BREAKING (FROM) *BOARD*: PUTTING "STUDENT" IN "STUDENT-ATHLETE" NCAA BASKETBALL TRANSFER REGULATIONS

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As the business of Division I College Basketball balloons to massive levels, criticism of restrictive NCAA practices that prevent players from benefiting from the fruits of their play have become increasingly loud, as evident by calls to compensate college athletes and eliminate the "one and done" rule. Yet despite growing unrest, courts, including the Seventh Circuit, continue to latch on to antiquated notions of preserving "amateurism" in order to maintain the status quo of college basketball and the parties that benefit from nonreform. What has emerged is a unique system in which the NCAA emphasizes the importance of the "student" athlete but places restrictions on Division I basketball players—such as their ability to freely transfer between institutions and be immediately able to compete—that don't conflate with this idea or match the rules governing their non-athlete peers. Although problematic on their face, such restrictions become increasingly troublesome in cases like that of John Vassar, where pressure on programs to succeed results in coaches aggressively encouraging student-athletes to leave programs, but restrictions on eligibility limit a player's ability to find a suitable landing spot. This Note advocates for attempting to cure the injustices inherent in the Division I College Basketball regulatory model by exposing NCAA rules such as the year-in-residence requirement to a more in-depth rule of reason analysis, instead of simply granting such regulations a "procompetitve presumption" based in decades-old Supreme Court dicta. Engaging in a more searching antitrust analysis based in data and case specific factual and legal arguments—as demonstrated in the Ninth Circuit—could reveal the possibility that, on the balance, less restrictive regulatory solutions exist that might facilitate change in the face of the NCAA's reluctance to adapt to the realities of the modern Division I Basketball world.

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I. INTRODUCTION

On January 30, 2018, Professor Jeremy Counseller of Iowa State University and Professor Tim Day of Baylor University drafted "A Proposal for Reform of NCAA Transfer Bylaws."[1] Perhaps the most significant element in the proposal is immediate eligibility for student-athletes who transfer to another institution as a result of either the departure of the head coach for the sport in which the student-athlete participates or sanctions imposed on the original institution that limit post-season competition in the student-athlete's sport.[2] The plan touts its efforts to "relocate[] all control of transfer decisions to student-athletes" by "remov[ing] all authority on transfer decisions from the original institution."[3]

The proposal reflects a growing movement in the world of major college sports that calls for changes to the National College Athletic Association's ("NCAA") transfer regulations and builds upon momentum gained in September 2017, when word leaked "that the NCAA was considering a proposal to allow athletes who met an unstated academic standard to play immediately upon transferring to a new school."[4] Ultimately, in October 2017, the NCAA Division I Transfer Working Group—"tasked to evaluate potential rule changes in order to 'improve the transfer environment' for student athletes"[5]—decided not to move forward with all of the proposed rule changes.[6] Instead, the Transfer Working Group implemented a national rule change, effective October 15, 2018, that eliminated the ability of coaches to block student-athletes from attempting to transfer schools.[7]

Perhaps what influenced the Transfer Working Group from promulgating the broader eligibility changes suggested in Counsellor and Day's proposal was that the proposal, although originating from and on behalf of the Big 12 Athletic Conference, and backed by the conference's commissioner, was met with unfavorable reviews. These negative reviews were expressed by those that would be the most impacted from such changes—NCAA Division I Men's basketball

1. Jeremy Counseller & Tim Day, A Proposal for Reform of NCAA Transfer Bylaws (Jan. 30, 2018) (proposal draft), https://sports.cbsimg.net/images/collegefootball/NCAA-Transfer-Bylaws-Reform-Proposal.pdf [hereinafter Proposal Draft]; Bill Connelly, *The NCAA Might Ease Transfer Restrictions for Players Whose Head Coaches Leave. That's a Long Overdue Change.*, SBNATION (Jan. 30, 2018, 1:06 PM), https://www.sbnation.com/2018/1/30/16950794/ncaa-transfer-rules-changes-coaches.

2. Proposal Draft, *supra* note 1.

3. *Id.*

4. Dan Greene, *The Case for Allowing NCAA Transfer Chaos*, SPORTS ILLUSTRATED (Sept. 8, 2016), https://www.si.com/college-basketball/2017/09/08/ncaa-transfer-rule-immediate-eligibility-scott-drew-archie-miller.

5. Meghan Durham, *Committee on Academics Discusses DI Transfer Rules*, NCAA (Oct. 20, 2017, 12:00 PM), http://www.ncaa.org/about/resources/media-center/news/committee-academics-discusses-di-transfer-rules; Mitch Sherman, *NCAA Will Not Change Rule Requiring Transfers to Sit Out*, ESPN (Oct. 4, 2017), http://www.espn.com/college-sports/story/_/id/20915201/ncaa-keep-rule-requiring-transfers-sit-one-year.

6. Sherman, *supra* note 5.

7. Michelle Hosick, *New Transfer Rule Eliminates Permission-to-Contact Process*, NCAA (June 13, 2018, 12:12 PM), http://www.ncaa.org/about/resources/media-center/news/new-transfer-rule-eliminates-permission-contact-process.

coaches.[8] For example, Southern Illinois' men's basketball head coach, Barry Hinson, opined that "[SIU is] getting ready to be a farm club system," while Southern Methodist University's coach, Tim Jankovich, stated that transfer changes producing such an outcome would be "tragic" and "would turn college athletics upside down."[9] In September 2017, the initial news that the NCAA would consider transfer rule changes was met with a similar response.[10] Baylor University basketball coach Scott Drew said the change "would be the worst rule ever."[11] Indiana University basketball coach Archie Miller claimed the rule proposal "would cripple teams and programs."[12]

Notably, Archie Miller is under contract to coach Indiana through 2024 in a deal worth at least $24 million (potentially making him the state's highest paid employee in 2017, depending on bonuses obtained by Purdue head football coach Jeff Brohm),[13] while Scott Drew earned $2,872,975 in 2018.[14] Miller and Drew's high-paying contracts are far from anomalies in the NCAA Division I Basketball head-coaching world. 2018 data identifying the highest paid public employee in every state reveals that in eight states, a men's Division I college basketball coach was the state's highest paid public employee.[15] For perspective, the cumulative governor salaries in all fifty states was less than the cumulative base salary of three basketball coaches from public institutions that reached the Final Four of the 2016 NCAA basketball tournament.[16] Also notable is that NCAA basketball coaches, despite their contractual obligations, are free to pursue more lucrative opportunities.[17] The aforementioned vocal opponents of the transfer rule

8. Dennis Dodd, *Proposal to Let Athletes Transfer Instantly After a Coaching Change Picks Up Steam*, CBS SPORTS (Jan. 30, 2018, 11:25 AM), https://www.cbssports.com/college-football/news/proposal-to-let-athletes-transfer-instantly-after-a-coaching-change-picks-up-steam/.

9. *See* Bradley Smart, *Big 12's Transfer Proposal Is What Student Athletes Need*, HEIGHTS (Feb. 6, 2018), https://bcheights.com/2018/02/06/ncaa-transfer-proposal/.

10. Sherman, *supra* note 5 ("The possible change was largely met with skepticism.").

11. Greene, *supra* note 4.

12. *Id.*

13. Zach Osterman, *Archie Miller's Contract Makes Him Among College Basketball's Highest Paid Coaches*, INDYSTAR (June 27, 2017, 9:49 AM), http://www.indystar.com/story/sports/college/indiana/2017/06/27/archie-millers-first-iu-contract-worth-least-24-million/431329001/.

14. *2018 NCAAB Coaches' Pay*, USA TODAY, http://sports.usatoday.com/ncaa/salaries/mens-basketball/coach/ (last visited Apr. 11, 2019).

15. *Who's the Highest-Paid Person in Your State?*, ESPN (Mar. 20, 2018), http://www.espn.com/espn/feature/story/_/id/22454170/highest-paid-state-employees-include-ncaa-coaches-nick-saban-john-calipari-dabo-swinney-bill-self-bob-huggins (The coaches are: John Calipari, Kentucky; Bill Self, Kansas; Bob Huggins, West Virginia; Archie Miller, Indiana; Kevin Ollie (former coach), Connecticut; Mark Turgeon, Maryland; Dan Hurley, Rhode Island; Eric Musselman, Nevada). With the inclusion of NCAA Division I Football coaches, a college football or basketball coach is the highest paid employee in thirty-nine U.S. states. *Id.*

16. *Id.* (noting the cumulative 2016 salaries of all U.S. governors was $6.9 million, while, collectively, Dana Altman (Oregon), Frank Martin (South Carolina), Roy Williams (North Carolina) earned $7.2 million in 2016 base pay).

17. *Scott Drew Resigns as Valpo's Head Basketball Coach; Accepts Head Coaching Position at Baylor*, VALPO ATHLETICS (Aug. 22, 2003), http://www.valpoathletics.com/mbasketball/news/2003-04/5914/scott-drew-resigns-as-valpos-head-basketball-coach-accepts-head-coaching-position-at-baylor/#. [hereinafter *Scott Drew Resigns*].

changes—Miller and Drew—have both done so: Miller resigned from the University of Dayton to take the Indiana University job, while Drew resigned from Valparaiso University to coach Baylor University.[18] In total, there were more than forty new Division I men's basketball head coaches this season.[19]

In an age where college coaches use institutional loyalty as a recruiting tool to attract student-athletes, only to routinely leave mid-contract for more lucrative career opportunities,[20] the athletes who play a vital role in fueling their coaches' enhanced career prospects are subject to NCAA "regulations" that restrict their ability to mirror the actions of their coaches and freely transfer to other institutions.[21] As currently constructed, NCAA regulations that force transferring student-athletes to sit out a year of competition are unduly restrictive.[22]

Although it remains unclear when, or if, further changes to NCAA regulations will take place, there remains a belief that the NCAA's Transfer Working Group has been tasked with proposing a transfer construct that is "the least restrictive model that's feasible."[23] To accomplish this objective and most fairly align NCAA transfer regulations with the law, this Note advocates for the employment of a "rule of reason" analysis to transfer restrictions and the creation of NCAA regulations that advance beyond the Big 12's proposal.[24] This Note also argues for the elimination of the permission-to-contact rule at the national level. and in its place, the adoption of a free market system in which NCAA Division I basketball student-athletes, like their coaches, administrators, and non-athlete collegiate peers, could freely transfer between academic institutions without being subjected to NCAA transfer restrictions that require student-athletes to "sit out" for one academic year after transferring before being allowed to compete.[25] Part II of this Note presents statistical trends in transfer rates of NCAA collegiate basketball players and background on common restrictive regulations faced by basketball players seeking to transfer. Part II will also discuss

18. Osterman, *supra* note 13; *Scott Drew Resigns*, *supra* note 17.

19. *See* Smart, *supra* note 9.

20. *See* Myron Medcalf, *Want Loyalty? Don't Hold Your Breath*, ESPN (Apr. 26, 2012), http://www.espn.com/mens-college-basketball/story/_/id/7857655/want-loyalty-college-basketball-hold-your-breath; Gabriel Stovall, *Only Loyalty Student-Athletes Owe When Choosing College is Loyalty to Self*, COVINGTON NEWS (Dec. 5, 2017, 4:24 PM), https://www.covnews.com/sports/stovall-only-loyalty-student-athletes-owe-when-choosing-college-loyalty-self/.

21. *See, e.g.*, NCAA, TRANSFER 101: BASIC INFORMATION YOU NEED TO KNOW ABOUT TRANSFERRING TO AN NCAA COLLEGE, FOR DIVISIONS I/ II/ III 2012-13 (2012), available at http://www.ncaapublications.com/productdownloads/TGONLINE2012.pdf.

22. *Id.*

23. Kevin Sherrington, *How the Big 12's New Transfer Proposal Could Mean Progress for the NCAA*, SPORTSDAY (Jan. 30, 2018), https://sportsday.dallasnews.com/college-sports/collegesports/2018/01/30/big-12s-new-transfer-proposal-could-mean-progress-ncaa.

24. Hosick, *supra* note 7.

25. Although the restrictive transfer rules in question apply to Division I basketball, football, and hockey players, this Note will focus on the implications for NCAA Division I men's basketball.

John Vassar v. National Collegiate Athletic Association and Northwestern University[26]—a class action case formerly before the Northern District of Illinois—to illustrate shortcomings in the NCAA's current transfer model and to serve as a springboard to examine prior case law relevant to the formulation of a standard of review of NCAA eligibility regulations. Part III provides an analysis of case law that led to the development of a "procompetitive presumption" for NCAA eligibility rules in antitrust, as well as exploring the Ninth Circuit's application of the "rule of reason" analysis in *O'Bannon*.[27] Part IV recommends that claims such as Vassar's should follow the Ninth Circuit's *O'Bannon*[28] analysis and be subject to a "rule of reason" analysis. It encourages the creation of NCAA basketball transfer regulations that balance the NCAA's desires to maintain the "student"-athlete label with fair, competitive principles.

II. BACKGROUND

A. The NCAA and Its Mission

The NCAA governs some 1,100 member schools competing across three different levels: Division I, Division II, and Division III.[29] As of the 2017–2018 season, the Division I level consisted of 351 basketball-playing schools scattered across thirty-two conferences.[30] Division I programs have the largest athletic programs and provide the most scholarship monies to student-athletes.[31] In the 2017–2018 Division I Manual outlining the NCAA's bylaws and constitutional provisions, the NCAA cites as core Constitutional Pillars for Conduct of Intercollegiate Athletes the defense of amateurism and an academic focus as primary drivers of the collegiate experience.[32] As Article 2.9: The Principle of Amateurism reads: "[s]tudent-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises."[33] The NCAA builds

26. Complaint, John Vassar, on behalf of himself and all others similarly situated v. Nat'l Collegiate Athletic Ass'n et al., No. 1:16-cv-10590, 2016 WL 6693054 (N.D. Ill. Nov. 14, 2016).

27. O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1053 (9th Cir. 2015); *see infra* Part III.

28. *See infra* Part IV.

29. *O'Bannon*, 802 F.3d at 1053.

30. *Division I: Men's Basketball*, NCAA, https://www.ncaa.com/standings/basketball-men/d1 (last visited Mar. 24, 2019).

31. Justin Berkman, W*hat Are the NCAA Divisions? Division 1 vs 2 vs 3*, PREPSCHOLAR (Aug. 21, 2015, 6:54 PM), https://blog.prepscholar.com/what-are-ncaa-divisions-1-vs-2-vs-3.

32. NCAA, 2017-2018 NCAA DIVISION I MANUAL 4 (2017), available at http://www.ncaapublications.com/productdownloads/D118.pdf.

33. *Id.*

upon this idea in stating that a "Fundamental Policy" 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."[34]

34. *Id.* at 1.

B. The Prevalence of Division I College Basketball Transfers

According to 2016 NCAA data, nearly 40% of all men's basketball players who enter Division I directly out of high school depart their initial school by the end of their sophomore year.[35] 90% of these transfers were for athletic reasons.[36] During the 2016–2017 season, more than 700 Division I college basketball players transferred to another program or institution,[37] and over the past six seasons, the number of transfers have jumped to a staggering 4,360 student-athletes.[38] In 2016, the impact was widespread: 269 Division I teams had at least one player transfer to another program.[39] Although one might naturally assume transfers are primarily a result of players leaving to be a part of more successful programs, research analyzing transfers over the past six seasons has shown this is largely a myth:[40]

> [T]he majority of transfers are joining teams that typically have a very similar winning percentage. Just 7.15% of transfers go to teams that have an average winning percentage 30% or better than their previous team's. Interestingly enough, that's almost equal to the frequency of transfers going to teams that have a winning percentage 30% lower or worse than their original team's (6.41%). Just over two-thirds of players transferring between D-I teams go to teams that have an average winning percentage between 20% lower and 20% higher than the team they left. Exactly 49% of transfers join teams that have had a higher average winning percentage over the past six seasons. This does not support the idea that players want to transfer to better teams.[41]

35. *Tracking Transfer in Division I Men's Basketball*, NCAA (Dec. 18, 2018, 3:55 PM), http://www.ncaa.org/about/resources/research/tracking-transfer-division-i-men-s-basketball.

36. *Id.*

37. Jeff Goodman & Jeff Borzello, *2016-2017 College Basketball Transfer List*, ESPN (Jan. 25, 2017), http://www.espn.com/mens-college-basketball/story/_/id/18325059/2016-2017-college-basketball-transfer-list.

38. Eli Boettger, *Investigating College Basketball's Transfer Movement*, ATHLETIC DIRECTOR U, https://athleticdirectoru.com/articles/investigating-college-basketballs-transfer-movement/ (last visited Mar. 23, 2019).

39. Adam Coleman, *Rice Among College Basketball Teams Hit Hardest by Transfer Trend*, HOUS. CHRON. (May 21, 2017), https://www.houstonchronicle.com/sports/rice/article/Rice-among-college-basketball-teams-hit-hardest-11162957.php.

40. Eli Boettger, *College Basketball's Transfer Movement by the Numbers*, HEAT CHECK (July 1, 2017), https://heatcheckcbb.com/2017/07/01/college-basketballs-transfer-movement-by-the-numbers/.

41. *Id.*

C. The Business of Basketball

The NCAA earns approximately 90% of its annual revenue from "March Madness"—the end-of-season NCAA Division I basketball championship tournament.[42] In 2016, during this three-week tournament, the NCAA earned $1 billion from ticket sales, sponsorships, media rights fees, and television ads.[43] Earnings are expected to increase in future years due to the NCAA's sale of broadcast rights: in 2010, the NCAA reached a fourteen-year, $10.8 billion agreement with CBS and Turner for broadcast rights to the three-week tournament.[44] Meanwhile, the student-athletes playing in the tournament receive no direct payment for their participation.[45]

D. NCAA Regulations Govern the Transfer of Student-Athletes

1. Division I's Five-Year Clock

NCAA Division I student-athletes are governed by the NCAA's Continuing Eligibility rules.[46] Student-athletes have five calendar years in which they are allowed to participate in four seasons of competition.[47] The "eligibility clock" begins upon a student-athlete's enrollment as a full-time student and continues to wind down over five years.[48] Interruptions do not result in additional time being added to a student-athlete's five year eligibility window: "Your clock continues to tick down, even if you spend an academic year in residence as a result of transferring, if you red shirt, if you do not attend school or even if you enroll part time during your college career."[49]

2. The Year-in-Residence Requirement

Division I basketball student-athlete transfers are governed by NCAA Bylaw 14.5.5.1, which requires a transferring student-athlete to "spend an academic year in residence" at the school to which they are transferring.[50] According to this bylaw, "[a] transfer student from a four-year institution shall not be eligible

42. Tim Parker, *How Much Does the NCAA Make off March Madness?*, INVESTOPEDIA (Mar. 13, 2017, 11:44 AM), https://www.investopedia.com/articles/investing/031516/how-much-does-ncaa-make-march-madness.asp.

43. *Id.*

44. *Id.*

45. *Id.*

46. NCAA, 2017–18 GUIDE FOR FOUR-YEAR TRANSFERS FOR STUDENT-ATHLETES AT FOUR-YEAR COLLEGES 20 (2017), available at http://www.ncaapublications.com/productdownloads/TGONLINE42017.pdf (last visited Apr. 10, 2019) [hereinafter TRANSFER GUIDE].

47. *Id.*

48. *Id.*

49. *Id.*

50. *Transfer Terms*, NCAA, http://www.ncaa.org/student-athletes/current/transfer-terms (last visited Mar. 17, 2019).

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."[51] During this period, if a student-athlete is academically eligible, they may receive an academic scholarship from their new institution, transfer, and practice with their new team.[52] During the required year-in-residence, however, the student-athlete cannot compete in games or receive travel expenses from their new institution.[53] The year-in-residence requirement applies to men's baseball, men's and women's basketball, football, and men's ice hockey players.[54] To satisfy the year-in-residence requirement, Division I basketball student-athlete transfers who have not been granted an exception or waiver must complete two full semesters or three full quarters at their new school—summer school and part-time enrollment do not count toward satisfying the requirement.[55] Per the NCAA's official transfer guide, the requirement is designed to allow student-athletes to "become comfortable in [their] new environment" and "encourages [student-athletes] to make decisions motivated by academics as well as athletics."[56]

3. The Permission-to-Contact Requirement

Formerly, NCAA Division I regulations required a transferring student-athlete to receive a "permission-to-contact" letter prior to the student-athlete, or their parents, discussing transfer opportunities with a coach or athletics administrator at a new school.[57] This requirement was mandatory even if the student-athlete did not compete for, or receive, an athletics scholarship from their current institution.[58] Although a student-athlete could write to a new school to indicate their interest in transferring, coaches and athletics staff from the new institution would be prohibited from discussing transfers with the student-athlete prior to receiving such letter.[59] A student-athlete was required to contact their compliance officer or athletic director (dictated by the team's coach), in writing, to request permission-to-contact letter.[60] If the administrator at the student-athlete's original school granted permission—by written communication directly to either the student-athlete or the new school—the student was free to engage in a two-way dialogue with the athletics staff at the new school regarding transfer opportunities.[61] The original institution could deny the student-athlete's permission-

51. Division I Bylaw 14.5.5.1.1 (Attendance for One Academic Year), NCAA (Aug. 1, 2007), https://web3.ncaa.org/lsdbi/search/bylawView?id=18562#result.

52. *See* TRANSFER GUIDE, *supra* note 46.

53. *Id.*

54. *See Transfer Terms*, *supra* note 50.

55. *Id.*

56. TRANSFER GUIDE, *supra* note 46, at 15.

57. *Id.* at 13; *see* Hosick, *supra* note 7.

58. TRANSFER GUIDE, *supra* note 46, at 13.

59. *Id.*

60. *Id.*

61. *Id.*

to-contact request.[62] Should they do so, the new school could not contact the student-athlete regarding transfer opportunities prior to the student requesting a release from their current institution.[63] Denial of a permission-to-contact letter left student-athletes in a potentially difficult situation and NCAA requirements encouraged student-athletes not to request a release from the program until they are sure they can transfer to a new program, as release may impact their scholarship at the current institution.[64] Furthermore, student-athletes could still transfer upon being granted their release but became ineligible to receive an athletic scholarship at their new school until they attended the school for one academic year.[65] As Greg Bishop notes, "[c]oaches cannot fully prevent athletes . . . from transferring to any university they want. But if a coach does not grant an athlete a release, the player must forfeit any scholarship opportunity, pay his own way to the new university and sit out the next season."[66]

In a June 13, 2018 release, the NCAA announced the Division I Council's adoption of a "notification-of-transfer" system.[67] The model was touted as replacing the permission-to-contact rule.[68] Under this rule change, which took effect October 15, 2018, after student-athletes notify their original school of their desire to transfer, the school must enter the student-athlete's name in a national "transfer portal" database within two business days.[69] Once in the database, coaches from other schools can contact the student-athlete without requiring the permission of the original school.[70] While the change is "national," however, the NCAA explicitly notes that individual conferences "can make rules that are more restrictive than the national rule," theoretically allowing schools to continue employing practices that produce restrictions similar to the aforementioned national permission-to-contact rule.[71] Furthermore, under the NCAA's new model, once a student-athlete notifies his or her school of an impending transfer and initiates the transfer portal process, the "school has the right to reduce or cancel [their] financial aid at the end of the academic term" and "is not obligated to take [them] back as a student-athlete" should a transfer not occur.[72]

62. *Id*. at 14.
63. *Id.*
64. *Id.* at 13.
65. *Id.* at 14.
66. Greg Bishop, *Want to Play at a Different College? O.K., But Not There or There*, N.Y. TIMES (June 7, 2013), http://www.nytimes.com/2013/06/08/sports/ncaafootball/college-coaches-use-transfer-rules-to-limit-athletes-options.html.
67. Hosick, *supra* note 7.
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *Notification of Transfer: What Division 1 Student-Athletes Should Know*, NCAA (Oct. 15, 2018), http://www.ncaa.org/sites/default/files/di-saac-notification-transfer.pdf.

4. Transfer Exceptions

NCAA's transfer regulations provide that student-athletes transferring to a Division I school may be granted a one-time transfer exception which would make such student immediately eligible to compete upon transferring.[73] Student-athletes not competing in baseball, basketball, or men's ice hockey may use the transfer exception to compete immediately if it is their first transfer and they return to the first school post-transfer without ever competing in sports at the second school because the sport is dropped or no longer sponsored at their transferred school, if they have never been recruited, or if they have not participated in the sport in two years.[74] Unlike other student-athletes, however, Division I men's basketball players may not use the first-time transfer exception: "If this is [their] first time transferring . . . [they] may not use the one-time [first] transfer exception, unless . . . considered both nonrecruited by [their] original four year school and [they] have never received an athletics scholarship."[75] Although the NCAA's transfer guide does not explicitly detail why these additional restrictions exist for Division I basketball players,[76] the NCAA's website identifies basketball as a "historically academically underperforming" sport in answering: "Why do football and basketball players have to sit out a year after they transfer?"[77]

E. The Sherman Antitrust Act

Section 1 of the Sherman Antitrust Act makes illegal "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations . . . ."[78] A successful Sherman Act claim is three-pronged, and must demonstrate "(1) that there was a contract, combination, or conspiracy; (2) that the agreement unreasonably restrained trade under either a per se rule of illegality or a rule of reason analysis; and (3) that the restraint affected interstate commerce."[79] Historically, courts have applied a per se standard in assessing antitrust violations, which "deems certain conduct illegal on its face"[80] and accordingly gives no consideration to

73. *See* TRANSFER GUIDE, *supra* note 46, at 17.

74. *Id.*

75. *Id.* at 17–18.

76. *Id.*

77. *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.

78. 15 U.S.C. § 1 (2018).

79. *See* Tanaka v. Univ. of S. Cal., 252 F.3d 1059, 1062 (9th Cir. 2001).

80. Thomas A. Piraino, Jr., *Making Sense of the Rule of Reason: A New Standard for Section 1 of the Sherman Act*, 47 VAND. L. REV. 1753, 1753 (1994).

the actual market impact of such practices or potential competitive justifications.[81] In contrast, non–per se illegal activities are governed by a "rule of reason" standard, in which the "factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition."[82] Such circumstances include "the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed."[83] A modified version of the "rule of reason" analysis, known as a "quick look" analysis, has emerged as a standard for analyzing antitrust behavior and is employed where "the conduct at issue and context in which it arises must have likely anticompetitive effects that are so intuitively obvious as to be clear without a detailed market analysis."[84] Procedurally, the first step of a "quick look" analysis—as with all "rule of reason" cases—is to identify the relevant market in which the defendant's product or services compete and in which the restraint at issue will have its impact.[85] Next, in antitrust cases where the "quick look" standard is deemed to apply, and the plaintiff demonstrates that the defendant's conduct does or will likely produce anticompetitive harms, appellate courts have typically employed some variation of a burden-shifting test:

> The burden shifts to the defendant to put forward a plausible procompetitive justification for its conduct, or to otherwise explain why the challenged conduct is on balance procompetitive or at least competitively neutral. If the defendant presents a plausible justification or explanation, then some courts shift the burden of proof back onto the plaintiff to prove that the challenged conduct is on balance competitively unreasonable, weighing procompetitive benefits against anticompetitive effects and giving due consideration to the availability of less anticompetitive alternatives. Other courts, in contrast, appear to treat the issue as an affirmative defense in which the burden shifts to the defendant to not only present evidence of a plausible justification, but to prove that the procompetitive effects of the challenged conduct outweigh the anticompetitive effects or at least render the conduct competitively neutral.[86]

81. WILLIAM HOLMES & MELISSA MANGIARACINA, § 2:10. *Per Se Versus Rule of Reason Analysis—Rule of Reason; "Quick Look" Rule of Reason*, *in* ANTITRUST LAW HANDBOOK (2017).

82. Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977).

83. Nat'l Soc. of Prof'l Engineers v. United States, 435 U.S. 679, 692 (1978).

84. HOLMES & MANGIARACINA, *supra* note 81.

85. *See id*.

86. *Id.*

F. Vassar v. NCAA and Northwestern University

1. Vassar's Initial Complaint

On November 14, 2016, John Vassar, a former Northwestern University basketball player, filed a class action complaint against the NCAA and Northwestern University.[87] Vassar's first cause of action alleged—on behalf of the class of Division I basketball players—that the NCAA and its member schools unlawfully agreed to restrain trade or commerce through anticompetitive restrictions on Division I basketball student-athlete transfers, namely the creation of artificial restrictions on Division I basketball student-athletes' ability to transfer without loss of eligibility, resulting in a violation of Section 1 of the Sherman Act.[88]

Vassar claimed that the University, after deciding it no longer wanted him as a scholarship player on their basketball team, attempted to force his transfer to a different school in order to utilize his scholarship on a different player as part of the thirteen athletic scholarships allocated to the team.[89] To accomplish this, Vassar claimed that the coaching staff used a series of "force out"[90] tactics designed to pressure him to transfer schools.[91] Vassar's complaint stated that, in exploring potential transfer opportunities, he reached out to multiple Division I schools[92] that would have agreed to allow him to join their program as a scholarship athlete if he were immediately eligible to compete.[93] He further claimed

87. *See* Complaint, John Vassar, on behalf of himself and all others Similarly Situated v. Nat'l Collegiate Athletic Ass'n et al., No. 1:16-cv-10590, 2016 WL 6693054 (N.D. Ill. Nov. 14, 2016).

88. *Id.* at ¶ 133–42.

89. *Id.* at ¶ 5.

90. The alleged tactics employed by the University to force Vassar's transfer included the coaching staff telling him he "sucked" and "had no future with the team," calling and texting Vassar and his parents urging him to transfer, an attempt to obtain a signed "Roster Deletion" form stating he would be voluntarily withdrawing from the team, placing Vassar in an internship program where he worked as a janitor and subsequently falsifying related timecards to create misconduct allegations that would result in forfeiture of his athletic scholarship, inquiring as to Vassar's willingness to accept a cash payment to leave the team, and false claims made to Vassar that his attorney had signed off on Northwestern's efforts to resolve his situation. *Id.* A report from Vice Sports detailed Vassar's story, including alleged fraudulent time submissions submitted by Northwestern in an effort revoke his athletic scholarship due to "noncompliance with the with the terms outlined in his nonparticipant agreement." *See* Kevin Trahan, *Did Northwestern Basketball Run off Johnnie Vassar?*, VICE SPORTS (Mar. 29, 2017, 10:37 AM), https://sports.vice.com/en_us/article/53x5pq/did-northwestern-basketball-run-off-johnnie-vassar. Vice reviewed the time cards Northwestern used as evidence of Vassar's noncompliance—included were timecards that misspelled Vassar's first name and accounted for time worked when Vassar says he was in California attending his father's funeral, a claim Vassar backed with credit card and plane ticket receipts. *See id.*

91. *Id.*

92. Vassar told CBS Sports that DePaul, Georgia Tech, Utah, and UNLV offered to accept him as a scholarship player on their respective basketball teams in the spring of 2015 if he received an NCAA transfer exception that would allow him to play immediately. *See* Jon Solomon, *Basketball Player Sues Northwestern, NCAA After Long Battle Over His Scholarship*, CBS SPORTS (Nov. 15, 2016, 10:38 AM), https://www.cbssports.com/college-basketball/news/basketball-player-sues-northwestern-ncaa-after-long-battle-over-his-scholarship/. Vassar's mother indicated the matter was discussed on multiple occasions with the NCAA, who refused to grant the hardship exception that would make Vassar immediately eligible to compete. *See id.*

93. *See* Complaint, John Vassar, 2016 WL 6693054 at ¶ 11–12.

that the NCAA Division I transfer regulations prevented him from transferring to the schools that expressed interest in him joining their team without sitting out a year in accordance with NCAA bylaw's year-in-residence requirement.[94] Accordingly, because he was not immediately eligible to compete, the schools that did express interest ultimately decided against offering Vassar an athletic scholarship.[95] Consequently, Vassar decided, instead, to remain a part of the Northwestern team.[96] In response to his decision not to transfer, Northwestern told Vassar he would be required to sign a nonparticipation agreement, which would allow him to maintain his athletic scholarship if he worked eight hours per week in the school's internship program and complied with all NCAA regulations.[97] Believing he had no other options to keep his athletic scholarship other than to sign the nonparticipation agreement, he did so and began working as an intern in the school's facilities department, tasked with jobs in which he had no prior experience, such as yard maintenance, facility cleanup, and painting the football field.[98]

Vassar alleged that Northwestern then attempted to force him into accepting a cash settlement—essentially buying out the remaining portion of his athletics scholarship so as to free up the use of the scholarship for a replacement player on the men's basketball team.[99] Vassar declined, fearing that such a payment would jeopardize his future eligibility.[100] Northwestern next attempted to switch Vassar to a merit-based scholarship under threat of revocation of all scholarships (merit and athletic), again in an attempt to use Vassar's athletic scholarship for a different basketball player.[101] Vassar once again declined—on principle and to protect his scholarship interests—and did not understand Northwestern's legal justification to revoke his athletic scholarship under NCAA bylaw 15.3.4.2, which regulates when scholarship reduction or cancellation is to be permitted.[102]

94. *Id.*

95. *Id.*

96. *See* Trahan, *supra* note 90.

97. *Id.*

98. *Id.*

99. Allegedly, Northwestern deputy general counsel Priya Harjani contacted Vassar's lawyer and "informally inquired into Johnnie's openness to considering a cash payment equivalent to the remaining value of his athletics scholarship." *Id.* Vice Sports validated the communication between the Vassar's and their attorney discussing same. *See id.* The court denied Northwestern's motion to strike the portions of Vassar's complaint that referenced these settlement talks. *See* Matthew Periman, *Northwestern Can't Strike Deal Talks Info from Transfer Suit*, LAW360 (Oct. 2, 2017, 8:21 PM), https://www.law360.com/articles/970349?utm_source=rss&utm_medium=rss&utm_campaign=articles_search.

100. *See* Trahan, *supra* note 90.

101. Per communication verified by Vice Sports, Harjani emailed Vassar's attorney, writing "Northwestern has the ability to revoke [Vassar's] athletic scholarship should he not sign the agreement and plans to do so" and ultimately presented an ultimatum—Vassar must agree to switch from an athletic to a nonathletic scholarship, or lose his scholarship entirely. *See id.*

102. *Id.*; *see* 2017-2018 NCAA DIVISION I MANUAL, *supra* note 32. Bylaw 15.3.4.2 notes that scholarship reduction or cancellation is permitted where a student-athlete:

In a final attempt to revoke his athletic scholarship, Northwestern's Director of Financial Aid informed Vassar that, due to alleged noncompliance with the terms of his nonparticipation agreement, and with the recommendation of the school's athletic department, his athletic scholarship would be revoked.[103] Instead, Northwestern would administer to Vassar a different scholarship covering his full cost of tuition.[104] Perhaps tellingly, the school also noted that Vassar's election to maintain his athletic scholarship "caused an immediate impact with our basketball program. Each Division I program is able to fund 13 full scholarships and, because of John's decision to transfer, our program naturally was researching other student-athletes to fill his open spot."[105]

Vassar appealed the decision as permitted by the NCAA, and Northwestern's appeals committee ruled in his favor.[106] Still, the committee maintained the revocation of his athletic scholarship, and instead placed him on an academic scholarship, citing the "unusual circumstances" of his appeal.[107] In response, Vassar filed suit in a class action lawsuit against Northwestern six months after the decision of the appeals committee.[108] Vassar's complaint alleged that, in a competitive market where he could transfer without NCAA regulatory limitations, he would have had multiple Division I basketball offers from which to choose.[109] The suit alleged that the NCAA's anticompetitive practices restricting the transfer of Division I basketball student-athletes who are unable to meet the narrow hardship waiver requirement to sit out a year while losing a year of eligibility results in injury

> (a) Renders himself or herself ineligible for intercollegiate competition; (b) Fraudulently misrepresents any information on an application, letter of intent or financial aid agreement . . . (c) Engages in serious misconduct warranting substantial disciplinary penalty . . . or (d) Voluntarily (on his or her own initiative) withdraws from a sport at any time for personal reasons; how- ever, the recipient's financial aid may not be awarded to another student-athlete in the academic term in which the aid was reduced or canceled. A student-athlete's request for written permission to contact another four-year collegiate institution regarding a possible transfer does not constitute a voluntary withdrawal.

Id.

103. *See* Trahan, *supra* note 90.

104. *Id.*

105. *Id.* Although Northwestern, and Vassar in response, issued statements indicating his intent to transfer, he never signed a roster deletion or release from scholarship form that would amount to voluntary withdrawal from the team. *Id.*

106. *See id.* (detailing Vassar's defense).

107. Northwestern's Director of Financial Aid explained this was done to alleviate the awkwardness of the work Vassar's nonparticipation agreement entailed:

> In our conversation on April 28, you discussed that you had not come to Northwestern with the expectation that you would be doing maintenance work and that it was very awkward for you to be at work while other student athletes were coming for practice. Since work for the Department of Athletics was a part of the July 1, 2015, agreement, the Committee is taking away this obstacle by removing your athletic scholarship and providing you with equivalent scholarship from the general Northwestern Scholarship account in the same amount as you would have received as a student athlete.

Id.

108. *Id.*

109. Complaint, John Vassar, on behalf of himself and all others Similarly Situated v. Nat'l Collegiate Athletic Ass'n et al., No. 1:16-cv-10590, 2016 WL 6693054 at ¶ 68 (N.D. Ill. Nov. 14, 2016).

> by causing them to either lose an opportunity to transfer schools or give up a year of play. Division I basketball players who have lost grants-in-aid at their current schools are further faced with the decision to transfer to a Division I school where they are unlikely to receive full grants-in-aid, if any aid at all, or transfer to a less competitive Division II school.[110]

Personally, Vassar alleged that the transfer regulations that prevented him from being immediately eligible to compete at another institution and resulted in a conversion of his more valuable athletic scholarship into an academic scholarship at Northwestern resulted in a loss of monetary and nonmonetary benefits:

> [A]s a member of the basketball program at Northwestern, Johnnie had to satisfy a mandatory summer school attendance obligation. But without his athletics grant-in-aid, Johnnie could not afford to pay the $6,832 dollars for summer school in 2015 and/or 2016 that he would have received as a basketball student-athlete with his athletics grant-in-aid. Moreover, Johnnie has lost other valuable items as a result of losing his athletic scholarship as he is no longer eligible to register for his classes before other students, he cannot receive medical and health services from Northwestern's sports medicine staff, and he cannot use Northwestern's training facilities or receive cost-free athletic training to maintain his basketball skills. As a direct result, Johnnie has paid more money and suffered an ascertainable loss than he would have in the absence of the NCAA's transfer rules.[111]

The complaint alleged, as a whole, that the class of Division I basketball student-athletes suffers from anticompetitive NCAA transfer regulations, as the loss of a year of athletic eligibility tied to the year-in-residence requirement amounts to "a severe penalty for transferring."[112] Accordingly, this can make transferring basketball players "a very unattractive option for coaches who are under constant 'win now' pressure," resulting in a "restrain[t] [on] players' ability to make the best choices for themselves, including ones based on financial considerations, academics considerations, athletics considerations, and personal circumstances" and resulting in the NCAA's transfer regulations amounting to anticompetitive rules in violation of the Sherman Act.[113] As Vassar's complaint stated, "[t]hrough the year-in-residence requirement, the NCAA and its members have thus contracted, combined, and conspired to restrict the movement of players between schools in the relevant market, as well as remove some players from the market altogether."[114] At its core, this decision to lock in student-athletes participating in highest-revenue sports and maintain the status quo in athletic programs seemingly stems from financial motivations such as minimizing administrative costs that come from increased recruiting, increased retention efforts stemming from potential student-athlete transfers in a less restrictive transfer system, and reducing expenses related to competition for athletes among NCAA

110. *Id.*
111. *Id.* ¶ 12.
112. *Id.* ¶ 9.
113. *Id.*
114. *Id.* ¶ 108.

member schools.[115] According to Vassar's complaint, the NCAA's transfer regulations cannot be justified "as necessary to preserve education or amateurism," as evidenced by the fact that Division I basketball student-athletes—unlike their non-football playing and non-men's ice hockey playing student-athlete peers—are ineligible for a one-time transfer exception regardless of their level of academic success.[116]

Vassar's complaint finally alleged that eliminating the NCAA's year-in-residence requirement would result in a more equitable situation for student-athletes and consumers.[117] With the removal of the year-in-residence requirement, the complaint advanced, Division I men's basketball transfers would increase as student-athletes seek out institutions that offer the "most value," which could be determined by factors such as "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."[118] According to Vassar, institutions, too, would seek out the players they value most, creating "an optimal and most efficient matching of schools and players."[119] Vassar further alleged that freeing basketball student-athletes to transfer without restriction would advance the interests of consumers—college basketball fans.[120] As the complaint stated, limiting and restricting the ability of student-athletes to transfer to schools for "which the players may be a better athletic fit" amounts to a restriction on the potential production of a better product for Division I basketball fans, thus running counter to the interests of consumers desiring the most competitive and entertaining display of basketball.[121]

2. The NCAA's Motion to Dismiss

In response to Vassar's class action complaint, the NCAA moved to dismiss Count 1 of Vassar's complaint alleging the year-in-residence requirement as a violation of the Sherman Act.[122] In its motion, the NCAA cited three primary reasons why Count 1 of Vassar's complaint fails and should be dismissed accordingly: "(1) the year-in-residence bylaw is presumptively procompetitive; (2) the bylaw is non-commercial and does not implicate the Sherman Act; and (3) Vassar has not sufficiently alleged an anticompetitive effect of the bylaw."[123]

115. *Id.* ¶¶ 107–11, 113.
116. *Id.* ¶¶ 110–11.
117. *Id.* ¶¶ 107, 115.
118. *Id.* ¶ 107.
119. *Id.*
120. *Id.* ¶ 115.
121. *Id.*
122. *See* Brief in Support of Nat'l Collegiate Athletic Ass'n's Rule 12(b)(6) Motion for Partial Dismissal of Plaintiff's Complaint, John Vassar, on behalf of himself and all others Similarly Situated v. Nat'l Collegiate Athletic Ass'n et al., No. 1:16-cv-10590, 2017 WL 1132607 (N.D. Ill. Jan. 31, 2017).
123. *Id.* at 1.

The NCAA, citing to *Agnew v. NCAA,*[124] concluded that Vassar's challenge fails because his allegation is merely a threshold issue: because the rule in question relates to eligibility, it is "presumptively procompetitive" and thus does not violate the Sherman Act.[125] Vassar's complaint pointed out that the Third, Fifth, and Seventh Circuits have all determined NCAA eligibility rules to be presumptively procompetitive, and "[n]o court has disagreed."[126] Second, the NCAA stated that the bylaw is noncommercial, and thus, falls beyond the realm of the Sherman Act.[127] According to the NCAA, this is because the year-in-residence requirement only impacts when an athlete may take the field for his new institution, and "does not affect the NCAA's commercial or business activities."[128] Finally, the NCAA claimed Vassar did not sufficiently allege an anticompetitive impact of the year-in-residence requirement.[129]

It is worth noting that, as a starting point, courts have held the Sherman Act to apply to bylaws generally.[130] A modern interpretation of the Sherman Act applies broadly to nearly all activities done in anticipation of economic gain; recruiting, and navigating the bylaws that impact the recruiting of transfer students, is done in anticipation of building a successful program, which in turn produces an anticipation of economic gain.[131] Accordingly, academic institutions and student-athletes contemplating the value of a degree or the potential impact a scholarship might have on future economic gains through professional play can be said to be commercial in nature.[132]

3. Vassar Drops and Refiles

Ultimately, in August 2018, following a ruling unfavorable to his federal antitrust claim in *Peter Deppe v. NCAA*, Vassar dropped his federal suit and refiled in Illinois state court, dropping his antitrust claims and naming Northwestern University as the lone defendant.[133] Still, the facts surrounding Vassar's case,

124. 683 F.3d 328 (7th Cir. 2012).

125. Brief for Nat'l Collegiate Athletic Ass'n, John Vassar, on behalf of himself and all others Similarly Situated v. Nat'l Collegiate Athletic Ass'n et al., 2017 WL 1132607 at 4.

126. *Id.*

127. Asim S. Raza, *Should the NCAA's Eligibility Rules Be Subjected to the Sherman Antitrust Act?*, 4 DEPAUL J. ART TECH. & INTELL. PROP. L. 113, 122 (1993).

128. Brief for Nat'l Collegiate Athletic Ass'n, John Vassar, on behalf of himself and all others Similarly Situated v. Nat'l Collegiate Athletic Ass'n et al., 2017 WL 1132607 at 6.

129. *Id.*

130. Agnew v. Nat'l Collegiate Athletic Ass'n, 683 F.3d 328, 340 (7th Cir. 2012).

131. *Id.*

132. The court's discussion centers on major college football recruiting and the resulting creation of a commercial football recruiting market, but the same principles easily translate to a Division I college basketball. *Id.* at 341.

133. Ryan Boysen, *Ex-Northwestern Hoops Player Drops Transfer Rule Suit*, LAW360 (Aug. 13, 2018, 6:36 PM), https://www.law360.com/articles/1072544/ex-northwestern-hoops-player-drops-transfer-rule-suit; Ben Pope, *Johnnie Vassar's Lawsuit Dropped in Federal Court, Re-filed Against Northwestern in State Court*, DAILY NW. (Aug. 27, 2018), https://dailynorthwestern.com/2018/08/27/sports/johnnie-vassars-lawsuit-dropped-in-federal-court-re-filed-against-northwestern-in-state-court/; *see* John Vassar v. Northwestern Univ., No. 2014L008685, 2018 WL 3997099 (Ill. Cir. Ct. 2018).

including the use of "force out" tactics to free athletic scholarship, illustrate the shortcoming and injustice that result from providing tremendous deference to the NCAA in legal analysis of its eligibility rules. The analysis that follows will focus on the NCAA's so-called "threshold" issue—the classification of eligibility requirements as presumptively procompetitive—to assess the merits of such a presumption in a "rule of reason" based antitrust assessment and to consider a more equitable alternative to the year-in-residence requirement.

III. ANALYSIS

A. The Evolution of the Treatment of NCAA Eligibility Rules as "Presumptively Procompetitive"

Historically, courts have treated NCAA eligibility rules as "presumptively procompetitive."[134] In its Motion to Dismiss, the NCAA noted Count 1 of Vassar's complaint must fail because the year-in-residence bylaw is an eligibility rule "and therefore presumptively precompetitive."[135] In formulating this argument, the NCAA relied heavily upon the Seventh Circuit's Decision in *Agnew v. NCAA*.[136]

134. *See generally supra* notes 123–32.

135. Brief in Support of Nat'l Collegiate Athletic Ass'n's Rule 12(b)(6) Motion for Partial Dismissal of Plaintiff's Complaint, John Vassar, on behalf of himself and all others Similarly Situated v. Nat'l Collegiate Athletic Ass'n et al., No. 1:16-cv-10590, 2017 WL 1132607 at 4 (N.D. Ill. Jan. 31, 2017).

136. 683 F.3d 328 (7th Cir. 2012).

1. The Creation of a "Procompetitive Presumption": NCAA v. Board of Regents of University of Oklahoma

In *NCAA v. Board Regents of University of Oklahoma*,[137] the Supreme Court affirmed a district court opinion that the NCAA unreasonably restrained trade in the television broadcasting of football college games and was in violation of the Sherman Act.[138] Specifically, the Supreme Court found that the NCAA's television plan—which restricted broadcast contracting abilities to two television networks, limited the total number of televised collegiate football games, restricted the number of games each team was able to televise, and prohibited individual institutions from selling television rights outside of the NCAA's television plan—served to raise prices and reduce output, and accordingly, did not enhance competition.[139] In reaching their decision, the Supreme Court declined to apply a per se anticompetitive rule, instead stating, "horizontal restraints on competition are essential if the product is to be available at all."[140] In its analysis, the court focused on the importance of regulations in maintaining an academic-based "product" as contrasted with professional sports:

> Moreover, the NCAA seeks to market a particular brand of football—college football. The identification of this "product" with an academic tradition differentiates college football from and makes it more popular than professional sports to which it might otherwise be comparable, such as, for example, minor league baseball. In order to preserve the character and quality of the "product," athletes must not be paid, must be required to attend class, and the like. And the integrity of the "product" cannot be preserved except by mutual agreement; if an institution adopted such restrictions unilaterally, its effectiveness as a competitor on the playing field might soon be destroyed. Thus, the NCAA plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable. In performing this role, its actions widen consumer choice—not only the choices available to sports fans but also those available to athletes—and hence can be viewed as procompetitive.[141]

Ultimately, the Court rejected the NCAA's contention that the restrictive football television contracts were justified under the rule of reason because maintaining an equal competitive balance maximized consumer demand for the product—college football.[142] In fact, the Court held the opposite to be true: with the removal of the restrictive contractual controls, consumer demand for college football would "materially increase," thus demonstrating that the NCAA's attempt

137. 468 U.S. 85 (1984).
138. *Id.* at 88.
139. *Id.* at 100, 113.
140. *Id.* at 100.
141. *Id.* at 101–02.
142. *Id.* at 118.

to control football television contracts in order to maintain competitive balance was not justified as a procompetitive purpose.[143]

In reaching this conclusion, the Supreme Court differentiated the specific restraints on college football television contracts at issue from more general restraints imposed by NCAA bylaws.[144] The latter, the Court stated, were necessary to ensure public interest in the NCAA's athletic product:

> Our decision not to apply a per se rule to this case rests in large part on our recognition that a certain degree of cooperation is necessary if the type of competition that petitioner 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.[145]

The Supreme Court agreed with the District Court's finding that other NCAA restrictions, namely its bylaws, "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," were "better tailored to the goal of competitive balance than is the television plan," "designed to preserve amateurism," and "are 'clearly sufficient' to preserve competitive balance to the extent it is within the NCAA's power to do so."[146] Per the Court, as a result of the NCAA's role in maintaining collegiate amateurism, NCAA bylaws were permissible: "[t]here can be no question but that [The NCAA] 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."[147] The Court was careful to caution that, in order to maintain consistency with the Sherman Act, the regulatory role of the NCAA "must be to preserve a tradition that might otherwise die" and that "rules that restrict output are hardly consistent with this role."[148]

143. *Id.*

144. *Id.* at 119.

145. *Bd. Regents of Univ. of Okla.*, 468 U.S. at 117.

146. *Id.* at 116, 119. The district court identified several elements to NCAA bylaws within the NCAA's regulatory abilities that presumably improved competition. *See* Bd. of Regents of Univ. of Okla. v. Nat'l Collegiate Athletic Ass'n, 546 F. Supp. 1276, 1296 (W.D. Okla. 1982), aff'd in part, remanded in part, 707 F.2d 1147 (10th Cir. 1983), aff'd, 468 U.S. 85, 104 (1984).

> The NCAA regulations on recruitment, the limitations on the number of scholarships each team may award, and the other standards for preserving amateurism found in NCAA legislation are sufficient to achieve this goal. Rather than relying on the NCAA to improve their competitive position by restraining completion, the schools can and should compete on their own and improve their position in that way.

Id.

147. *Bd. Regents of Univ. of Okla.*, 468 U.S. at 120.

148. *Id.*

2. Eligibility Bylaws as Presumably Procompetitive: Agnew v. NCAA

In *Agnew v. NCAA*,[149] the plaintiffs were former Division I football players who, after suffering injuries that prevented them from continuing their athletic careers, had their scholarships revoked by their respective institutions.[150] In assessing the procompetitive presumption to be granted to NCAA bylaws, the Seventh Circuit determined that "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 precompetitive because the NCAA—per *Board of Regents*—must be provided "ample latitude to play that role."[151] If, according to the Court, an NCAA regulation is not "on its face, helping to 'preserve a tradition that might otherwise die,' either a more searching rule of reason analysis will be necessary to convince us of its procompetitive or anticompetitive nature, or a quick look at the rule will obviously illustrate its anticompetitiveness."[152] As the court noted, "most—if not all—eligibility rules, on the other hand, fall comfortably within the presumption of procompetitiveness afforded to certain NCAA regulations," as "they are clearly necessary to preserve amateurism and the student-athlete . . . ."[153] In contrast, according to the court, bylaws, such as the one-year scholarship and limits to scholarship numbers for each athletic team at issue in *Agnew*, "not inherently or obviously necessary for the preservation of amateurism, the student-athlete, or the general product of [a given sport]," do not implicate student-athlete amateurism and thus do not constitute eligibility rules subject to a presumption of procompetitiveness.[154] Accordingly, although the plaintiffs' claims failed due to what the court described as a failure to adequately describe a commercial market, the bylaws at issue theoretically "[would] not be deemed procompetitive at the motion-to-dismiss stage."[155]

149. 683 F.3d 328 (7th Cir. 2012).

150. *Id.* at 332.

151. *Id.* at 342–43 (quoting *Bd. of Regents of Univ. of Okla.*, 468 U.S. at 120).

152. *Id.*

153. *Id.* at 343 ("Indeed, they define what it means to be an amateur or a student-athlete, and are therefore essential to the very existence of the product of college football.").

154. *See id.* at 343–44 ("Issuing more scholarships (thus creating more amateur players) and issuing longer scholarships cannot be said to have an obviously negative impact on amateurism. Nor is there an obvious effect on the ability of college football to survive without the Bylaws in question.").

155. *Id.* at 345.

3. Falling in Line: Year-in-Residence Cases Following Agnew*'s Precedent*

a. *Pugh v. NCAA*

In *Pugh v. NCAA*, the District Court for the Southern District of Indiana granted the NCAA's Motion to Dismiss Pugh's complaint that alleged the year-in-residence bylaw violated the Sherman Act.[156] In *Pugh*, the student-athlete accepted a full-ride scholarship to play football at Weber State University in 2010.[157] In 2011, Weber State's then-head coach pledged to Pugh that his scholarship would be renewed annually so long as Pugh maintained his NCAA eligibility.[158] Subsequently, Weber State's head football coach retired and was replaced.[159] The new coach informed Pugh that his scholarship would not be renewed and that he should explore transferring to a different school.[160] Pugh did so, and was offered full athletic scholarships at several schools; however, the scholarships were contingent upon Pugh's ability to play football for two or more seasons.[161] The NCAA's year-in-residence bylaw, however, required that Pugh sit out for a full year of competition after transferring to a new institution, which would result in Pugh having only one year of remaining athletic eligibility.[162] To overcome this and obtain the requisite two years of eligibility the scholarship-offering schools desired, Pugh applied for an NCAA hardship waiver that would allow him to play immediately.[163] The NCAA denied his hardship waiver request, and every full scholarship offer previously advanced to Pugh was rescinded.[164]

Accordingly, Pugh transferred to a Division II school, as NCAA regulations allow football players a one-time transfer exception allowing for immediate eligibility when transferring from Division I to Division II.[165] Pugh claimed that because he would have been unable to satisfy the year-in-residence requirement after transferring, and thus lacking immediate eligibility, he was left with a grant-in-aid at the Division II school that was less than what he was receiving at Weber State, failing to cover books, housing, and other costs beyond tuition.[166] Accordingly, Pugh's student loans doubled from $3,000 per year to $6,000 per year.[167]

156. Pugh v. Nat'l Collegiate Athletic Ass'n, No. 1:15-cv-01747-TWP-DKL, 2016 WL 5394408, at *5 (S.D. Ind. Sept. 27, 2016).
157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.*

The *Pugh* court relied almost entirely on *Agnew* in dismissing the portion of Pugh's claim seeking to characterize the year-in-residence requirement as violating the Sherman Act, electing to let precedent dictate its decision instead of formulating an individualized assessment based upon the factual intricacies of Pugh's situation; namely, the departure via retirement of his head coach and the fact that Pugh was told by the incoming head coach that his full scholarship would not be renewed and that he should seek to transfer elsewhere. As the *Pugh* court stated:

> In this regard, the law is clear. NCAA eligibility bylaws are 'presumptively procompetitive' and, therefore, do not violate the Sherman Act . . . [a]ccordingly, because the challenged bylaw is directly related to eligibility, it is presumptively procompetitive and no further analysis under the Sherman Act is required . . . dismissal of the Pugh's second cause of action is warranted.[168]

The portion of the opinion to which the Southern District of Indiana devoted to considering factors beyond a default presumption of procompetitiveness again relies on precedent rather than individualized analysis of the plaintiff's particular circumstances. Even if the year-in-residence requirement produced an indirect economic impact on the plaintiff, the *Pugh* court determined, relying on *Board of Regents*, it is "required to give the NCAA 'ample latitude' 'in the maintenance of a revered tradition of amateurism in college sports.'"[169]

b. *Deppe v. NCAA*

As in *Pugh*, *Deppe v. NCAA* involved a player challenging the NCAA's year-in-residence requirement after a coach's departure led to Deppe failing to receive an athletic scholarship.[170] Deppe joined the Northern Illinois University football team as a nonscholarship, preferred walk-on punter in 2014.[171] After the team's head coach told Deppe he would receive an athletic scholarship, the coach accepted another job and his replacement informed Deppe that he would not receive an athletic scholarship and that the team signed another punter to take over Deppe's playing time.[172] With no scholarship and poor playing time prospects, in 2015, Deppe sought to transfer to another program.[173] Deppe found a suitor in the University of Iowa—the team indicated they wanted him on their team, provided he was immediately eligible to compete in the 2016-2017 season.[174] The NCAA informed Deppe's family, however, that per its year-in-residency bylaw, he would be forced to sit out the 2016-2017 season unless he were granted a hardship waiver, the application for which was to be initiated by the school to

168. *Id.* at 3–4.
169. *Id.* at 4 (quoting *Bd. of Regents of Univ. of Okla.*, 468 U.S. at 117).
170. 893 F.3d 498, 499 (7th Cir. 2018).
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.* at 500.

where Deppe sought to transfer.[175] Although Iowa granted Deppe academic admission, shortly thereafter, the team informed Deppe they would be pursuing an immediately eligible punter and would not initiate a potential hardship waiver on his behalf.[176]

In affirming the district court's dismissal of Deppe's suit, the Seventh Circuit relied heavily on *Board of Regents* and *Agnew* to determine the year-in-residence restriction is not an unreasonable restraint of trade sufficient to implicate the Sherman Act.[177] Specifically, the court cited to *Agnew* in noting that "[m]ost—if not all—eligibility rules . . . fall within the presumption of procompetitiveness established in *Board of Regents*."[178] Unsurprisingly, the court had "no difficulty concluding that the year-in-residence bylaw is an eligibility rule . . . entitled to the procompetitive presumption" because the bylaw appears in the eligibility section of the Division I Manual and governs transferring students' eligibility to participate in athletics.[179]

Further, the court noted that *Agnew*'s test asks not if the NCAA could survive without a bylaw, but "rather whether the rule is clearly meant to help preserve the amateurism of college sports" with special consideration of the fact that "the NCAA needs ample latitude to preserve the product of college sports."[180] Next, the court addressed Deppe's contention that the year-in-residence bylaw was economically motivated and not intended to preserve the amateurism, as demonstrated by the fact that transfer exceptions are unavailable to the highest revenue generators: Division I hockey, football, and basketball players.[181] Without directly addressing the validity of Deppe's contention, the court simply stated Deppe's claim ignored an "innocent" explanation: given their economic value, these athletes are more susceptible to being "poached" and "traded" like professional athletes without transfer restrictions in place.[182] Finally, the court cast aside Deppe's argument that the bylaw was aimed at lowering administrative costs that might otherwise rise with the "free" transfer movement, such as increased recruiting and player retention costs.[183] Instead, and again without analysis of the validity of Deppe's contention, the court stated that a bylaw might have other cost-reducing consequences whose fundamental aim is not to reduce costs, but rather to preserve amateurism.[184]

Accordingly, the court defaulted to procompetitive precedent and avoided engaging in a "rule of reason" analysis, concluding: "the year-in-residence rule

175. *Id.*
176. *Id.*
177. *Id.* at 501–02.
178. *Id.* at 502 (internal quotations omitted).
179. *Id.*
180. *Id.* at 503 (internal quotations omitted).
181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.*

is, on its face, a presumptively procompetitive eligibility rule under *Agnew* and *Board of Regents.* Accordingly, a full rule-of-reason analysis is unnecessary. Deppe's Sherman Act challenge to the NCAA's year-in-residence bylaw fails on the pleadings."[185]

4. Breaking from Board *and the Procompetitive Presumption in the Ninth Circuit: The NCAA Must Play by the Sherman Act's Rules per* O'Bannon*'s Rule of Reason Analysis*

In *O'Bannon v. NCAA*,[186] former All-American basketball player, Ed O'Bannon, sued the NCAA and the Collegiate Licensing Company after seeing the use of his likeness in a college basketball video game without his consent, alleging that NCAA amateurism rules that prevented student-athletes from being compensated for use of their name, image, and likeness ("NIL") illegally restrained trade and thus violated Section 1 of the Sherman Act.[187] O'Bannon's suit was subsequently joined with that of Sam Keller—formerly a Division I college quarterback—who similarly brought suit against the NCAA, Collegiate Licensing Company ("CLC"), and EA Sports for impermissible use of student-athletes' NIL in video games.[188] Ultimately, class certification was granted representing all current and former men's Division I football and basketball players whose likenesses were or may have been used in video games; while the joined plaintiffs settled their claims against EA and CLC, the *O'Bannon* and *Keller* cases were deconsolidated, and the *O'Bannon* antitrust claims proceeded to trial in the Ninth Circuit Court of Appeals.[189]

After the *O'Bannon*[190] court determined that the plaintiffs sustained an antirust injury by demonstrating "that, absent the NCAA's compensation rules, video game makers would likely pay them for the right to use their NILs in college sports video games,"[191] the Ninth Circuit applied the "rule of reason" standard in evaluating the NCAA's alleged anticompetitive practices—restrictions on payments to student-athletes for use of their "names, images, and likenesses."[192] In doing so, the court affirmatively rejected the NCAA's arguments—which were based on the Supreme Court's holding in *NCAA v. Board of Regents of the University of Oklahoma*—that NCAA amateurism rules were "valid as a matter of law."[193]

185. *Id.* at 503–04.
186. 802 F.3d 1049 (9th Cir. 2015).
187. *Id.* at 1070.
188. *Id.* at 1055.
189. *Id.*
190. *Id.* at 1070.
191. *Id.* at 1069.
192. *Northwestern Antitrust Lawsuit Places NCAA's Transfer Restrictions in Crosshairs*, ABOVE THE LAW (Nov. 16, 2016, 5:15 PM), https://abovethelaw.com/2016/11/northwestern-antitrust-lawsuit-places-ncaas-transfer-restrictions-in-crosshairs/?rf=1.
193. *O'Bannon*, 802 F.3d at 1063.

> *Board of Regents*, in other words, 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. To be sure, [w]e do not treat considered dicta from the Supreme Court lightly; such dicta should be accorded appropriate deference. Where applicable, we will give the quoted passages from *Board of Regents* that deference. But we are not bound by *Board of Regents* to conclude that every NCAA rule that somehow relates to amateurism is automatically valid.[194]

The court noted that, even if an NCAA bylaw addressing amateurism was deemed to be procompetitive, no automatic presumption of lawfulness is created due to the fact that, under the "rule of reason" analysis, "a restraint that serves a procompetitive purpose can still be invalid . . . if a substantially less restrictive rule would further the same objectives equally well."[195] Accordingly, following this logic, the *O'Bannon* court instead applied a three-pronged rule of reason test to determine if the NCAA's compensation rules constituted a restraint that could be replaced by a less restrictive alternative advancing the same objectives:

> [1] The plaintiff bears the initial burden of showing that the restraint produces significant anticompetitive effects within a relevant market. [2] If the plaintiff meets this burden, the defendant must come forward with evidence of the restraint's procompetitive effects. [3] The plaintiff must then show that any legitimate objectives can be achieved in a substantially less restrictive manner.[196]

At step one of their "rule of reason" analysis, the court concluded that the plaintiffs satisfied their burden by "showing that the NCAA's compensation rules fix the price of one component (NIL rights) of the bundle that schools provide to recruits," thus creating "significant anticompetitive effects on the college education market . . . ."[197] Specifically, the court noted the plaintiffs demonstrated that by fixing "the price of one component of the exchange between school and recruit"—as by the NCAA capping the value of a student-athletes' NIL at zero—competition is precluded among schools, who are unable to engage in a potential negotiation with student-athletes due to the fixed NIL value.[198] Although this price-fixing agreement between FBS football and Division I basketball schools might not directly harm their respective consumers (fans), student-athletes are harmed by their inability to accept payments above the value of their full scholarship due to a restriction in the ability of schools to compete in order to land recruits.[199]

194. *Id.* (internal citations omitted).
195. *Id.* at 1063–64.
196. *Id.* at 1070.
197. *Id.* at 1072.
198. *Id.* at 1071.
199. *Id.*

Although student-athlete competition in Division I basketball and FBS football has increased over time, the court highlighted that output reductions alone are not the sole measure of anticompetitive effects.[200] Accordingly, the *O'Bannon* court held that the plaintiffs satisfied their burden of demonstrating compensation rules "have a significant anticompetitive effect on the college education market," sufficient to allow for advancement to step two of the "rule of reason" analysis.[201]

At step two of the "rule of reason" analysis, the burden shifted to the defendant NCAA to demonstrate procompetitive effects sufficient to justify its restrictive compensations rules.[202] In its analysis, the court focused on one of four arguments initially advanced by the NCAA as an example of the restraint's procompetitive effects: "the promotion of amateurism," which in turn increases consumer demand for collegiate athletics.[203] The NCAA argued that the district court erred in focusing on the impact of amateurism on consumer demand.[204] In doing so, the NCAA advanced that the district court failed to consider that amateurism increases choice for student-athletes by allowing them to obtain a college education while competing athletically as students and that the district court was "inappropriately skeptical" of the NCAA's historical commitment to amateurism.[205] While conceding that—in some situations—restraints that have the effect of broadening choice can be procompetitive, the *O'Bannon* court found such logic to be inapplicable to the NCAA's restraint on student-athlete compensation at issue.[206] Citing the district court's findings, the court noted that it is "primarily 'the opportunity to earn a higher education' that attracts athletes to college sports rather than professional sports . . . ."[207] Thus, "loosening" or "abandoning" the NCAA regulation as by allowing student-athlete compensation, the court reasoned, might better serve the NCAA's intended effect of the rule and create more choice for student-athletes:

> Nothing in the plaintiffs' prayer for compensation would make student-athletes something other than students and thereby impair their ability to become student-athletes. Indeed, if anything, loosening or abandoning the compensation rules might be the best way to widen recruits' range of choices; athletes might well be more likely to attend college, and stay there longer, if they knew that they were earning some amount of NIL income while they were in school.[208]

200. *Id.* at 1070.
201. *Id.* at 1071–72.
202. *Id.* at 1058.
203. *Id.* at 1072.
204. *Id.*
205. *Id.*
206. *Id.* at 1072–73.
207. *Id.* at 1073 (quoting O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955, 986 (N.D. Cal. 2014), *aff'd in part, vacated in part*, 802 F.3d 1049 (9th Cir. 2015)).
208. *Id.* (internal quotation omitted).

Accordingly, the court rejected the NCAA's contention that the promotion of amateurism serves a procompetitive purpose by increasing choice for student-athletes.[209]

Next, the court rejected the validity of the NCAA's contention that the district court failed to give proper weight to the NCAA's longstanding commitment to amateurism.[210] In doing so, the court highlighted that adherence to historical tradition alone is not sufficient proof that the rule does not have anticompetitive effects. As the court noted:

> [T]he NCAA would still need to show that amateurism brings about some procompetitive *effect* in order to justify it under the antitrust laws. The NCAA cannot fully answer the district court's finding that the compensation rules have significant anticompetitive effects simply by pointing out that it has adhered to those rules for a long time.[211]

Ultimately, the court determined the NCAA's rules restricting compensation had two procompetitive effects satisfying the NCAA's burden of proof. First, the restriction on compensation amounted to "integrating academics with athletics . . . ."[212] Second, the restrictions had the procompetitive impact of "preserving the popularity of the NCAA's product by promoting its current understanding of amateurism."[213]

At step three of its "rule of reason" analysis, the court—citing to *Board of Regents*—noted that "not every rule . . . that restricts the market is necessary to preserving the 'character' of college sports," and thus, evaluated whether a "substantially less restrictive alternative[]" existed to the current NCAA regulations restricting student-athlete compensation that was "'virtually as effective' in serving the procompetitive purpose[] of the NCAA's current rules, and 'without significantly increased costs.'"[214] In its analysis, the court noted the burden of proof shifted back to the plaintiff and that "ample latitude" must generally be afforded to the NCAA to govern college athletics.[215] Here, relying on the opinion of the district court, the court evaluated two less restrictive alternatives: "(1) allowing NCAA member schools to give student-athletes grants-in-aid that cover the full cost of attendance; and (2) allowing member schools to pay student-athletes small amounts of deferred cash compensation for use of their NILs."[216]

In assessing the viability of grants to cover a student-athlete's full cost of attendance, the court found the "grant-in-aid cap" to have "no relation whatsoever to the procompetitive purposes of the NCAA . . . ."[217] Furthermore, the record indicated that increasing grant in aids to the full cost of student-athlete

209. *Id.* at 1072–73.
210. *Id.* at 1073.
211. *Id.*
212. *Id*.
213. *Id.*
214. *Id.* at 1074 (quoting Tuolumne v. Sonora Cmty. Hosp., 236 F.3d 1148, 1159 (9th Cir. 2001)).
215. *Id.*
216. *Id.*
217. *Id.* at 1075.

attendance would not lessen consumer interest in college sports or impede the integration of student-athletes at their respective schools.[218] Accordingly, the cap represented a restraint "*patently and inexplicably* stricter than is necessary to accomplish all of its procompetitive objectives . . . ."[219] As such, the cap violated the Sherman Act and could properly be replaced by compensating student-athletes' full cost of attendance—"a substantially less restrictive alternative means of accomplishing the NCAA's legitimate procompetitive purposes."[220] Next, the court considered whether paying student-athletes deferred cash compensation for use of their NILs presented a substantially less restrictive alternative to the current NCAA compensation rules. Here, the court determined that a transformation from paying student-athletes education-based compensation to non-education-based $5,000 annual cash sums—as allowed by the district court's judgment—represented a "quantum leap" that would encourage continued legal action from student-athletes until compensation reached a point determined to be commensurate with the full value of the NIL.[221] Such challenges, according to the court, would result in the NCAA "surrender[ing] its amateurism" status and transitioning to "minor league status."[222] Accordingly, the court determined, utilizing the rule of reason analysis, that $5,000 deferred cash compensation payments did not represent "a substantially less restrictive alternative restraint" that will necessarily result in reduced consumer demand,[223] and vacated the portion of the district court's judgment requiring NCAA schools to make such payments to student-athletes.[224] Importantly, while the court's majority opinion noted the ample latitude traditionally afforded by the Supreme Court to the NCAA in its governing abilities, it concluded by reaffirming that the NCAA and its regulations are not above antitrust:

> Today, we reaffirm that NCAA regulations are subject to antitrust scrutiny and must be tested in the crucible of the Rule of Reason. When those regulations truly serve procompetitive purposes, courts should not hesitate to uphold them. But the NCAA is not above the antitrust laws, and courts cannot and must not shy away from requiring the NCAA to play by the

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.* at 1078–79.

222. *Id.* at 1079.

223. *Id.* In response to the dissent, the majority was careful to point out that step three of the rule of reason inquiry places the burden of proof on the plaintiffs in proving a substantially less restrictive and equally as effective alternative in serving procompetitive purposes existed. *Id.* at n. 25.

> [W]e do not decide, and the NCAA need not prove, whether paying student athletes $5,000 payments will necessarily *reduce* consumer demand. The proper inquiry in the Rule of Reason's third step is whether the plaintiffs have shown these payments will *not reduce* consumer demand (relative to the existing rules). And we conclude they have not.

Id.

224. *Id.* at 1079.

> Sherman Act's rules. In this case, the NCAA's rules have been more restrictive than necessary to maintain its tradition of amateurism in support of the college sports market.[225]

IV. RECOMMENDATION

Had it reached trial in the Seventh Circuit, the facts surrounding John Vassar's case presented a unique opportunity for court reform of an NCAA eligibility regulation that is based on an antiquated perception of the NCAA that does not align with the current realities of Division I basketball. In consistently ruling in favor of the NCAA, when eligibility rules are challenged on antitrust grounds because such rules have been traditionally afforded a "procompetitive presumption," courts are ruling based on case law—established by dicta in *Board of Regents*—decided nearly thirty-five years ago and centered upon issues regarding the anticompetitive effects of television contracts.[226]

The NCAA encouraged the *Vassar* court to dismiss the claim largely because the Southern District of Indiana in *Pugh*[227] dismissed a similar claim brought by the same attorney, and because the Third, Fifth, and Seventh Circuits historically have held other NCAA eligibility rules to be presumptively procompetitive.[228] Establishing a blanket default rule for all eligibility regulations prevents the type of individualized analysis of NCAA regulations that will ensure fairness for student-athletes and overvalues the procompetitive benefits against anticompetitive effects.

A potential better solution for the *Vassar* court—instead of the likely *Deppe*-based dismissal that motivated Vassar's voluntary dismissal and move to state court—would have been to allow the antitrust claim to stand and follow the Ninth Circuit's decision in *O'Bannon* to subject "amateurism" regulations to an antitrust, "rule of reason" analysis.[229] Doing so would allow Vassar's case to advance toward trial and undergo a "rule of reason" analysis that would, as demonstrated by *O'Bannon*, explore the anticompetitive effects of the year-in-residence transfer regulation and examine less restrictive alternatives in light of the NCAA as it stands *today*. Such a decision might allow the court to assess factors contributing to an underlying unfairness for student-athletes as the transfer rules are currently constructed and would allow the court to evaluate the extent to which a free market transfer system with a predetermined time period in which student-athletes may transfer institutions serves to create a competitive, equitable market for transferring student-athletes.

A. The Year-in-Residence Regulation Produces Anticompetitive Effects for

225. *Id.*
226. *See generally* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85 (1984).
227. *See* discussion *supra* Subsection III.B.3.
228. *See generally supra* notes 123–32 and accompanying text.
229. *See generally* O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049 (9th Cir. 2015).

Division I Men's Basketball Players

The anticompetitive effects of the year-in-residence requirement are readily apparent. By preventing student-athlete basketball players from being immediately eligible posttransfer, their choices are restricted to schools that are willing and able to offer an athletic scholarship to the student despite the fact that they cannot compete for one year. Such restrictions prevent student-athletes (and, likewise, schools) from fully realizing an ability to select the school (or student-athlete) that represents the best academic, athletic, and personal fit. Further, as noted in *Vassar*'s complaint and *Pugh*, there are tangible financial costs if restrictions on a student-athlete's transfer results in dropping to a lower level of player to achieve immediate eligibility; namely, a reduction in grant-in-aid.[230]

These anticompetitive effects are amplified when considering that coaches, as well as student-athletes, from other non-major-revenue-producing sports are not subject to the same restrictions. Basketball coaches who recruit players are able to break their contracts at any time to pursue better opportunities, and often do so with the immediate ability to begin coaching at their new institution.[231] Further, student-athletes outside of basketball, football, and ice hockey are allowed transfer exceptions whereby they can transfer with immediate eligibility to compete.[232] Finally, *student*s, which the NCAA goes through great lengths to attempt to ensure that collegiate athletes remain first and foremost, are allowed to transfer freely between institutions with no penalty.[233] While the NCAA labels the anticompetitive effects advanced by *Vassar* as "conclusory,"[234] further analysis via the "rule of reason" analysis will be well suited to shed light on national data surrounding the competitive or anticompetitive effects of such transfer restrictions.

B. The Year-in-Residence Regulation Also Produces Limited Procompetitive Benefits

A de facto restriction of a student-athlete's ability to transfer due to a procompetitive presumption for eligibility rules ignores the current realities of the Division I college basketball market. Financially, efforts to "preserve amateurism" conflicts with the reality that college basketball has transformed into a multi-billion dollar business.[235] Coaches, like their peers at the professional level, are free to break contracts and abandon the student-athletes they recruited

230. *See* Pugh v. Nat'l Collegiate Athletic Ass'n, No. 1:15-cv-01747-TWP-DKL, 2016 WL 5394408, at *1 (S.D. Ind. Sept. 27, 2016).

231. *See, e.g.*, Osterman, *supra* note 13.

232. *See Transfer Terms*, *supra* note 50.

233. *Id.*

234. Defendant Northwestern University's Memorandum in Support of its Motion to Dismiss All of Plaintiff's Claims against it, John Vassar, on behalf of himself and all others Similarly Situated v. Nat'l Collegiate Athletic Ass'n et al., No. 1:16-cv- 10590, 2017 WL 1132049 (N.D. Ill. 2017).

235. *See* Parker, *supra* note 42.

in order to pursue better opportunities. [236] Further, as in *Vassar*, pressure to win can lead to coaches employing "force out" tactics, where players are encouraged to transfer.[237]

Restricting transfers to advance a competitive balance are flawed. As currently constructed, there is parity in NCAA college basketball despite the fact that a true "competitive balance" among player acquisitions likely does not exist.[238] As an example of the lack of parity in recruiting, the three top ranked players in the high school class of 2018 are all attending Duke University.[239] Further, data suggests that transferring players are more often leaving to compete for *lesser* teams, which allows the logical presumption that transfers in NCAA Division I men's basketball might actually serve to *increase* competitive balance.[240]

The procompetitive benefits of transfer restrictions from the standpoint of integration of academics and athletics are also limited. The first page of the NCAA's 2017–2018 *Four Year Transfer Guide* poses a question to student-athletes: "What Should I Think About Before Transferring?"[241] In response, the guide reiterates that transfer rules are designed to help student-athletes "make sensible decisions about the best place to earn a degree."[242] As the guide states, "[s]tudent-athlete success on the field, in the classroom and in life is at the heart of the NCAA's mission . . . [y]ou do not want to risk your education or your chance to play NCAA sports."[243] As currently constructed, the NCAA's transfer policy and restrictions placed on men's basketball student-athletes run counter to this educational narrative. If NCAA athletes truly are *student*-athletes, they should be treated as such and have transfer requirements that are on par with their non-athlete, institutional peers. Basketball—along with the other major revenue generating NCAA sports of football and baseball—should not be singled out as a sport where athletes must sit out a year prior to becoming eligible to play in games for their new institution and obtain payment of travel expenses.

Additionally, the NCAA claims "[t]he year-in-residence is required to help student-athletes adjust to their new school and ensure that their transfer was motivated by academics as well as athletics,"[244] as well as to offset the "dynamic" where "student-athletes who transfer do not perform as well academically over time."[245] First, these "educational adjustment" concerns are seemingly rendered null by inconsistencies identified by commentators that note that freshman players and transfers from junior college are allowed to play immediately, without

236. *See, e.g.*, Osterman, *supra* note 13.

237. *See* Trahan, *supra* note 90.

238. *See, e.g.*, Nat'l Collegiate Athletic Ass'n v. Bd. Regents of Univ. of Okla., 468 U.S. 85, 117 (1984).

239. *See Recruiting Database 2018 ESPN 100*, ESPN, http://www.espn.com/college-sports/basketball/recruiting/playerrankings/_/view/espnu100/sort/rank/class/2018 (last visited Apr. 12, 2019).

240. *See* Boettger, *supra* note 40.

241. *See* TRANSFER GUIDE, *supra* note 46, at 3.

242. *Id.*

243. *Id.*

244. *Get the Facts about Transfers*, *supra* note 77.

245. *Id.*

needing to sit out a year to "acclimate" to their new institution.[246] Furthermore, the NCAA transfer regulations do not consider a student-athlete's academic performance beyond ensuring that they have met minimum requirements rendering them in "good academic standing"[247] at their current institution. Thus, the required one-year adjustment period post transfer does not contain an individualized assessment of academic abilities, where presumably there would be students who have achieved a level of academic success at their prior institution that would demonstrate academic capabilities not necessitating a year of "academic adjustment" prior to being able to play basketball.[248]

Finally, even as transfer rates ascend, consumer demand continues to increase.[249] This is demonstrated by increased college basketball viewership and specifically ratings during the March Madness Tournament: 2017 represented the most watched tournament in its history—signaling a positive trend between transfer increases and consumer demand.[250] As the *O'Bannon* dissent noted: "[i]n terms of antitrust analysis, the concept of amateurism is relevant only insofar as it relates to consumer interest."[251] The Supreme Court in *Board of Regents*, indicated as much: "[i]t 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."[252] Similarly, scholars have noted that a "rule of reason" analysis should be consistent with antitrust law's overarching goals of maintaining consumer welfare.[253] As such, engaging in a rule of reason analysis to analyze eligibility regulations in cases like Vassar's year-in-residency challenge might allow courts to avoid defaulting to policy-based analysis evaluating the threats to the historical concept of collegiate amateurism, and instead engage in bright-line antitrust analysis based on the current economics of college basketball.

C. Less Restrictive Alternatives Exist to Accomplish the NCAA's Objectives

In its *Vassar* Motion to Dismiss, the NCAA argued that the potentially "frequent and unpredictable" movement of student-athletes should the year-in-residence requirement be altered "would completely divorce the athletic and academic experience for NCAA student-athletes and destroy the 'product' of college

246. *See Northwestern Antitrust Lawsuit Places NCAA's Transfer Restrictions in Crosshairs*, *supra* note 192.

247. *See* TRANSFER GUIDE, *supra* note 46, at 17.

248. *Id.* ("Yet the rule applies whether the transferring athlete has a 2.0 or 4.0 GPA.").

249. *See, e.g.*, Patrick Hipes, *NCAA Tournament Ratings at 24-Year High Through First Weekend*, DEADLINE (Mar. 20, 2017, 1:38 PM), https://deadline.com/2017/03/ncaa-tournament-ratings-record-2017-1202047200/.

250. *Id.*

251. O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049 (9th Cir. 2015) (Thomas, J., dissenting).

252. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 117 (1984) (emphasis added).

253. Herbert Hovenkamp, *The Rule of Reason*, 70 FLA. L. REV. 81, 118 (2018).

sports."[254] Such a mindset fails to take into consideration changes that could be implemented to current NCAA legislation—such as an open-market, one-transfer-per-year limitation limited to a specific time period—that would result in limited, predictable transfer rules for Division I basketball student-athletes that are still inherently more procompetitive than existing regulations. Such rule changes would remove the penalty feature the year-in-residence requirement represents for transferring basketball players and place the academic and extracurricular interests and well-being of the student-athlete on par with their fellow students and ahead of the business interests of the NCAA's highest revenue-generating sports.

254. Brief in Support of Nat'l Collegiate Athletic Ass'n's Rule 12(b)(6) Motion for Partial Dismissal of Plaintiff's Complaint, John Vassar, on behalf of himself and all others Similarly Situated v. Nat'l Collegiate Athletic Ass'n et al., No. 1:16-cv-10590, 2017 WL 1132607 at 5 (N.D. Ill. Jan. 31, 2017).

V. CONCLUSION

Recent case law interpreting fundamental cases, such as *Board of Regents of University of Oklahoma*, has afforded issues related to NCAA eligibility requirements—including the NCAA's regulations governing student-athlete transfers—a "procompetitive presumption," supporting a ruling that such rules do not violate the Sherman Antitrust Act. Despite the Seventh Circuit's recent decision in *Deppe* signaling a continued unwillingness to engage in such analysis, with public momentum building for changes to the NCAA's transfer policies, as well as potential momentum within the NCAA itself with the creation of a NCAA Division I Transfer Working Group, the *Vassar* court was denied a potentially tremendous opportunity to utilize the Ninth Circuit's standard of review as outlined in *O'Bannon* to create meaningful change to the NCAA's transfer policies. Through the use of a "rule of a reason" analysis, the *Vassar* court might have recognized that the procompetitive purposes advanced by the NCAA in its year-in-residency requirement—and indirectly, advanced via the permission-to-contact requirement—can be better accomplished through substantially less restrictive alternatives that will not reduce consumer demand while affording more academic choice to student-athletes. As *O'Bannon* noted, the NCAA must play by the Sherman Act's rules—forcing them to do so as by deciding equally competitive but less alternative restrictions options exist for amending the transfer rule will help restore fairness to the NCAA transfer regulations and help re-empower the *student*-athlete.