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Prevent Defense

WILL THE RETURN OF THE MULTIYEAR SCHOLARSHIP ONLY PREVENT THE NCAA'S SUCCESS IN ANTITRUST LITIGATION?

INTRODUCTION

In football there is a common defensive formation called "Prevent Defense," which teams use at the end of a game or right before halftime, in hopes of stopping an opposing team from scoring.[1] The formation positions defensive backs and linebackers, the players responsible for pass coverage, farther away from the line of scrimmage.[2] This strategy makes it exceedingly difficult for the offense to gain substantial yardage on any single play, but allows them to easily and consistently move the football down the field through short gains.[3] By forcing a team to run a greater number of plays, coaches believe that time will expire before the offense has reached a scoring position.[4]

Although teams continue to use this formation, it has received significant criticism for its ineffectiveness.[5] The use of this strategy almost always involves switching from a successful defensive formation to a less tested one,[6] and as a result, defenses frequently allow offenses to score points and win the game. Ignoring a valuable paradigm from one of the sports it regulates, the NCAA recently switched to a preventative defensive strategy by revising a scholarship bylaw in response to antitrust litigation brought by student-athletes.

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[1] *Prevent Defense*, SPORTING CHARTS, http://www.sportingcharts.com/dictionary/nfl/prevent-defense.aspx (last visited Jan. 10, 2013).

[2] *Id.*

[3] *Id.*

[4] Famous football coach and NFL commentator John Madden once stated, "The only thing prevent defense does is prevent you from winning." *See* David Flemming, *In Defense of the Prevent*, ESPN THE MAG., *available at* http://sports.espn.go.com/espnmag/story?section=magazine&id=3837562 (last visited Dec. 31, 2013).

[5] *Id.*

[6] Teams rarely utilize Prevent Defense throughout the game, but instead solely resort to it at the end of the game when they have the lead. *Id.*

The NCAA's regulations have become "a self-protection measure for the NCAA rather than carefully thought-out rules to protect the student-athlete."[7] Not only do many of the NCAA's bylaws fail to protect student-athletes, but many also place undue restrictions on student-athletes[8] and even create harm.[9] Although the NCAA considers itself committed to protecting athletes from the dangers of collegiate athletics,[10] it has recently faced scrutiny for failing to live up to its self-proclaimed purpose.[11] To seek redress, student-athletes have challenged various NCAA bylaws in courtrooms throughout the country, but have achieved limited success.[12]

An example of an unsuccessful challenge occurred in *Agnew v. NCAA*.[13] In this case, the plaintiff-appellants, former college football players, challenged the NCAA's prohibition of multiyear athletic scholarship awards and the limit on the total number of athletic scholarships a member institution can offer.[14] Plaintiff-appellants alleged that limiting athletic scholarships to one year[15] created anticompetitive effects on the

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[7] Mary Grace Miller, *The NCAA and the Student-Athlete: Reform is on the Horizon*, 46 U. RICH. L. REV. 1141, 1149 (2012).

[8] *See, e.g.*, DON YAEGER, UNDUE PROCESS: NCAA'S INJUSTICE FOR ALL 109-19 (1991).

[9] The NCAA's rules fail to take necessary preventive measures to protect collegiate football players from concussions by allowing multiple full-contact practices a week. The NFL, Pop Warner, and many high schools have instituted rules restricting the number of contact practices allowed per week to one. As a result, a college football player receives approximately 70% more contact to the head per season than a professional one. *Real Sports: Think About Them* (HBO television broadcast Nov. 20, 2012).

[10] This includes physical dangers, as well as the dangers of commercialization. The NCAA revised the rules of play in collegiate football to make the game safer, such as moving the kickoff starting line forward and banning the shield-blocking scheme on punts. *Rule Changes Become Official for Several Fall Sports*, NCAA.COM (Oct. 20, 2012), http://www.ncaa.com/news/ncaa/article/2012-08-27/rule-changes-become-official-several-fall-season-sports; *see also Money and March Madness: Mark Emmert Interview*, FRONTLINE (Feb. 14, 2011), *transcript available at* http://www.pbs.org/wgbh/pages/frontline/money-and-march-madness/interviews/mark-emmert.html [hereinafter *Mark Emmert Interview*] (discussing how the NCAA works to protect student-athletes from professionalism).

[11] Miller, *supra* note 7, at 1150.

[12] *See* Christian Dennie, *Changing the Game: The Litigation That May Be the Catalyst for Change in Intercollegiate Athletics*, 62 SYRACUSE L. REV. 15, 51 (2012).

[13] Agnew v. NCAA, 683 F.3d 328, 332 (7th Cir. 2012). See *infra* Part II.B, for an in-depth discussion of the *Agnew* case.

[14] "If a student's athletic ability is considered in any degree in awarding financial aid, such aid shall neither be awarded for a period in excess of one academic year nor for a period less than one academic year." NCAA, 2011–2012 NCAA DIVISION I MANUAL: CONSTITUTION, OPERATING BYLAWS, ADMINISTRATIVE BYLAWS art. 15.3.3.1, at 200 (2011) [hereinafter NCAA DIVISION I MANUAL].

[15] After one year, universities, through the discretion of their coaching staffs, had the option to renew a student's athletic scholarship for an additional year. *See* Neil Gibson, Note, *NCAA Scholarship Restrictions as Anticompetitive Measures: The One-*

market and "prevented them from obtaining scholarships that covered the entire cost of their college education,"[16] thereby violating the Sherman Antitrust Act.[17] The United States Court of Appeals for the Seventh Circuit ruled in favor of the NCAA and upheld the lower court's dismissal of the claim.[18]

Despite the dismissal,[19] the NCAA subsequently removed its ban on multiyear scholarships. In October 2011, NCAA's Division I board of directors[20] adopted a proposal to permit multiyear scholarship offers to Division I student-athletes.[21] Some critics feel the change is a "huge step toward meaningful reform,"[22] but unfortunately this is a mischaracterization. The NCAA—following its historical priority of escaping scrutiny from courts and governmental agencies[23]—enacted a superficial policy that merely provides schools the opportunity to offer multiyear scholarships and fails to resolve the problem of lost scholarships due to an injury or a coach's boundless discretion.[24]

In addition to insufficiently protecting student-athletes, the new policy undermines the NCAA's traditional legal defenses of preservation of amateurism and maintenance of competitive balance, which it has used to thwart antitrust

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Year Rule and Scholarship Caps as Avenues for Antitrust Scrutiny, 3 WM. & MARY BUS. L. REV. 203, 205-07 (2012).

[16] Michael P. Tremoglie, *Seventh Circuit: NCAA Does Not Violate Antitrust Law*, LEGAL NEWSLINE (June 20, 2012, 7:00 AM), http://legalnewsline.com/news/236512-seventh-circuit-ncaa-does-not-violate-antitrust-law.

[17] Section 1 of the Sherman Antitrust Act makes it illegal for any person to engage in a contract, combination, or conspiracy that places an unreasonable restraint on a market or trade. 15 U.S.C. § 1 (2012).

[18] *Agnew*, 683 F.3d at 332-34.

[19] *Id.*

[20] "This measure" was not mandated "from university presidents, court cases, or other influential sources." Miller, *supra* note 7, 1155; *see also* Steve Wieberg, *Multiyear Scholarship Rule Narrowly Survives Override Vote*, USA TODAY (Feb. 17, 2012, 7:00 PM), http://usatoday30.usatoday.com/sports/college/story/2012-02-17/multiyear-scholarships-survives-close-vote/53137194/1.

[21] "The new rule would allow scholarships to be awarded for as little as two years, for junior college transfers, or as long as four or five years for incoming freshmen." *Multiyear Scholarship Plan Moves On*, ESPN (Feb. 17, 2012, 7:37 PM), http://espn.go.com/college-sports/story/_/id/7587582/challenge-ncaa-multiyear-scholarship-plan-falls-short.

[22] Allen L. Sack, *Making Peace with the NCAA*, INSIDE HIGHER ED (Mar. 22, 2012, 2:59 AM), http://www.insidehighered.com/views/2012/03/22/essay-longtime-critic-applauds-ncaa-action-multiyear-scholarships-athletes.

[23] *See* YAEGER, *supra* note 8, at 159-61.

[24] *See* Josh Levin, *The Most Evil Thing About College Sports*, SLATE (May 17, 2012, 7:50 PM), http://www.slate.com/articles/sports/sports_nut/2012/05/ncaa_scholarship_rules_it_s_morally_indefensible_that_athletic_scholarships_can_be_yanked_after_one_year_for_any_reason_.html.

litigation.[25] The new rule erodes the NCAA's principle of amateurism by allowing universities to compete for recruits with athletic scholarships of different lengths. This imposes a monetary value on an athlete's ability,[26] and inadvertently acknowledges the possibility of a labor market for student-athletes, which plaintiffs have struggled to identify in past antitrust litigation.[27] Moreover, it encourages unconscionable employee-like contract negotiations that place student-athletes' academic and athletic goals in direct conflict. Finally, the new rule marks the abandonment of the NCAA's long-held position that the ban on multiyear scholarships was necessary to prevent schools with greater financial resources from gaining an unfair advantage and thus maintain a competitive balance in college athletics.

This note argues that by eroding its traditional legal defenses, the NCAA exposes itself to stronger antitrust claims by student-athletes and demonstrates that the NCAA's policy considerations focus on protecting the commercialization of college athletics, not student-athletes. The first section of this note will provide background information that details the history of the NCAA's athletic scholarship policies, focusing primarily on collegiate football. Part II will discuss the antitrust litigation that motivated the NCAA's policy shift. It will also highlight the ways in which the NCAA utilizes its procompetitive justifications of amateurism and maintenance of competitive balance. Part III will discuss how the effect of the NCAA's change in scholarship policy undermines its legal defenses, leaving the NCAA susceptible to stronger antitrust claims. Part IV will address the inability of the policy to effectuate reform that protects student-athletes and discuss the shortsightedness of the NCAA's attempt to protect itself against antitrust litigation. Finally, this note will explore the benefits of adopting a mandatory multiyear scholarship that guarantees all student-athletes at least four years of athletic scholarship, so long as they maintain academic eligibility and a willingness to participate on the team.

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[25] Provided that the plaintiff proves anticompetitive effects or behavior of the defendant, "the burden then shifts to the defendant to show the merits of his or her activity by pointing out its procompetitive elements. In other words, the defendant must show that, on balance, the restraint in question functions to enhance competition." Gibson, *supra* note 15, at 223-26; *see infra* Part II.C. The Supreme Court has recognized preservation of amateurism and maintenance of competitive balance as legitimate procompetitive justifications for regulations that create anticompetitive effects. *See generally* NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85 (1984) [hereinafter *Bd. of Regents*].

[26] The value is determined by the number of expense-covered years the scholarship awards. *See infra* Part III.

[27] *See* Agnew v. NCAA, 683 F.3d 328, 346-47 (7th Cir. 2012).

I. THE NCAA AND ATHLETIC SCHOLARSHIPS

A. The Founding of the NCAA and Its Principles

Over a century ago, the NCAA developed as the governing body for major collegiate sports, specifically college football, which it continues to service today. Due to the "rugged, violent, and deadly" nature of college football in the early twentieth century, President Theodore Roosevelt called for attempts to "reduce the brutality of the game."[28] In December 1905, representatives from 62 schools created the Intercollegiate Athletic Association of the United States (IAAUS), a formal organization dedicated to formulating rules and regulations for collegiate athletics.[29] The organization, which was renamed the National Collegiate Athletic Association (NCAA) in 1912, created a football committee that focused on devising rules to alleviate the game's violence, and ultimately make football "more palatable to the general public."[30]

Although reducing violence was the impetus that led to the creation of the NCAA, the immediate rise of a national market for collegiate football required the NCAA to focus its attention on amateurism and eligibility rules as early as its initial meeting.[31] The NCAA made the determination that college athletics were for the "amateur athlete," or someone who "competed *only* for [the] symbolic or intrinsic benefits"[32] that playing a sport provides. This differentiated the amateur athlete from the paid professional athlete and led the NCAA to ban offering any financial incentive—including athletic scholarships—to recruit an athlete to attend a particular university.[33] But the NCAA lacked the policing resources to enforce these restrictions, which essentially left the regulation

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[28] Ray Yasser, *Competition On and Off The Field: An Analysis of the Role of Antitrust Law in the Continuing Evolution of Professional Sports and Intercollegiate Athletics: The Case for Reviving the Four-Year Deal*, 86 TUL. L. REV. 987, 990-91 (2012).

[29] *See* ALLEN L. SACK & ELLEN J. STAUROWSKY, COLLEGE ATHLETES FOR HIRE: THE EVOLUTION AND LEGACY OF THE NCAA'S AMATEUR MYTH 33 (1998).

[30] *Id.*

[31] The NCAA wanted to keep college sports for college students, and prevent skilled professional athletes from "parading under college colors" and "receiving pay . . . for [their] athletic prowess." The increase in a national market made this difficult because there were high stakes, such as "national prestige and large amounts of money," available to winning programs. *Id.* at 34.

[32] *Id.*

[33] Article VI of the NCAA's 1906 bylaws stated that member institutions must take measures "to prevent violations of amateur principles," including "the offering of inducements to players to enter college or universities because of their athletic abilities or supporting or maintaining players while students on account of their athletic abilities, either by athletic organizations, individual alumni, or otherwise, directly or indirectly." *Id.* at 33.

of universities to an honor system and created an atmosphere conducive to perpetual violations.[34]

Without an effective enforcement mechanism, member institutions defied the regulations that were supposed to protect the principles of amateurism, resulting in college athletes who closely resembled professional athletes. Teams felt pressured to violate the rules because there were no guarantees that their competitors would abide, and compliance placed them at a competitive disadvantage.[35] Having a successful team was of the utmost importance because it "created a revenue base, strong ties to their communities, willing investors, and media coverage."[36] As a result, universities moved away from the NCAA's idealized vision of athletic programs—a place where amateur athletes played sports as beloved hobbies to supplement their education, unencumbered by contemptible financial incentives.[37] Instead, universities cultivated an environment where "[a]thletes were putting in long hours of intensive and specialized training to meet the entertainment needs of thousands of discriminating fans" and were provided monetary support for their efforts.[38]

B. The Creation of the Student-Athlete and Athletic Scholarship

As early as the 1930s, the NCAA attempted to enact regulations to maintain the illusion that college athletes were unpaid amateurs. At this time, supporters of universities, or boosters, would commonly "adopt a local high school athlete and 'put him through college.'"[39] According to a study by the Carnegie Foundation for the Advancement of Teaching, "subsidization of athletes in some form or another took place at 81 of the 112 colleges and universities studied."[40] In 1948, to stop private payments to athletes, the NCAA abandoned its previous position and endorsed athletic scholarships.[41] Under the NCAA

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[34] *See* Mechelle Voepel, *College Athletes Are Already Getting Paid*, ESPN (July 18, 2011), http://sports.espn.go.com/ncaa/columns/story?columnist=voepel_mechelle&id=6739971; *see also* SACK & STAUROWSKY, *supra* note 29, at 35-40 (comparing NCAA's amateur code to the Eighteenth Amendment).

[35] *See* SACK & STAUROWSKY, *supra* note 29, at 35-37.

[36] Yasser, *supra* note 28, at 992.

[37] SACK & STAUROWSKY, *supra* note 29, at 35.

[38] *Id.*

[39] WALTER BYERS, UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETICS 65 (1995).

[40] SACK & STAUROWSKY, *supra* note 29, at 36.

[41] *Id.* at 42; *see also* BYERS, *supra* note 39, at 65.

scholarship policy, known as the Sanity Code,[42] "a student-athlete could receive tuition and fees if he showed financial need and met the school's ordinary entrance requirements; this amounted to a merit award for athletic ability."[43] With the adoption of the Sanity Code, the NCAA hoped to protect its notion of amateurism and gain control over growing collegiate athletics.[44] Similar to earlier regulations, the NCAA lacked the capability to enforce the Sanity Code and establish punishment for violations, which occurred openly.[45] Due to its ineffectiveness, the NCAA renounced the Sanity Code in 1951, and consequently left a void in athletic scholarship regulation.[46]

The lapse in regulation did not last long as the NCAA solidified the foundation of the modern athletic scholarship in order to avoid potentially costly litigation. Although debate continued to rage over the emergence of athletic scholarships and whether it amounted to "pay for play," a new problem overshadowed this concern.[47] Courts indicated that they might view NCAA athletes as employees, which posed a significant problem for colleges because such a determination would force them to provide Workmen's Compensation benefits to injured players.[48] According to these courts, under the Workmen's Compensation Act, if athletes were given scholarships that paid for tuition and were contingent on their participation in a sport, then these arrangements qualified as employment contracts.[49] Under this immense and potentially costly pressure, universities across the country united to make a

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[42] The Sanity Code was "named in part after a delegate at a previous [NCAA] Convention who called for 'a return to sanity' with regard to members following established rules[,] which contains strict regulations regarding financial aid, recruiting, academic standards, institutional control and amateurism." *Chronology of Enforcement*, NCAA.ORG, *available at* http://archive.is/Ea1B (last visited May 6, 2014).

[43] BYERS, *supra* note 39, at 67. In addition, "[an athlete] could receive a scholarship exceeding tuition and fees *regardless* of need if he ranked in the upper 25 percent of his high school graduating class or maintained a B average in college." *Id.*

[44] *See id.* at 67-69; *see also* SACK & STAUROWSKY, *supra* note 29, at 44-46.

[45] Seven schools refused to comply with the Sanity Code, including "Boston College, the Citadel, Villanova, Virginia Military Institute, Virginia Polytechnic Institute, the University of Maryland, and the University of Virginia," but they were not expelled from the NCAA because the major Southern Conferences threatened to secede. SACK & STAUROWSKY, *supra* note 29, at 46.

[46] BYERS, *supra* note 39, at 68.

[47] *Id*. at 68-69.

[48] *See, e.g.*, Van Horn v. Indus. Accident Comm'n, 33 Cal. Rptr. 169 (1963); Fort Lewis A&M State Comp. Ins. Fund v. Indus. Comm'n 314 P.2d 288 (Colo. 1957); Univ. of Denver v. Nemeth, 257 P.2d 423 (Colo. 1953).

[49] *Van Horn*, 33 Cal. Rptr. 169; *Fort Lewis A&M State Comp. Ins. Fund*, 314 P.2d 288; *Nemeth*, 257 P.2d 423.

determination that college athletics were only for "amateurs."[50] To reinforce this notion, the NCAA created the term "student-athlete" to establish a clear demarcation between college athletes and employees (professional athletes), inserting the term pervasively throughout its rules and regulations.[51] As a result of the NCAA's propagation, the courts and the public began using the term "student-athlete" ubiquitously.[52]

As an additional measure to prevent Workmen's Compensation litigation, the NCAA instituted a revised athletic scholarship policy that covered only the expenses associated with attending college.[53] The hope was that if a player did not receive compensation beyond the cost of education, then there was no payment as an employee.[54] Although the NCAA alleged that the revitalization of "true amateurism"[55] motivated this change, the NCAA's then-director Walter Byers later admitted, "[T]he campaign had nothing to do with the noble ideal of amateurism, but rather addressed the practical consequences of litigation involving worker's rights."[56] The new approach failed to stop under-the-table payments to players, diverted alumni and booster money from players to universities, and pushed collegiate athletics further down the path of commercialization, corruption, and unfairness.[57] The superficial protective measures merely succeeded in establishing a legal foundation for the NCAA to protect itself from claims that alleged collegiate athletes deserved employee-status.[58]

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[50] BYERS, *supra* note 39, at 69.

[51] *See id.*

[52] *Id.*

[53] This included "room, board, tuition, fees, books, and $15 a month for laundry for nine months." Yasser, *supra* note 28, at 995.

[54] *See* BYERS, *supra* note 39, at 72. A position that has stood the test of time, as current president of the NCAA explained in an interview, "We don't pay our student-athletes . . . . We provide them with remarkable opportunities to get an education at the finest universities on earth." *Mark Emmert Interview*, *supra* note 10.

[55] The NCAA advised member institutions to make recruits sign a statement agreeing with the principles of amateurism, and acknoledging that no employment-duty was created from the fact that scholarships were often contingent on athletic participation. BYERS, *supra* note 39, at 75.

[56] Yasser, *supra* note 28, at 995. As one commentator observed: "[F]ull-ride athletic scholarship was a marriage of convenience for the NCAA—it made the whole arrangement 'legal.'" Yasser, *supra* note 28, at 995-96.

[57] *See* BYERS, *supra* note 39, at 73.

[58] Similarly, the NCAA is crafting new laws, such as the discretionary multiyear scholarship offer to avoid continued antitrust litigation. This is as opposed to addressing the issues that student-athletes rights are being violated. *See infra* Part III.

C. The End of Multiyear Scholarships

The NCAA's decision to limit the length of athletic scholarships also resulted from an attempt to minimize the costs of collegiate athletics and to increase revenue. From the 1950s to the 1970s, the NCAA's regulations failed to limit the term of years of an athletic scholarship and the total number of athletic scholarships an institution could award.[59] Although this allowed institutions to award multiyear scholarships, it also set the stage for the elimination of this practice.[60]

> Some colleges were offering only one-year grants to recruits, who were being wooed away by colleges offering 'no-cut' four-year grants . . . . [These] one-year recruiters, who believed that the four-year scholarship colleges had too big an advantage . . . motivat[ed] [ ] a not-so-subtle campaign among big-time coaches and athletic directors to place control of athletes' grants in the hands of coaches instead of scholarship committees.[61]

Players increasingly frustrated coaches when they quit or were injured because the coaches could not strip them of their scholarships.[62] This, in conjunction with the ever-rising flood of television money and escalating rewards for winning, bred the mentality that scholarships should only go to players who contributed on the field.[63]

In January 1973, institutions and coaches asserted their authority by eliminating the multiyear scholarship and limiting scholarships to the one-year renewable offer.[64] The motive behind eliminating multiyear scholarships derived from cutting the cost of "deadwood"[65] and providing coaches with more control to build winning programs.[66] The NCAA, however, framed this as a measure to facilitate a competitive balance and ensure that the recruiting process did not disadvantage universities.[67] They argued that a uniform scholarship rule would reduce the recruiting disparity between universities offering only one-year scholarships and those offering

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[59] Louis Hakim, *The Student-Athlete vs. the Athlete Student: Has the Time Arrived for an Extended-Term Scholarship Contract*, 2 VA. J. SPORTS & L. 145, 158 (2000).

[60] *See* Yasser, *supra* note 28, at 996.

[61] *See* BYERS, *supra* note 39, at 75-76.

[62] Yasser, *supra* note 28, at 1001-03.

[63] *See* BYERS, *supra* note 39, at 76.

[64] Yasser, *supra* note 28, at 1002.

[65] "Deadwood" is defined as: Players who received athletic scholarships, but whose contributions to the team were considered unsatisfactory by coaches because they were not as athletically gifted as anticipated or got injured. BYERS, *supra* note 39, at 76.

[66] Yasser, *supra* note 28, at 1003.

[67] *See* Hakim, *supra* note 59, at 158.

extended-term scholarships, thus establishing the maintenance of competitive balance legal defense. [68] Further, the NCAA claimed the new scholarship policy supported the ideal of amateurism because individuals who maintained their scholarship, but were no longer on the team received benefits that went beyond expenses.[69]

The one-year deal existed for more than 40 years, but coaches continued to commonly use the term "full-ride" while recruiting players.[70] Even though the NCAA's bylaws forbid anything more than a one-year scholarship with the option of renewal, coaches assured promising high school student-athletes that these grants would be renewed so long as the student continued to participate on the team and remain eligible.[71] This once again sounded precariously similar to an employment contract, but the NCAA established a formal requirement that student-athletes sign a letter of intent that reinforced the amateur agreement.[72]

With the letter of intent in place, athletic scholarships became binding contracts.[73] Student-athletes' protection under these contracts lasted for only one academic year, after which schools were free to release players from a team and vacate their scholarships.[74] As a result,

> One-year renewable scholarships have provided the burgeoning college sports industry with a reliable and disciplined source of cheap labor . . . . It is difficult to overstate the kinds of demands coaches can make on players as a condition for the yearly renewal of financial aid. Coaches ask that athletes play with injury, and control their lives on and off the field. Because each season is a tryout for financial aid the next, sports takes priority. An NCAA survey carried out a few years ago found that big-time college football players spend

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[68] *Id.*

[69] SACK & STAUROWSKY, *supra* note 29, at 82-84.

[70] Levin, *supra* note 24 (dispelling the notion that athletic scholarships are always a four-year guaranteed education or full ride).

[71] *See* Hakim, *supra* note 59, at 172-73.

[72] BYERS, *supra* note 39, at 75.

[73] *See generally* Sean Hanlon, *Athletic Scholarship as Unconscionable Contracts of Adhesion: Has the NCAA Fouled Out?*, 13 SPORTS LAW. J. 41 (2006) (explaining how the athletic-scholarship developed into a recognized contract). The letter of intent also requires that student-athletes sign their respective school's Statement of Financial Aid, which defines the terms, conditions, and amount of the athletic award. Although the Statement of Financial Aid is made between each school and their respective scholarship athletes, the actual Statements of Financial Aid are uniform contracts that do not vary from school to school. *Id.* at 69-70.

[74] Yasser, *supra* note 28, at 1003.

> an average of 44.8 hours a week on their sport in addition to time in the classroom.[75]

As Ray Yasser aptly stated, despite these demands, "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."[76]

Under this system the NCAA has grown into "a voluntary unincorporated association that governs more than 1,200 colleges, universities, athletic conferences, and sports organizations; 380,000 student-athletes; and eighty-eight championship events in three divisions."[77] A more accurate portrayal of the NCAA is a commercialized big business that benefits the NCAA, member institutions, corporate sponsors, and everyone else except those whose skills are marketed.[78] The biggest collegiate sports such as football and men's basketball "generate more than $6 billion in annual revenue," a profit exceeding some professional sports.[79] College coaches can earn a salary as high as or higher than professional coaches.[80] The commercialization of collegiate athletics, focus on profit maximization, and continuous scandals[81] indicate that the NCAA has strayed from its stated goals to "promote student-athletes and college sports through public awareness . . . [,] protect student-athletes through standards of fairness and integrity . . . [,] prepare student-athletes for lifetime

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[75] Sack, *supra* note 22.

[76] Yasser, *supra* note 28, at 1003.

[77] Dennie, *supra* note 12, at 16.

[78] Miller noted,

> Yet the student-athlete sees none of the money that exchanges hands as a result of his or her performance. For instance, big college football teams . . . bring in between $40 million and $80 million in profits a year, even after paying coaches multimillion-dollar salaries. The student-athlete is granted a scholarship that often fails to cover the true cost of living, and thus he or she frequently lives below the poverty line. The student-athlete is exploited.

Miller, *supra* note 7, at 1143.

[79] Joe Nocero, *Let's Start Paying College Athletes*, N.Y. TIMES, Dec. 20, 2011, *available at* http://www.nytimes.com/2012/01/01/magazine/lets-start-paying-college-athletes.html?pagewanted=all.

[80] "Ohio State just agreed to pay Urban Meyer $24 million over six years." *Id.*

[81] Miller noted,

> Scandals have recently crowded the newspapers and sports blogs with stories of one football player or another selling his own jersey for a profit or accepting money from a booster. These scandals are unnerving because the NCAA's bylaws strictly prohibit a student-athlete from profiting from his or her athletic performance.

Miller, *supra* note 7, at 1144.

leadership, and provide student-athletes and college sports with the funding to help meet these goals."[82]

D. The Return of the Multiyear Option

In October 2011, the NCAA's Division I board of directors adopted a proposal to change their policy on athletic scholarships.[83] The new rule, which allows schools the option to provide multiyear scholarships, went into effect immediately, and by National Signing Day[84] in February 2012 some schools already offered multiyear scholarships.[85] Although a few schools signed student-athletes to multiyear scholarships, a majority of member institutions met the overnight change of the four-decade-old scholarship policy with resistance.[86] A substantial number of member institutions formally opposed the new rule and demanded a repeal vote.[87] The option to offer multiyear scholarship barely survived the repeal vote—"[o]f 330 institutions voting, 62.12 percent voted to override the legislation. A 62.5 percent majority of those voting was required to override legislation."[88] The opposing member institutions failed to gain the two extra votes necessary to repeal the new rule, and thus schools retain the option to make multiyear rather than one-year offers.[89]

The NCAA, led by its current president Mark Emmert, argues that elimination of the prohibition on multiyear scholarships is part of a larger initiative to enhance athletes' welfare.[90] Such an explanation ignores the tradition of the NCAA's policy changes. History suggests that the change results from the NCAA's attempt to avoid antitrust claims by

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[82] Dennie, *supra* note 12, at 16-17.

[83] *Multiyear Scholarship Plan Moves On*, *supra* note 21; *see also* Gibson, *supra* note 15, at 242.

[84] A specified date designated by a number of the major football conferences, where recruits sign letters of intent and commit to attend particular universities. Rod Goldberg, *National Signing Day 2013: Predicting Where Top Uncommitted Prospects Will Sign*, BLEACHER REP. (Jan. 15, 2013), http://bleacherreport.com/articles/1486603-national-signing-day-2013-predicting-where-top-uncommitted-prospects-will-sign.

[85] "Including Ohio State, Auburn, Michigan, Michigan State, Florida and Nebraska." *Multiyear Scholarship Plan Moves On*, *supra* note 21.

[86] *See* Michelle Brutlag Hosick, *Multiyear Scholarships To Be Allowed*, NCAA.COM (Feb. 17, 2012), http://www.ncaa.com/news/ncaa/article/2012-02-17/multiyear-scholarships-be-allowed; *see also Multiyear Scholarship Plan Moves On*, *supra* note 21.

[87] *See* Hosick, *supra* note 86.

[88] *Id.*

[89] *Id.*

[90] *See Mark Emmert Interview*, *supra* note 10; *see also* Allie Grasgreen, *New Day for Division I Athletes*, INSIDE HIGHER ED (Oct. 28, 2011, 3:00 AM), http://www.insidehighered.com/news/2011/10/28/ncaa-board-approves-athletic-eligibility-rules-division-i-athletes.

student-athletes that directly challenged the bylaw,[91] and the attention that the bylaw garnered from United States Department of Justice Antitrust Division, who "informed the NCAA a little less than two years ago that it was looking into the single-year restriction and whether it restrained competition among schools for top players."[92] Yet, the NCAA's strategic attempt to insulate itself from antitrust litigation comes at the cost of abandoning its most common legal defenses: preservation of amateurism and maintenance of competitive balance.

II. ANTITRUST SCRUTINY AND THE NCAA

The NCAA continues to enforce bylaws that create restrictions and requirements for student-athletes that essentially treat them as an unpaid labor force and leave them powerless to seek recourse internally.[93] As a result, student-athletes resort to filing lawsuits that claim the NCAA's bylaws place unreasonable restraints on them.[94] Because of this tension, the NCAA has been "no stranger to protracted litigation and has been involved in a plethora of lawsuits relating to nearly every conceivable area of the law."[95] The NCAA, however, has a strong tradition of success in the courtroom, including antitrust litigation.[96]

Student-athletes often bring claims against the NCAA for violations of Section 1 of the Sherman Act. Section 1 of the Sherman Act states that "[e]very contract, combination in the form of trust or otherwise, or conspiracy,"[97] that creates an unreasonable restraint on trade is illegal.[98] To succeed in an antitrust litigation under Section 1 of the Sherman Act, a plaintiff must prove a contract, combination or conspiracy, an unreasonable restraint on trade in a relevant market, and an injury.[99]

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[91] Agnew v. NCAA, 683 F.3d 328 (7th Cir. 2012).

[92] Wieberg, *supra* note 20.

[93] *See* Miller, *supra* note 7, at 1150.

[94] Dennie, *supra* note 12, at 22.

[95] *Id.*

[96] "Since the mid-1970s, plaintiffs have brought a great number of antitrust claims against the NCAA before federal courts. Only twice, however, have these courts recognized NCAA violations of the Sherman Act, first in *NCAA v. Board of Regents of the University of Oklahoma*, and later in *Law v. NCAA*." Gibson, *supra* note 15, 208 n.22. This is in large part due to the NCAA's time-honored legal defenses of amateurism and maintenance of competitive balance. *See* Dennie, *supra* note 12, at 22.

[97] 15 U.S.C § 1 (2012).

[98] *See generally* Standard Oil Co. v. United States, 221 U.S. 1 (1911) (interpreting 15 U.S.C § 1).

[99] Agnew v. NCAA, 683 F.3d 328, 335 (7th Cir. 2012) (quoting Denny's Marina, Inc. v. Renfro Prods., Inc., 8 F.3d 1217, 1220 (7th Cir. 1993)).

The NCAA faced challenges under Section 1 of the Sherman Act with increased frequency following *Board of Regents*,[100] the seminal and successful application of antitrust principles to the NCAA.[101] In *Board of Regents*, the Supreme Court determined that the NCAA violated Section 1 of the Sherman Act by restricting "both the quantity of college football games televised and the number of televised games allowed to a given team in a single season."[102] The Court also established a precedent that "the NCAA is not exempt from the strictures of the Sherman Act merely because it is a nonprofit entity," and further indicated that "*all* the regulations passed by the NCAA are subject to the Sherman Act."[103] Despite the Court's language that "all" regulations are subject to antitrust scrutiny, courts continue to struggle to apply the Sherman Act to the NCAA's bylaws.[104]

A. A Dichotomous Antitrust Approach to the NCAA

The difficulties courts face in applying the Sherman Act to the NCAA's bylaws largely stem from the dichotomous approach adopted after *Board of Regents*.[105] Rather than apply a single approach to all NCAA regulations, the courts established a "two-pronged antitrust approach."[106] The first approach applies to cases that involve obvious commercial restraints, such as output and price restraints on televised college football.[107] With obvious commercial restraints, *Board of Regents* established precedent to apply a stringent balancing test that weighs the plaintiff's anticompetitive complaint against the defendant's procompetitive justifications to determine if the regulation creates an unreasonable restraint.[108]

The second approach applies to regulations that promote noncommercial goals, such as rules of play and eligibility.[109] This

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[100] NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85 (1984).

[101] *Id.*

[102] Gibson, *supra* note 15, at 228.

[103] *Agnew*, 683 F.3d at 338-39 (describing the interpretation and legacy of the *Board of Regents* decision).

[104] *See, e.g.*, Daniel E. Lazaroff, *The NCAA in Its Second Century: Defender of Amateurism or Antitrust Recidivist*, 86 OR. L. REV. 329 (2007).

[105] *See generally id.* (explaining the dichotomous approach courts use in assessing antitrust litigation against the NCAA).

[106] *Id.* at 340.

[107] NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85 (1984).

[108] *See* Lazaroff, *supra* note 104, at 340.

[109] *See* Yasser, *supra* note 28, at 1011; *see also* Chad W. Pekron, *The Professional Student-Athlete: Undermining Amateurism as an Antitrust Defense in NCAA Compensation Challenges*, 24 HAMLINE L. REV. 24, 37 (2000).

approach derived from Justice Stevens's "now famous (perhaps infamous) dicta" [110] in *Board of Regents*:

> The identification of this "product" with an academic tradition differentiates college football from and makes it more popular than professional sports to which it might otherwise be comparable . . . . In order to preserve the character and quality of the "product," athletes must not be paid, must be required to attend class, and the like. And the integrity of the "product" cannot be preserved except by mutual agreement; if an institution adopted such restrictions unilaterally, its effectiveness as a competitor on the playing field might soon be destroyed. Thus, the NCAA plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable. In performing this role, its actions widen consumer choice—not only the choices available to sports fans but also those available to athletes—and hence can be viewed as procompetitive.[111]

Courts interpreted this language to establish a more lenient standard for the NCAA in advancing procompetitive justifications. Despite the fact that noncommercial regulations may place economic restraints on student-athletes, courts accept, without demonstration by the NCAA, that these rules are justified by preservation of amateurism or maintenance of competitive of balance.[112] That a number of district courts held that various bylaws pertaining to student-athlete eligibility do not violate antitrust regulation exemplifies the leniency of this approach.[113]

The Supreme Court, however, has never determined "whether and when the Sherman Act applies to the NCAA and its member schools in relation to their interaction with student-athletes."[114] Because the Supreme Court has not weighed directly on the issue, student-athletes continue to use antitrust law as an avenue to challenge the restrictions imposed upon them. Recently, "lower federal courts are also beginning to blur the distinction between restraints on players and restraints on other actors."[115] One of the claims that appears strongly situated to

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[110] Lazaroff, *supra* note 104, at 339.

[111] *Bd. of Regents*, 468 U.S. at 101-02.

[112] *See* Lazaroff, *supra* note 104, at 339 (referencing *Bd. of Regents*, 468 U.S. 85).

[113] *See, e.g.*, Smith v. NCAA, 139 F.3d 180 (3d Cir. 1998); Banks v. NCAA, 977 F.2d 1081 (7th Cir. 1992); McCormack v. NCAA, 845 F.2d 1338 (5th Cir. 1988); Gaines v. NCAA, 746 F. Supp. 738 (M.D. Tenn. 1990).

[114] Agnew v. NCAA, 683 F.3d 328, 339 (7th Cir. 2012).

[115] In fact,

> In some cases, antitrust claims have been rejected summarily because jurists have determined that antitrust laws have no application to restraints on amateur student-athletes. In other cases, courts have engaged in antitrust analyses but concluded that the NCAA acted lawfully in imposing restraints.

demonstrate that an NCAA bylaw violates Section 1 of the Sherman Act is the challenge to the previous ban on multiyear scholarships.

B. Antitrust Challenges to Athletic Scholarship Bylaws

Agnew v. NCAA[116] applied Section 1 of the Sherman Act to NCAA scholarship bylaws, and provided the context in which the NCAA utilizes its legal defenses of amateurism and maintenance of a competitive balance. In this case, NCAA student-athletes Joseph Agnew and Patrick Courtney directly attacked the NCAA's limitation on athletic-scholarships, claiming that the NCAA's bylaws that limit athletic scholarships to one-year[117] and the total number of athletic scholarships available[118] violated Section 1 of the Sherman Act.[119] Both Agnew, who played football for Rice University in 2006, and Courtney, who played for North Carolina A&T in 2009, received one-year athletic scholarships to play football at their respective universities.[120] Unfortunately, Agnew and Courtney suffered career-ending injuries while playing football during their college tenures, and their universities exercised the right to not renew these players' scholarships.[121] Agnew and Courtney sued the NCAA, claiming the imposed cap "on the number of scholarships given per team and the prohibition of multi-year scholarships prevented them from obtaining scholarships that covered the entire cost of their college education."[122] The plaintiffs alleged that this violated Section 1 of the Sherman Act because, absent these restrictions, colleges would offer multi-year scholarships to stay competitive, and they would have received them.[123] In response, "the NCAA filed a motion to dismiss claiming that the plaintiffs failed to identify a relevant market, failed to allege facts sufficient to show that the NCAA injured

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> Further, some courts have suggested that, at least at the preliminary stages of litigation, NCAA athlete claims can move forward.

Lazaroff, *supra* note 104, at 344.

[116] *See Agnew*, 683 F.3d 328.

[117] NCAA DIVISION I MANUAL, *supra* note 14, at 200.

[118] *Id.* at 207.

[119] *Agnew*, 683 F.3d 328.

[120] *Id.* at 332.

[121] *Id.*

[122] *Id.*

[123] *Id.*

competition in a relevant market, and failed to allege facts sufficient to show an injury."[124]

The first element in an antitrust challenge requires a plaintiff student-athlete to demonstrate "a contract, combination, or conspiracy."[125] "[T]he NCAA is a voluntary unincorporated association that governs more than 1,200 colleges, universities, athletic conferences, and sports organization,"[126] which promulgates "rules and regulations to monitor a variety of issues facing member institutions, conferences, student-athletes, and coaches, including bylaws governing amateurism, recruiting, eligibility, financial aid, and practice and playing seasons."[127] As the court in *Agnew* stated, the member institutions have unquestionably agreed to abide by these rules and regulations, and therefore the showing of an agreement is not an issue when student-athletes challenge a bylaw.[128]

The second element requires a plaintiff student-athlete to demonstrate "an unreasonable restraint of trade in a relevant market."[129] To do so, the plaintiff must first establish a relevant market. Agnew and Courtney attempted to challenge the NCAA scholarship regulation as a restriction on the market for bachelor's degrees.[130] This is not typically the focus of challenges to Section 1 of the Sherman Act and it proved fatal to Agnew and Courtney's claim. The district court held that the bachelor's degree market was not a cognizable market under the Sherman Act because bachelor's degrees cannot be bought through tuition payments.[131] Rather, bachelor's degrees are earned by satisfying requirements, and student-athletes are only provided an opportunity to fulfill these requirements.[132] There is no exchange of a bachelor degree for participation on the athletic field.[133] The district court also foreclosed the possibility that a student-athlete labor market could be a cognizable market and dismissed the plaintiffs' complaint.[134]

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[124] *Id.* at 333.

[125] *Id.* at 335 (quoting Denny's Marina, Inc. v. Renfro Prods. Inc., 8 F.3d 1217, 1220 (7th Cir. 1993)).

[126] Dennie, *supra* note 12, at 16.

[127] *Id.* at 17.

[128] *Agnew*, 683 F.3d at 335.

[129] *Id.* (quoting Denny's Marina, Inc. v. Renfro Prods., Inc., 8 F.3d 1217, 1220 (7th Cir. 1993)).

[130] *Id.* at 333.

[131] *Id.* at 338.

[132] *Id.*

[133] *Id.*

[134] *Id.*

On appeal, the court emphasized that the plaintiffs must "describe the rough contours of the relevant market in which anticompetitive effects may be felt."[135] Plaintiffs failed to meet this burden for both the market for bachelor's degrees and the market for student-athlete labor. The *Agnew* court suggested that "[t]he proper identification of a labor market for student-athletes . . . would meet plaintiff's burden of describing a cognizable market under the Sherman Act."[136] This contradicted a prior decision, which dismissed the argument that scholarship athletes could be considered a labor market because "schools do not engage in price competition for players,"[137] "the value of [a] scholarship is based upon the school's tuition and room and board,"[138] and supply and demand does not determine the worth of student-athletes' labor.[139] The *Agnew* court recognized that a market was certainly at play, stating "a transaction clearly occurs between a student-athlete and a university: the student-athlete uses his athletic abilities on behalf of the university in exchange for an athletic and academic education, room, and board."[140] This dictum provides support for recognizing a nationwide labor market for student-athletes under the Sherman Act,[141] and contradicts the belief that bylaws affecting student-athletes, such as scholarship policies are not commercial.[142] Similarly, the *Agnew* court stated, "No knowledgeable observer could earnestly assert that big-time college football programs competing for highly

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[135] *Id.* at 345.

[136] *Id.* at 346.

[137] *Id.* at 346 (citing Banks v. NCAA, 977 F.2d 1081, 1091 (7th Cir. 1992)).

[138] *Banks*, 977 F.2d 1091.

[139] *Agnew*, 683 F.3d at 346 (citing *Banks*, 977 F.2d 1081, 1091).

[140] *Id.* at 338.

[141] It is important to note that it would not be enough for a plaintiff class to simply "write the words 'nationwide labor market for student athletes' on paper." Order Granting Defendant's Motion to Dismiss at 16, Rock v. NCAA, 928 F. Supp. 2d 1010, (S.D. Ind. 2013) (No. 12-CV-1019). Instead, a plaintiff "must properly identify the labor market at issue, plead its rough contours, or account for the commercial reality of the transaction." *Id.*

[142] The belief that scholarship and eligibility rules are not commercial is "an outmoded image of intercollegiate sports that no longer jibes with reality." *Agnew*, 683 F.3d at 340 (quoting *Banks*, 977 F.2d at 1099 (Flaum, J., dissenting)). The Seventh Circuit seems to accept this dictum. The Seventh Circuit followed the *Agnew* court's guidance in resolving the NCAA's motion to dismiss in *Rock v. NCAA*, stating that:

> [T]he NCAA's one-year scholarship limit and the cap on the number of scholarships are financial aid rules, not eligibility rules. As financial aid rules, those bylaws 'are not inherently or obviously necessary for the preservation of amateurism, the student-athlete, or the general product of college football. Accordingly, unlike eligibility rules, financial aid rules are not deserving of a procompetitive presumption . . . at the motion-to-dismiss stage.

Order Granting Defendant's Motion to Dismiss at 7, Rock v. NCAA, 928 F. Supp. 2d 1010, (S.D. Ind. 2013) (No. 12-CV-1019).

sought-after high school football players do not anticipate economic gain from successful recruiting program."[143]

Although the *Agnew* court recognized that the labor market for student-athletes may be cognizable under the Sherman Act, which will likely provide guidance to future student-athlete plaintiffs to properly identify relevant market, such as the class in *Rock v. NCAA*,[144] it stated that the NCAA bylaws prohibiting multiyear scholarships and limiting the number of scholarships do not necessarily violate the Sherman Act.[145] Future plaintiffs still need to prove the additional component that these regulatory controls are an unreasonable restraint. Despite the fact that the climate is changing, the legacy of the Supreme Court's decision in *Board of Regents* suggests that there is still "a presumption in favor of certain NCAA rules when it stated: It is reasonable to assume that most of the regulatory controls of the NCAA are . . . procompetitive because they enhance public interest in intercollegiate athletics."[146] Furthermore, the Court suggests that many of the NCAA bylaws are necessary to distinguish and preserve the "character and quality of the product."[147]

C. *Unreasonable Restraint and the Rule of Reason*

Typically, the focus of Section 1 Sherman Act cases is whether a regulation poses an unreasonable restraint. To determine whether a restraint is unreasonable, courts "focus on the competitive effects of challenged behavior relative to such

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[143] *Agnew*, 683 F.3d at 341.

[144] The named plaintiff John Rock represents a class of individuals who received an athletic-based scholarship for at least one year and had it reduced or not renewed, and subsequently was forced to pay tuition. Rock was an accomplished high school quarterback, who attended Gardner-Webb University in North Carolina on a football scholarship. Despite having been the team's starting quarterback and captain, Rock's scholarship was revoked when the school replaced the head coach. Like in *Agnew*, the plaintiff alleges that had it not been for the NCAA's prohibition on multiyear scholarships and the limit on the overall number of scholarships a university can offer, he would have received a scholarship that covered the full cost of his education. The focus of the complaint addresses the labor market for student-athletes as the relevant market, and the bylaws as an unreasonable restraint on that market, attempting to correct the shortcomings of the plaintiff's in *Agnew*. Complaint at 3-6, Rock v. NCAA, 928 F. Supp 2d 1010 (S.D. Ind. 2013) (No. 12-CV-1019). The plaintiffs in *Rock* eventually amended the original complaint to narrow the proposed market to the "market for the labor of Division I football student athletes." *See infra* note 173.

[145] *Agnew*, 683 F.3d at 341.

[146] *Id.* (quoting NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 117 (1984)).

[147] The product the court refers to is college football. *Bd. of Regents*, 468 U.S. at 117.

alternatives as its abandonment or a less restrictive substitute."[148] Courts apply a balancing test, known as the "rule of reason," to assess whether the NCAA bylaw that prohibits multiyear scholarships creates an unreasonable restraint.[149] The rule of reason analysis has three criteria: First,

> the plaintiff [must] show that the agreement has a substantially adverse effect on the competition; [second], the defendant presents some evidence of the procompetitive virtue of the challenged behavior; [and third], the plaintiff shows that the challenged conduct is not necessary to achieve the procompetitive justifications put forth by defendant or that those justifications can be achieved in a less restrictive manner.[150]

Under the first step in the rule of reason, the plaintiff must show an actual restraint on the quantity and quality of output and price.[151] The restraint on multiyear scholarships prevents member institutions and student-athletes from constructing scholarship agreements that each might find more favorable.[152] The *Rock* complaint indicated,[153] picking up where the *Agnew* plaintiffs left off, that Bylaw 15.3.3.1[154] is "a blatant price-fixing agreement and restraint between member institutions of the [NCAA]. For years, NCAA member institutions unlawfully conspired to maintain the price of student-athletes' labor at artificially low levels by agreeing never to offer student-athletes athletics-based scholarships of a duration in excess of one year."[155] As the *Rock* complaint and the *Agnew* court suggest, absent the limitation on scholarship offers, "member schools would choose to alter the price of the opportunity being sold by

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[148] *Agnew*, 683 F.3d at 335 (quoting Phillip Areeda, Antitrust Law ¶ 1500, at 362-63 (1986)).

[149] As one commentator points out, "Both the sport cases and the pervasive trend in antitrust jurisprudence support th[e] conclusion" that courts will evaluate an NCAA mandate under the rule of reason, even if price fixing, usually analyzed under the per se approach, was implicated. Yasser, *supra* note 28, at 1010. The Court in *Board of Regents* elucidated: "What 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." *Bd. of Regents*, 468 U.S. 85, 101 (1984); Some horizontal restrains are necessary to the NCAA and its member institutions if the product is to exist at all such as rules of the game, size of the fields, etc. *See generally* Yasser, *supra* note 28.

[150] Pekron, *supra* note 109, at 32-33.

[151] Yasser, *supra* note 28, at 1011-25.

[152] *Id.* at 1012.

[153] *See supra* note 144.

[154] Bylaw 15.3.3.1 limits scholarships to one year. It reads, "If a student's athletics ability is considered in any degree in awarding financial aid, such aid shall neither be awarded for a period in excess of one academic year nor for a period less than one academic year." NCAA DIVISION I MANUAL, *supra* note 14, at 200.

[155] Complaint at 1, Rock v. NCAA, 928 F. Supp 2d 1010 (S.D. Ind. 2013) (No. 12-CV-1019).

offering multiyear scholarships in order to compete more effectively for talented players against schools that choose to offer only one-year deals."[156] Prospective student-athlete plaintiffs appear well situated to demonstrate that the bylaw is a restraint on the market.[157]

The second step of the rule of reason shifts the burden to the defendant to provide evidence that the restraint offers a justifiable procompetitive effect.[158] Under this step, the burden falls on the NCAA to demonstrate that the one-year scholarship rule provides "procompetitive effects that outweigh the anticompetitive ones."[159] To meet its burden, the NCAA will undoubtedly argue that the bylaw limiting scholarships to one year "preserves amateurism and helps to maintain a competitive balance."[160] Not only were these the principles on which the NCAA instituted the rule, but the NCAA has also successfully used these defenses in a number of cases.[161] As the court stated in *Board of Regents*, "maintaining a competitive balance among amateur athletic teams is legitimate and important."[162] Additionally, courts have upheld the "NCAA's efforts to maintain a discernible line between amateurism and professionalism and protect amateur objectives,"[163] as a procompetitive justification, despite the fact that "the NCAA has not distilled amateurism to its purest form."[164]

The last step of the rule of reason allows the plaintiff an opportunity to demonstrate that the actual restraint is not necessary or that it is overly restrictive.[165] Although courts have determined that the NCAA regulations dictating eligibility "fall comfortably within the presumption of procompetitiveness," courts have also indicated that the prohibition on multiyear scholarships falls into a separate category of rules.[166] Unlike eligibility regulations, the scholarship bylaw fails to distinguish between professional and amateur sports. This distinction is

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[156] Yasser, *supra* note 28, at 1012.

[157] Should a court, as the dicta in *Agnew* suggests, recognize the labor market for student-athletes. Agnew v. NCAA, 683 F.3d 328, 341 (7th Cir. 2012).

[158] Yasser, *supra* note 28, at 1013.

[159] *Id.*

[160] *Id.*

[161] *See, e.g.*, Smith v. NCAA, 139 F.3d 180 (3d Cir. 1998); Banks v. NCAA, 977 F.2d 1081 (7th Cir. 1992); McCormack v. NCAA, 845 F.2d 1338 (5th Cir. 1988); Gaines v. NCAA, 746 F. Supp. 738 (M.D. Tenn. 1990).

[162] NCAA v. Bd. of Regents, 468 U.S. 85, 117 (1984).

[163] *Gaines*, 746 F. Supp. at 743.

[164] *McCormack*, 845 F.2d at 1345.

[165] Pekron, *supra* note 109, at 31-34.

[166] *See* Agnew v. NCAA, 683 F.3d 328, 343 (7th Cir. 2010); *see also In re* NCAA I-A Walk-On Football Players Litig., 398 F. Supp. 2d 1144 (W.D. Wash. 2005).

necessary to preserve amateurism, because courts "consider players who receive nothing more than educational costs in return for their services to be 'unpaid athletes.'"[167] Therefore, whether an athlete receives one or four years of scholarship grant does not affect a court's interpretation of whether he is a professional or amateur.[168] The court in *Agnew* further indicated that the bylaw does not implicate maintenance of a competitive balance, because the NCAA survived without a prohibition on multiyear scholarships until 1973. Further, numerous other less restrictive methods exist to achieve a competitive balance such as restricting alumni donation or recruiting budgets.[169] If a court were to apply the rule of reason to the NCAA's prohibition on multiyear scholarships, a student-athlete plaintiff has a reasonable case to prove that the bylaw fails the analysis.

D. Injury and Future Cases

Finally, to succeed in demonstrating that the NCAA's regulation violated Section 1 of the Sherman Act, a plaintiff student-athlete must demonstrate an accompanying injury.[170] Plaintiffs challenging Bylaw 15.3.3.1 alleged that they would have been able to secure a guaranteed four- or five-year scholarship, which would have protected them from losing their aid once they were injured or a coaching change occurred, had it not been for prohibition on multiyear scholarships.[171] Despite the *Agnew* plaintiffs' failure to assert a relevant market, the court indicated that it is likely that the one-year scholarship violates Section 1 of the Sherman Act.[172] With the *Agnew* court's willingness to recognize a labor market for student-athletes if a plaintiff properly identifies it, the *Rock* class has a better opportunity to successfully challenge the bylaw than ever before.[173]

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[167] *Agnew*, 683 F.3d at 344.

[168] *Id.*

[169] *See* Complaint at 8, Rock v. NCAA, 928 F. Supp 2d 1010 (S.D. Ind. 2013) (No. 12-CV-1019).

[170] *Agnew*, 683 F.3d at 335.

[171] *Id.* at 332-33; *see also* Complaint, *supra* note 169, at 23.

[172] *Agnew*, 683 F.3d at 345-47.

[173] Initially, the *Rock* class struggled to get through the pleading stage. The court granted the NCAA's motion to dismiss on the grounds that the plaintiffs failed to identify a legally cognizable market. The plaintiff's alleged market, "labor market for student athletes," was fatally broad. The proposed market was too broad because it lumped "all student-athletes into the same labor market without accounting for germane differences such as gender and sport played." Rock v. NCAA, 928 F. Supp. 2d 1010, 1022 (S.D. Ind. 2013).

III. PREVENT DEFENSE: A SHIFT FROM LEGAL DEFENSES

By lifting the ban on multiyear scholarships in 2011, the NCAA has attempted to insulate itself from antitrust litigation. The new policy, which gives member institutions the option to offer multiyear scholarships, comes at the cost of eroding the NCAA's most common legal defenses: preservation of amateurism and maintenance of competitive balance. The new rule betrays the NCAA's ideal of amateurism by inadvertently acknowledging a labor market for student-athletes; the rule quantifies a price on their athletic ability, promotes competition over student-athletes, and demonstrates that supply and demand govern the market. In addition, the rule encourages unconscionable employee-like contract negotiations that place student-athletes' academic and athletic goals in direct conflict. More blatantly, the new rule abandons the NCAA's argument that the one-year scholarship provided the procompetitive effects necessary to maintain competitive balance. The harsh resistance and attempt to repeal the new policy by member institutions exemplifies this abandonment and highlights the "legitimate concerns," raised by these schools, when the NCAA regulates haphazardly.[174]

A. Abandonment of Amateurism

Critics admonish the NCAA's antiquated notion of amateurism, argue that commercialization permeates NCAA, and indicate that the only individuals prevented from benefitting from the system are the student-athletes who generate billions of dollars in revenue for the NCAA's member institutions.[175] In an

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The court subsequently granted the plaintiffs' motion to amend the complaint, in which the plaintiffs revised their description of the proposed relevant market as follows:

> The relevant market is the nationwide market for the labor of Division I football student athletes. In this labor market, student athletes compete for spots on Division I football athletic teams of NCAA member institutions, and NCAA member institutions compete for the best Division I football collegiate student athletes by paying in-kind benefits, namely, Division I football scholarships, academic programs, access to training facilities, and instructions from premier coaches.

Rock v. NCAA, No. 12-CV-1019, 2013 WL 4479815, at *3 (S.D. Ind. Aug. 16, 2013).

By narrowing the relevant market to one sport and one division, the court found that the amended complaint "pled the rough contours of a relevant market that is plausible on its face"; and thus the court rejected the NCAA's motion to dismiss. *Rock*, 2013 WL 4479815, at *14.

[174] Wieberg, *supra* note 20.

[175] These critics may have evidence on their side because the NCAA is riddled with scandals of players already being paid under the table. In addition,

interview with the Public Broadcasting Service, Mark Emmert, current president of the NCAA, addressed these concerns and suggested that the NCAA's most important priority was to prevent the commercialization of college athletics.[176] Even though Mr. Emmert recognizes the challenge of preserving the amateur status of student-athletes in the modern era of commercialized college athletics, his promotion of the reform of the one-year scholarship rule undermines the very principle of amateurism by identifying a student-athlete labor market and by introducing employee-like contracts.

1. Identifying a Student-Athlete Labor Market

Prior to *Agnew v. NCAA*, courts opined, "[T]he market for scholarship athletes cannot be considered a labor market, since schools do not engage in price competition for players, nor does supply and demand determine the worth of student-athletes' labor."[177] By contrast, the *Agnew* court suggested that there is obviously a market at play, and explained that the only reason schools do not "engage in price competition for student-athletes is that other NCAA bylaws prevent them" from doing so.[178] With the enactment of the option to offer multiyear scholarships, NCAA bylaws no longer prohibit, and in fact encourage, price competition for student-athletes, demonstrating

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> [i]n 2010, despite the faltering economy, a single college athletic league, the football-crazed Southeastern Conference (SEC), became the first to crack the billion-dollar barrier in athletic receipts. The Big Ten pursued closely at $905 million. That money comes from a combination of ticket sales, concession sales, merchandise, licensing fees, and other sources—but the great bulk of it comes from television contracts.

Taylor Branch, *The Shame of College Sports*, ATLANTIC MONTHLY, Oct. 2011, *available at* http://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643; *see also* Nocero, *supra* note 79 ("College football and men's basketball have become such huge commercial enterprises that together they generate more than $6 billion in annual revenue, more than the National Basketball Association.").

[176] Mark Emmert stated,

> I think the biggest challenge that faces intercollegiate athletics right now is, in fact, trying to protect the notion of intercollegiate athletics as a place where student-athletes compete . . . So when we talk about the creeping commercialization of it, what we're concerned about—what I'm concerned about—is making sure that we maintain that preprofessional amateur status of the student-athletes while recognizing that there's increasingly greater interest in the whole nature of athletics in America.

Mark Emmert Interview, *supra* note 10.

[177] *Agnew*, 683 F.3d at 346 (referencing Banks v. NCAA, 977 F.2d 1081, 1091 (7th Cir. 1992)).

[178] *Id.*

that the value of the scholarship is based upon the supply of and demand for players.

The NCAA's new scholarship rule provides universities with a template to formally engage in classical price competition over student-athletes. Prior to October 2011, student-athletes could "neither be awarded [an athletic scholarship] for a period in excess of one academic year nor for a period less than one academic year."[179] To comply with this bylaw, member institutions could only offer identical one-year renewable scholarships to high school athletes. Alternatively, the new rule provides member institutions the discretion to offer one-year renewable scholarships or up to a five-year guaranteed scholarships.[180] Colleges have taken,[181] and will continue to take advantage of this rule by offering athletic-scholarships of various lengths, inevitably using multiyear scholarships as a recruiting tactic to persuade highly sought-after student-athletes to attend their school over another. An athletic scholarship awarded for up to four or five years guarantees a gifted athlete funding for a full education and provides "a significant incentive to select a university offering a four-year aid package over other schools offering only one-year scholarships with merely the possibility for renewal."[182] According to CNN in 2011, "[t]he sticker price of living and studying for a year at a typical private college rose 4.3% to $42,224."[183] Each year this cost rises as tuition at public, community, and private colleges across the country escalates,[184] forcing many students to take out loans to pay for their education and pushing our nation closer to the brink of a student debt crisis.[185] College recruiters will certainly take advantage of this frightening reality, by emphasizing the particular monetary value on the offer they are extending to prospective recruits, which now can vary significantly.

As a representative from Indiana State University astutely indicated in opposition to the new scholarship policy, "to get into bidding wars where one school offers a 75 percent

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[179] NCAA DIVISION I MANUAL, *supra* note 14, at 200.

[180] *See supra* note 86.

[181] *Multiyear Scholarship Plan Moves on*, *supra* note 21.

[182] Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71, 112 (2006).

[183] Kim Clark, *College Costs Climb, Yet Again*, CNN MONEY (Oct. 29, 2011, 6:09 PM), http://money.cnn.com/2011/10/26/pf/college/college_tuition_cost/index.htm.

[184] *Id.*

[185] *See* Megan McArdle, *Is College a Lousy Investment*, NEWSWEEK (Sept. 29, 2012), http://www.thedailybeast.com/newsweek/2012/09/09/megan-mcardle-on-the-coming-burst-of-the-college-bubble.html.

(scholarship) for two years and the other school then offers 85 percent for three years, etc.,"[186] creates unfair advantages in the recruiting process. To understand the "bidding wars" or price competition that will occur as recruiters vie for prospective student-athletes one need only conduct simple arithmetic. Using the estimates from 2011,[187] a school that offers a one-year renewable scholarship would only be guaranteeing a player approximately $42,224 toward his or her education.[188] On the other hand, another university might offer a five-year scholarship, which includes an added $2,000 expense award per year, promising over $220,000 guaranteed toward that athlete's education.[189] Thus, the NCAA transformed athletic scholarships into a bargaining chip that demonstrates concretely that universities engage in price competition over student-athletes, and that provides further evidence of the ways in which recruiters already engage in such competition.[190]

In addition, the new rule recognizes a labor market for student-athletes by highlighting the reality that "the value of the scholarship is based upon . . . the supply and demand for players."[191] The NCAA's regulation on the amount of

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[186] Complaint at 14, Rock v. NCAA, 928 F. Supp. 2d 1010 (S.D. Ind. 2013) (No. 12-CV-1019).

[187] *See* Clark, *supra* note 183.

[188] *See* Grasgreen, *supra* note 90.

[189] Grasgreen stated,

> Athletes can receive additional scholarship funds of up to $2,000 or the full cost of attendance, whichever is less. Depending on the institution, the gap ranges from $200 to nearly $11,000 per year, and is the result of miscellaneous costs incurred on top of the tuition and fees, room and board, and books that full athletic scholarships currently cover. The $2,000 limit will be in place for at least three years, the board said, but in the future will be adjusted according to the consumer price index.

Id.

[190] In *Agnew*, the court stated that

> [C]olleges do, in fact, compete for student athletes, though the price they pay involves in-kind benefits as opposed to cash. For instance, colleges may compete to hire the coach that will be best able to launch players from the NCAA to the National Football League, an attractive component for a prospective college football player. Colleges also engage in veritable arms races to provide top-of-the-line training facilities which, in turn, are supposed to attract collegiate athletes. Many future student-athletes also look to the strength of a college's academic programs in deciding where to attend. These are all part of the competitive market to attract student-athletes whose athletic labor can result in many benefits for a college, including economic gain.

Agnew v. NCAA, 683 F.3d 328, 347 (7th Cir. 2012). Moreover, universities have resorted to illegal forms of price competition, like offering cash or other incentives, which results in countless scandals.

[191] Banks v. NCAA, 977 F.2d 1081, 1091 (7th Cir. 1992).

scholarships has varied over the years. Currently, the NCAA limits the amount of scholarships universities can offer in every sport.[192] While the NCAA maintained the one-year scholarship rule, the demand for student-athletes at a given university remained restricted to the limited number of scholarships and the fixed value of one-year scholarships. Therefore, plaintiff student-athletes struggled to "allege that NCAA colleges purchase labor through the grant-in-aid athletic scholarships offered to college players when the value of the scholarship is based upon the school's tuition and room and board."[193] Because schools can now award athletic scholarships of varying amounts, the value of a scholarship is no longer related to the expense of attending a university, but to the perceived athletic value of a student-athlete to that school.[194] Furthermore, because teams that win are more profitable, if the new scholarship rule remains in place, schools will learn the best combination of differently valued athletes to create more successful teams. This will affect a school's demand for a particular one-year or two-year or five-year guaranteed scholarship caliber athlete, and consequently an individual student-athlete's contribution to a program will be valued accordingly and reflected in his scholarship.

The value of scholarships awarded each year will also depend on the supply of quality student-athletes graduating high school each year. Organizations like Max Preps, Rivals, ESPN, and others dedicate portions of their websites to recording statistics of high school athletes and to ranking them.[195] These rankings assess the top overall recruits in the country and the best players by position, track a player's scholarship offers and commitment, and grade universities on their eventual recruiting class.[196] These analysts travel the country attending camps or combines—held by universities, independent organizations, and corporations such as Nike—where student-athletes preform drills and play games to put their talents on display.[197] For these students, the goal is to

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[192] NCAA DIVISION I MANUAL, *supra* note 14, at 202-15.

[193] *Banks*, 977 F.2d at 1091.

[194] The greater the athletic ability of a prospect the more scholarship money that prospect will likely be awarded.

[195] *See, e.g.*, *Recruiting Nation Football*, ESPN, http://espn.go.com/college-sports/football/recruiting/index (last visited Oct. 1, 2013); MAXPREPS, http://www.maxpreps.com/national/national.htm (last visited Oct. 1, 2013); RIVALS, http://www.rivals.com (last visited Oct. 1, 2013).

[196] *Id.*

[197] *See 2014 Nike Football SPARQ Combines*, STUDENT SPORTS, http://www.studentsports.com/nike-football-sparq-combine-registration/ (last visited Jan. 22, 2014).

make a "top-list" or to receive a five-star ranking, because this translates to multiple scholarship offers. Now that the NCAA member institutions can offer varying scholarships, the supply of "five-star" caliber student-athletes will affect the amount of multiyear scholarships offered each year.

Moreover, the new rule will likely increase the supply of student-athletes in the overall market. Each year a number of high-school student-athletes choose to go to schools that do not provide athletic scholarships.[198] Often this is because these institutions are some of best academic institutions in the country, such as those in the Ivy League.[199] But some recruits choose to forgo an athletic scholarship because they fear being unable to compete athletically or sustaining an injury.[200] At a Division I school, this meant their scholarship might not be renewed. Now with the possibility of receiving an athletic scholarship that guarantees the full cost of an athlete's education, these individuals might be persuaded to reenter the market.[201]

2. Engaging in Contract Negotiations

Due to the athletic scholarship, "[c]ourts and scholars already overwhelmingly recognize the contractual nature of the relationship between student-athletes and their institutions."[202]

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[198] Bill Pennington, *Financial Aid Changes Game as Ivy Sports Teams Flourish*, N.Y. TIMES, Dec. 22, 2011, *available at* http://www.nytimes.com/2011/12/23/sports/financial-aid-changes-game-as-sports-teams-in-ivies-rise.html?pagewanted=all&_r=0.

> "We're seeing a significant change in the caliber of the student-athlete," said Steve Bilsky, the University of Pennsylvania's athletic director, one of more than 50 Ivy League administrators and coaches interviewed. "It's not even the same population because the pool has widened. We see a considerable number of student-athletes turning down athletic scholarships from places like Stanford, Northwestern or Duke to come to Penn."

[199] Recruits like Christian Webster, who chose to go to Harvard University instead of taking one of his twenty-five athletic-scholarship offers to play basketball. *Id.*

[200] Instead, these students choose to pay to attend schools that they would consider better academic institutions. As Christian Webster explained, "It's a sacrifice but it's doable. . . . It's not free, but it's also not the full price of $50,000 or more. To me it was a 40-year life decision, not a four-year decision." *Id.* (internal quotation marks omitted) (explaining his decision to attend Harvard University for $20,000 a year, instead of attending a university that offered him a one-year renewable scholarship).

[201] "[S]tudent-athletes contemplating scholarship offers likely include economic factors in their decision-making process, such as the value of a given degree or the increased potential for entry into professional football." Agnew v. NCAA, 683 F.3d 328, 341 (7th Cir. 2012).

[202] Hakim, *supra* note 59, at 169.

> The Letter of Intent, Statement of Financial Aid, and university bulletins and brochures provide the basis for the contractual relationship between the

Despite the incessant call from critics and reformers that the NCAA should acknowledge the employer-employee relationship between universities and pay their athletes—thereby ridding the NCAA of the student-athlete myth[203]—the NCAA adamantly rejects the notion that an employment relationship exists and refuses to create one. President Mark Emmert stated he "can't say often enough, obviously, that student-athletes are students; they are not employees . . . [and it] would be utterly unacceptable . . . to convert students into employees . . . . We don't pay our student-athletes."[204] The NCAA's position stems from the history of the athletic scholarship and its creation of a legal argument that a scholarship cannot be considered payment—and that student-athletes cannot be considered employees—so long as the scholarship does not exceed the cost of tuition and miscellaneous expenses.[205] Although "the NCAA has crafted a body of case law that provides a position that student-athletes will remain simply student-athletes and will not obtain employee status,"[206] in light of one of the most "tumultuous years in college sports"[207] the NCAA's position is vulnerable.

> university and a student-athlete. The offer extended by the institution is found in its promise to pay for the legitimate educational expenses incurred by the student-athlete, while attending the university. The acceptance is found in the student-athlete's return promise to provide athletic participation for the university and abide by the rules of the NCAA, conference, and institution for the duration of the scholarship period. A student-athlete accepts the initial offer presented by the university by signing the Letter of Intent, which formalizes the bargaining process and outlines each parties' intent to be bound to the terms and conditions contained within. The student-athlete will also sign a statement of financial aid offered by the university formalizing the conditions and amount of the financial scholarship award. Valuable consideration is found in the monetary value of the athletic scholarship and the student-athlete's promise only to attend a particular institution.

Id. at 169-70.

[203] *See generally* McCormick & McCormick, *supra* note 182; *see also* Stephen L. Ukeiley, *No Salary No Union, No Collective Bargaining: Scholarship Athletes Are an Employer's Dream Come True* 6 SETON HALL J. SPORT L. 167, 177-78 (1996); Nocero, *supra* note 79; Branch, *supra* note 175. Among these critics are college athletes themselves, who formed the labor organization College Athletes Players Association ("CAPA"), and the Regional Director of the National Labor Relations Board, Region 13, Peter Sung Ohr, who ruled in favor of CAPA holding that scholarship football players at Northwestern University are employees under the National Labor Relations Act and may conduct an election to unionize. *See generally* Northwestern Univ. v. College Athletes Player Ass'n, N.L.R.B No. 13-RC-121359 (Mar. 26, 2014).

[204] *Mark Emmert Interview*, *supra* note 10.

[205] *See supra* Part I.

[206] Dennie, *supra* note 12, at 46.

[207] "[W]hich included conference realignment motivated by greed, several lawsuits that challenged the NCAA on antitrust grounds, and a massive scandal at Penn State that raised questions about the role of big-time college sports in university governance." Sack, *supra* note 22.

The adoption of a scholarship rule that creates dramatically different scholarship offers and negotiations between student-athletes and member institutions is incongruous with the NCAA's unwavering stance that no employee-like relationship exists. With the reintroduction of the multiyear athletic scholarship, students can shop themselves to different universities to discover the price of their abilities indicated by the amount of guaranteed years offered in their scholarships—the potential contract salary for their labor.[208] Even though players with lesser skill may still have their one-year scholarships renewed and eventually receive the same amount as the player guaranteed a five-year scholarship upfront, this process exacerbates the emphasis placed on athletic ability and performance, and eliminates any consideration of helping to subsidize a player's education. This resembles the problem the NCAA faced when it first instituted athletic scholarships, and courts used the athletic scholarship as an indicator that the players qualified for worker's compensation benefits.[209] Consequently, athletic scholarships can now, more than ever, be paralleled to employment contracts, eroding the notion of amateurism before athletes even step foot on campus and enter the commercialized world of big-time college athletics.

The new scholarship policy contradicts the notion of amateurism not only because scholarship offers now resemble employment contracts, but also because it places academic goals at odds with athletic goals during the recruiting process. That student-athletes receive a valuable education is critical to the notion of amateurism. At the earliest stages of its organization, the NCAA posited an idealized notion of amateurism in college athletics, where an athlete focused primarily on something other than sports.[210] The role of academics endures today as President Emmert denied the claim that student-athletes are employees on the basis that the NCAA "provide[s] [student-athletes] with remarkable opportunities to get an education at the finest universities on earth—that's American universities and colleges."[211] But almost since its inception, the NCAA has struggled to maintain the illusion that student-athletes are

[208] A representative from St. Francis College stated that as a result of the new scholarship policy, "prospective student athletes shop themselves around for the best deal in terms of length and compensation." Complaint at 14-15, Rock v. NCAA, No. 12-CV-1019 (S.D. Ind. 2012).

[209] *See, e.g.*, Van Horn v. Indus. Accident Comm'n, 33 Cal. Rptr. 169 (1963); Fort Lewis A&M State Comp. Ins. Fund v. Indus. Comm'n 314 P.2d 288 (Colo. 1957); Univ. of Denver v. Nemeth, 257 P.2d 423 (Colo. 1954).

[210] *See* SACK & STAUROWSKY, *supra* note 29, at 33.

[211] *Mark Emmert Interview*, *supra* note 10.

primarily students.[212] In the commercialized NCAA that exists today, it is apparent that athletes in big-time sports play a limited role as students, exemplified by the amount of hours dedicated to their sport, the limitation on academic choices, the reduced standards to which they are subjected, the weak curricula they assume, and the low graduation rates they achieve.[213] As many people believe, student-athletes are "just brought in to play some games. They don't get a very good education, if they get one at all."[214]

Amid all this criticism, the NCAA's new scholarship policy pits athletics against academics by asking high school students to choose guaranteed education over athletic glory. Schools will try to entice athletes with four or five-year scholarships that practically provide a guaranteed paid education. But these schools face opposition from more successful programs that play up the appeal of winning, becoming a professional, playing in bowl games, and learning from premiere coaches in premiere facilities (all football-related benefits). Although less than two percent of collegiate athletes make it to professional sports,[215] this is obviously a huge attraction for many high school students, whose dream since childhood has been to become a professional athlete in their chosen sport.[216] The situation will certainly arise in which a student chooses a one-year renewal offer from a school whose football team is consistently ranked in the top 25, instead of a school whose team is less successful, but guarantees four fully funded years of education. This places the decision on teenagers to choose between the guarantee of an academic degree and potential athletic fame.[217]

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[212] SACK & STAUROWSKY, *supra* note 29, at 33.

[213] McCormick & McCormick, *supra* note 182, at 120; *see also* Branch, *supra* note 175; Nocera, *supra* note 79.

[214] Ukeiley, *supra* note 203, at 209.

[215] Except for baseball where 11.6% of collegiate baseball players play professionally. Tom Manfred, *Here are the Odds Your Kid Becomes a Professional Athlete*, BUS. INSIDER (Feb. 10, 2012, 4:21 PM), http://www.businessinsider.com/odds-college-athletes-become-professionals-2012-2?op=1.

[216] *See id.*

[217] Although it may appear that the new scholarship policy provides students with a valuable bargaining chip, it fails to sufficiently protect those it will most likely affect, namely young black men who have been exploited by the recruiting process since the 1970s. As Gerald D. Higginbotham explains,

> Young black children develop deep aspirations for sports because images of successful black figures in the media are usually limited to popular black entertainers and sportsmen and in the black communities athletic achievement is rewarded more than any other activity. Sport, being focused more on physical and athletic ability rather than academic knowledge or social has lead to social mobility for immigrants and minority groups who faced discrimination other

B. Maintenance of Competitive Balance

The Supreme Court recognized maintenance of a competitive balance as a legitimate procompetitive justification for an NCAA bylaw under the rule of reason.[218] The court assessed that in some instances regulations that fostered "equal competition will maximize consumer demand for the product."[219] When the NCAA adopted the one-year renewable scholarship in 1973, it supported the policy by claiming it would create competitive balance.[220] The NCAA proposed that a uniform scholarship rule would even competition between universities offering only one-year scholarships and universities offering extended-term scholarships, thus preventing the recruiting process from disadvantaging any one university.[221] The NCAA reaffirmed its stance in *Agnew v. NCAA* arguing "that multi-year scholarships would make it too difficult for less wealthy schools to compete in the recruiting market."[222] The NCAA, however, abandoned this position when it revised its bylaws to allow universities the discretion to offer single or multiyear scholarships.

The removal of the one-year scholarship rule marks a complete abandonment of the NCAA's longstanding position that the rule was necessary to maintain a competitive balance.[223] By no longer regulating the length of a scholarship offer, the NCAA explicitly states that a single and mandatory type of scholarship is not necessary to ensure that all universities have an equal opportunity to have successful programs. Unsurprisingly, member institutions met this policy change with resistance. These institutions argued that for decades they had operated under the belief, as the NCAA had purported, that a universal limit on scholarships prevented prospects from being wooed from their university by a school offering a more beneficial financial package. In opposition to the

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> sectors of the economy. Universities have capitalized on the fact that African-Americans view professional sports as one of their most achievable goals and quickest path to stardom. Institutions recruit these players to profit from their athletic abilities as the players mainly focus on becoming professional athletes.

Gerald D. Higginbotham, *Free Play: Unmasking and Ending the Exploitation of NCAA Student-Athletes*, STUDENT PULSE, *available at* http://www.studentpulse.com/articles/552/2/free-play-unmasking-and-ending-the-exploitation-of-ncaa-student-athletes (internal quotations omitted) (last updated May 6, 2014).

[218] NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 117 (1984).

[219] The product of college sports. *See Bd. of Regents*, 468 U.S. at 119-20.

[220] Hakim, *supra* note 59, at 158.

[221] *See id.*

[222] Agnew v. NCAA, 683 F.3d 328, 344 (7th Cir. 2012).

[223] *See* Hakim, *supra* note 59, at 158.

new rule, some member institutions argue that more financially capable programs, whether through success or devotion of resources, are afforded an unfair advantage in the recruiting process because they will have the ability to offer more multiyear scholarships.[224] As a result, they will be able to attract the most gifted athletes and create dominant teams, which will ultimately decrease the product of collegiate sports, because fans want to see exciting games and not one-sided games.

The *Agnew* court and critics expressed skepticism that the ban on multiyear scholarships will affect the overall product of collegiate football because the sport flourished prior to the institution of the ban.[225] But this argument appears to be tenuous given the dramatic evolution of college football, specifically in the recruiting processes, over the last four decades. Absent any empirical evidence, it is difficult to quantify the effect the new rule will have on universities' abilities to compete in the recruiting process.[226] Yet, it is not farfetched to imagine that schools that devote more financial resources to their athletic programs may receive an advantage from having more multiyear scholarships at their disposal.

Additionally, the divergence from the justification of the one-year scholarship as a necessity for the maintenance of a competitive balance uncovers the ulterior motive behind the long-contested policy. Member institutions expressed outrage over the NCAA's shift in scholarship policy because it hinders their ability to decline to renew a student-athlete's scholarship. Over 62% of the member institutions voted to override the legislation.[227] A representative of one institution stated that the new policy:

> Creates a recruiting disaster . . . institutions will be competing for recruits by making the best deal . . . in order to be competitive, institutions may offer multiyear awards so they can sign higher level recruits. However, there is never a guarantee that the incoming student-athlete will be a good fit for the program and the institution. If it is a poor fit the program is put in a difficult situation to continue to keep a student-athlete on scholarship.[228]

Member institutions that oppose the rule believe that the burdens associated with preserving a scholarship for a player who lacks "athletic usefulness" inhibits their ability to produce a

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[224] *See* Levin, *supra* note 24.

[225] *See Agnew*, 683 F.3d at 344.

[226] *Id.*

[227] *See* Hosick, *supra* note 86.

[228] Complaint at 13, Rock v. NCAA, 928 F. Supp. 2d 1010 (S.D. Ind. 2013) (No. 12-CV-1019).

competitive team.[229] According to these member institutions, the new policy not only eliminates a necessary regulation to maintain a competitive balance, but also enacts a new policy that actually undermines their ability to compete.

IV. UNSOUND POLICY: FAILURE TO SUPPORT NCAA PRINCIPLES

The option to allow universities to offer student-athletes multiyear scholarships not only marks a retreat from the NCAA's classical legal defenses, but it also fails to provide the reform needed to protect student-athletes and eliminate the harm that gives rise to antitrust clams.

Although it was important for the NCAA to reform its scholarship policy, its adopted policy suffers from a number of critical shortcomings. First, the new rule fails to address the problem created by one-year renewable scholarship offers, which caused the injury to the plaintiffs who brought forth the antitrust litigation.[230] Universities are not required to offer multiyear scholarships, but rather have the option to do so.[231] As a result, many student-athletes will continue to fear that their scholarship will not be renewed, and thus sacrifice their academics and risk playing with injury.[232] Even an NCAA Presidential Taskforce concluded that, under the one-year scholarship policy: "[A]thletes may be legitimately concerned that their continued access to 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."[233] Moreover, the continued "fear of losing a scholarship and the economic hardship associated with expensive tuition incentivize injured student-athletes to resume playing before full recovery."[234] It is possible that the new scholarship policy might in fact magnify these problems for many student-athletes because coaches might not renew a one-year scholarship to make room for a multiyear

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[229] *Id.*

[230] *See, e.g.*, *Agnew*, 683 F.3d at 332-33; *see also* Complaint at 19-25, *Rock*, 928 F. Supp. 2d 1010 (S.D. Ind. 2013) (No. 12-CV-1019).

[231] Levin, *supra* note 24.

[232] *See* Branch, *supra* note 175 (At "'informal' football workouts at the University of Iowa just after the season-ending bowl games—workouts so grueling that 41 of the 56 amateur student-athletes collapsed, and 13 were hospitalized with rhabdomyolysis, a life-threatening kidney condition often caused by excessive exercise.").

[233] Brian C. Root, *How The Promises of Riches in Collegiate Athletics Lead to the Compromised Long-Term Health of Student-Athletes: Why and How the NCAA Should Protect Its Student-Athletes' Health*, 19 HEALTH MATRIX 279, 288 (2009).

[234] *Id.*

scholarship recruit.[235] By ignoring the harm experienced by student-athletes, the NCAA fails to discourage student-athletes from bringing suits for compensatory damages.

Second, without representation from agents, student-athletes are ill-prepared to engage in the bargaining process for contracts that fully protect them.[236] The NCAA recently removed the restrictions that limited college coaches' ability to contact recruits, further aiding their already zealous recruiting behavior. Now, as early as the end of a prospect's sophomore year "there will be no restrictions on phone calls, text messaging or contacting recruits via social media messengers."[237] Although this form of official contact is limited to the end of sophomore year, that does not prevent coaches from recruiting as early as middle school. This summer at their football camp, Louisiana State University's football coaches offered a "soon-to-be eighth grader" a scholarship to be a member of the class of 2017.[238] Student-athletes rely on these offers and the promises made by recruiters, but lack any means to guarantee that they will be fulfilled. Coaches are free to renege on their offers, "regardless of [whether a recruit] verbally committed or signed their National Letter of Intent."[239] This typically occurs as a result of oversigning, where "[s]chools often sign more players than they have available roster spots under the assumption that not all of the signees will qualify for the financial aid award."[240] When more recruits sign than there are spots available, "lesser regarded signees are told there is no room for them."[241] The addition of gradations in scholarship guarantees provides coaches with an additional incentive to entice and exploit student-athletes in an already

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[235] "From 2008 to 2009, 22 percent of men's college basketball players didn't have their scholarships renewed, according to the National College Players Association." Jamilah King, *How Scholarships Leave Student-Athletes Powerless in the NCAA Game*, COLORLINES (Mar. 23, 2012, 10:08 AM), http://colorlines.com/archives/2012/03/ncaa_scholarships_rules.html.

[236] Miller, *supra* note 7, at 1155.

[237] Josh Barr, *NCAA Changing Basketball Recruiting Model*, WASH. POST (Oct. 27, 2011), http://www.washingtonpost.com/blogs/recruiting-insider/post/ncaa-changing-basketball-recruiting-model-will-allow-coaches-unlimited-calls-and-texts-to-juniors-and-seniors/2011/10/27/gIQA5ci8MM_blog.html.

[238] "Indeed, even if he accepted the offer, Dylan Moses couldn't officially sign with LSU for another five years." David Helman, *LSU Courts Middle Schooler*, ESPN (July, 26, 2012, 10:03 PM), http://espn.go.com/college-football/story/_/id/8199497/soon-8th-grader-dylan-moses-offered-lsu-tigers-scholarship.

[239] Justin N. Fielkow, *"Notional" Letter of Intent: College Football Offers More Than It Can Deliver*, TULANE SPORTS BLOG, http://www.law.tulane.edu/tlsAcademicPrograms/sportsblog.aspx (last visited Jan. 11, 2013).

[240] *Id.*

[241] *Id.*

inequitable system. Without the assistance of counsel or an agent to help negotiate for a beneficial scholarship, the change to allow multiyear scholarship offers fails to "truly protect[] the student-athlete's academic or athletic pursuits."[242]

Instead, the new rule benefits the NCAA by insulating the organization from further litigation and perpetuating its history of self-protective measures under the guise of reforms to protect student-athletes. The option to award multiyear scholarships only revises a bylaw that the NCAA feared courts might have found violated antitrust law. The new rule effectively removes the unreasonable restriction by allowing member institutions the freedom to award any scholarship that they choose. As a result, future plaintiffs will not be able to prove injury, as was claimed in the *Agnew* and *Rock* complaints, because the student-athletes cannot allege that they would have been awarded a multiyear scholarship but for the bylaw. This eliminates a cause of action for student-athletes to challenge a university's unfair failure to renew a scholarship, and demonstrates that "scholarship is still an area where the NCAA . . . fail[s] in its mission to protect student-athletes."[243]

Ultimately, the NCAA's "Prevent Defense" from this particular antitrust challenge is shortsighted because it willfully adopts policy that erodes its legal defenses and fails to rectify harm caused to the student-athletes it vows to protect. Such policy decisions uncover a long history of building and protecting a commercialized big business. The reaction of member institutions to the new policy substantiates the critique that the NCAA's scholarship policy for the last four decades attempted to reduce costs, rather than maintain competition between universities. Since the inception of the multiyear scholarship ban, coaches and universities denied cancelling scholarships due to poor athletic performance or injury. But, as one critic questioned, "[i]f they were telling the truth, why did so many oppose this [multiyear scholarship option]?"[244] The opposition by member institutions reveals that the primary purpose of the scholarship policy was to reduce costs associated with scholarships and enable coaches to "run-off" players they no longer wanted.[245] These cost-cutting benefits came at the expense and exploitation of student-

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[242] Miller, *supra* note 7, at 1156.

[243] *Id.*

[244] Sack, *supra* note 22.

[245] *See* Hakim, *supra* note 59, at 167.

athletes.[246] The one-year scholarship fueled the practices that enable modern-day coaches to control every aspect of a student-athlete's life from the time he arrives on campus to his graduation (if a player is among the minority to reach graduation).[247] As result, student-athletes devote over 50 hours a week to their sport in season and offseason, play through injuries, miss class or give up certain majors, without a promise of continued education, leading to terribly low graduation rates for athletes who play revenue-generating sports.[248]

The exposure of a significant regulatory area where the NCAA not only failed to protect student-athletes, but also facilitated their exploitation, uncovers the hypocrisy of the NCAA's bylaws. This creates increased vulnerabilities for other bylaws, including those that have existed for long periods of time.[249] For example, in *In re NCAA Student-Athlete Name & Likeness Licensing Litigation*, an ongoing antitrust case, a class made up of current and former NCAA student-athletes is challenging the NCAA restriction on allowing athletes to profit from the use of their names and likenesses.[250] In an attempt to have the case dismissed, the NCAA argued the claims present "nothing more

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[246] "Cost-cutting by itself is not a valid procompetitive justification." Yasser, *supra* note 28, at 1013 n.188.

[247] This is because student-athletes fear that they will lose their scholarship, and that "their continued access to education depends on sports success." *Id.*

[248] *See* McCormick & McCormick, *supra* note 182; *see also* Luke DeCock, *Football Graduation Gap Remains a Chasm*, CHARLOTTE OBSERVER, Sept. 24, 2012, *available at* http://www.newsobserver.com/2012/09/24/2367364/decock-football-graduation-gap.html ("Three years after the University of North Carolina's College Sport Research Institute started tracking graduation rates based not on raw numbers but on how athletes performed when compared to other students, nothing has changed. Football players are still graduating about 20 percent less than regular students. The latest edition of the study, planned for release Tuesday, found that FBS football players were 17 percent less likely to graduate than their male peers, down from 20 percent last year, with a three-year rolling average of 19 percent [graduation gap].").

[249] This vulnerability even extends to the viability of the scholarship itself. In two different district courts, California and New Jersey, classes of student-athlete plaintiffs have recently filed claims alleging that the athletic scholarship artificially caps collegiate athletes' compensation to the cost of tuition, room, board, and books, and thus violate the Sherman Act. *See* Complaint, Alston v. NCAA, No. 3:14-cv-01011 (N.D. Cal. Mar. 4, 2014); *see also* Complaint, Jenkins v. NCAA, No. 3:33-av-00001 (D.N.J Mar. 17, 2014).

[250] *See* Steve Berkowitz, *Judge Denies NCAA's Motion to Dismiss Antitrust Lawsuit*, USA TODAY SPORTS (Oct. 25, 2013, 6:24 PM), http://www.usatoday.com/story/sports/college/2013/10/25/ncaa-antritrust-lawsuit-electronic-arts-ed-obannon-names-likenesses/3188993/; *see also* Marc Edelman, *Federal Court Ruling Paves Way for Class Action Antitrust Challenge to NCAA Amateurism Rules*, FORBES, (Oct. 28, 2013, 8:13 AM), http://www.forbes.com/sites/marcedelman/2013/10/28/federal-court-ruling-paves-the-way-for-class-action-challenge-to-ncaa-amateurism-rules/; Tom Farrey, *NCAA Motion Denied in Player Suit*, ESPN (Nov. 5, 2013, 6:01 PM), http://espn.go.com/espn/otl/story/_/id/9879455/judge-denies-motion-dismiss-ed-obannon-ncaa-lawsuit.

than a challenge to the NCAA's rules on amateurism," which the NCAA posited were protected under *Board of Regents*.[251] The court rejected this argument stating that *Board of Regents* does not bar the student-athletes antitrust claims and that the NCAA must demonstrate that the ban "serves some procompetitive purpose."[252] The District Court for the Northern District of California made clear that to defeat the antitrust claims the NCAA would need to rely on its traditional procompetitive justifications of amateurism and maintenance of competitive balance. Because the court utilized *Agnew* and *Rock* to deny the NCAA's motion to dismiss,[253] the plaintiff class can use these cases to demonstrate that the NCAA has recently weakened its traditional legal defenses, and therefore those defenses are no longer sufficient to justify the restraint on the market at issue in *In re NCAA Student-Athlete Name & Likeness Licensing Litigation*. Although the NCAA and its "member schools have downplayed the antitrust risks that stem from their current mode of business[,]"[254] it appears courts no longer accept that the "NCAA plays a vital role in enabling college football to preserve [the] character"[255] of collegiate athletics, but rather treat the NCAA like a comparable profit-maximizing business.

CONCLUSION: ADOPTION OF THE MANDATORY MULTIYEAR DEAL

The NCAA's decision to revive the multiyear scholarship by allowing member institutions the option to provide scholarships for more than one year is an unsound policy because it undermines the NCAA's traditional legal defenses to antitrust litigation and fails to protect student-athletes. In reality, the NCAA could rectify the problems of its newly adopted scholarship policy simply by

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[251] *In re* NCAA Student-Athlete Name & Likeness Licensing Litigation, No. C-09-1967-CW, 2013 WL 5778233, at *4 (N.D. Cal. Oct. 25, 2013) (internal quotation marks omitted).

[252] *Id.* at *6.

[253] "In recent years, courts have held that NCAA rules restricting the size and availability of student-athletes' scholarships and financial aid grants may be challenged under the Sherman Act, even though they relate to forms of student-athlete compensation." *Id.* at *12 (citing Rock v. NCAA, 2013 WL 4479815, at *14 (S.D. Ind. 2013)). The court continued to refute the NCAA's argument by stating,

> Although the plaintiffs in *Agnew* focused on the NCAA's scholarship rules, rather than its rules prohibiting student-athletes from licensing their publicity rights, the court's rationale for distinguishing *Board of Regents* is still persuasive here: in short, *Board of Regents* did not address the impact of the NCAA's horizontal restraints on student-athletes.

Id. at *6.

[254] Edelman, *supra* note 250.

[255] NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, at 101-02 (1984).

eliminating one-year renewable scholarships entirely and only allowing member institutions to offer multiyear scholarships.

By instituting a mandatory multiyear scholarship that provides the guaranteed cost of attendance for all student-athletes to graduate,[256] the NCAA can revive its legal defenses and protect student-athletes. As Louis Hakim points out, "The formation of the extended-term scholarship contract will essentially follow the requisites of the scholarship agreement under the current system. The critical difference is that the parties will promise to be bound for four or five years rather than simply one year."[257]

First, the mandatory multiyear policy would prevent coaches from cancelling scholarships of players who they no longer want or who suffered injuries,[258] thereby eliminating the harm experienced by the plaintiffs in *Agnew* and *Rock*. To appease coaches and universities, players who quit without cause would become eligible to lose their scholarship because a student-athlete would have to remain eligible and willing to participate in athletics to maintain his or her athletic scholarship.[259] Second, a mandatory four-year scholarship reinforces NCAA's ideal of amateurism—"[s]tudent-[a]thletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental[,] and social benefits to be derived"[260]—by shifting the emphasis to ensuring an education.[261] Third, a rule that regulates evenly and limits universities to a singular type of scholarship option reinstates a competitive balance.

Critics of such a policy argue that this will decrease the quality of play on the field because coaches will be forced to carry players who they feel do not have the ability to make an impact. Among these critics are many college coaches

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[256] This would most likely range from three to six years depending on whether a student-athlete graduated early or elected to use a redshirt and medical redshirt.

[257] Hakim, *supra* note 59, at 170.

[258] *Id.* at 167.

[259] *Id.* at 165. The NCAA would need to create a provision or assign a committee to review these terminations to ensure that coaches were not running off undesirable players.

[260] Kristen R. Muenzen, Comment, *Weakening Its Own Defense? The NCAA's Version of Amateurism*, 13 MARQ. SPORTS L. REV. 257, 283-84 (2003).

[261] The mandatory scholarship rule must be an initial step to shift the paradigm in college athletics to emphasize the student-athlete's education. Such a shift would require critical subsequent measures, including scaling back the number of allowable hours devoted to sport, eliminating the reduced academic standards for college athletes, and increasing the available academic support, in order to eradicate the low graduation rates and provide the meaningful education promised. *See supra* notes 213-14 and accompanying text.

themselves, who prefer one-year scholarships because it provides them overwhelming discretion over their teams and ultimately the fates of their student-athletes. These coaches also fear that guaranteed scholarships increase the costs associated with scholarships.[262] But,

> [t]he average compensation for head football coaches at public universities, now more than $2 million, has grown 750 percent (adjusted for inflation) since the *Regents* decision in 1984; that's more than 20 times the cumulative 32 percent raise for college professors. For top basketball coaches, annual contracts now exceed $4 million, augmented by assorted bonuses, endorsements, country-club memberships, the occasional private plane, and in some cases a negotiated percentage of ticket receipts.[263]

Coaches should not bemoan developing the players they recruited considering that is the job for which they receive such significant salaries. Moreover, if mandatory multiyear scholarships, which ensure that student-athletes graduate, do in fact increase costs for athletic programs, it justly reallocates the revenue to the individuals who generate it. Finally, any reduction of quality of play at the cost of "enhancing academic integrity and educational primacy in intercollegiate athletics"[264] should be welcomed from organizations whose claimed principles are "educational values and academic integrity," such as the NCAA and its member institutions.[265]

Vincent J. DiForte[†]

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[262] Branch, *supra* note 175.

[263] *Id.*

[264] Hakim, *supra* note 59, at 168-69.

[265] *Id.* at 164-65.

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