

## COMMENT

### NCAA Division I Transfers “are now basically screwed”<sup>1</sup>

*The Battle Against the NCAA’s Year in Residence Rule in the Seventh Circuit*

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#### INTRODUCTION

Most National Collegiate Athletic Association (NCAA) bylaws have enjoyed over thirty years of antitrust protection under Section 1 of the Sherman Act—it is time for this era to end. Bylaws are the backbone of the NCAA’s model: they hold each member institution and its actors to the same standards of conduct, academic eligibility, recruiting, and playing and practice seasons to attempt to establish an even playing field among competitors.<sup>2</sup> In 1984, the Supreme Court reasoned

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1. Gary Parrish, *The NCAA’s new policy on transfers has one bad unintended consequence*, CBS SPORTS (Apr. 21, 2015), <https://www.cbssports.com/college-basketball/news/the-ncaas-new-policy-on-transfers-has-one-bad-unintended-consequence>.

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2. See NCAA CONST. art II, §§ 2.1–2.16.

in *NCAA v. Board of Regents*<sup>3</sup> that most NCAA bylaws were presumptively procompetitive under antitrust law because cooperation among competitor schools was necessary to establish basic standards for intercollegiate competition, and therefore the NCAA deserved ample latitude to set these standards through its bylaws.<sup>4</sup>

At the time the case was decided, the myth of the student-athlete<sup>5</sup> was alive and well. In 1984, the NCAA did not enjoy billion-dollar TV contracts, had not yet encountered a two decade-long academic fraud scandal at one of its most decorated institutions, and Division I basketball had not been investigated by the FBI for conspiracy, bribery, and fraud in a pay-for-play scheme in which coaches used six-figure cash payments to secure the nation's top recruits. Instead, this describes the NCAA of 2018, whose bylaws do not deserve the same antitrust protection.

Since 1984, *Board of Regents* has enabled the NCAA to defeat numerous legal challenges to its governance system.<sup>6</sup> However, in September 2015, the Ninth Circuit broke away from the deference granted to NCAA Bylaws in *O'Bannon v. NCAA*, holding that certain NCAA amateurism bylaws violated the Sherman Act.<sup>7</sup> By applying the Rule of Reason to these bylaws, the Ninth Circuit opened the NCAA's amateur sports model to antitrust attack.

This Comment focuses on one of the resulting attacks: an antitrust challenge to Bylaw 14.5.5.1, the Year in Residence Rule. This rule mandates that any student-athlete who plays

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3. 468 U.S. 85 (1984).

4. *Id.* at 120.

5. Gary Gutting, *The Myth of the 'Student-Athlete'*, N.Y. TIMES (Mar. 15, 2012), <https://opinionator.blogs.nytimes.com/2012/03/15/the-mthy-of-the-student-athlete>.

6. *See, e.g.*, *Marucci Sports, L.L.C. v. NCAA*, 751 F.3d 368, 379 (5th Cir. 2014); *Banks v. NCAA*, 977 F.2d 1081, 1094 (7th Cir. 1992); *McCormack v. NCAA*, 845 F.2d 1338, 1340 (5th Cir. 1988).

7. *O'Bannon v. NCAA*, 802 F.3d 1049, 1065 (9th Cir. 2015).

a revenue-generating sport (baseball, basketball, bowl subdivision football, or men's ice hockey) and subsequently transfers to a new institution must complete a full academic year (two semesters or three quarters) at the new school<sup>8</sup> before participating in NCAA-sanctioned competition.<sup>9</sup> The rule seeks to ensure student-athletes are adequately situated at their new institution before balancing the pressures of competing in Division I intercollegiate competition. The rule also seeks to prevent free agency.

In writing, the Year in Residence Rule helps further the NCAA's objectives of interscholastic sports, but in practice it is problematic. As coaches continue to chase prestigious jobs and huge contracts, student-athletes have become expendable. Four-year scholarship promises are easily broken when student-athletes could cost coaches opportunities for a contract extension or a big payday. When coaches seeking a big payday choose not to renew scholarships, student-athletes are penalized if they seek to transfer to another Division I school because they must fulfill an entire academic year in residence before competing for their new school even if they are in good academic standing at their current institution.

To make matters worse, Division I schools want players who can compete immediately and often offer scholarships to transfers if the student-athletes can successfully petition the NCAA to waive the requirement (which happens rarely, if ever). Consequently, to be able to play immediately, these student-athletes are forced make a sacrifice athletically and financially. Within the NCAA bylaws there are only two realistic ways to transfer to be academically eligible to play upon arriving at the new campus. A student-athlete can

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8. In this Comment, "school" and "institution" are used interchangeably to refer to colleges and universities.

9. NCAA, *DIVISION I MANUAL: AUGUST 2016–17* § 14.5.5.1 (2016), <http://www.ncaapublications.com/p-4435-2016-2017-ncaa-division-i-manual-august-version-available-august-2016.aspx> [hereinafter *NCAA DIVISION I MANUAL*].

transfer to a Division II school where the grant in aid packages provide less financial support and the level of competition is significantly lower.<sup>10</sup> Or, in the alternative, if the student-athlete is a football player with two or more years of eligibility left, he can transfer from an FBS to a FCS<sup>11</sup> school, which again is a marked decrease in the quality of competition.<sup>12</sup> So, the Year in Residence Rule essentially functions to deprive the market of its best players because teams pass on student-athletes who would otherwise be given roster spots but for having to fulfill the year in residence.

In just over twelve months, starting in November 2015, Hagens Berman filed three class-action lawsuits against the NCAA challenging the Year in Residence Rule under the Sherman Act. Two cases, *Pugh v. NCAA*<sup>13</sup> and *Deppe v. NCAA*<sup>14</sup> were decided in the NCAA's favor.<sup>15</sup> However, the Seventh Circuit granted the plaintiff's appeal in *Deppe*, and

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10. *Transfer Terms*, NCAA, <http://www.ncaa.org/student-athletes/current/transfer-terms> (last visited Feb. 23, 2018).

11. Although there are numerous differences in FBS (Football Bowl Subdivision) and FCS (Football Championship Subdivision) schools, which are outlined in section 17.10 of the NCAA Division I Manual, the chief difference between the two subdivisions is the amount of aid the programs can give. FBS schools are mainly Power Five Conference (ACC, Big 10, Big 12, PAC 12, SEC) schools that are consistently seen on television every Saturday in the fall and ultimately compete for a spot in the College Football Playoff. These schools can offer up to eighty-five full grant-in-aid scholarships. NCAA DIVISION I MANUAL, *supra* note 9, at § 15.5.6.1. FCS schools are lesser known schools, commonly of "mid-major" level. These schools are also allowed to award eighty-five scholarships to student-athletes, but only sixty-three student-athletes may be awarded full grant-in-aid scholarships. *Id.* § 15.5.6.2.

12. NCAA ELIGIBILITY CENTER, 2017–18 GUIDE FOR FOUR-YEAR TRANSFERS FOR STUDENT-ATHLETES AT FOUR-YEAR COLLEGES 17–18 (2017), [http://www.ncaa.org/sites/default/files/2017-18\\_Transfer\\_Guide\\_4\\_Year\\_20170721.pdf](http://www.ncaa.org/sites/default/files/2017-18_Transfer_Guide_4_Year_20170721.pdf).

13. No. 1:15-cv-01747-TWP-DKL, 2016 U.S. Dist. LEXIS 168174 (S.D. Ind. Sep. 27, 2016).

14. No. 1:16-cv-00528-TWD-DKL, 2017 U.S. Dist. LEXIS 31704 (S.D. Ind. Mar. 6, 2017).

15. *Id.* at \*12; *Pugh*, 2016 U.S. Dist. LEXIS 168174, at \*11.

heard oral arguments in September 2017.<sup>16</sup> As of April 2018, the court has not yet issued its decision.<sup>17</sup> In the last case, *Vassar v. NCAA*,<sup>18</sup> the parties agreed to await the Seventh Circuit's decision in *Deppe*, which will likely determine its outcome.<sup>19</sup>

In light of the current state of the NCAA, which has come to be defined by money, power, and scandal, coupled with the Ninth Circuit's holding in *O'Bannon*, the Seventh Circuit should follow its sister circuit's lead and analyze Bylaw 14.5.5.1 under the Rule of Reason. *Deppe* presents a unique opportunity to institute much needed reform of an organization whose president has recognized needs "fundamental change."<sup>20</sup> The realities of today's NCAA clearly demonstrate that the organization no longer warrants the antitrust protection it has been afforded. More importantly, *Deppe* is a chance to do right by the group of individuals the NCAA would be nothing without—the student-athletes.

This Comment demonstrates the importance of the first antitrust challenge to the NCAA after *O'Bannon*. Part I provides a realistic overview of the current vulnerability of the NCAA due to certain elements of unfairness to student-athletes in its model. Part II delves into the jurisprudential background that enabled NCAA bylaws to pass antitrust scrutiny for over thirty years, and how *O'Bannon* seeks to break that trend. Part III analyzes how and why *Pugh* and *Deppe* were held in favor of the NCAA. Part IV demonstrates

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16. Oral Argument, *Deppe v. NCAA*, No. 17-1711 (7th Cir. Sept. 13, 2017), <https://player.fm/series/oral-arguments-for-the-court-of-appeals-for-the-seventh-circuit/peter-deppe-v-ncaa>.

17. *Deppe v. NCAA*, No. 17-1711 (7th Cir. filed Apr. 6, 2017).

18. No. 1:16-CV-10590 (N.D. Ill. filed Nov. 14, 2016).

19. *See id.*

20. Will Hobson, *NCAA President Mark Emmert: 'Fundamental change' needed in college basketball*, WASH. POST (Oct. 30, 2017), <http://www.washingtonpost.com/news/sports/wp/2017/ncaa-president-mark-emmert-fundamental-change-needed-in-college-basketball>.

the harms that could result in the NCAA's transfer environment if the Seventh Circuit affirms *Deppe*, by setting forth the facts in *Vassar*. Part V concludes by applying the Rule of Reason to the Year in Residence Rule, as it suggests the Seventh Circuit should do in *Deppe*.

## I. BACKGROUND

### A. *The NCAA*

The National Collegiate Athletic Association was founded in 1906<sup>21</sup> to govern intercollegiate athletics in the

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21. The NCAA was founded as a direct result of President Theodore Roosevelt's call to end brutality in college football. *National Collegiate Athletic Association*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/National-Collegiate-Athletic-Association> (last visited Mar. 27, 2018). Organized college football similar to today's version of football began in the United States in the 1880s. See JOHN SAYLE WATTERSON, COLLEGE FOOTBALL: HISTORY, SPECTACLE, CONTROVERSY 19–21 (2000). By the mid-1890s, Harvard, Yale, and Princeton developed heated football rivalries that attracted nationwide attention. *Id.* at 10. By the turn of the century, the game spread in popularity as these rivalries grew, games turned more violent, and injury, including death, became more frequent. *Id.* at 58–59. In October of 1905, President Theodore Roosevelt met with Secretary of State, Elihu Root, Yale's chief athletic adviser and football coach, Walter Camp and Jack Owsley, William T. Reid, head football coach, and Dr. D.H. Nichols of Harvard, and football coaches, Arthur T. Hillebrand and John B. Fine, from Princeton, to discuss college football rule reform. According to a *Washington Post* article,

[the] President wished to have an interchange of views with the object of devising means of eliminating so far as possible the brutal elements of football. President Roosevelt is especially desirous that the great American college game should not suffer through unsportsmanlike conduct of players who may willfully injure a member of an opposing team in the heat of contest.

*Hears Football Men: Coaches in Conference with President Roosevelt*, WASH. POST (Oct. 10, 1905), <https://www.documentcloud.org/documents/1175005-144576144-1.html>. The article continues, “[it] is hoped by the President that with the cooperation of the college authorities and the athletic advisers the rules of the game may be so amended as practically to do away with much of the brutality which makes the game objectionable to many people. . . . [T]he idea of the President [was] simply to start the ball rolling in the direction of a modification of the rules of the game.” *Id.* Roosevelt, a Harvard alumnus and huge football fan, threatened to put an end to the entire system of college football if the universities could not

United States.<sup>22</sup> From its inception to today, the NCAA has distinguished its product from professional sports by the unique characterization of its participants as “student-athletes.”<sup>23</sup> According to the NCAA Constitution, athletics are a fundamental element of the educational programs of its member universities.<sup>24</sup> In order to participate in any practice or competition, all NCAA student-athletes must meet a minimum academic standard in the classroom.<sup>25</sup> Subsequently, the NCAA has been wildly successful in establishing itself as the governing body of nearly all college athletics in the United States.<sup>26</sup> Today, almost 500,000 student-athletes participate in NCAA-sanctioned

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control their players. George H. Hanford, *Controversies in College Sports*, 445 ANNALS AM. ACAD. POL. SOC. SCI. 66, 68 (1979). As such, the NCAA was founded “to codify, promulgate, and enforce rules and regulations which would ensure proper behavior on and off the field.” *Id.*

22. EDWARD J. SHEA & ELTON E. WIEMAN, ADMINISTRATIVE POLICIES FOR INTERCOLLEGIATE ATHLETICS 14 (1967). According to its first constitution, the NCAA was established to govern “the regulation and supervision of college athletics throughout the United States, in order that the athletic activities of the colleges and universities of the United States may be maintained on an ethical plane in keeping with the dignity and high purpose of education.” *Id.* For a discussion on the history of NCAA’s governance of intercollegiate athletics in the United States, see, for example, Rodney K. Smith, *A Brief History of the National Collegiate Athletic Association’s Role in Regulating Intercollegiate Athletics*, 11 MARQ. SPORTS L. REV. 9 (2000).

23. *Student-Athletes*, NCAA, <http://www.ncaa.org/student-athletes> (last visited Feb. 24, 2018).

24. NCAA CONST. art I, § 1.3.1 (stating the purpose of the NCAA is “to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports”).

25. *Division I Academic Eligibility*, NCAA, <http://www.ncaa.org/about/division-i-academic-eligibility/> (last visited Mar. 27, 2018).

26. The NCAA is comprised of over 1200 member schools, conferences, and organizations. *Membership*, NCAA, <http://www.ncaa.org/about/who-we-are/membership> (last visited Feb. 24, 2018) [hereinafter *Membership*]. Between its three divisions, the NCAA supervises almost half a million student-athletes, who make up 19,500 teams that participate in 90 national championships in twenty-four sports. *What is the NCAA?*, NCAA, <http://www.ncaa.org/about/resources/media-center/ncaa-101/what-ncaa> (last visited Feb. 24, 2018) [hereinafter *What is the NCAA?*].

competition each year<sup>27</sup> in the organization's three divisions: Division I, Division II and Division III.<sup>28</sup> The NCAA and its member institutions award \$2.9 billion in scholarships annually to over 150,000 student-athletes.<sup>29</sup>

### B. *Division I*

Division I athletics represent the highest level of intercollegiate athletics in the United States and are the most well-known nationally.<sup>30</sup> The schools that make up the division have the most populous student bodies, finance the largest athletics budgets, offer the most amount of scholarship money to their student-athletes, and are given the most money by donors.<sup>31</sup> Division I's most popular and widely televised sports are FBS football<sup>32</sup> and men's basketball.<sup>33</sup> Each sport's most talented players are drafted

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27. *What is the NCAA?*, *supra* note 26.

28. The chief difference between the three divisions is the amount of scholarship money that may be offered to student-athletes. Division I programs may offer grant-in-aid up to the cost of attendance (*i.e.* "full scholarships"). *Cost of Attendance Q&A*, NCAA, <https://www.ncaa.com/news/ncaa/article/2015-09-03/cost-attendance-qa> (last visited Mar. 27, 2018). Division II schools offer mostly "partial" scholarships that combine athletic, academic, and financial aid packages. *See About NCAA Division II*, NCAA, <http://www.ncaa.org/about?division=d2> (last visited Feb. 24, 2018). Finally, Division III programs are prohibited from providing athletics aid to any student-athlete. Only athletes who can show financial need will receive tuition assistance. *See* Ronald J. Waicukauski, *The Regulation of Academic Standards in Intercollegiate Athletics*, in *LAW & AMATEUR SPORTS* 161, 162 (Ronald J. Waicukauski ed., 1982).

29. *Finances*, NCAA, <http://www.ncaa.org/about/resources/finances> (last visited Feb. 24, 2018).

30. Division I is the smallest of the three NCAA divisions by membership with about 350 institutions and 170,000 student-athletes. *NCAA Division I*, NCAA, <http://www.ncaa.org/about?division=d1> (last visited Feb. 24, 2018).

31. *See id.*; *see also* discussion of Division I, *supra* note 21.

32. Division I football averages over two million viewers per game. *See* Emily Kaplan, *Why Haven't College Football Ratings Fallen Like the NFL's?*, *SPORTS ILLUSTRATED* (Nov. 16, 2016), <http://mmqb.si.com/mmqb/2016/11/15/college-football-ratings-2016-season-nfl-ratings-ESPN-fox-nfl-draft>.

33. *See* Rob Goldberg, *2017 NCAA Tournament is Most Viewed in 24 Years, Ratings Up 10 Percent from 2016*, *BLEACHER REPORT* (Mar. 20, 2017),

into professional leagues, and some commentators,<sup>34</sup> including one federal court,<sup>35</sup> have labeled these two sports as the *per se* minor leagues for the NFL and NBA.<sup>36</sup> As college athletics have morphed into a proving ground for future professional athletes, the NCAA's governance structure, the Bylaws, have become a crucial line of demarcation to ensure the highest level of college athletics remain amateur.

### C. *The Bylaws*

Each of the NCAA's three divisions are governed by their own set of bylaws,<sup>37</sup> which hold all member institutions to the same standards to ensure competitive balance and advance the NCAA's Core Values.<sup>38</sup> When an institution is

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<http://bleacherreport.com/articles/2699087-2017-ncaa-tournament-is-most-viewed-in-24-years-ratings-up-10-percent-from-2016>.

34. For instance, in his introductory press conference as head coach of the Tennessee Titans, former NFL linebacker, Mike Vrabel, commented: “[t]he NFL has the greatest farm system in the world. We pay our farm-system coaches \$10 million to develop players. . . . [Alabama coach] Nick Saban is our farm system. [Ohio State coach] Urban Meyere is our farm system.” Richard Johnson, *New Titans Coach Mike Vrabel said the thing everyone knows about college football*, SB NATION (Jan. 23, 2018), <https://www.sbnation.com/college-football/2018/1/23/16923966/mike-vrabel-nfl-college-football-minor-system>.

35. See *Hall v. Univ. of Mich.*, 530 F. Supp. 104 (D. Minn. 1982) (“The exceptionally talented student athlete is led to perceive the basketball, football, and other athletic programs as farm teams and proving grounds for professional sports leagues. It well may be true that a good academic program for the athlete is made virtually impossible by the demands of their sport at the college level.”).

36. Tim MacMahon, *Should NCAA Serve as NBA's Minor League?*, ESPN (June 24, 2015), [http://www.espn.com/nba/story/\\_/id/13136578/should-ncaa-serve-nba-minor-league](http://www.espn.com/nba/story/_/id/13136578/should-ncaa-serve-nba-minor-league); William C. Rhoden, *NFL Crosses a Boundary in the Pryor Case*, N.Y. TIMES: SPORTS OF THE TIMES (Aug. 21, 2011), <http://www.nytimes.com/2011/08/22/sports/football/pryor-case-highlights-nfls-uncomfortably-cozy-ties-with-ncaa.html>.

37. *Membership*, *supra* note 26.

38. The NCAA's Core Values state: “The Association—through its member institutions, conferences and national office staff—shares a belief in and commitment to:

- *The collegiate model of athletics* in which students participate as an avocation, balancing their academic, social and athletics experiences.

admitted as an NCAA member, the institution agrees it will obey all bylaws and subject itself to discipline for any violations.<sup>39</sup> Overall, the bylaws dictate standards for academic eligibility of student-athletes, amateurism restrictions, recruiting guidelines for coaches and players, financial aid limits and requirements, athletic department budgetary oversight, and playing and practice season hour requirements.<sup>40</sup> These bylaws govern every student-athlete (current and prospective), coach, administrator, faculty member, and donor affiliated with each of its member institutions.<sup>41</sup> With its current size and multibillion dollar revenues, institutional control and bylaw adherence are integral to the continued success of the NCAA, especially in Division I.<sup>42</sup>

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- *The highest levels of integrity and sportsmanship.*
  - *The pursuit of excellence in both academics and athletics.*
  - *The supporting role that intercollegiate athletics plays in the higher education mission and in enhancing the sense of community and strengthening the identity of member institutions.*
  - *An inclusive culture that fosters equitable participation for student-athletes and career opportunities for coaches and administrators from diverse backgrounds.*
  - *Respect for institutional autonomy and philosophical differences.*
  - *Presidential leadership of intercollegiate athletics at the campus, conference and national levels.*”

NCAA Core Values, NCAA, <http://www.ncaa.org/about/ncaa-core-values> (last visited Feb. 24, 2018) (emphasis in original).

39. NCAA CONST. art. 1, § 1.3.2 (“Member institutions shall be obligated to apply and enforce this legislation, and the infractions process of the Association shall be applied to an institution when it fails to fulfill this obligation.”).

40. NCAA DIVISION I MANUAL, *supra* note 9, at iii-v.

41. *See generally id.*

42. *See, e.g.,* Maureen A. Weston, *Symposium Introduction: The New Normal in College Sports: Realigned and Reckoning*, 41 PEPP. L. REV. 209, 216–17 (2014) (finding all symposium panelists agreed that “institutional control is a shared responsibility” that starts from the top down, where the “university president appoint[s] capable and ethical” athletic department leaders, an athletic director hires competent and responsible compliance officers, and the compliance officers then inform “administrators, coaches, student-athletes, boosters, alumni, and even fans to know and honor the rules and implement a monitoring system that

### 1. Article 14: Academic Eligibility

Article 14 of the NCAA Division I Manual defines academic standards for incoming, currently enrolled, and transfer student-athletes.<sup>43</sup> In essence, the academic eligibility bylaws set a minimum academic benchmark that every student-athlete at every NCAA institution must meet to be eligible for competition. These uniform standards seek to ensure future student-athletes are academically qualified when they arrive on campus, and current student-athletes are successfully balancing their coursework and athletic commitments.

### 2. Bylaw 14.5.5.1, The Year in Residence Rule

Section 14.5 of Article 14 governs the eligibility of transfer students.<sup>44</sup> The section at issue in this Comment is

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results in compliance with those rules”).

43. The stated purpose of Bylaw 14 is “to ensure that the Division I membership is dedicated to providing student-athletes with exemplary educational and intercollegiate-athletics experiences in an environment that recognizes and supports the primacy of the academic mission of its member institutions, while enhancing the ability of male and female student-athletes to earn a four-year degree.” NCAA DIVISION I MANUAL, *supra* note 9, at 143, § 14.01.4.

44. Bylaw 14.5.2 defines a transfer student as:

[A]n individual who transfers from a collegiate institution after having met any one of the following conditions at that institution: . . . (a) The student was officially registered and enrolled in a minimum, full-time program of studies in any quarter or semester of an academic year, as certified by the registrar or admissions office, provided the student was present at the institution on the opening day of classes; (b) The student attended a class or classes in any quarter or semester in which the student was enrolled in a minimum full-time program of studies, even if the enrollment was on a provisional basis and the student was later determined by the institution not to be admissible; (c) The student is or was enrolled in an institution in a minimum full-time program of studies in a night school that is considered to have regular terms (semesters or quarters) the same as the institution’s day school, and the student is or was considered by the institution to be a regularly matriculated student; (d) The student attended a branch school that does not conduct an intercollegiate athletics program, but the student had been enrolled in another collegiate institution prior to attendance at the branch school; (e) The student attended a branch school that conducted an intercollegiate

Bylaw 14.5.5.1, the “Year in Residence Rule.” The text of Bylaw 14.5.5.1, the rule for four-year college to four-year college (i.e. four-four) transfers, states: “[a] transfer student from a four-year institution shall not be eligible for intercollegiate competition at a member institution until the student has fulfilled a residence requirement of one full academic year (two full semesters or three full quarters) at the certifying institution.”<sup>45</sup> The NCAA’s rationale behind the rule is that it “encourages [student-athletes] to make decisions motivated by academics as well as athletics. Most student-athletes who are not eligible to compete immediately benefit from a year to adjust to their new school and focus on their classes.”<sup>46</sup>

Bylaw 14.5.5.1 attempts to prevent students from immediately competing, regardless of the reason for transferring.<sup>47</sup> However, the student-athlete may petition

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athletics program and transfers to an institution other than the parent institution; (f) The student reported for a regular squad practice (including practice or conditioning activities that occur prior to certification per Bylaws 14.3.5.1 and 14.5.4.6.7), announced by the institution through any member of its athletics department staff, prior to the beginning of any quarter or semester, as certified by the athletics director. Participation only in picture-day activities would not constitute “regular practice”; (g) The student participated in practice or competed in a given sport even though the student was enrolled in less than a minimum full-time program of studies; or (h) The student received institutional financial aid while attending a summer term, summer school or summer-orientation program (see Bylaws 15.2.8.1.3 and 15.2.8.1.4). A recruited student who receives institutional aid pursuant to Bylaw 15.2.8.1.4 is subject to the transfer provisions, except that a prospective student-athlete (recruited or nonrecruited) who is denied admission to the institution for full-time enrollment shall be permitted to enroll at another institution without being considered a transfer student.

*Id.* at 163–64, § 14.5.2.

45. *Id.* § 14.5.5.1.

46. *Frequently Asked Questions About the NCAA*, NCAA, <http://www.ncaa.org/about/frequently-asked-questions-about-ncaa> (last visited Feb. 25, 2018).

47. *See id.* Bylaw 14.7.2 notes four cases where the NCAA’s Subcommittee for Legislative Relief has the *option* to waive the year in residence: (1) when a student-athlete transfers schools for health reasons; (2) in the event eligibility was taken away from the student-athlete because of a violation of the prohibition on “pay for participation” and the student-athlete proves he is innocent; (3) when

the NCAA for a Section 12.8.4 hardship waiver to forego the year in residency if the student can demonstrate substantial adversity or other mitigating circumstances.<sup>48</sup> Nevertheless, the NCAA has taken a hard line—especially in Division I football and men’s basketball—and almost never grants hardship waivers for transfers.<sup>49</sup>

*a) Bylaw 14.5.5.2.10: The One-Time Transfer Exception*

While Bylaw 14.5.5.1 appears broad at first glance, the NCAA has limited its reach. Bylaw 14.5.5.2.10, the “One-Time Transfer Exception,” allows a student-athlete to be immediately eligible to participate in intercollegiate competition at a transfer institution if the student:

- (a) is a participant in a sport *other than* baseball, basketball, bowl subdivision football or men’s ice hockey . . . ;
- (b) has not previously transferred from a four-year institution . . . ;
- (c) would have been academically eligible had he or she remained at the institution from which the student transferred . . . ;
- (d) the student’s previous institution . . . certify[ies] in writing that it has no objection to the student being granted an exception to the transfer-residence requirement.<sup>50</sup>

*b) The True Function of the Year in Residence Rule*

The One-Time Transfer Exception shows the true rationale behind the Year in Residence Rule: the NCAA does not want free agency in its most popular and profitable

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a student-athlete transfers to a new school because his previous school is on probation for an NCAA infraction and the student-athlete will be prevented from competing in postseason competition for the rest of his years of eligibility; and (4) when a student-athlete transfers to a new school because his previous school is on probation for an NCAA academic sanction and the student-athlete will be prevented from competing in postseason competition for the rest of his years of eligibility. NCAA DIVISION I MANUAL, *supra* note 9, at 173–74, § 14.7.2.

48. *See id.* at 77–79, §12.8.4.

49. ROBERT C. BERRY & GLENN M. WONG, 2 LAW AND BUSINESS OF THE SPORTS INDUSTRIES: COMMON ISSUES IN AMATEUR AND PROFESSIONAL SPORTS 144, § 3.13 (2d ed. 1993).

50. NCAA DIVISION I MANUAL, *supra* note 9, at 170, § 14.5.5.2.10 (emphasis added).

sports.<sup>51</sup> By excluding revenue-generating sports from this one-time exception, it is clear the NCAA is concerned about its public relations image. Specifically, the organization appears concerned that its amateur model will not be as popular if players are allowed to freely transfer between schools. It would be a public relations nightmare to see a player on one football team in September and another in November, within the same academic semester.

Consequently, the Year in Residence Rule functions to prevent the small percentage of Division I athletes who are NBA and NFL prospects from shopping teams to increase their draft stock. Yet only 1.1% of 18,684 men's basketball players and 1.5% of 73,660 football players go on to compete professionally.<sup>52</sup> Unfortunately, the remaining 98% of Division I football and basketball players are forced to abide by the same rules as the few who would go on to a professional career. So, for instance, if a student-athlete transfers to a new school to pursue a major her previous school did not offer, she must sit out one year. If a student-athlete transfers due to a coaching change, where the new head coach chooses not to renew his scholarship, he will also be held from competition for one year. Finally, if a student-athlete transfers because he has been verbally or physically abused by a coach,<sup>53</sup> he will also be forced to sit out a year.

*c) Criticism of Bylaw 14.5.5.1*

Unsurprisingly, the rule has drawn criticism. For example, Gary Parrish of CBS Sports wrote in April 2015

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51. Where a men's tennis player can transfer from one Power Five team to another and not have to sit out a year if it is his first transfer, a football or men's basketball player will have to fulfill this year in residence.

52. *Estimated probability of competing in professional athletics*, NCAA, <http://www.ncaa.org/about/resources/research/estimated-probability-competing-professional-athletics> (last visited Feb. 26, 2018).

53. See, e.g., Steve Eder & Kate Zernike, *Rutgers Leaders Are Faulted on Abusive Coach*, N.Y. TIMES (Apr. 3, 2013), <http://www.nytimes.com/2013/04/04/sports/ncaabasketball/rutgers-fires-basketball-coach-after-video-surfaces.html>.

“there’s a pretty terrible unintended consequence to the NCAA no longer allowing waivers for transfers to play immediately . . . [which] is this: [p]layers who are run off by their coaches are now basically screwed.”<sup>54</sup> Parrish’s article goes on to quote one Power Five basketball coach, who chose to remain anonymous: “It’s wrong . . . . You’re telling me I can sign a kid, keep him for a year or two, decide I misevaluated him and pull his scholarship, and then that kid has to sit a year no matter what? That’s [expletive] up, man. That’s just [expletive] up.”<sup>55</sup>

*d) Potential Changes: 2018 NCAA Convention Rumbblings*

In light of this criticism and the three lawsuits that challenge the Year in Residence Rule discussed in this Comment, the NCAA is reportedly considering a change to its Division I transfer rules.<sup>56</sup> During the NCAA Convention, held in late January 2018, the NCAA reported that the Committee on Transfers has strongly considered extending the “One-Time Transfer Exception”<sup>57</sup> to all sports.<sup>58</sup> One source reported that an official was “95% certain” changes to the current transfer legislation would be adopted in 2018.<sup>59</sup> At the NCAA Convention in January 2018, the NCAA Board of Governors set an April 2018 deadline for transfer rule change proposals and anticipates its committees and

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54. Gary Parrish, *The NCAA’s New Policy on Transfers Has One Bad Unintended Consequence*, CBS SPORTS (April 21, 2015), <https://www.cbssports.com/college-basketball/news/the-ncaas-new-policy-on-transfers-has-one-bad-unintended-consequence>.

55. *Id.*

56. Michelle Brutlag Hosick, *DI Council Moves Start of Basketball Season: Football Preseason, Future Transfer Rules Changes also Considered*, NCAA (Jan. 17, 2018, 7:44 PM), <https://www.ncaa.org/about/resources/media-center/news/di-council-moves-start-basketball-season>.

57. NCAA DIVISION I MANUAL, *supra* note 9, at 170, § 14.5.5.2.10.

58. Hosick, *supra* note 56.

59. Matt Schick (@ESPN\_Schick), TWITTER (Jan. 17, 2018, 8:54 AM), [https://twitter.com/ESPN\\_Schick/status/953671983866277888](https://twitter.com/ESPN_Schick/status/953671983866277888).

membership will vote on new transfer regulations, including the ground rules for the transfer process and extending the one-time exception to all sports, by summer 2018.<sup>60</sup>

#### D. *Skepticism of the NCAA Model*

Notwithstanding the three lawsuits challenging the Year in Residence Rule, the Division I Committee on Transfers' proposal to change the transfer rules comes during an era of serious strife for the NCAA. Many commentators have begun to question whether the NCAA's student-athletes at the highest level are actually students, given that football and men's basketball comprise two of the four the lowest Graduation Success Rates (GSR) of all Division I sports.<sup>61</sup> Writing for the *New York Times* in an influential article, entitled "The Myth of the 'Student-Athlete,'" Gary Gutting argued that "members of [football and men's basketball] teams are athletes first . . . , both from their own standpoint and from that of their schools" as schools "point [athletes] toward easier courses and majors and offer extraordinary amounts of academic coaching and tutoring, primarily designed to keep athletes eligible to play."<sup>62</sup>

Donna Lopiano and Gerald Gurney of *Inside Higher Ed* echoed Gutting's concerns, writing that Division I schools are

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60. Michelle Brutlag Hosick, *DI Board of Directors Provides Legislative Flexibility*, NCAA (Jan. 18, 2018, 5:54 PM), <https://www.ncaa.org/about/resources/media-center/news/di-board-directors-provides-legislative-flexibility>.

61. NCAA, TRENDS IN GRADUATION SUCCESS RATES AND FEDERAL GRADUATION RATES AT NCAA DIVISION I INSTITUTIONS 13 (2017), [http://www.ncaa.org/sites/default/files/2017D1RES\\_Grad\\_Rate\\_Trends\\_FINAL\\_20171108.pdf](http://www.ncaa.org/sites/default/files/2017D1RES_Grad_Rate_Trends_FINAL_20171108.pdf).

62. Gutting, *supra* note 5. Gutting argues further that "given the amount of time most such athletes devote to their sports, they would have to be academically *superior* to the average student to do as well in their classes." *Id.* (emphasis in original). He continues by noting that graduation rates for NCAA football and men's basketball players are sixteen and twenty-five percent, respectively, below the average graduation rate, and these numbers understate the problem because so many schools "provide underqualified athletes with advisers who[se]" main concern is keeping athletes eligible to play.

turning a blind eye to admissions requirements for “elite but often woefully academically deficient athletes.”<sup>63</sup> In light of coaching carousels, increased concussion numbers without rule reform, and inadequate academic standards, Lopiano and Gurney argued that the NCAA is beyond saving: “the U.S. Congress should immediately act to establish a federally chartered organization to replace a dysfunctional NCAA to protect college athletes in the same way that it did to protect open amateur sports athletes in 1978 [via the Amateur Sports Act].”<sup>64</sup> Sally Jenkins of the *Washington Post* reiterated Lopiano and Gurney’s call to dissolve the NCAA.<sup>65</sup> She maintained the NCAA “doesn’t know what it’s supposed to be doing” because it “has no means of enforcing [its bylaws]—short of extortion tactics.”<sup>66</sup>

#### 1. A Hellacious Fall 2017 for the NCAA

Jenkins’ 2014 criticism of the NCAA’s inability to govern itself rang true in September 2017 when the U.S. Attorney’s Office for the Southern District of New York filed three complaints and arrested ten people—including four current Division I assistant and associate men’s basketball coaches—for conspiracy, bribery, and wire fraud.<sup>67</sup> The arrests came

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63. Donna Lopiano & Gerald Gurney, *The NCAA Can’t be Reformed—Replace It*, INSIDE HIGHER ED. (Sept. 11, 2014, 3:00 AM), <https://www.insidehighered.com/views/2014/09/11/ncaa-cant-be-reformed-congress-should-replace-it-essay>. The authors believe “[a]thletic departments are running opaque academic support programs in which staff have direct conflicts of interest from managing athletes’ eligibility by seeking easy classes and friendly professors to ensure their continued participation on the field or court to control of legions of tutors who bring into question the authorship of athletes’ classwork.” *Id.*

64. *Id.*

65. Sally Jenkins, *It’s not that the NCAA Doesn’t Know what it’s Doing: It’s that the NCAA Doesn’t Know what it’s Supposed to be Doing*, WASH. POST, Nov. 10, 2014, [https://www.washingtonpost.com/sports/colleges/its-not-that-the-ncaa-doesnt-know-what-its-doing-its-that-the-ncaa-doesnt-know-what-its-supposed-to-be-doing/2014/11/10/ec1aa64e-6905-11e4-b053-65cea7903f2e\\_story.html](https://www.washingtonpost.com/sports/colleges/its-not-that-the-ncaa-doesnt-know-what-its-doing-its-that-the-ncaa-doesnt-know-what-its-supposed-to-be-doing/2014/11/10/ec1aa64e-6905-11e4-b053-65cea7903f2e_story.html).

66. *Id.*

67. Shachar Peled, *College Basketball Coaches Among Those Charged with Federal Crimes*, CNN (Sept. 26, 2017, 7:11 PM), <http://www.cnn.com/2017/09/26/>

after the FBI released a report detailing how these coaches were part of a system that bribed recruits to commit to their schools with cash payments funded by Adidas.<sup>68</sup> These men also took bribes from certain athletic and financial advisors, who paid the coaches to direct players to enlist the advisors' services.<sup>69</sup> By and large, this investigation revealed two scary details: (1) *at least* NCAA basketball players are being wrongfully paid to play amateur basketball; and (2) the NCAA was incapable of policing the numerous wrongdoers, including coaches who should be governed by the amateurism standards of its bylaws.

To make matters worse, just weeks later the NCAA Committee on Infractions voted to not penalize the University of North Carolina at Chapel Hill (UNC) after a ten-year investigation into a two-decade academic scandal.<sup>70</sup> Over the course of eighteen years, UNC offered "paper classes" that awarded students high grades for courses in the Department of African and Afro-American Studies that were

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us/college-basketball-scheme/index.html.

68. *Id.*

69. *Id.* One coach, Tony Bland, was taped bragging to these managers and advisors that he could "definitely mold players and put them in the lap of [Adidas]." *Id.* The largest casualty of this investigation was Louisville head coach, Rick Pitino, who the FBI found had called one of the implicated financial advisors and directly asked for \$100,000 to secure the commitment of a five-star recruit. Daniel Rapaport, *What We Know About Each School Implicated in the FBI's College Basketball Investigation*, SI.COM (Nov. 17, 2017), <https://www.si.com/college-basketball/2017/09/29/what-we-know-about-each-school-fbi-investigation>. Pitino, a College Basketball Hall of Famer and coach of two-time national championship teams, was fired on October 16, 2017 and filed suit against Adidas for deliberately damaging his reputation. Kyle Boone, *Rick Pitino Sues Adidas Alleging It Deliberately Damaged His Reputation*, CBS SPORTS (Oct. 18, 2017), <https://www.cbssports.com/college-basketball/news/ousted-coach-rick-pitino-sues-adidas-alleging-it-deliberately-damaged-his-reputation>; Gary B. Graves, *Rick Pitino out at Louisville as expected amid federal probe*, ASSOCIATED PRESS: NCAA MEN'S BASKETBALL (Oct. 16, 2017), <https://collegebasketball.ap.org/article/rick-pitino-out-louisville-expected-amid-federal-probe>.

70. Kyle Boone, *10 Key Quotes About the NCAA Letting UNC Off the Hook for Academic Misconduct*, CBS SPORTS (Oct. 13, 2017), <https://www.cbssports.com/college-basketball/news/10-key-quotes-about-the-ncaa-letting-unc-off-the-hook-for-academic-misconduct>.

not actually held and consisted entirely of an easily graded paper at the end of the semester.<sup>71</sup> Advisors funneled UNC athletes, especially those who struggled academically, into the department so these athletes remained eligible and could continue to compete for the university.<sup>72</sup> Where other student-athletes wrote papers, took tests, and *attended classes*, UNC student-athletes were handed degrees. The NCAA Committee on Infractions investigated five major allegations, including lack of institutional control (the worst penalty an institution can receive), but ultimately chose not to penalize the university because the classes were offered to general students, as well as student athletes.<sup>73</sup> By not penalizing UNC, the NCAA failed to achieve one of its main duties—ensuring competitive equity among member institutions.

After an embarrassing October, Dr. Mark Emmert, the president of the NCAA, stated that “fundamental change” was necessary in college basketball.<sup>74</sup> To support this conclusion, Emmert pointed to an NCAA-commissioned poll that showed seventy-nine percent of Americans believed college athletic departments valued revenue over the well-being of their student athletes and more than half of Americans believed the NCAA exacerbated this mentality. Furthermore, Emmert revealed that seventy percent of Americans believed the school administrations were also to blame, and only “a very small portion of Americans” supported the Committee on Infractions decision not to

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71. Sara Ganim & Devon Sayers, *UNC Report Finds 18 Years of Academic Fraud to Keep Athletes Playing*, CNN (Oct. 23, 2014, 10:28 AM), <http://www.cnn.com/2014/10/22/us/unc-report-academic-fraud/index.html>.

72. *Id.*

73. Scooby Axson, *NCAA Declares UNC Did Not Violate Academic Fraud Rules*, SI.COM (Oct. 5, 2017), <https://www.si.com/college-basketball/2017/10/13/ncaa-sanctions-north-carolina-academic-fraud>.

74. Will Hobson, *NCAA President Mark Emmert: ‘Fundamental Change’ Needed in College Basketball*, WASH. POST, Oct. 30, 2017, <https://www.washingtonpost.com/news/sports/wp/2017/10/30/ncaa-president-mark-emmert-fundamental-change-needed-in-college-basketball>.

punish UNC.<sup>75</sup> Emmert reiterated his message that change is necessary at the 2018 NCAA Convention in his State of College Sports address: “[s]candals that call into question our commitment to academic integrity make whatever praise we have of our higher graduation rates ring pretty hollow . . . . What we saw with that FBI investigation is Exhibit A for demanding action . . . . It’s corrupt. It’s just wrong. And it feeds all the cynics.”<sup>76</sup>

As he predicted, some critics were concerned Emmert’s call for change in October was just lip-service. According to former Duke basketball player, law school grad, and current ESPN college basketball analyst, Jay Bilas, “[n]ow you have the president saying the system is broken. What, he and his staff didn’t know the system was broken two weeks before the charges were filed in this matter? Of course they did. The system’s been broken forever, so that’s disingenuous to say the least.”<sup>77</sup>

## 2. February 2018

February 2018 proved to be an equally damning month for the NCAA as the apparent amateurism farce in NCAA men’s basketball was unmasked even more. On the eve of the NCAA tournament, with the FBI investigation looming, the NCAA officially stripped the Louisville men’s basketball team and head coach Rick Pitino of all wins from 2012–15, including its 2013 National Championship, because the program funded the services of strippers and prostitutes for current and prospective student-athletes.<sup>78</sup> In this same

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75. *Id.*

76. Mitch Sherman, *NCAA President: ‘Meaningful Change’ to come Before Tipoff of ‘18*, ABC NEWS (Jan. 18, 2018), <http://abcnews.go.com/Sports/ncaa-president-meaningful-change-tipoff-18/story?id=52450118>.

77. Gene Wang, *ESPN’s Jay Bilas: ‘The NCAA Makes Its Own Rules, and Their Rules are Bad,’* WASH. POST, Oct. 30, 2017, <https://www.washingtonpost.com/news/sports/wp/2017/10/30/espns-jay-bilas-the-ncaa-makes-its-own-rules-and-their-rules-are-bad>.

78. Jacob Bogage & Roman Stubbs, *Its NCAA appeal denied, Louisville is*

week, a Yahoo! report added perennial March Madness championship contenders Duke, North Carolina, Kentucky, Kansas, and Michigan State to the list of schools which bribed recruits to commit with cash advances, loans and money transfers.<sup>79</sup> Then, hours later, the biggest bombshell went off when ESPN reported an FBI wiretap recorded Arizona Head Coach Sean Miller, explicitly offering number one center prospect<sup>80</sup> and 2018 Pac-12 freshman and player of the year<sup>81</sup> DeAndre Ayton \$100,000 if he committed to play for the Wildcats.<sup>82</sup> Consequently, Miller became the first head coach directly linked to offering money to recruits.<sup>83</sup>

In response to the reports, NCAA President Mark Emmert issued a statement condemning the actions.

These allegations, if true, point to systematic failures that must be fixed and fixed now if we want college sports in America. . . . The Board and I are completely committed to making transformational changes to the game . . . [and] will continue to cooperate with the efforts of federal prosecutors to identify and punish the unscrupulous parties seeking to exploit the system through

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*stripped of 2013 national championship*, WASH. POST (Feb. 20, 2018), [https://www.washingtonpost.com/news/early-lead/wp/2018/02/20/louisville-basketball-will-vacate-2013-national-championship-as-ncaa-upholds-ruling/?utm\\_term=.f7ea2e26c563](https://www.washingtonpost.com/news/early-lead/wp/2018/02/20/louisville-basketball-will-vacate-2013-national-championship-as-ncaa-upholds-ruling/?utm_term=.f7ea2e26c563).

79. Pat Forde & Pete Thamel, *Federal documents detail sweeping potential NCAA violations involving high-profile players, schools*, YAHOO! (Feb. 23, 2018), <https://sports.yahoo.com/exclusive-federal-documents-detail-sweeping-potential-ncaa-violations-involving-high-profile-players-schools-103338484.html>.

80. *Deandre Ayton*, ESPN (Jan. 27, 2017), [http://www.espn.com/college-sports/basketball/recruiting/player/\\_id/187828/deandre-ayton](http://www.espn.com/college-sports/basketball/recruiting/player/_id/187828/deandre-ayton).

81. Ron Clements, *Arizona's Deandre Ayton both Pac-12 freshman and player of the year*, SPORTING NEWS (Mar. 6, 2018), <http://www.sportingnews.com/ncaa-basketball/news/arizona-deandre-ayton-ncaa-basketball-pac-12-freshman-player-of-the-year/nytom1q7x97h1rxxq3q4j2l46>.

82. Mark Schlabach, *FBI wiretaps show Sean Miller discussed \$100K payment to lock recruit*, ESPN (Feb. 25, 2018), [http://www.espn.com/mens-college-basketball/story/\\_id/22559284/sean-miller-arizona-christian-dawkins-discussed-payment-ensure-deandre-ayton-signing-according-fbi-investigation](http://www.espn.com/mens-college-basketball/story/_id/22559284/sean-miller-arizona-christian-dawkins-discussed-payment-ensure-deandre-ayton-signing-according-fbi-investigation).

83. *Id.*

criminal acts.<sup>84</sup>

Emmert's comments were both predictable and meaningless. As of April 2018, the NCAA has only proven it was incapable of punishing anyone. It took five years to issue Louisville a penalty, it chose not to hold UNC accountable for two decades of academic fraud, and it created a system where coaches paid amateur athletes. The events of the past six months prove the NCAA has become an ineffective and obsolete governing body for its revenue-generating sports. "Student-athlete" and "amateurism" have become buzzwords for standards that member institutions can elect to follow based on good faith. The reason the FBI began its investigation and the U.S. Attorney's Office issued its indictments was because the NCAA *was not doing its job*. If the organization was going to punish its bad actors, it should have done so before the government became involved.

#### E. *The Next Step*

Given the current state of NCAA athletics in the United States, it is clear the organization is in dire need of reform. The organization had the opportunity to initiate such reform at its 2018 Convention, but ultimately chose not to do anything in the middle of the academic year.<sup>85</sup> However, if the skeptics are correct and Emmert's proposed "fundamental change" proves to be a slogan rather than an action, internal change is not the only option. Given the current legal challenges the NCAA is facing across the country, a full-scale restructuring could be mandated by the federal courts.

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84. NCAA statement on Yahoo! Sports story, NCAA (Feb 23, 2018, 7:37 AM), <http://www.ncaa.org/about/resources/media-center/news/ncaa-statement-yahoo-sports-story>.

85. Michael Marot, *Emmert expects to see quick changes in college basketball*, CHI. TRIB. (Jan. 19, 2018), <http://www.chicagotribune.com/sports/sns-bc-us-ncaa-convention—emmert-20180118-story.html>.

II. JURISPRUDENTIAL BACKGROUND TO THE SEVENTH  
CIRCUIT TRANSFER RULES LITIGATION

*Deppe v. NCAA* is one opportunity for a federal court to apply the Rule of Reason to an eligibility bylaw, the Year in Residence Rule, and order the NCAA to institute meaningful change to help adapt its model to the current era of college athletics. However, the Seventh Circuit in *Deppe* must decipher a complicated jurisprudential background to determine what protections the NCAA warrants under antitrust law.

The first obstacle the Seventh Circuit will encounter is the precedential value of the seminal case on antitrust attacks to the NCAA's amateurism model, *NCAA v. Board of Regents of the University of Oklahoma and University of Georgia Athletic Association*.<sup>86</sup> Where *Board of Regents* conferred antitrust protection to most NCAA bylaws in dicta, it was also decided in 1984 when the NCAA looked nothing like it does today. Though the Seventh Circuit recently reaffirmed this antitrust protection in 2011, in *Agnew v. NCAA*,<sup>87</sup> it is impossible to ignore the current state of college athletics, which is ripe with hypocrisy. As such, the Seventh Circuit should look to a more recent decision that offers a realistic and current assessment of the NCAA's amateur sports model, the Ninth Circuit's decision in *O'Bannon v. NCAA*,<sup>88</sup> and to apply the Rule of Reason analysis to the Year in Residence Rule. Taken together, these three cases, *Board of Regents*, *Agnew*, and *O'Bannon*, constitute the jurisprudential background the *Deppe* court must consider, and are thus discussed below.

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86. 468 U.S. 85 (1984).

87. 683 F.3d 328, 342–43 (7th Cir. 2012).

88. 802 F.3d 1049 (9th Cir. 2015).

## A. NCAA v. Board of Regents

In *Board of Regents*, the U.S. Supreme Court held that certain aspects of the NCAA's intercollegiate athletics operation were subject to antitrust scrutiny under Section 1 of the Sherman Act and analyzed the NCAA's conduct under the Rule of Reason.<sup>89</sup> However, *Board of Regents* became a landmark case for the NCAA for a different reason. In dicta, the court wrote that because cooperation between member schools was necessary to the overall success of the NCAA, the association should be given sufficient antitrust latitude to "play[] a critical role in the maintenance of a revered tradition of amateurism in college sports."<sup>90</sup> Correspondingly, the court ruled that most NCAA bylaws were presumptively procompetitive and exempt from the Rule of Reason.<sup>91</sup> So, in a case where the Supreme Court confirmed that the NCAA could and did violate antitrust law, it also articulated that most other antitrust challenges to the organization's amateur sports model should be dismissed.

## 1. Factual Background

At the advent of network television, college football teams handled how and when their games would be broadcasted through their own network contracts.<sup>92</sup> Yet, as television became ubiquitous in the United States, the NCAA grew concerned that wall-to-wall college football coverage across network television would adversely affect ticket sales.<sup>93</sup> To counter this threat, the NCAA took control of all

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89. *Board of Regents*, 468 U.S. at 103, 120.

90. *Id.*

91. *See id.* at 117.

92. *See id.* at 89. As television provided easier, less expensive access to games, the NCAA feared the gate at its games, its major stream of revenue, would diminish, and the organization would be in dire financial straits. *See id.* at 89–90.

93. *Id.* at 89 (“[T]he [Television] [C]ommittee had concluded that ‘television does have an adverse effect on college football attendance . . .’”).

television rights and prohibited all member institutions from pursuing their own, independent agreements.<sup>94</sup> With complete control of the rights to televised college football, the NCAA restricted the total games televised per season and the number of times each team could be seen on local and national television.<sup>95</sup> The NCAA divided its annual broadcast revenue evenly among schools whose games were broadcast regardless of the number of viewers and geographic markets a game was broadcast in.<sup>96</sup>

At issue in *Board of Regents* was a 1981 agreement between the NCAA, ABC, and CBS, which granted both networks the semi-exclusive right to broadcast Division I football.<sup>97</sup> The points of contention in this contract were “appearance requirements” and “appearance limitations,” which required CBS or ABC to broadcast each of the eighty-two schools the NCAA deemed fit for broadcast at least once during a two-year period, but no more than four times on national telecast and six total telecasts.<sup>98</sup>

Members of the College Football Association (CFA), comprised of schools in the five largest conferences along with a few independent teams (e.g., Notre Dame), believed they deserved a voice in negotiating broadcast rights and warranted a bigger portion of the revenue.<sup>99</sup> Accordingly, CFA signed its own exclusive agreement with a different network, NBC, that provided for an unrestricted number of television appearances and greater revenues distributed among the group.<sup>100</sup> In response, the NCAA threatened to impose athletic department-wide sanctions on any school

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94. *Id.* at 94.

95. *Id.* at 90.

96. *Id.* at 93.

97. *Id.* at 92.

98. *Id.* at 94–95.

99. *Id.* at 89, 94–95.

100. *Id.* at 94–95.

that performed under the NBC contract.<sup>101</sup> As a result, CFA filed suit against the NCAA for an illegal restraint on output in violation of Section 1 of the Sherman Act.<sup>102</sup>

## 2. Holding and Analysis

In a 7-2 decision, the Supreme Court struck down the NCAA's restrictions on college football broadcasting rights by applying the Rule of Reason antitrust analysis.<sup>103</sup> Writing for the majority, Justice Stevens held that the NCAA's exclusive broadcast agreements with ABC and CBS constituted horizontal price fixing and output limitation, which generally would be deemed a *per se* illegal restraint on trade.<sup>104</sup> However, because some cooperation between competitors was necessary to coordinate games<sup>105</sup> for the NCAA's distinct product of college football,<sup>106</sup> the court

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101. *Id.* at 95.

102. *Id.*

103. *Id.* at 120 (“Today we hold only that the record supports the District Court’s conclusion that by curtailing output and blunting the ability of member institutions to respond to consumer preference, the NCAA has restricted rather than enhanced the place of intercollegiate athletics in the Nation’s life.”).

104. *Id.* at 99–100 (finding the NCAA’s exclusive agreements constituted “an agreement among competitors on the way in which they will compete with one another,” which would “ordinarily [be] condemned as a matter of law under an ‘illegal *per se*’ approach because the probability that these practices are anti-competitive is so high”).

105. *Id.* at 101 (including “such matters as the size of the field, the number of players on a team, and the extent to which physical violence is to be encouraged or proscribed, all must be agreed upon, and all restrain the manner in which institutions compete”).

106. *Id.* at 101–02 (“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

applied the less stringent Rule of Reason.<sup>107</sup>

Though certain horizontal restraints on competition were critical to the overall success of college football,<sup>108</sup> the court held that the NCAA's exclusive broadcast agreement did not survive antitrust scrutiny even under the less-stringent Rule of Reason analysis because the contracts produced significant anticompetitive effects in the college football broadcasting market.<sup>109</sup> First, the court found the uniqueness of the product of college football generated huge consumer demand.<sup>110</sup> If member institutions were not restricted from selling television rights to broadcast their teams' games, these schools could negotiate their own broadcast contracts and networks would televise more college football.<sup>111</sup> However, because the NCAA retained the sole right to negotiate broadcast contracts, it held significant market power, and could enter into highly lucrative agreements while still restricting the number of games televised.<sup>112</sup> Further, schools had no choice but to comply based on fear of sanction or expulsion from the NCAA.<sup>113</sup> Finally, the court found that protecting ticket sales during televised games was a pretextual justification for restricting broadcasts.<sup>114</sup> As such, the NCAA's television broadcast

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available to athletes—and hence can be viewed as procompetitive.”).

107. *Id.* at 100.

108. *Id.* at 101 (“[W]hat is critical is that this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all.”).

109. *Id.* at 104–07, 107 (concluding the “[p]rice [to broadcast college football] is higher and output lower than they would otherwise be, and both are unresponsive to consumer preference”).

110. *Id.* at 111 (finding “advertisers will pay a premium price per viewer to reach audiences watching college football because of their demographic characteristics”).

111. *Id.* at 108 (noting that “many telecasts that would occur in a competitive market are foreclosed by the NCAA’s plan”).

112. *Id.* at 105.

113. *Id.* at 106, 106 n.31.

114. *See id.* at 116–17 (“The television plan protects ticket sales by limiting

restrictions violated the Rule of Reason.

### 3. Important Dicta for Future Litigation

The Supreme Court in *Board of Regents* held that the NCAA's amateur sports model was subject to scrutiny under the Rule of Reason analysis under the Sherman Act, but ironically, also insulated the NCAA from nearly all antitrust liability for three decades.<sup>115</sup> Three of Justice Stevens's statements have defined the legacy of *Board of Regents* for antitrust plaintiffs like the student-athletes currently challenging the NCAA in the Seventh Circuit.

First, in Part III of the decision, the court ruled that the NCAA had market power in the college football broadcasting market.<sup>116</sup> In reaching this conclusion, Justice Stevens stated that just because a party fails to prove market power does not automatically relieve the challenged party from antitrust liability, especially when a non-compete agreement or agreement to restrict output exists.<sup>117</sup> Instead, where anticompetitive effects are so obvious, as in the NCAA agreements restricting broadcast rights, a court can apply the Rule of Reason without defining a market. The key language the court cites to is found in footnote thirty-nine: “[t]he essential point is that the rule of reason can sometimes be applied *in the twinkling of an eye*.”<sup>118</sup> In *Board of Regents*, the court applied the Rule of Reason “in a twinkling of an eye” to the NCAA's restrictive broadcast contract to find antitrust liability under the Sherman Act.<sup>119</sup> However, in

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output—just as any monopolist increases revenues by reducing output. By seeking to insulate live ticket sales from the full spectrum of competition because of its assumption that the product itself is insufficiently attractive to consumers, petitioner forwards a justification that is inconsistent with the basic policy of the Sherman Act.”).

115. See *infra* notes 111–12 and accompanying text.

116. *Board of Regents*, 468 U.S. at 111.

117. *Id.* at 109.

118. *Id.* at 110 n.39 (emphasis added).

119. See *id.* at 110 (“We have never required proof of market power in such a

future legal action against the NCAA, numerous courts, including the Seventh Circuit, hastily applied this phrase without much explanation to support a finding that NCAA bylaws were exempt from Rule of Reason analysis at the motion to dismiss stage.<sup>120</sup>

Next, in Part VI of the decision, Justice Stevens addressed the NCAA's argument that telecast restrictions helped maintain competitive balance among member institutions.<sup>121</sup> While the Court agreed the NCAA had an interest in maintaining competitive balance among schools to achieve a uniform, marketable product, it held these broadcast restrictions had little to do with competitive balance.<sup>122</sup> However, in analyzing this argument, Justice Stevens supplied the NCAA with the ammunition to defeat most future antitrust challenges to its Bylaws in this pronouncement:

[A] certain degree of cooperation is necessary if the type of competition that [the NCAA] and its member institutions seek to market is to be preserved. It is reasonable to assume that *most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive* because they enhance public interest in intercollegiate athletics. The specific restraints on football telecasts that are challenged in this case *do not, however, fit into the same mold as* do rules defining the conditions of the contest, *the eligibility of participants*, or the manner in which members of a joint enterprise shall share the responsibilities and the benefits of the total venture.<sup>123</sup>

In essence, Justice Stevens declared that most NCAA

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case. This naked restraint on price and output requires some competitive justification even in the absence of a detailed market analysis.”).

120. *See, e.g., Agnew v. NCAA*, 683 F.3d 328, 342–43 (7th Cir. 2012).

121. *Board of Regents*, 468 U.S. at 117 (“Petitioner argues that the interest in maintaining a competitive balance among amateur athletic teams is legitimate and important and that it justifies the regulations challenged in this case. We agree with the first part of the argument but not the second.”).

122. *Id.*

123. *Id.* (emphasis added).

bylaws passed Rule of Reason antitrust analysis at first glance. So long as a rule complied with private association law,<sup>124</sup> the NCAA was free to run its amateur sports model as it pleased. Later, the Court reaffirmed this conclusion in the final important statement from *Board of Regents* dicta:

The NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports. There can be no question but that it needs ample latitude to play that role, or that the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act. Today we hold only that the record supports the District Court's conclusion that by curtailing output and blunting the ability of member institutions to respond to consumer preference, the NCAA has restricted rather than enhanced the place of intercollegiate athletics in the Nation's life.<sup>125</sup>

#### 4. Aftermath: The Advent of Big Money in College Sports

*Board of Regents* ushered big money into college athletics by opening the door for the multi-billion-dollar broadcasting contracts college football and men's basketball enjoy today. After the case was decided, the NCAA conferred the power of negotiating media agreements for regular season competition in all sports to each athletic conference,<sup>126</sup> but retained broadcast rights for its national

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124. In *NCAA v. Tarkanian*, the Supreme Court held that the NCAA was not a state actor. 488 U.S. 179, 181–82 (1988). As a result, the NCAA is treated as a private association. “Traditionally, the courts have only intervened in the affairs of private associations where the organization's actions violate its own rules or where its acts constitute fraud or illegality or are arbitrary and unreasonable. In situations other than these, the courts historically have been hesitant to interfere.” RAY YASSER ET AL., *SPORTS LAW CASES & MATERIALS* 54 (7th ed. 2011).

125. *Board of Regents*, 468 U.S. at 120.

126. See Thomas A. Baker III & Natasha T. Brison, *From Board of Regents to O'Bannon: How Antitrust and Media Rights Have Influenced College Football*, 26 MARQ. SPORTS L. REV. 331, 341 (2016). The most lucrative college football and basketball broadcasting contracts are held by the “Power Five” Conferences. The Power Five is a group of the five most athletically dominant and profitable

championships.<sup>127</sup> In 1985, the NCAA signed a three-year, \$94.7 million deal with CBS to broadcast the Division I Men's College Basketball Championships.<sup>128</sup> That contract is now a fourteen-year, \$10.8 billion deal as of 2010.<sup>129</sup> In the 2011–12 academic year, the NCAA generated \$705 million in media revenue, which was eighty-one percent of its annual revenue.<sup>130</sup> ESPN reportedly paid the NCAA between \$5.64 billion<sup>131</sup> and \$7.3 billion<sup>132</sup> in November 2012 to broadcast the College Football Playoff, while the NCAA and CBS/Turner agreed to an eight-year, \$8.8 billion extension to continue to broadcast the Men's Basketball Championships in April 2016.<sup>133</sup>

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conferences in Division I college athletics, made up of the Atlantic Coast Conference (ACC), Big 12, Big 10, Pac-12, and Southeastern Conference (SEC). Paula Lavigne, *Rich Get Richer in College Sports As Poorer Schools Struggle to Keep Up*, ESPN (Sep. 6, 2016), [http://www.espn.com/espn/otl/story/\\_/id/17447429/power-5-conference-schools-made-6-billion-last-year-gap-has-nots-grows](http://www.espn.com/espn/otl/story/_/id/17447429/power-5-conference-schools-made-6-billion-last-year-gap-has-nots-grows). In the 2015–16 academic year, Power Five conferences generated \$6 billion in revenues—\$4 billion more than the rest of the Division I schools combined. *Id.*

127. Thomas Scully, Note, *NCAA v. Board of Regents of the University of Oklahoma: The NCAA's Television Plan is Sacked by the Sherman Act*, 34 CATH. U. L. REV. 857, 860 n.19 (1985).

128. *Revenue*, NCAA, <http://www.ncaa.org/about/resources/finances/revenue> (last visited Mar. 3, 2018).

129. *Id.*

130. *Id.*

131. Jerry Hinnen, *ESPN Reaches 12-Year Deal to Air College Football Playoffs*, CBS SPORTS (Nov. 21, 2012), <http://www.cbssports.com/collegefootball/eye-on-college-football/21083689/espn-reaches-12year-deal-to-air-college-football-playoffs>.

132. Frank Pallotta, *ESPN's \$7.3 Billion College Football Gamble Pays Off*, CNN (Jan 13., 2015, 5:33 AM), <http://money.cnn.com/2015/01/12/media/espn-college-football-playoff-pays-off>.

133. *Turner, CBS and the NCAA Reach Long-Term Multimedia Rights Extension for NCAA Division I Men's Basketball Championship: New Agreement Extends Television, Digital and Marketing Rights Through 2032*, NCAA (Apr. 12, 2016), <http://www.ncaa.com/news/basketball-men/article/2016-04-12/turner-cbs-and-ncaa-reach-long-term-multimedia-rights>.

### 5. Subsequent Judicial Interpretations: Antitrust Insulation of Eligibility Bylaws

Beyond major revenues, *Board of Regents* dictated that certain horizontal restraints defined in the bylaws were necessary for the NCAA to operate and thus presumptively procompetitive. Future courts were left to determine exactly which bylaws were immune from antitrust attack and which would be subject to the Rule of Reason. Of particular importance to this Comment is the post-*Board of Regents* jurisprudence regarding student-athlete eligibility rules because the Year in Residence Rule functions as an eligibility bylaw.<sup>134</sup>

After *Board of Regents*, federal appellate courts ruled that NCAA eligibility bylaws on the whole did not violate the Sherman Act under two different reasons.<sup>135</sup> First, some courts ruled the bylaws were noncommercial and thus not subject to antitrust scrutiny at all.<sup>136</sup> Other courts found eligibility bylaws to be a presumptively reasonable commercial restraint that helped the NCAA preserve its unique model for intercollegiate sports.<sup>137</sup>

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134. See discussion of NCAA Division I Manual, article 14, *supra* notes 43–44.

135. See Matthew J. Mitten, *Why and How the Supreme Court Should Have Decided O'Bannon v. NCAA*, 62 ANTITRUST BULL. 62, 77 (2017), <http://journals.sagepub.com/doi/abs/10.1177/0003603X17691383>.

136. See *Bassett v. NCAA*, 528 F.3d 426, 433 (6th Cir. 2008) (finding that the “NCAA’s rules on recruiting student athletes, specifically those rules prohibiting improper inducements and academic fraud, are all explicitly non-commercial”); *Smith v. NCAA*, 139 F.3d 180, 185–86 (3d Cir. 1998) (concluding “eligibility rules are not related to the NCAA’s commercial or business activities” and “that the Sherman Act does not apply to the NCAA’s promulgation of eligibility rules”); *Banks v. NCAA*, 977 F.2d 1081, 1094 (7th Cir. 1992), *cert. denied*, 508 U.S. 908 (1993) (holding that the NCAA’s “no-draft” and “no-agent” eligibility rules were not a commercial restraint on trade and thus did not cause antitrust injury).

137. See *McCormack v. NCAA*, 845 F.2d 1338, 1344–45 (5th Cir. 1998) (treating eligibility bylaws as commercial restraints but upholding their antitrust validity under the Rule of Reason because “[t]he eligibility rules create the [unique college football] product and allow its survival in the face of commercializing pressures”); see also *Agnew v. NCAA*, 683 F.3d 328, 340, 343 (7th Cir. 2012).

The most important decision from the post-*Board of Regents* jurisprudence for eligibility bylaws is *Agnew v. NCAA*,<sup>138</sup> a 2012 decision from the U.S. Court of Appeals for the Seventh Circuit. In *Agnew*, the court affirmed the district court's grant of the NCAA's motion to dismiss, with prejudice, in a class action suit by the student-athletes who alleged that two scholarship restrictions set forth in the NCAA Bylaws—scholarship caps per team and prohibitions on multi-year scholarships—had an anticompetitive effect on the market for student-athletes.<sup>139</sup>

The court's opinion is a straightforward reiteration of *Board of Regents* dicta. First, the court began by noting that NCAA bylaws are generally subject to the Sherman Act.<sup>140</sup> Immediately after, however, the court qualified this statement: just because the bylaws could be challenged under the Sherman Act does not “suggest that all NCAA bylaws, or even *any* NCAA bylaws” actually violate antitrust law.<sup>141</sup> Accordingly, the court used *Board of Regents* dicta to put forth the rule for whether an NCAA bylaw is valid under the Sherman Act: “when an NCAA bylaw is clearly meant to help maintain the ‘revered tradition of amateurism in college sports’ or the ‘preservation of the student-athlete in higher education,’ the bylaw will be presumed procompetitive, since we must give the NCAA ‘ample latitude to play that role.’”<sup>142</sup>

Much like *Board of Regents*, the dicta in *Agnew* is far more important to this Comment than the holding. After

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138. 683 F.3d 328 (7th Cir. 2012).

139. *Id.* at 333–34. While scholarship caps still exist for all teams who compete in Division I and II competition (mainly to comply with Title IX), the same year *Agnew* was decided, the NCAA membership voted to allow schools to grant multi-year scholarships. See Jon Solomon, *Schools Can Give Out 4-Year Athletic Scholarships, But Many Don't*, CBS SPORTS (Sep. 16, 2014), <https://www.cbssports.com/college-football/news/schools-can-give-out-4-year-athletic-scholarships-but-many-dont>.

140. *Agnew*, 683 F.3d at 340.

141. *Id.* at 341.

142. *Id.* at 342–43 (citing *NCAA v. Board of Regents*, 468 U.S. 85, 120 (1984)).

defining this test for the validity of bylaws under the Sherman Act, the court used eligibility bylaws as an example of something the Supreme Court would have treated as presumptively procompetitive. In a blanket statement, the court states definitively, “[m]ost—if not all—eligibility rules . . . fall comfortably within the presumption of procompetitiveness afforded to certain NCAA regulations” by *Board of Regents*.<sup>143</sup> Next, the opinion notes that “no ‘detailed analysis,’ . . . would be necessary to deem such rules procompetitive,” and it explicitly states that challenges to eligibility bylaws would be properly disposed at the motion to dismiss stage.<sup>144</sup> To bolster this conclusion,<sup>145</sup> the court employed two basic eligibility rules, one requiring class attendance and another prohibiting cash payments to student-athletes beyond cost of attendance, to support its position that eligibility rules help maintain the role of the student-athlete in academia and protect the ideal of amateur athletics.<sup>146</sup>

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143. *Id.* at 343.

144. *Id.* (citing *Board of Regents*, 468 U.S. at 102).

145. *See id.* It is important to note that the court’s discussion of eligibility bylaws had no bearing on the outcome of the case. *Id.* at 343–44 (“The Bylaws at issue in this case, however, are not eligibility rules, nor do we conclude they ‘fit into the same mold’ as eligibility rules. . . . These Bylaws—a one-year limit to scholarships and a limit on scholarships per team—are not inherently or obviously necessary for the preservation of amateurism, the student-athlete, or the general product of college football.”). In *Agnew*, plaintiffs challenged financial aid bylaws—an entirely different section unto themselves. They are found in Article 15 of the NCAA Division I Manual, while Eligibility Bylaws are found in Article 14. *See* NCAA DIVISION I MANUAL, *supra* note 9, at 179–203, § 15.

146. *Agnew*, 683 F.3d at 343. It is important to note that the two examples of eligibility bylaws the court illustrates are oversimplifications of the NCAA’s rules. First, no part of the bylaws require student-athletes to attend class. Rather, “[t]o be eligible to represent an institution in intercollegiate athletics competition, a student-athlete shall be *enrolled* in at least a minimum full-time program of studies, be *in good academic standing* . . . as determined by the academic authorities who determine the meaning of such phrases for all students of the institution, subject to controlling legislation of the conference(s) or similar association of which the institution is a member.” NCAA DIVISION I MANUAL, *supra* note 9, at 143, § 14.01.2.1 (emphasis added). While academic authorities at a school would likely require the student-athlete to attend class, the NCAA in

6. Issues with *Agnew*

In a tangential discussion that had no bearing on the outcome of the case, the Seventh Circuit in *Agnew* adopted an incorrect standard for why eligibility bylaws pass Rule of Reason muster. *Agnew*'s precedential value for the Seventh Circuit was problematic for future litigants who filed antitrust challenges to any of the NCAA's two articles worth of eligibility bylaws, as in *Pugh*, *Deppe* and *Vassar*. Through two oversimplified examples of eligibility bylaws,<sup>147</sup> the court justified treating all twenty-five NCAA eligibility bylaws as presumptively procompetitive. Accordingly, because the validity of these bylaws was so obvious to the court, it used footnote thirty-nine from *Board of Regents*<sup>148</sup> to set an improper procedural standard that permitted courts to dismiss any portion of a complaint that dealt with an eligibility bylaw at the motion to dismiss stage. Granting this motion to dismiss stands in direct opposition to widely accepted federal pleading standards set forth in *Bell Atlantic v. Twombly* and *Ashcroft v. Iqbal*, which requires a court to first distinguish facts from legal conclusions and then to evaluate plausible claims for relief based on judicial experience.<sup>149</sup> As proven by the inconsistencies in the amateurism model in the past six months, plaintiffs that challenge eligibility bylaws clearly state a plausible claim for

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fact has no eligibility bylaw on its books requiring class attendance. Second, "cash payments . . . beyond the cost of attendance" are treated under Article 12, Amateurism and Athletics Eligibility, which prohibits student-athletes from receiving financial assistance beyond the cost of attendance in specific, enumerated situations (e.g. when the student-athlete "(a) [u]ses his or her athletics skill (directly or indirectly) for pay in any form in that sport; (b) [a]ccepts a promise of pay even if such pay is to be received following completion of intercollegiate athletics participation; . . . [or] (d) [r]eceives, directly or indirectly, a salary, reimbursement of expenses or any other form of financial assistance from a professional sports organization based on athletics skill or participation, except as permitted by NCAA rules and regulations." *Id.* at 55–56, § 12.1.2.

147. See *supra* note 146 and accompanying text.

148. 468 U.S. 85, 109 n.39 (1984).

149. See, e.g., Christine P. Bartholomew, *Twiqbal in Context*, 65 J. L. EDUC. 744, 749–51 (2016).

relief. Nonetheless, future challenges to all eligibility bylaws in the NCAA's home circuit would be dismissed before the court could determine their validity under the Rule of Reason.

While challenges to eligibility bylaws may have been properly dismissed at the time of *Board of Regents*, the developments in college athletics over the past thirty years makes outright dismissal of a similar antitrust challenge problematic. In the current era of college sports, eligibility looks like more of a slogan than a bylaw, which makes *Agnew's* precedential weight increasingly problematic.

Though *Agnew* was decided in 2011, the writing was on the wall for the NCAA as to when a major scandal would break and the faults in its amateurism model would be exposed. As opposed to relying on a nearly thirty-year-old precedent to make a blanket pronouncement about eligibility bylaws, which no doubt would be challenged in the coming years, the Seventh Circuit should have left the discussion of eligibility bylaws for a case that actually challenged these bylaws, not treated them in the dicta of a challenge to financial aid rules. Four years later, the Ninth Circuit attempted to correct the Seventh Circuit's mistake in *O'Bannon*.

#### B. *O'Bannon v. NCAA*

Where the NCAA, its conferences, schools, administrators, athletic departments, trainers, coaches, and staff have all received a piece of the billion-dollar deals, the one group that the NCAA cannot survive without—the student-athletes—has not.<sup>150</sup> While Division I athletes were

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150. Whether student-athletes deserve to be paid has long been debated. Recently, the debate has gathered greater attention because of the ever-expanding revenues in college athletics. On why student-athletes should be paid, see, for example, Lee Goldman, *Sports and Antitrust: Should College Athletes be Paid to Play*, 65 NOTRE DAME L. REV. 206, 223 (1990); Jason Gurdus, Note, *Protection Off of the Playing Field: Student Athletes Should be Considered University Employees for Purposes of Workers' Compensation*, 29 HOFSTRA L. REV.

allowed to receive up to a full grant-in-aid scholarship at their schools, student-athletes began to question if they were really receiving the benefit of their bargain as certain financial models valued athletes at far more than their scholarships were actually worth.<sup>151</sup>

In 2008, Ed O'Bannon, a former All-American basketball player and 1995 national champion at UCLA, brought a class action lawsuit against the NCAA, alleging the organization violated Section 1 of the Sherman Act by profiting off the use of student-athletes' names, images, and likenesses (NILs) without compensating the athletes.<sup>152</sup> Although O'Bannon framed his suit on the commercial use of NILs, this case turned into the first major battle in the federal courts about whether the NCAA could justify not paying student-athletes based solely on the NCAA's role as gatekeeper of amateur athletics in the United States.

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907, 916 (2001); Kathryn Young, Note, *Deconstructing the Façade of Amateurism: Antitrust and Intellectual Property Arguments in Favor of Compensating Athletes*, 12 VA. SPORTS & ENT. L. J. 338, 352–54 (2013). On why student-athletes should not be paid, see, for example, Christopher M. Parent, *Forward Progress? An Analysis of Whether Student-Athletes Should Be Paid*, 3 VA. SPORTS & ENT. L. J. 226, 237 (2004); Patrick Hurby, *This is How To Pay College Athletes*, DEADSPIN (Mar. 6, 2018, 2:17 PM), <https://deadspin.com/this-is-how-to-pay-college-athletes-1823353456>; John R. Thelin, *Here's Why We Shouldn't Pay College Athletes*, TIME: MONEY (Mar. 1, 2016), <http://time.com/money/4241077/why-we-shouldnt-pay-college-athletes>; Ekow N. Yankah, *Why NCAA Athletes Shouldn't Be Paid*, NEW YORKER (Oct. 14, 2015), <http://www.newyorker.com/news/sporting-scene/why-ncaa-athletes-shouldnt-be-paid>.

151. A 2013 article by *Business Insider* concluded that fair market value of the average FBS football players was \$137,357 per year. See Tony Manfred, *Here's How Much Big-Time College Athletes Should Be Getting Paid*, BUSINESS INSIDER (Mar. 20, 2013, 12:26 PM), <http://www.businessinsider.com/heres-how-much-college-athletes-are-worth-2013-3>. In 2016, *Business Insider* found the average division I basketball player was worth \$170,098 per year. See Cork Gains & Diana Yukari, *The Average Division I Basketball Player Is Worth \$170,098 Per Year to His School*, BUSINESS INSIDER (Mar. 16, 2017, 10:04 PM), <http://www.businessinsider.com/college-basketball-player-value-2017-3>. Even more alarming is *Business Insider's* valuation of players at top basketball schools. The 2016 study found the average basketball player for the University of Louisville was worth about \$1.7 million per year, while the average Duke basketball player was worth \$1.16 million to the university. See *id.*

152. O'Bannon v. NCAA, 802 F.3d 1049, 1055 (9th Cir. 2015).

### 1. Procedural History

*O'Bannon* was decided by the U.S. Court of Appeals for the Ninth Circuit after the NCAA appealed from a decision of the Northern District of California.<sup>153</sup> Northern District Judge, Claudia Wilken, held that the NCAA could no longer prohibit schools from paying players for use of NILs, that student-athletes could now be awarded up to the cost of attendance in exchange for their athletic services,<sup>154</sup> and that FBS football and Division I basketball student-athletes were entitled to a payment of five thousand dollars per year, to be set aside in trust until graduation or the end of a student-athlete's career.<sup>155</sup> At issue in the Ninth Circuit was whether the NCAA's amateurism bylaws were subject to antitrust law, and, if so, whether they were an unlawful restraint on trade under Section 1 of the Sherman Act.

### 2. Factual Background

Ed O'Bannon was a four-time all-American basketball player at UCLA, who excelled at the college level but did not make it in the pros.<sup>156</sup> Years after his college career ended, O'Bannon, a car salesman,<sup>157</sup> was visiting a friend's house when he witnessed his friend's son playing a college basketball video game and saw himself.<sup>158</sup> The video game avatar played for UCLA, looked exactly like O'Bannon

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153. *Id.* at 1053.

154. Cost of attendance consists of a full-tuition scholarship, room and board, and a reasonable payment of the anticipated cost of living expenses student-athletes incur like books, food, travel, and home and cell phone bills. Marc Tracy & Ben Strauss, *Court Strikes Down Payments to College Athletes*, N.Y. TIMES (Sept. 30, 2015), <https://www.nytimes.com/2015/10/01/sports/obannon-ncaa-case-court-of-appeals-ruling.html>.

155. *O'Bannon v. NCAA*, 7 F.Supp.3d 955, 1008 (N.D. Cal. 2014).

156. *O'Bannon*, 802 F.3d at 1055.

157. *Between Selling Cars, Former UCLA Star Ed O'Bannon Takes on the NCAA Over Pay*, ASSOCIATED PRESS (Feb. 19, 2014), <http://www.foxnews.com/sports/2014/02/19/between-selling-cars-former-ucla-star-ed-obannon-takes-on-ncaa-over-pay.html>.

158. *O'Bannon*, 802 F.3d at 1055.

(African American, bald head), was adorned with O'Bannon's number 31, and had his patented lefty jump shot.<sup>159</sup> The only characteristic the avatar lacked was O'Bannon's name.<sup>160</sup> O'Bannon was never notified this avatar would be in the video game, claimed he never consented to it, and was never paid for the use of his NIL.<sup>161</sup> The game was produced by Electronic Arts (EA) and licensed by the NCAA.<sup>162</sup> In response, O'Bannon sued the NCAA and the Collegiate Licensing Company,<sup>163</sup> claiming that the NCAA's amateurism rules prevented student-athletes from being paid for their NILs and thus constituted an illegal restraint on trade under Section 1 of the Sherman Act.<sup>164</sup>

### 3. Holding and Analysis

On appeal, the Ninth Circuit affirmed in part and reversed in part Judge Wilken's decision.<sup>165</sup> Overall, the court held that contrary to *Board of Regents*, the NCAA's rules preventing amateur compensation were not immune from antitrust challenges,<sup>166</sup> college athletes were injured as a result of these amateur compensation rules,<sup>167</sup> and the compensation rules were subject to Rule of Reason analysis.<sup>168</sup>

Applying the Rule of Reason, the court found that the

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159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. The Collegiate Licensing Company (CLC) manages license grants, trademark protection, and controls the brands for the NCAA, nearly 200 of its member institutions, its bowl games, the numerous athletic conferences, and the Heisman Trophy. *About IMG College Licensing*, IMG C. LICENSING, <https://www.clc.com/About-CLC.aspx> (last visited Nov. 13, 2017).

164. *O'Bannon*, 802 F.3d at 1055.

165. *Id.* at 1053.

166. *Id.* at 1066.

167. *Id.* at 1067.

168. *Id.* at 1070.

NCAA's compensation rules fix the price for NIL rights in the scholarship bundle schools provide their athletes, which "extinguish[es] one form of competition" schools may use to get recruits.<sup>169</sup> However, the court found the NCAA's compensation rules serve two procompetitive purposes: "integrating academics with athletics" and protecting the popularity of NCAA athletics by ensuring its athletes remain amateurs.<sup>170</sup> In the last step of the Rule of Reason analysis, the court found that a less restrictive alternative to the NCAA's current rule would be to provide athletes up to the cost of attendance to cover the "legitimate" costs of attending school, but would not jeopardize the amateurism of the model because the money would be connected to educational expenses of the athletes.<sup>171</sup> Nonetheless, the court ruled that providing student-athletes with a cash payout of five thousand dollars per year upon the completion of a student-athlete's career violated the general principles of amateurism because any pay-for-play compensation would be considered a salary.<sup>172</sup>

#### 4. Important Dicta in *O'Bannon* for Future Litigation

The single most important commentary to come out of *O'Bannon* was the Ninth Circuit's unwillingness to confer upon the NCAA the broad antitrust deference granted by *Board of Regents*. According to the court,

*Board of Regents* . . . did not approve the NCAA's amateurism rules as categorically consistent with the Sherman Act. Rather, it held that, because many NCAA rules (among them, the amateurism rules) are part of the "character and quality of the [NCAA's] 'product,'" . . . *no NCAA rule should be invalidated without a Rule of Reason analysis*. The Court's long encomium to amateurism, though impressive-sounding, was therefore dicta. . . . [We] are not bound by *Board of Regents* to conclude that every NCAA rule that

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169. *Id.* at 1071–72.

170. *Id.* at 1073.

171. *Id.* at 1075.

172. *See id.* at 1078.

somehow relates to amateurism is automatically valid.<sup>173</sup>

The court then criticized how the NCAA sought to use *Board of Regents* as the end all and be all for litigation against its amateurism rules:

What is more, even if the language in *Board of Regents* addressing amateurism were *not dicta*, it would not support the tremendous weight that the NCAA seeks to place upon it. The Court's opinion supports the proposition that the preservation of amateurism is a legitimate procompetitive purpose for the NCAA to pursue, but the NCAA is not asking us to find merely that its amateurism rules are procompetitive; rather, it asks us to hold that those rules are essentially exempt from antitrust scrutiny. Nothing in *Board of Regents* supports such an exemption. To say that the NCAA's amateurism rules are procompetitive, as *Board of Regents* did, is not to say that they are automatically lawful; a restraint that serves a procompetitive purpose can still be invalid under the Rule of Reason if a substantially less restrictive rule would further the same objectives equally well.<sup>174</sup>

Overall, these two statements justified the Ninth Circuit's breakthrough holding—the NCAA's amateurism model is no longer immune from antitrust challenges. As opposed to dismissing the case “in the twinkling of an eye,” as first proposed in footnote thirty-nine of *Board of Regents*, the Ninth Circuit applied the three-step Rule of Reason analysis to an amateurism bylaw previous courts would have considered to “fit into the same mold” as other presumptively procompetitive bylaws.

### 5. Precedential Value

The NCAA appealed the Ninth Circuit's decision in *O'Bannon* to the U.S. Supreme Court, but its appeal was denied.<sup>175</sup> Many commentators believe that the next successful antitrust challenge levied against the NCAA could

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173. *Id.* at 1063 (emphasis added).

174. *Id.* at 1063–64 (emphasis in original).

175. *O'Bannon v. NCAA*, 137 S. Ct. 277 (2016).

place its entire amateurism model in jeopardy.<sup>176</sup> However, where *O'Bannon* offers an interpretation of *Board of Regents* that is a pragmatic view of today's NCAA and all of its realities, because the Supreme Court denied certiorari it is only persuasive authority outside of the Ninth Circuit; its precedential value is yet to be determined.

### III. THE ANTITRUST CHALLENGES TO THE NCAA'S TRANSFER BYLAW: *PUGH & DEPPE*

Despite the uncertainty of its authority, one group of student-athletes has already attempted to capitalize on the NCAA's potential antitrust vulnerability found in *O'Bannon*.<sup>177</sup> In less than thirteen months, between November 2015 and November 2016, Hagens Berman filed three class-action lawsuits challenging the Year in Residence Rule<sup>178</sup> for transfer student-athletes as an illegal restraint on trade under the Sherman Act. Two of these cases, *Pugh v. NCAA* and *Deppe v. NCAA*, have already been decided in the NCAA's favor on motions to dismiss by Judge Tanya Walton Pratt of the Southern District of Indiana.<sup>179</sup> However, the Seventh Circuit granted the plaintiff's appeal in *Deppe* and heard oral arguments in September 2017.<sup>180</sup> The court has not yet issued a decision as of April 2018. In the third case,

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176. See, e.g., William W. Berry III, *Amending Amateurism Saving Intercollegiate Athletics Through Conference-Athlete Revenue Sharing*, 68 ALA. L. REV. 551, 573 (2016); John Niemeyer, *The End of an Era: The Mounting Challenges to the NCAA's Model of Amateurism*, 42 PEPP. L. REV. 883, 932 (2015); Audrey C. Sheetz, *Student-Athletes v. NCAA: Preserving Amateurism in College Sports Amidst the Fight for Player Compensation*, 81 BROOK. L. REV. 865, 881 (2016).

177. 802 F.3d 1049.

178. NCAA DIVISION I MANUAL, *supra* note 9, at 168, §14.5.5.1.

179. *Deppe v. NCAA*, No. 1:16-cv-00528-TWP-DKL, 2017 U.S. Dist. 31709, at \*1, \*2 (S.D. Ind. Mar. 6, 2017); *Pugh v. NCAA*, No. 1:15-cv-01747-TWP-DKL, 2016 U.S. Dist. LEXIS 132122, at \*1 (S.D. Ind. Sept. 27, 2016).

180. Oral Argument, *Deppe v. NCAA*, No. 17-1711 (7th Cir. Sept. 13, 2017), <https://player.fm/series/oral-arguments-for-the-court-of-appeals-for-the-seventh-circuit/peter-deppe-v-ncaa>.

*Vassar v. NCAA*, the parties have agreed that the *Deppe* appeal likely will be dispositive of the plaintiff's antitrust claims against the NCAA and will await the Seventh Circuit's decision.<sup>181</sup>

Judge Pratt's decisions in *Pugh* and *Deppe* were unsurprising. Both lawsuits were pleaded in the same district court in the Seventh Circuit where *Agnew*<sup>182</sup> would be mandatory authority. Since bylaw 14.5.5.1 is an eligibility bylaw, *Agnew* dictates that the Year in Residence Rule is presumptively procompetitive and the district court could dismiss the challenge in "the twinkling of an eye." However, where Judge Pratt's decision falls in line with previous Seventh Circuit jurisprudence, it has the potential to create a dangerous precedent by insulating the NCAA's model from antitrust challenges to bylaws that have proven to be ineffective. Accordingly, it makes the Seventh Circuit's decision in *Deppe* that much more important to future litigants who seek to challenge the antitrust status of eligibility bylaws.

## A. *Pugh v. NCAA*

### 1. Factual Background

In 2010, Devin Pugh accepted a full scholarship to play Division I FCS football at Weber State University in Ogden, Utah.<sup>183</sup> Pugh was promised a yearly renewable scholarship by then-head coach, Ron McBride, so long as he remained

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181. "MINUTE entry before the Honorable Andrea R. Wood: Status hearing held. The parties acknowledge that the outcome of the appeal in *Deppe v. NCAA*, Case No. 17-1711 pending in the Court of Appeals for the Seventh Circuit, will likely be dispositive of the antitrust claim in plaintiff's complaint here." Minute Entry, *Vassar v. Nat'l Collegiate Athletic Ass'n*, No. 1:16-cv-10590 (N.D. Ill. Nov. 22, 2017) (hereinafter *Vassar Minute Entry*).

182. *Agnew v. NCAA*, 683 F.3d 328 (7th Cir. 2012).

183. *Pugh*, 2016 U.S. Dist. LEXIS 132122, at \*2.

academically eligible.<sup>184</sup> At Weber State, Pugh redshirted<sup>185</sup> his freshman year and then played two seasons under McBride.<sup>186</sup> In those two seasons, he played eighteen games for the Wildcats at cornerback, tallying forty-two tackles and four interceptions.<sup>187</sup> Nevertheless, after his redshirt sophomore season,<sup>188</sup> Coach McBride retired and was replaced by Jody Sears, who instructed Pugh to pursue a transfer because he would not renew the cornerback's scholarship.<sup>189</sup>

After receiving his release,<sup>190</sup> Pugh received full grant-in-aid offers from Division I FBS and FCS schools.<sup>191</sup> However, all of these transfer options were contingent on Pugh being able to play two years of football.<sup>192</sup> Since Pugh redshirted his freshman year, he only had two years of eligibility left on his five-year clock,<sup>193</sup> and he would need to

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184. *Id.*

185. As a general rule, from the time a student-athlete enrolls in a four-year university, the athlete "shall not engage in more than four seasons of intercollegiate competition in any one sport." NCAA, DIVISION I MANUAL, *supra* note 9, at 71, §12.8. Further, under §12.8.1 the athlete "shall complete his or her seasons of [athletic] participation within five calendar years from the beginning of the semester or quarter in which the student-athlete first registered for a minimum full-time program of studies in a collegiate institution." *Id.* If any student-athlete decides not to participate in competition due to injury or is prevented from participating because he or she did not meet the necessary academic standards, the student-athlete will be considered a redshirt. *See id.* at 73, §12.8.1.5.1.2.

186. 2010 *Football Roster: Devin Pugh*, WEBER STATE UNIV. [http://www.weberstatesports.com/ViewArticle.dbml?DB\\_OEM\\_ID=8600&ATCLID=204959959](http://www.weberstatesports.com/ViewArticle.dbml?DB_OEM_ID=8600&ATCLID=204959959) (last visited Mar. 18, 2017).

187. *Id.*

188. A redshirt sophomore is a student-athlete in his third year of enrollment.

189. *Pugh*, 2016 U.S. Dist. LEXIS 132122, at \*2–3.

190. In order to initiate the transfer process, a student-athlete must first receive a release from his current school that certifies the school has no objection to the student transferring institutions. NCAA, DIVISION I MANUAL, *supra* note 9, at 170, §14.5.5.2.10(d).

191. *Pugh*, 2016 U.S. Dist. LEXIS 132122, at \*3.

192. *Id.*

193. *See* NCAA, DIVISION I MANUAL, *supra* note 9, at 71–72, §12.8.1.

compete immediately upon transferring to qualify for any of these offers. As a result, Pugh submitted a hardship waiver to the NCAA in the hopes of avoiding the Year in Residence Rule because the One-Time Transfer Exception, bylaw 14.5.5.2.10, is not available to football players.<sup>194</sup> The NCAA denied Pugh's request, which prevented him from qualifying for any of the Division I offers.<sup>195</sup>

Consequently, Pugh transferred to Division II Colorado State University-Pueblo where he was immediately eligible to compete because the One-Time Transfer Exception to the Year in Residence Rule does allow football players transferring from Division I to Division II schools to compete immediately.<sup>196</sup> One major difference between Division I and Division II institutions, however, is their capacity to offer athletics aid to student-athletes.<sup>197</sup> Though Pugh was immediately eligible to play at CSU-Pueblo, his scholarship only covered tuition, not books, housing, or any other costs of attendance he would have received at Weber State.<sup>198</sup> As a result, Pugh increased his student loans from three thousand dollars per year to six thousand dollars per year for his remaining two undergraduate years.<sup>199</sup>

## 2. Cause of Action

Pugh brought a class action lawsuit against the NCAA in November 2015 alleging Bylaw 14.5.5.1 was an unreasonable restraint on trade that violated Section 1 of the Sherman Act by requiring transfers to sit out one year of competition before competing at a new school.<sup>200</sup> In response, the NCAA filed a FRCP 12(b)(6) motion to dismiss because

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194. *Pugh*, 2016 U.S. Dist. LEXIS 132122, at \*3.

195. *Id.*

196. *Id.* at \*3–4.

197. *See About NCAA Division II*, *supra* note 28.

198. *Pugh*, 2016 U.S. Dist. LEXIS 132122, at \*4.

199. *Id.*

200. *Id.*

the Year in Residence Rule was previously deemed “presumptively procompetitive” by the Seventh Circuit in *Agnew*.<sup>201</sup>

### 3. The Southern District of Indiana’s Decision

Judge Pratt held that because the Year in Residence Rule was directly related to eligibility, it was “presumptively procompetitive” and Pugh’s antitrust challenge to the rule could be dismissed “in the twinkling of an eye” on the NCAA’s FRCP 12(b)(6) motion to dismiss.<sup>202</sup> First, citing language from both *Agnew* and *Board of Regents*, Judge Pratt recognized that while the Sherman Act “applies to NCAA regulations . . . ‘most regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics.’”<sup>203</sup> The judge again quoted *Board of Regents* for the pronouncement that collusion between teams in college football is acceptable: “when an NCAA bylaw is clearly meant to help maintain that ‘revered tradition of amateurism in college sports’ or the ‘preservation of the student-athlete in higher education,’ the bylaw will be presumed procompetitive, since the NCAA needs ‘ample latitude to play that role.’”<sup>204</sup>

Pratt then examined what function of the bylaws Pugh was challenging. She determined that Pugh was challenging the legality of the eligibility section of the NCAA Division I Manual, because the Year in Residence Rule is an eligibility rule.<sup>205</sup> Citing *Agnew*, *Smith*, and *McCormack* as authority, the decision found that all eligibility bylaws are

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201. *Id.* at \*7.

202. *Id.* at \*9–11 (citing *Agnew v. NCAA*, 683 F.3d 328, 341 (7th Cir. 2012)).

203. *Pugh*, 2016 U.S. Dist. LEXIS 132122, at \*10–11 (citing *NCAA v. Board of Regents*, 468 U.S. 85, 117 (1984)).

204. *Id.* at \*8 (citing *Board of Regents*, 468 U.S. at 117).

205. *Id.*

“presumptively procompetitive” under the Sherman Act.<sup>206</sup> Again citing *Agnew*, Judge Pratt found that because the rule was presumptively procompetitive, the court did not need to analyze the antitrust challenge any further and could properly dismiss it “in a twinkling of an eye.”<sup>207</sup>

#### 4. Analysis

Judge Pratt relied heavily on *Board of Regents* and its Seventh Circuit reaffirmation in *Agnew* to grant the NCAA’s FRCP 12(b)(6) motion. Given the depth of *Agnew*’s analysis of the procompetitiveness of eligibility bylaws and the uncertain status of *O’Bannon* in September 2016, *Pugh* was an easy decision for the judge. *Board of Regents* and *Agnew* confirmed that the NCAA deserved the autonomy to set eligibility standards for its member institutions and their student-athletes to establish a level academic playing field for all participants in intercollegiate competition—the essence of Bylaw 14.

#### B. Deppe v. NCAA

Before Judge Pratt issued her decision in *Pugh*, Hagens Berman filed another complaint in the Southern District of Indiana in March 2016 on behalf of Peter Deppe,<sup>208</sup> a punter at Northern Illinois University. The complaint contained the exact same allegations as *Pugh* and sought the same relief.<sup>209</sup> During oral argument at the district court level, both parties agreed that the factual allegations did not distinguish the

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206. *Id.* at \*9.

207. *Id.* at \*9–10. Beyond the holding, Judge Pratt clarified an important point for future litigants: antitrust liability will only be proven by demonstrating that a bylaw lacks a procompetitive justification, not by showing economic harm to the plaintiff. Here, Devin Pugh’s increase to his student loans due to the Year in Residence Rule did not confer antitrust liability on the NCAA. Instead, the court looked at the character of the bylaw at issue. *Id.* at \*10, \*11.

208. Complaint at 1, *Deppe v. NCAA*, No. 1:16-cv-00528-TWP-DKL, 2017 U.S. Dist. LEXIS 31709 (S.D. Ind. Mar. 6, 2016) (hereinafter *Deppe Complaint*).

209. *Id.*

legal issues in *Deppe* from the legal issues in *Pugh*.<sup>210</sup> Instead, Deppe's attorneys claimed Judge Pratt, again the presiding judge, applied *Agnew* incorrectly in *Pugh* and should find differently here.<sup>211</sup>

### 1. Factual Background

The facts in *Deppe* vary only slightly from *Pugh*. Peter Deppe was a very good high school punter and was extended preferred walk-on<sup>212</sup> or full-scholarship offers from multiple FBS or FCS schools.<sup>213</sup> He chose to become a preferred walk-on at Northern Illinois University.<sup>214</sup> At NIU, Deppe chose to redshirt his freshman year to retain his four years of eligibility because he was promised a scholarship by the Huskies' then-special teams coach in August 2014, which would begin the following year in January 2015, when he would take over as the team's starting punter.<sup>215</sup> Yet, as in *Pugh*, Deppe's special teams coach left NIU for another coaching job and the head coach informed the punter he would not be receiving the promised scholarship offer.<sup>216</sup> NIU then signed another punter, which signaled that Deppe had

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210. *Deppe v. NCAA*, No: 1:16-cv-00528-TWP-DKL, 2017 U.S. Dist. LEXIS 31709, at \*9–10 (S.D. Ind. Mar. 6, 2017).

211. *Id.*

212. The court offers no definition of “preferred walk-on” and the term is not contained in the NCAA Division I Manual. Essentially, a preferred walk-on is the term used to describe a not-yet proven player who will have the opportunity to be a part of a football team's practice squad in order to earn a spot on the team and potentially a scholarship if he can prove himself worthy. A preferred walk-on does not sign a letter of intent and the coaching staff has no obligations to extend a scholarship offer. See Brandon Parker, *While Top Recruits Celebrate on National Signing Day, Preferred Walk-Ons Gamble On Their Football Futures*, WASH. POST (Feb. 2, 2016), [https://www.washingtonpost.com/sports/highschools/while-top-recruits-celebrate-on-national-signing-day-preferred-walk-ons-gamble-on-their-football-futures/2016/02/02/211661da-c9b3-11e5-a7b2-5a2f824b02c9\\_story.html?utm\\_term=.1a1e8da46ea9](https://www.washingtonpost.com/sports/highschools/while-top-recruits-celebrate-on-national-signing-day-preferred-walk-ons-gamble-on-their-football-futures/2016/02/02/211661da-c9b3-11e5-a7b2-5a2f824b02c9_story.html?utm_term=.1a1e8da46ea9).

213. *Deppe*, 2017 U.S. Dist. LEXIS 31709 at \*2.

214. *Id.* at \*3.

215. *Id.*

216. *Id.*

little chance to make the active roster and receive a scholarship.<sup>217</sup>

Deppe requested his release, which NIU granted in September 2015, and began soliciting offers from other Division I schools.<sup>218</sup> The University of Iowa offered Deppe a roster spot for the 2016–17 season if he could petition the NCAA to waive the year in residence requirement.<sup>219</sup> Deppe’s parents called the NCAA to ask about transfer options and NCAA agents informed them that 14.5.5.1 mandated Peter sit out one year of competition.<sup>220</sup> In response, on November 11, 2015, Deppe’s attorney sent a letter to the NCAA to explain his client’s special circumstances, but upon review the NCAA discovered that Iowa had not submitted a year in residence waiver for the punter.<sup>221</sup> Consequently, the NCAA was precluded from even considering waiving the year in residence until Iowa filed this request.<sup>222</sup> On November 16, 2015, Deppe was offered admission at the University of Iowa.<sup>223</sup> Three days later, the Iowa coaching staff informed him that they would not file a waiver on his behalf because they had signed another punter who was immediately eligible for the 2016–17 season.<sup>224</sup>

## 2. Causes of Action

Peter Deppe filed a complaint in the Southern District of Indiana on March 8, 2016, asserting (1) that the NCAA’s cap on multi-year scholarships is unlawful and, (2) that the NCAA transfer rules violate the Sherman Act by restraining “players’ ability to make the best choices for themselves,

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217. *Id.*

218. *Id.*

219. *Id.* at \*3–4.

220. *Id.* at \*4.

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.* at \*5.

including ones based on financial considerations, academic considerations, athletics considerations, and personal circumstances.”<sup>225</sup> This Comment only examines Deppe’s second claim for relief. In response, the NCAA filed a FRCP 12(b)(6) motion to dismiss for failure to state a claim because Deppe’s suit against the NCAA was no different than *Pugh*, which was decided in the same court by the same judge just six months prior.<sup>226</sup>

### 3. The Southern District’s Unsurprising Decision

Wholly relying on her recent decision in *Pugh*, Judge Pratt again granted the NCAA’s motion to dismiss.<sup>227</sup> The judge began her decision by confirming the issue in *Deppe* was “virtually identical” to the issue in *Pugh*: whether the Year in Residence rule is presumptively procompetitive.<sup>228</sup> As in *Pugh*, Judge Pratt quoted the *Board of Regents* dicta that “most of the regulatory controls of the NCAA are justifiable means of fostering competition . . . and therefore procompetitive”<sup>229</sup> and that “when an NCAA bylaw is clearly meant to help maintain that revered tradition of amateurism in college sports or the preservation of the student-athlete in higher education, the bylaw will be presumed procompetitive, since we must give the NCAA ample latitude to play that role.”<sup>230</sup> Judge Pratt then identified that the Year in Residence Rule was an eligibility bylaw, all of which were deemed presumptively procompetitive in *Agnew* and *Pugh*.<sup>231</sup> As such, Pratt dismissed Deppe’s claim that Bylaw 14.5.5.1 violated Section 1 of the Sherman Act on the NCAA’s FRCP 12(b)(6) “in the twinkling of an eye,” once again noting

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225. *Deppe Complaint*, *supra* note 208, at 2.

226. *Deppe*, 2017 U.S. Dist. LEXIS 31709, at \*9.

227. *Id.* at \*12.

228. *Id.* at \*9–10.

229. *Id.* at \*10.

230. *Id.* at \*11.

231. *Id.*

that the issue did not need to be analyzed any further.<sup>232</sup>

#### 4. Analysis

Pratt's reasoning in *Deppe* was no different and justifiably shorter than *Pugh*, relying on the basic principle of stare decisis. She decided this exact legal issue six months earlier, and no cases from the Seventh Circuit or the Supreme Court dictated any reason to reverse course.

#### C. *The Aftermath of Pugh & Deppe*

Judge Pratt's decisions in *Pugh* and *Deppe* were very straightforward analyses of the relevant legal standards applied to NCAA bylaws in *Board of Regents* and *Agnew*: eligibility bylaws are presumptively procompetitive, period. The timing of the *Pugh* decision is important, however. Pratt issued her decision in *Pugh* on September 30, 2016, just four days before the Supreme Court denied certiorari in *O'Bannon* on October 3, 2016.<sup>233</sup>

Judge Pratt made a calculated decision to adhere to *Board of Regents* when there was still a question of whether *O'Bannon* would be heard by the nation's highest court.<sup>234</sup> At the time, this was the safe holding because of the firm foundation *Board of Regents* stood on. The Ninth Circuit's holding in *O'Bannon* was the first time the *Board of Regents* dicta was questioned by a federal court in a case against the NCAA. Moreover, it was still unclear whether this decision would be upheld by the Supreme Court, which both wrote *Board of Regents* and accepted four amicus briefs on behalf of the NCAA (and none from *O'Bannon*).<sup>235</sup> Finally, the Seventh Circuit had recently reaffirmed the controlling

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232. *Id.* at \*12.

233. *O'Bannon v. NCAA*, 802 F.3d 1049, 1055 (9th Cir. 2015), *cert. denied*, 137 S. Ct. 277 (2016).

234. *Pugh v. NCAA*, No. 1:15-cv-01747-TWP-DKL, 2016 U.S. Dist. LEXIS 132122, at \*9 (S.D. Ind. Sept. 27, 2016).

235. *O'Bannon v. NCAA*, 137 S. Ct. 277 (2016).

influence of *Board of Regents* in 2011 with *Agnew*,<sup>236</sup> so Pratt had little reason to stray from the 1984 case's long-held precepts.

#### D. *The Dangers of Pugh and Deppe*

If allowed to stand as held by Judge Pratt, *Pugh* and *Deppe* will set harmful precedents regarding the rights of student-athletes to challenge the NCAA under antitrust law when the organization's model is justifiably in its most vulnerable state. Where *O'Bannon* should mark the beginning of an era of jurisprudence-defined bolstering of the rights of student-athletes, *Pugh* and *Deppe* could counteract or even stop this. So, in an era when the president of the NCAA has recognized his organization needs "fundamental change,"<sup>237</sup> it is also time for the federal courts to rethink their stance on the amount of antitrust protection this broken model deserves. While *Board of Regents* and *Agnew* are controlling authority in the Seventh Circuit, these cases are also representative of the NCAA of the past. Accordingly, the Seventh Circuit has the opportunity recalibrate and do right by the student-athletes on appeal in *Deppe* the same way the Ninth Circuit did in *O'Bannon*.

#### IV. THE HARMFUL EFFECTS OF THE YEAR IN RESIDENCE RULE: VASSAR

The Seventh Circuit's forthcoming decision on the procompetitiveness of eligibility bylaws in *Deppe*<sup>238</sup> is especially important for student-athletes like Johnnie Vassar, the lead plaintiff in the final challenge to the Year in Residence Rule in the Seventh Circuit. Vassar's case, filed in

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236. *Agnew v. NCAA*, 683 F.3d 328, 342 (7th Cir. 2012).

237. See Hobson, *supra* note 74.

238. *Deppe v. NCAA*, No: 1:16-cv-00528-TWP-DKL, 2017 U.S. Dist. LEXIS 31709 (S.D. Ind. Mar. 6, 2017).

the Northern District of Illinois on November 14, 2016,<sup>239</sup> is an example of the ends to which athletic departments will go to secure athletic success at the expense of its student-athletes. The complaint set forth four causes of action, three against Vassar's school, Northwestern,<sup>240</sup> and one against the NCAA challenging the Year in Residence Rule.<sup>241</sup> While Northwestern was directly responsible for a number of issues the freshman shooting guard encountered, the NCAA's Year in Residence Rule accelerated the alleged harm to Vassar. As it stands, the parties have agreed to pause further action on the case because the Seventh Circuit's decision in *Deppe* will likely determine the outcome of Vassar's claim against the NCAA.<sup>242</sup>

#### A. *Factual Background*

Johnnie Vassar was a three-star point guard who was heavily recruited out of high school.<sup>243</sup> After being recruited by a number of perennial March Madness contenders,<sup>244</sup> Vassar accepted a four-year scholarship to Northwestern, valid for the 2014–15 through 2017–18 academic years.<sup>245</sup> The young point guard committed to Northwestern based on

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239. Complaint at 1, *Vassar v. NCAA*, No. 1:16-cv-10590 (N.D. Ill. Nov. 14, 2016) (hereinafter *Vassar Complaint*).

240. These causes of action assert (1) breach of contract, (2) promissory estoppel of a four-year scholarship that coaches did everything in their power to revoke, and (3) common law fraud against Northwestern and its basketball coaches for forcing Vassar to relinquish his scholarship award and attempting to push him out of the school through continued harassment. *Vassar Complaint*, *supra* note 239, at 41–43.

241. *Id.*

242. *See Vassar Minute Entry*, *supra* note 181.

243. *College Basketball Recruiting, Johnnie Vassar*, ESPN, [http://www.espn.com/college-sports/basketball/recruiting/player/\\_id/124491/johnnie-vassar](http://www.espn.com/college-sports/basketball/recruiting/player/_id/124491/johnnie-vassar) (last visited Mar. 10, 2017).

244. Vassar was recruited by and/or received scholarship offers from Cal, Illinois, Northwestern, SMU, Syracuse, Tennessee, UCLA, USC, Villanova and West Virginia. *Vassar Complaint*, *supra* note 239, at 8.

245. *Id.*

the quality of education and its proximity to his home in Chicago, where he would help care for a sick family member.<sup>246</sup>

As a freshman, Johnnie Vassar played a limited role for the Wildcats under head coach, Chris Collins, averaging 3.9 minutes/game (of 40 total), 0.8 points/game and shot 36.8% from the floor.<sup>247</sup> At the end of the season, Vassar alleged he was “strongly and repeatedly urged” to transfer by his coaches so they could offer his scholarship to a different player the coaches felt would help the team.<sup>248</sup>

In no uncertain terms, Vassar’s complaint alleges his Northwestern coaches had buyer’s remorse. At the time, the team had never made the NCAA Tournament in seventy-eight years of competing in Division I, and there was huge pressure on Collins to end the streak—which he did in March 2017.<sup>249</sup> As a result, the complaint alleged the coaching staff undertook a series of forceful and deceptive measures to coerce Vassar to surrender his scholarship.

According to the complaint, the coaches first asked Vassar to sign a “permission to contact” form, which allowed him to legally contact other schools regarding the potential for transferring, but then used Vassar’s request as a reason to remove him from the team roster.<sup>250</sup> The coaches then forced him to sign a “roster deletion form” which acknowledged that he would be relinquishing any benefits student-athletes received, such as access to athletic facilities

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246. *Id.*

247. *College Basketball Player Statistics, Johnnie Vassar*, ESPN, [http://www.espn.com/mens-college-basketball/player/\\_id/3136745/johnnie-vassar](http://www.espn.com/mens-college-basketball/player/_id/3136745/johnnie-vassar) (last visited Mar. 31, 2018).

248. *Vassar Complaint*, *supra* note 239, at 10.

249. Teddy Greenstein, *Northwestern Will ‘Go Dance in Salt Lake City’ After First NCAA Tournament Bid*, CHI. TRIB. (Mar. 12, 2017, 8:55 PM), <http://www.chicagotribune.com/sports/college/ct-northwestern-ncaa-tournament-greenstein-spt-0313-20170312-column.html>.

250. *Vassar Complaint*, *supra* note 239, at 11–12.

and the training staff.<sup>251</sup> Next, the school issued a press release that stated Vassar was transferring, even though he had neither asked for, nor had been granted a release.<sup>252</sup>

The complaint stated that after receiving a transfer release he did not want, Vassar spoke with coaches from DePaul, Georgia Tech, Utah, and UNLV about the possibility of transferring.<sup>253</sup> However, the schools all responded with the same message: if Vassar could waive the Year in Residence Rule, there was a scholarship available, and if not, tough luck.<sup>254</sup> As a result, he chose to remain at Northwestern, where his full athletics scholarship was supposedly good for another three years.

After he informed the Athletics Department he planned to remain at the school, Northwestern allegedly changed the nature of Vassar's guaranteed four-year scholarship from a full grant-in-aid athletic award to a scholarship premised upon a work-study "internship" where he performed janitorial duties at the school's athletic facilities.<sup>255</sup> The school then allegedly offered Vassar a cash payment equal to the value of his scholarship in exchange for giving up this scholarship, which he declined.<sup>256</sup> Next, the school's attorneys issued an ultimatum to relinquish the athletic scholarship and receive a full-tuition academic scholarship or not relinquish and pay full tuition.<sup>257</sup> Vassar refused the offer and the athletics' department stripped him of his scholarship because he had not met his eight-hour per week work requirement under the internship program.<sup>258</sup> However, Vassar appealed the decision because the time

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251. *Id.* at 12.

252. *Id.* at 12–13.

253. *Id.* at 13.

254. *Id.*

255. *Id.* at 14–15.

256. *Id.* at 16.

257. *Id.* at 18.

258. *Id.* at 19.

cards the department relied upon to cancel the scholarship were falsified.<sup>259</sup> He won the appeal and kept his scholarship, but the university still changed the nature of his the financial aid to academic in May 2015.<sup>260</sup> Vassar brought this lawsuit in November 2016.<sup>261</sup>

### B. *Cause of Action*

For the final time in a less than thirteen month window, Hagens Berman, on behalf of Johnnie Vassar, asserted that the Year in Residence Rule injured a class of NCAA athletes, Division I basketball players, and thus violated Section 1 of the Sherman Act.<sup>262</sup> The complaint defines the injury as follows: “[class] members’ choice of which NCAA Division I member institution to attend has been artificially restricted by the NCAA’s restrictions on their ability to transfer without loss of athletics eligibility.”<sup>263</sup> Like in *Pugh* and *Deppe*, the NCAA filed a FRCP 12(b)(6) motion to dismiss the cause of action for failure to state a claim because (1) the rule has been deemed presumptively procompetitive, (2) the rule is non-commercial, and (3) Vassar has not shown any injury to competition.<sup>264</sup>

In November of 2017, Vassar and the NCAA agreed to put the case on hold until the Seventh Circuit rules on *Deppe* because the court’s decision on the antitrust claims will most likely dictate the outcome of the antitrust portion of Vassar’s suit.<sup>265</sup>

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259. Two of the time cards used as evidence of Vassar not meeting the eight-hour requirement did not have the same handwriting and one spelled Johnnie’s name incorrectly—“Johnie.” *Id.* at 21.

260. *Id.* at 22.

261. *Id.* at 3.

262. *Id.* at 41.

263. *Id.* at 40.

264. Defendant NCAA’s 12(b)(6) Motion for Partial Dismissal of Plaintiff’s Complaint, *Vassar v. NCAA*, No. 1:16-cv-10590, at 2 (N.D. Ill. filed Jan. 31, 2017).

265. “The parties acknowledge that the outcome of the appeal in *Deppe v.*

*C. Why Deppe Matters That Much More*

If true, the allegations against Northwestern confirm why so many Americans have become skeptical of the NCAA and its most prominent athletic programs.<sup>266</sup> Frankly, the system is failing its student-athletes, who are treated as disposable objects in coaches' and institutions' quests for athletic and financial success. When Vassar signed his NLI, the Northwestern basketball program committed to financing a four-year scholarship for him. Yet, after one year, Coach Collins changed his mind and allegedly resorted to a number of disturbing tactics to coerce Vassar to surrender his spot on the team and his financial aid.

The coaches' actions towards Vassar are equivalent to a professional team cutting one of its players. Yet, Johnnie Vassar was not a professional: he was an NCAA student-athlete, who committed to Northwestern to play basketball *and* be the first person in his family to earn a college degree. To make matters worse, unlike a professional athlete, Vassar could not play at another school right away because of the Year in Residence Rule.

While the NCAA did not directly commit these alleged harms to Vassar, it helped created a culture that fostered these actions by putting its own financial success ahead of the best interests of its student-athletes. In this case, ending Northwestern's March Madness drought meant increased job security in a coveted Power Five head coaching position and a big contract for Coach Collins. In fact, after the 2017 season—when Collins led the Wildcats to the Big Dance for the first time in program history—Northwestern rewarded the coach with a six-year contract extension worth over \$3 million per year.<sup>267</sup> Yet to Collins, Vassar was an obstacle on

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NCAA, Case No. 17-1711 pending in the Court of Appeals for the Seventh Circuit, will likely be dispositive of the antitrust claim in plaintiff's complaint here." *Vassar Minute Entry*, *supra* note 181.

266. See Hobson, *supra* note 74.

267. Matt Norlander, *After finally making an NCAA Tournament*,

the way to a big payday, and he became expendable.

As the NCAA's revenues continue to grow, Johnnie Vassar will not be the only expendable student-athlete to a coach. As such, the Seventh Circuit's decision in *Deppe* is that much more important for transfers who have been unfortunate casualties of the Year in Residence rule. Where the bylaw supposedly protects eligibility, it has proven to victimize many student-athletes. Given the current state of the NCAA after the FBI investigation, the subsequent indictments and the UNC paper class scandal, these transfer cases should encourage the Seventh Circuit to take a fresh look at the eligibility bylaws to determine if they are functioning to "help maintain that 'revered tradition of amateurism in college sports' or the 'preservation of the student-athlete in higher education.'"<sup>268</sup>

#### V. THE SEVENTH CIRCUIT'S CHANCE AT REDEMPTION: *DEPPE*

*Deppe*<sup>269</sup> presents the Seventh Circuit with the chance to scrutinize NCAA eligibility bylaws through a more practical lens if it is willing to recognize the current state of NCAA athletics. While the safest route the court could take is to affirm the district court's dismissal because eligibility bylaws have been deemed "presumptively procompetitive" by *Board of Regents*<sup>270</sup> and *Agnew*,<sup>271</sup> this path ignores the current vulnerability of the NCAA after *O'Bannon*<sup>272</sup> and the events of Fall 2017. Hence, this Comment advocates that the

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*Northwestern gives Chris Collins a big raise*, CBS SPORTS (Apr. 25, 2017), <https://www.cbssports.com/college-basketball/news/after-finally-making-an-ncaa-tournament-northwestern-gives-chris-collins-a-big-raise/>.

268. *Pugh v. NCAA*, No. 1:15-cv-01747-TWP-DKL, 2016 U.S. Dist. LEXIS 132122, at \*8 (S.D. Ind. Sept. 27, 2016) (citing *NCAA v. Board of Regents*, 468 U.S. 85, 117 (1984)).

269. *Deppe v. NCAA*, No: 1:16-cv-00528-TWP-DKL, 2017 U.S. Dist. LEXIS 31709 (S.D. Ind. Mar. 6, 2017).

270. *NCAA v. Board of Regents*, 468 U.S. 85 (1984).

271. *Agnew v. NCAA*, 683 F.3d 328 (7th Cir. 2012).

272. *O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015).

Seventh Circuit should apply conventional pleading standards and the Rule of Reason to determine if the Year in Residence Rule violates Section 1 of the Sherman Act.

As opposed to dismissing Deppe's suit "in the twinkling of an eye," the court should first apply the *Twombly* and *Iqbal* plausibility pleading standard to determine whether the District Court's grant of the NCAA's FRCP 12(b)(6) motion was proper. If the court finds the grant was improper, the court should then analyze the Year in Residence Rule under the Rule of Reason. When applying the Rule of Reason, as *O'Bannon* recognizes, even if the NCAA can prove the bylaw is procompetitive, it is not "automatically lawful; a restraint that serves a procompetitive purpose can still be invalid under the Rule of Reason if a substantially less restrictive rule would further the same objectives equally well."<sup>273</sup> This Comment suggests a number of viable, less restrictive alternatives that help balance the needs of both the NCAA and its student-athletes.

#### A. *Procedural Standard: Twombly and Iqbal*

Where the district court applied the *Agnew*-endorsed "twinkling of an eye" standard from *Board of Regents* to dispose Deppe's action on a FRCP 12(b)(6) motion to dismiss, the Seventh Circuit should instead apply the plausibility standard set forth by *Bell Atlantic v. Twombly* and *Ashcroft v. Iqbal*.<sup>274</sup> Though the Seventh Circuit in *Agnew* adopted the *Board of Regents* "twinkling of an eye" standard<sup>275</sup> for challenges to eligibility bylaws,<sup>276</sup> in 2018, the effectiveness of certain eligibility bylaws should not fall under the umbrella of protection the Supreme Court envisioned over three decades ago. Instead of affirming the district court's

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273. *Id.* at 1064.

274. Bartholomew, *supra* note 149, at 751.

275. *See Board of Regents*, 468 U.S. at 109.

276. *Agnew v. NCAA*, 683 F.3d 328, 341 (7th Cir. 2012).

grant of a FRCP 12(b)(6) motion to dismiss “in the twinkling of an eye” simply because *Deppe* challenges an eligibility bylaw, the court should apply the *Twombly* and *Iqbal* plausibility standard. Thus, the court should first distinguish the facts from the legal conclusions made in *Deppe*’s motions.<sup>277</sup> After striking the legal conclusions from the brief, the Seventh Circuit should determine, by using “judicial experience and common sense,” whether *Deppe* has made a plausible claim.<sup>278</sup> No longer applying the blanket “twinkling of an eye standard” to all eligibility bylaws and in light of the current state of NCAA, the court should recognize that *Deppe* has made a plausible challenge and review this claim under the Rule of Reason.

### B. *Applying the Rule of Reason*

As in *Board of Regents* and *O’Bannon*, the court should apply the Rule of Reason because some coordination between member institutions is imperative for the NCAA to operate.<sup>279</sup> Rule of Reason cases are analyzed by a three-step process. First, the plaintiff must define the market and prove a “substantially adverse effect on competition.”<sup>280</sup> Second, if the plaintiff successfully demonstrates negative effect on competition, the burden shifts to the defendant to prove the “procompetitive virtues” of its wrongful conduct.<sup>281</sup> Finally, if the defendant shows a procompetitive purpose of the conduct, the burden shifts back to the plaintiff to prove that “the challenged conduct is not reasonably necessary to achieve the legitimate objectives or that those objectives can be achieved in a substantially less restrictive manner.”<sup>282</sup> If

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277. Bartholomew, *supra* note 149, at 750.

278. *Id.* (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009)).

279. *Board of Regents*, 468 U.S. at 99.

280. *Law v. Nat’l Collegiate Athletic Ass’n*, 134 F.3d 1010, 1019 (10th. Cir. 1998).

281. *Id.*

282. *Id.*

all three steps are met, it is up to the court to weigh the harms and benefits of the defendant's conduct to determine whether this conduct is, in fact, reasonable.<sup>283</sup>

1. Step 1: The Relevant Market & Substantially Adverse Effect on Competition

Before analyzing the first step in the Rule of Reason, the plaintiff must define the relevant market. Here, Deppe's attorneys identified "the nationwide market for labor of Division I football student-athletes" in the United States.<sup>284</sup> In this market, student-athletes compete for coveted roster spots on Division I football teams and the teams compete for student-athletes by offering certain in-kind benefits such as athletic scholarships, academic programs, and access to elite-level coaching staffs and training facilities.<sup>285</sup>

After the market is defined, the court will look to see whether Deppe has proven the Year in Residence Rule had a substantial impact on competition. Deppe contends that Bylaw 14.5.5.1 "functions as a penalty imposed upon Division I football players for switching schools [because without] the ability to play immediately, transferring student-athletes are less attractive prospects and therefore less likely to secure athletics grants-in aid from their new schools."<sup>286</sup> As a result, student-athletes who wish to transfer are awarded smaller scholarships than they would receive if they were immediately eligible to compete upon transferring.<sup>287</sup>

The complaint then explores how coaches and players in the market would benefit without the rule:

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283. *Id.*

284. Brief and Short Appendix of Plaintiff-Appellant at 12, *Deppe v. NCAA*, No. 1:16-cv-00528-TWP-DKL (7th Cir. May 15, 2017).

285. *Id.*

286. *Deppe Complaint*, *supra* note 208, at 20.

287. *Id.*

[b]ut for this restraint, greater movement among Division I football players would inevitably occur. Players would seek out the team they most value, whether because of more playing time, a better relationship with the coaching staff, a change in the coaching staff that recruited the player, a better academic fit, or the availability of an athletics grant-in-aid on more favorable terms. Teams, in turn, would also seek out the players they most value. Free player movement would thus result in an optimal and most efficient matching of schools and players.<sup>288</sup>

But, due to Bylaw 14.5.5.1, the NCAA restricts both the movement of players between teams in the market and the type of financial assistance transfer students may receive.<sup>289</sup>

According to the complaint, but for the Year in Residence Rule, Deppe would have received a full scholarship at an FBS school. If he could play immediately, Deppe would have been able to field and accept grant in aid offers from Division I football teams, such as Iowa, who offered the punter a conditional spot on their team if he could waive the year in residence requirement.<sup>290</sup> However, because the rule prevented his immediate eligibility upon transfer, Iowa found another punter who was immediately eligible to play. Consequently, the only way Deppe would have been able to play immediately after a transfer and receive scholarship money in the process was if he was willing to transfer to a lesser program at the Division II level.<sup>291</sup> Yet, Peter Deppe was a Division I-caliber punter, who the Year of Residence rule kept out of competition.

## 2. Step 2: The NCAA's Rebuttal

If the court finds that Deppe successfully proved the Year in Residence Rule has a substantially adverse effect on competition, the burden shifts to the NCAA to provide

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288. *Id.*

289. *Id.*

290. *Id.* at 24.

291. *Id.* at 25.

evidence of the procompetitive virtues of its alleged wrongful conduct.<sup>292</sup> The NCAA will likely point to two validations: (1) ensuring the academic success of student-athletes, and (2) preventing free agency in amateur athletics.

*a) Justification 1: Ensuring Success in a New Academic Setting*

The NCAA's historical justification for its Year in Residence Rule has been that a year in residence at a new school helps student-athletes acclimate to the challenges of a new academic environment.<sup>293</sup> First, the NCAA claims transfer students have historically struggled, so serving a full academic year in residence attempts to protect the role of the student-athlete in higher education by prioritizing academic success over athletics.<sup>294</sup> In advising its student-athletes on the transfer process, the NCAA publishes a guide entitled *Transfer 101: Basic Information You Need to Know About Transferring to an NCAA College*.<sup>295</sup> The pamphlet frames the issue of transferring as an academics-first process: "to be a true student-athlete, you will need a basic academic foundation before you are eligible to play

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292. In its 12(b)(6) motion to dismiss for failure to state a claim, the NCAA provides three arguments: (1) that eligibility bylaws have been deemed presumptively procompetitive in the Seventh Circuit, (2) that the Year in Residence Rule is non-commercial, and (3) that Vassar failed to show injury to competition. Brief in Support of Motion For Partial Dismissal and to Strike Irrelevant Allegations of Plaintiff's Complaint at 1, *Deppe v. NCAA*, No: 1:16-cv-00528-TWP-DKL, 2017 U.S. Dist. LEXIS 31709 (S.D. Ind. Mar. 6, 2017). Yet, none of these reasons deal with procompetitive justifications for the rule; they are merely a recitation of *Board of Regents* and *Agnew*. As such, these justifications will not be analyzed.

293. *Get the Facts About Transfers*, NCAA (May 30, 2012, 12:00 AM), <http://www.ncaa.org/about/resources/media-center/news/get-facts-about-transfers>. However, it is important to reiterate that the only athletic activity student-athletes fulfilling their year in residence are prevented from participating in is competition. These students are allowed to practice with the team and complete the full weekly slate of athletic activities.

294. *Id.*

295. NCAA, *TRANSFER 101: BASIC INFORMATION YOU NEED TO KNOW ABOUT TRANSFERRING TO AN NCAA COLLEGE* (2014).

sports. . . . And that is why you will need to be a successful student in the classroom before you can play at an NCAA school.”<sup>296</sup>

Part of competing in NCAA athletics is being academically eligible—if an athlete cannot meet minimum standards in the classroom, the athlete cannot compete for the school. So, the NCAA would more than likely justify serving a full academic year in residence the same way: a year in residence is a way to make sure transfer student-athletes will be capable of fulfilling academic eligibility requirements when they are permitted to compete.<sup>297</sup>

*b) Justification 2: Preventing Free Agency in Amateur Athletics*

Beyond academic justifications, Robert C. Berry and Glenn M. Wong assert that the NCAA’s transfer bylaws were written with two goals in mind: (1) to prevent other institutions from recruiting a student-athlete once the student-athlete is enrolled at his college or university, and (2) to prohibit a student-athlete from shopping around for a school that offers a better athletic opportunity or increases the prospect of reaching the professional level.<sup>298</sup> The Year in Residence Rule is consistent with these two rationales because it deters student-athletes from using purely athletic motives to change schools by forcing transfers in revenue-generating sports to sit out a year. The rule prohibits mid-season and postseason transfers by students who find a more favorable athletic institution (e.g. if a student-athlete competes for one team during one semester, the student is prohibited from competing for another institution during the next).

Ultimately, through its transfer rules, NCAA has

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296. *Id.* at 4.

297. *See Frequently Asked Questions About the NCAA*, *supra* note 46.

298. BERRY & WONG, *supra* note 49 at 144.

eliminated free agency in its most popular sports.<sup>299</sup> Free agency is a professional sports concept where players can move between different teams after their contracts expire. At the end of their current contract, they shop the market of teams to determine what teams would be interested in signing them, and subsequently negotiate their own contracts. The Supreme Court noted in *Board of Regents* that the NCAA's model is unique because its athletes are amateurs.<sup>300</sup>

As the protector of the “revered tradition of amateurism in college sports,”<sup>301</sup> free agency would be terrible for the NCAA's optics. Amateur athletes should not be able to shop their athletics abilities to receive the most lucrative deal from a member institution, especially when the athlete is also required to complete a minimum course load at a college or university. In the most extreme scenario, if student-athletes had the opportunity to transfer at will, an athlete could begin the season at one institution and end at another in the same academic semester. So, by effectively preventing free agency in college sports, the NCAA will argue the Year in Residence Rule should be deemed presumptively procompetitive because it attempts to keep the NCAA's brand of amateur sports inherently amateur and its student-athletes primarily students.

### 3. Step 3: Deppe's Rebuttal

If the court finds the NCAA has met its burden of proving the procompetitive effects of the rule, Deppe must show that this restraint on competition is not reasonably necessary to the product or a less restrictive alternative is available. Deppe has a number of arguments he can make, especially with regard to proving less restrictive alternatives.

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299. Michael H. LeRoy, *NCAA Transfer Restraints: Free Agency for College Players?*, 7 NEB. L. REV. BULL. 1, 5 (2016).

300. *NCAA v. Board of Regents*, 468 U.S. 85, 101 (1984).

301. *Id.* at 120.

a) “*Students First*” Rebuttal

One response to the NCAA’s academic eligibility justification is the argument that transfer students are students first and need to have time to, in fact, be students. If student-athletes are indeed students first, they should have the opportunity to find the best bachelor’s degree program possible.<sup>302</sup> Yet, by restricting this freedom to move and choose the best school after entering college, the NCAA is closing off a section of the free market and engaging in anticompetitive action.<sup>303</sup>

Both ordinary college students and student-athletes must meet certain academic requirements to be admitted by a transfer school. Yet when a non-athlete begins classes, the student’s extra-curricular organization cannot force the student to refrain from participating in the extra-curricular activity until after he completes a full academic year at the school.<sup>304</sup> Why should student-athletes be subject to different standards if they are, in fact, students?<sup>305</sup>

Furthermore, it seems clear that if a four-year college transfer is eligible to compete at his current institution, this student-athlete would be equally—if not better—prepared for life at a new university than an incoming freshman who

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302. See Steve Silver, *Northwestern Antitrust Lawsuit Places NCAA Transfer Restrictions In Crosshairs*, ABOVE THE LAW: THE LEGAL BLITZ (Nov. 16, 2016, 5:15 PM), <http://abovethelaw.com/2016/11/northwestern-antitrust-lawsuit-places-ncaas-transfer-restrictions-in-crosshairs/?rf=1>.

303. *Id.*

304. See Ray Yasser, *Attacking the NCAA’s Anti-Transfer Rules As Covenants Not to Compete*, 15 SETON HALL J. SPORTS & ENT. L. 221, 222 (2005) (“Placing the rules in any other collegiate context reveals their absurdity. Imagine telling a budding young theater student at Harvard that if she transfers to Yale, she would be ineligible to participate in any dramatic production her first year at Yale.”); see also Silver, *supra* note 302 (“[T]he NCAA’s top piece of propaganda is that athletes are no different from any other student. Yet a scholarship journalism major who writes for the *Daily Northwestern* can transfer to Missouri and write for *The Maneater* immediately. So why does [Johnnie] Vassar have to sit out a year before joining a new team?”).

305. See Yasser, *supra* note 304, at 250.

has never faced a college course load or a junior college transfer, both of whom can compete immediately upon enrolling at the Division I school.<sup>306</sup> Division I football and basketball players may also compete immediately if they transfer from a Division I to a Division II or III program. Hopefully, the quality of the education remains the same when a student-athlete transfers from a Division I to a Division II or III program. If a student-athlete can be immediately eligible at a Division II or III school that offers a comparable education to a Division I school, why should the student-athlete have to sit out to adjust to academics at the Division I but not the Division II and III institution?

Overall, the academic justifications of the Year in Residence Rule fall flat. A less restrictive alternative would be to use the NCAA's academic eligibility standards, which are based on GPA and course load, to determine whether a student-athlete is ready for the academic challenge at a new institution.<sup>307</sup> If the student-athlete is in good standing at his former university and academically eligible to compete, upon transferring to a new school, the student-athlete should be permitted to play right away.

*b) Free Agency Rebuttal*

As far as attacking the NCAA's ability to prevent free agency, Deppe can make a number of arguments that prove free agency is not as damning for college sports as the NCAA believes it would be. Deppe's lawyers would argue for a less restrictive alternative, controlled free agency, and its benefits.

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306. See Silver, *supra* note 302 (“[i]f the NCAA is so concerned about academic integration, then why can freshmen compete immediately? Shouldn't they have to take a year to focus on studies after making the jump from high school? What about transfers from junior colleges? They can play immediately, but don't they need time to 'adjust' to their new school too?”).

307. *Id.*

i. Controlled Free Agency: The Less Restrictive Alternative

First, it is important to clarify that free agency in the NCAA would not be a free-for-all. There is no doubt the NCAA would adopt legislation to set ground rules to control the free agent market to maintain the role of the student-athlete in higher education. Put simply, student-athletes would not be able to transfer at will. First, to even qualify to transfer, student-athletes would have to meet certain academic eligibility benchmarks (*e.g.* be academically eligible at their current school). Second, the NCAA would limit transfer periods to a window after a championship season ends so players are not poached mid-season or during the semester. Finally, the rules would prohibit coaches from initiating contact with potential transfers. A student-athlete would first have to declare to his current school he wishes to transfer. After the current school certifies the student-athlete is eligible to transfer, it will be the duty of the student-athlete to take ownership of the transfer and reach out to different programs. By forcing the student-athletes to make the first move, the entire transfer process will be controlled from the outset by the student-athlete, not the coaches.

With these standard ground rules in place, the best alternative Deppe's attorneys can suggest is to extend the one-time transfer option to all student-athletes. This alternative has currently been proposed by the NCAA Division I Committee on Transfers as a reform to be voted on for the 2018–19 academic year.<sup>308</sup> This transfer option is currently available to NCAA Division I student athletes except those who participate in baseball, men's and women's basketball, football, and men's ice hockey. In this scenario, all players get one free pass to change schools within their five-year eligibility clock, but do not have the unbridled ability to transfer at will. If Pugh, Deppe, and Vassar had

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308. See Hosick, *supra* note 60.

this option, none of these cases would exist because each student-athlete would have been able to transfer from their original institution.

ii. The NCAA's Concerns: Popularity and Playbooks

So, while the NCAA may fear free agency in its model, and given the fact the NCAA is currently considering reforming the system, less restrictive alternatives such as extending the one-time transfer option are plausible because they offer the perfect compromise. The two major justifications for preventing free agency in college sports are popularity and playbooks. As for popularity, the NCAA is concerned it will be no different than professional leagues if student-athletes are free to transfer to whatever school they please, as many times as they wish. Yet, college athletics are not the pros specifically because the athletes are still students.<sup>309</sup> When a regular student decides to transfer, it is often deemed a calculated life decision; so long as the student-athletes are not permitted to abuse the transfer process, via a one-time exception to the rule, it is likely fans would be receptive.<sup>310</sup>

With respect to playbooks, coaches do have a legitimate concern about sacrificing competitive balance on opponents when a transfer student takes his playbook to the new school with him.<sup>311</sup> Yet this is not a concern unique to the Year in Residence Rule or student-athletes. If a student-athlete transfers to a new program, the athlete does everything with the team short of competing. There is no rule prohibiting the player from sharing the previous school's playbook with the new coaching staff, just as there is no rule prohibiting coaches who change universities from doing the same. A less

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309. *NCAA v. Board of Regents*, 468 U.S. 85, 101 (1984).

310. See Yasser, *supra* note 304, at 250 (“[s]tudent-athletes are, after all, students first and athletes second. Treating them as students when it comes to transferring strengthens the notion that they are indeed student-athletes.”).

311. The Silver, *supra* note 302.

restrictive alternative would be a case-by-case determination on the amount of time an athlete must sit out. For instance, an athlete who transfers to a conference opponent may have to sit out a full year because of the frequency his former team competed against other teams in conference, while transferring to a close geographic rival might warrant only sitting against the former school in regular season competition.<sup>312</sup> Students who transfer to lesser-connected schools may only be forced to sit out a certain number of games in a season, or wait a semester, rather than a full year, to compete.<sup>313</sup>

### iii. The Benefits of Controlled Free Agency

Where the NCAA's current transfer system clearly benefits coaches and institutions above players, a controlled free agency model would benefit the student-athletes as much as the other two groups.

#### (1) Benefit 1: A One-Time Free Pass Accommodates the Athletes

Professor Michael H. LeRoy argues that striking down the Year in Residence Rule “would make things [fairer] for players whose academic and athletic careers are shortened and made costlier by a new coach [and] would give players better options when a new coach wants to chase them off because they don't fit his plans.”<sup>314</sup> The professor's argument gets to the crux of all three transfer lawsuits discussed in this Comment. Where coaches can move freely about the market to chase more prestigious coaching positions and huge contracts at the expense of the student-athletes without missing any coaching time, Division I football and basketball players are not given this luxury. Devin Pugh, Peter Deppe, and Johnnie Vassar were all recruited to their teams, and

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312. Yasser, *supra* note 304, at 252.

313. *Id.*

314. LeRoy, *supra* note 299, at 9.

signed National Letters of Intent with the intention of competing at that school for four years. They did not expect to be kicked to the curb before these four years were up, and were ultimately left behind because they did not fit into a certain coach's plans.

By enabling these young men to transfer, via a one-time exception to the Year in Residence Rule, or even a more liberal hardship waiver process, the NCAA could have avoided this transfer litigation entirely. An exception to the rule would have protected these student-athletes from the agendas of coaches, which consider student-athletes expendable. However, because the NCAA drew a hard line with its football and basketball transfer policies, it ultimately locked these student-athletes into troublesome situations. To make it worse, because schools would only sign these student-athletes if the NCAA would waive the year in residence requirement (which it did not), Pugh, Deppe, and Vassar were stuck. There was no reasonable alternative that offered a similar academic, athletic, and financial aid option that would not require compromising the opportunity to play at the Division I level.

## (2) Benefit 2: Controlled Free Agency Would Benefit the Market

Beyond taking a more humane look at the transfer process, Professor LeRoy also believes a certain form of controlled free agency would benefit the market:

A court ordered ban on the one-year transfer penalty and the scholarship cap would [] open a new market for players. High achieving players at a lower school could transfer to a stronger program to showcase their talents. Conversely, highly recruited players with disappointing careers could transfer down to a school to become a starter. Some might transfer to avoid a harsh or difficult coach, others might move for academic reasons, and still others might relocate for family or personal reasons. The market for

players would be more fluid—and probably, more disrupted.<sup>315</sup>

Put simply, controlled free agency would allow student-athletes to make an informed, calculated decision about their best interests without being penalized for making such a choice. As shown in *Pugh*, *Deppe* and *Vassar*, these decisions are not always motivated by the desire to use the NCAA as a steppingstone to a professional career. Devin Pugh wanted to transfer to continue playing football at the level he proved he could play while continuing to afford his education. Peter Deppe wanted to transfer so he could reach his goal of punting for a Division I team. Finally, though Johnnie Vassar did not want to leave Northwestern, an exception to the transfer rule could have prevented the alleged wrongs committed to him by his former coaches. By enabling student-athletes to transfer schools one time over the course of four years of eligibility, student-athletes can take advantage of a number of benefits the NCAA offers, whether it is academic, athletic, geographic or familial.

*c) Conclusion*

Given the three recent legal challenges to the NCAA's transfer system and the conversations at the 2018 NCAA Convention among Division I institutions about extending the one-year transfer exception, the system is ripe for change. The Seventh Circuit should take all of this information into consideration to apply a true Rule of Reason analysis to the Year in Residence rule, which has negatively affected Peter Deppe among so many other student-athletes. If the NCAA is reportedly willing compromise on certain aspects of its current transfer bylaws, the court should also be willing to recognize that these archaic transfer bylaws no longer govern the NCAA as assessed in *Board of Regents*. Instead, the NCAA has grown to massive proportions and should be scrutinized under antitrust law as such. By

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315. *Id.* at 10.

adopting a less restrictive alternative, the Seventh Circuit will help the NCAA maintain control of the transfer process, preserve the role of the student-athlete in higher education, and continue to field a successful, and practical, amateur sports model.

#### CONCLUSION

Devin Pugh, Peter Deppe, and Johnnie Vassar all earned the opportunity to do something very few athletes get the chance to do: play Division I athletics—the pinnacle of collegiate sports in the United States. Yet issues with coaches prevented them from competing for their schools for all four years of eligibility and each student-athlete was forced to chase his dream elsewhere. Pugh, Deppe, and Vassar all had spots on other teams—they were wanted players, but only if they could play right away. Neither injuries nor academic ineligibility prevented these young men from playing; they were physically capable and academically qualified to compete at the highest level in their sports. Instead, a bylaw justified by Supreme Court dicta from a thirty-four-year-old case with increasingly unstable precedential value enabled the NCAA to keep Devin Pugh, Peter Deppe, and Johnnie Vassar from competition.

Where this bylaw sought to ensure these student-athletes were amply prepared for the new academic environment at their potential transfer schools, Pugh, Deppe, and Vassar were all in good academic standing. Where the bylaw sought to prevent college sports from looking like the pros, none of these athletes sought to transfer schools because it would be a lucrative move for their athletic careers. Instead, they wished to transfer to either keep or be granted a scholarship to make the cost of their education more affordable and to continue to play in Division I. The beauty of the NCAA is the access to education it provides students who otherwise would not likely pursue a

college degree.<sup>316</sup> Johnnie Vassar was the first man in his family to attend college, but the Year in Residence Rule put his degree in jeopardy.

After Judge Pratt issued her decision in *Deppe*, the NCAA's Chief Legal Officer commented, "[it] is unfortunate that plaintiffs' lawyers continue to file meritless lawsuits while ignoring multiple court decisions that uphold [the] NCAA transfer rule."<sup>317</sup> But in this quote lies the NCAA's largest issue: its unwillingness to alter its approach to its athletes. All Peter Deppe was to the NCAA was another frivolous lawsuit, but the NCAA was everything Peter Deppe had worked for his entire life. Same as Devin Pugh. Same as Johnnie Vassar. The reports regarding changes to the transfer rules coming out of the 2018 NCAA Convention are the first signs that the NCAA has recognized its model needs to be adapted to the realities of today's college sports.

Continuing to view NCAA Bylaw 14.5.5.1 as presumptively procompetitive via the *Board of Regents* dicta is turning a blind eye to the evolution of amateur athletics in the United States and also to the personal needs of student-athletes. The NCAA is earning money hand-over-fist, but depends on its student-athletes to drive its lucrative business model. The FBI investigation and indictments in Fall 2017 and February 2018 showed the inherent inconsistencies of today's NCAA, and proved to be a step in the right direction for reclaiming student-athletes' rights. *O'Bannon* was another step in making this model a little fairer for the young men and women who allow it to thrive. Future cases should follow its lead by no longer granting

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316. *Benefits to College Student-Athletes*, NCAA, <http://www.ncaa.org/student-athletes/benefits-college-student-athletes> (last visited Mar. 22, 2017) (finding fifteen percent of student-athletes are first generation college students).

317. Zachary Zaggar, *Another Attack on NCAA's Sit-Out Rule for Transfers Tossed*, LAW360: SPORTS (Mar. 7, 2017, 2:57 PM), [https://www.law360.com/sports/articles/899057/another-attack-on-ncaa-s-sit-out-rule-for-transfers-tossed?nl\\_pk=4b3282db-8360-4ca6-9196-f25802d28bb6&utm\\_source=newsletter&utm\\_medium=email&utm\\_campaign=sports](https://www.law360.com/sports/articles/899057/another-attack-on-ncaa-s-sit-out-rule-for-transfers-tossed?nl_pk=4b3282db-8360-4ca6-9196-f25802d28bb6&utm_source=newsletter&utm_medium=email&utm_campaign=sports).

NCAA bylaws the antitrust deference they have been given historically. Even the NCAA has realized that its transfer rules are archaic, and will reportedly vote to change them as early as Summer 2018. Regardless of the outcome of this vote, the NCAA must work to understand that its student-athletes are not commodities. In the end, where the Year in Residence Rule may be black and white, the transfer cases for the student-athletes subject to it are not.