Act, particularly in light of the obvious less-restrictive alternative: to allow each of the member schools to decide for itself whether to offer one-, two-, three-, four-, or even five-year deals.\footnote{195}

IV. CONCLUSION

As long as the NCAA continues to play the preeminent role in the administration of our nation's intercollegiate sports programs, its rules are likely to continue to face scrutiny under antitrust laws. And as the court in \textit{Board of Regents} observed, "There can be no question but that it needs ample latitude to play that role . . . ."\footnote{196} Moreover, while there is no doubt abundant criticism of our tradition of amateurism in college sports, it seems unlikely that litigation will be the vehicle for dismantling the entire system. In fact, courts generally adhere to the view expressed by Justice Stevens that "the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act."\footnote{197} But Justice Stevens went on to say that it was impossible under the Sherman Act for the NCAA to "blunt[] the ability of member institutions" to participate in unfettered markets as required by the Sherman Act.\footnote{198} And the same conclusion that was drawn in that case can be drawn here: The NCAA's one-year-only mandate, like the price-fixing scheme in \textit{Board of Regents}, "restricted

\footnotetext{194}{Fewer athletes will be run off and displaced, thus more of them will stay in school even if they are no longer playing a sport. Again, more empirical data is needed to support this idea, but common sense suggests that it is true. In \textit{White v. NCAA}, the court found that the plaintiff's allegations suggested that student-athletes were forced to pay "higher prices than would result from unfettered competition." No. 2:06-cv-00999-VBF-MAN, slip op. at *4 (C.D. Cal. Sept. 21, 2006). If this is in fact true, basic rules of economics suggest extorting higher prices for the opportunity to pursue a bachelor's degree while playing an intercollegiate sport would reduce the raw number of student-athletes who follow the pursuit through to the end—the receipt of a bachelor's degree.}

\footnotetext{195}{Allowing schools to make their own decisions also appears consistent with the NCAA's articulated commitment to institutional autonomy—a theme repeatedly referenced in NCAA governance.}

\footnotetext{196}{NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 120 (1984).}

\footnotetext{197}{Id.}

\footnotetext{198}{Id.}
rather than enhanced the place of intercollegiate athletics in the Nation's life.\textsuperscript{199}