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## A Need for Heightened Scrutiny: Aligning the NCAA Transfer Rule with its Rationales

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# A Need for Heightened Scrutiny: Aligning the NCAA Transfer Rule with its Rationales

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Unless exempted or waived, the “Transfer Rule”<sup>1</sup> provides that student-athletes transferring between “collegiate institutions [are] required to complete one full academic year of residence at the

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1. For purposes of this note, the term “Transfer Rule” refers generally to the rules and bylaws contained in the 2006-2007 NCAA Division I Manual, Article 14, Section 5, “Transfer Regulations.”

certifying institution before being eligible to compete.”<sup>2</sup> Originally designed to be a “discussion group and rules-making body”<sup>3</sup> to address very specific issues related to player safety, the National Collegiate Athletic Association (NCAA) has evolved into a governing body that “regulate[s] nearly every aspect of college sports.”<sup>4</sup> The NCAA constitution establishes amateurism and the promotion of education as two of its guiding principles.<sup>5</sup> Courts, recognizing the value of these principles, have generally deferred to the NCAA.

Despite the NCAA’s official promotion of these objectives, it has been widely suggested that the NCAA falls short of adequately advancing these principles.<sup>6</sup> An organization designed to further such goals has value to member institutions and the students who compete as athletes within the system. If the Transfer Rule no longer fosters the values that the NCAA was designed to create, courts should be less deferential to the NCAA. Any deference should erode even if the interests of the student-athletes are not aligned with those of the NCAA. The Supreme Court has held that the NCAA is not a state actor, but in the eyes of the public and the courts, the NCAA still serves a “public function.”<sup>7</sup> Courts should examine the extent to which the current implementation of the Transfer Rule furthers the goals it was designed to promote.

First, it is relevant to consider why courts have been deferential. Originally, the NCAA was a private organization that

2. NCAA DIVISION I MANUAL 2006-2007, NCAA OPERATING BYLAWS § 14.5.1, [hereinafter NCAA BYLAW] (“A student who transfers . . . to a member institution from any collegiate institution is required to complete one full academic year of residence at the certifying institution before being eligible to compete for or to receive travel expenses from the member institution, unless the student satisfies the applicable transfer requirements or receives an exception or waiver. . .”).

3. NCAA.org, History, <http://www.ncaa.org/about/history.html> (last visited Jan. 3, 2007) (offering a brief synopsis of the evolution of the NCAA).

4. Sarah M. Kinsky, Note, *An Antitrust Challenge to the NCAA Transfer Rules*, 70 U. CHI. L. REV. 1581, 1582 (2003).

5. NCAA DIVISION I MANUAL 2006-2007, NCAA CONST. §1.3 [hereinafter NCAA CONST.] (“A basic purpose of this Association is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports.”).

6. *Id.*; see generally Rodney K. Smith, *A Brief History of the National Collegiate Athletic Association’s Role in Regulating Intercollegiate Athletics*, 11 MARQ. SPORTS L. REV. 9 (2000).

7. Nat’l Collegiate Athletic Ass’n v. Tarkanian, 488 U.S. 179, 198-99 (1988); Hawkins v. Nat’l Collegiate Athletic Ass’n, 652 F. Supp. 602, 608 (C.D. Ill. 1987) (“Although the NCAA may perform a public function in overseeing the nation’s intercollegiate athletics, it remains a private institution.” (citing *McHale v. Cornell Univ.*, 60 F. Supp. 67, 70 (N.D.N.Y. 1985)).

“perform[ed] a public function in overseeing the nation’s intercollegiate athletics.”<sup>8</sup> Challenges to NCAA rules have been waged on antitrust grounds. The courts have acted by either carving out an exception for the NCAA because of its public function or by holding that the actions are “essentially noncommercial in nature.”<sup>9</sup> Today, there is a strong argument that the NCAA functions as a cartel, acting to further the goals of its member institutions largely by controlling both the means and the ends of production.<sup>10</sup> The interests of the member institutions and those of the student-athletes within the system are not entirely aligned.

Second, it is necessary to examine the details of the Transfer Rule and how it is enforced.<sup>11</sup> Every transfer is subject to a residency requirement.<sup>12</sup> The exceptions and waivers are largely for narrow circumstances, and are unlikely to apply to the majority of student-athletes seeking transfers.<sup>13</sup> Thus, students wishing to avoid the stricture of the residency requirement are left with a series of narrow exemptions and waivers. The Transfer Rule provides no guaranteed exemption for student-athletes seeking a transfer solely for academic purposes. If a student-athlete’s situation does not fall under one of the specific exemptions of Section 14.5<sup>14</sup> or under the “Additional Waivers” of Section 14.8.1.2, “there shall be no waiver by the Association of any of the provisions of this bylaw.”<sup>15</sup> Such a system places discretionary power in the NCAA and leaves those seeking waiver little authority upon which to stake their claim.

This note will explore the traditional rationales offered by the NCAA in implementing the Transfer Rule and suggests that these rationales are not served by the current Rule. Part I frames the environment in which the Transfer Rule exists by tracing the history of the NCAA. Part II explores the traditional rationales offered for justifying the Transfer Rule. In *McHale v. Cornell University*, the NCAA suggested that the purposes of the Transfer Rule are “(1) to prevent transfers solely for athletic reasons, (2) to avoid exploitation of student-athletes, and (3) to allow transfer students time to adjust to

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8. *McHale*, 620 F. Supp. at 69.

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

10. See ARTHUR A. FLEISHER III ET AL., *THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION: A STUDY IN CARTEL BEHAVIOR*, 20-34 (1992).

11. See NCAA BYLAW § 14.5.1.

12. *Id.*

13. Konsky, *supra* note 4, at 1586.

14. NCAA BYLAW § 14.5.

15. *Id.* § 14.8. The additional waivers for the residency requirement, which are permissive rather than mandatory, are described under bylaw 14.8.1.2. *Id.* § 14.8.1.2.

their new environment.”<sup>16</sup> While some regulation of the transfer of student-athletes between member institutions likely furthers these legitimate goals, this note will argue that there are other forces driving the Transfer Rule that are not aligned with such purposes. Finally, Part III offers some suggestions for how courts and the NCAA can align the Transfer Rule with its purported rationales.

## I. EVOLUTION OF THE NCAA AND ITS TRANSFER RULE

The NCAA describes itself as a “voluntary organization through which the nation’s colleges and universities govern their athletics programs.”<sup>17</sup> In reality, the NCAA is much more powerful than this mission statement implies. Member institutions are required to comply with the rules of the NCAA. Failure to become a member of the institution at the very least would likely “thwart” any hopes of being competitive in intercollegiate athletics.<sup>18</sup>

### A. Formation of the NCAA

In 1905, there was concern surrounding the increase in serious injuries and deaths occurring in intercollegiate football.<sup>19</sup> Pleas for reform from President Theodore Roosevelt and the public resulted in the creation of the Intercollegiate Athletic Association of the United States (IAAUS), which later became the NCAA.<sup>20</sup> The NCAA gradually expanded the scope of its power from its initial role—curbing football injuries and “loosely organizing sports”<sup>21</sup>—such that today, the NCAA dominates virtually every aspect of intercollegiate athletics.

While the NCAA began as an institution designed to apply rules and procedures of play on the field, it now exerts control over all of the externalities associated with a functioning intercollegiate athletic system. Beginning largely as a “discussion group and rules-making body,” one of the most prominent shifts occurred in 1921 when the NCAA held its first sanctioned national championship.<sup>22</sup> Since then, the NCAA has been synonymous with college athletics.

16. *McHale*, 60 F. Supp. at 68 n.4.

17. NCAA.org, About the NCAA, [http://www2.ncaa.org/portal/about\\_ncaa/](http://www2.ncaa.org/portal/about_ncaa/) (last visited Jan. 3, 2007).

18. *Nat'l Collegiate Athletic Ass'n, v. Tarkanian*, 488 U.S. 179, 199 n.19 (1988).

19. See NCAA.org, History, *supra* note 3.

20. *Id.* (“The IAAUS officially was constituted March 31, 1906, and took its present name (NCAA) in 1910.”).

21. Konsky, *supra* note 4 (providing a general background of the NCAA and its purpose).

22. See NCAA.org, History, *supra* note 3.

### B. Organizational Structure of the NCAA

In many ways, the organization of the NCAA resembles a corporate structure.<sup>23</sup> The general guidelines for its structure are detailed in Article 4 of the NCAA constitution.<sup>24</sup> The Executive Committee delegates responsibility, while the member institutions within each division are responsible for voting on issues as they arise.<sup>25</sup> To accomplish the governance of several different divisions, the NCAA Board of Directors, representative of the member institutions and their respective divisions, establishes policy and a “strategic plan.”<sup>26</sup> There are also committees and subcommittees that deal with daily business, including the investigation of “potential rule violations” and the levying of penalties.<sup>27</sup>

The NCAA governing bodies are organized to be representative of their members, as reflected in the rulemaking procedures and profit-sharing plans.<sup>28</sup> As the NCAA began to influence all aspects of intercollegiate athletics, however, it developed a brand all its own, one independent of the organizational needs of the members.<sup>29</sup> Pivotal decisions, such as *National Collegiate Athletic Association v. Tarkanian*, demonstrate how the NCAA as an organization is not only independent of its membership, but also can act as a powerful force in driving policy at the member institution level.<sup>30</sup> As the NCAA has evolved, so have opinions on how to properly classify its organizational structure and its impact on the market for college athletics.

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23. Konsky, *supra* note 4, at 1582.

24. NCAA CONST. § 4.01.

25. *Id.* § 4.01.1.

26. *Id.* §§ 4.1, 4.2.2.

27. Konsky, *supra* note 4, at 1582.

28. See NCAA CONST. § 4.5.2 (noting “rulemaking” among the responsibilities of the NCAA Management Council); NCAA CONST. § 4.01.2.2 (“All members shall receive revenue from all gross revenue sources received by the Association, unless specifically excluded, through the division’s revenue distribution formulas.”). The NCAA is managed by representatives of its member institutions and these institutions are the beneficiaries of any revenues generated by the Association. A voluntary organization, intuitively colleges and institutions will only join the NCAA if it is in their own interest to do so. Student-athletes are not members of the NCAA.

29. NCAA.org, The NCAA Brand, [http://www2.ncaa.org/portal/about\\_ncaa/ncaa\\_brand/](http://www2.ncaa.org/portal/about_ncaa/ncaa_brand/) (last visited Jan. 3, 2006) (“Learning. Balance. Spirit. Community. Fair play. Character. These are the attributes that the NCAA promotes through its branding initiative. An important part of the NCAA brand is a consistent image that supports these attributes.”).

30. *Nat’l Collegiate Athletic Ass’n v. Tarkanian*, 488 U.S. 179, 197-98 (1988).

## 1. NCAA as a Cartel

The rights, privileges, and obligations of a business entity are largely determined by the form it takes. The transformation of the NCAA from a limited purpose organization to a truly global force has resulted in confusion over how to classify its business structure. Although the NCAA is technically a “nonprofit” organization, even a cursory evaluation of its operations reveals that in many ways it resembles a cartel.<sup>31</sup>

The business goal of the NCAA is to maximize joint profits among its members.<sup>32</sup> Cartels act by regulating virtually every aspect of the competitive process. This includes regulation, minimization of the cost of “input” (student-athletes), and control over the “output” (games played and level of exposure).<sup>33</sup> By controlling both the means and the ends of production, a cartel is able to set a quantity and a price that is optimal to the cartel.

In economic theory, cartels provide strong incentives for individual members to “cheat” through competitive advantage.<sup>34</sup> As with all cartels, the NCAA’s member institutions retain their individual identities and seek to maximize their individual return by taking advantage of the structure governing the collective. The NCAA has dealt with this issue by instituting a system in which member institutions must remain in good standing with the NCAA’s bylaws.<sup>35</sup> Violations of the NCAA’s constitution and bylaws can result in sanctions or expulsion from membership in the NCAA.<sup>36</sup>

31. See, e.g., *United States v. Walters*, 997 F.2d 1219, 1224-25 (7th Cir. 1993) (Easterbrook, J.) (acknowledging that “[m]any scholars understand the NCAA as a cartel, having power in the markets for athletes,” and that “[t]he NCAA treats this [amateurism] as desirable preservation of amateur sports; a more jaundiced eye would see it as the use of monopsony power to obtain athletes’ services for less than the competitive market price”).

32. *Id.* at 1225.

33. Konsky, *supra* note 4, at 1585 (citing FLEISHER, *supra* note 10, at 5); see FLEISHER, *supra* note 10, at 7-9 (providing the factors of a cartel structure in the context of the NCAA: (1) open collusion among members; (2) revenues to members have increased while “compensation” to student-athletes has remained constant; (3) exclusion of regulation of school brand-names; (4) marginal value of education provided to student-athletes is significantly lower than the value of their performance to the school; and (5) illicit payments to student-athletes which suggest “the presence of rents attempting to find their way into the relevant input”).

34. See JEFFREY M. PERLOFF, *MICROECONOMICS* 426-27 (2d ed. 2001) (“[I]t is in each firm’s best interest for all *other* firms to honor the cartel agreement—thus driving up the market price—while it ignores the agreement and makes extra, profitable sales at the high price.”).

35. *Tarkanian*, 488 U.S. at 183; Konsky, *supra* note 4, at 1585.

36. See generally NCAA CONST. art. 3 (detailing the requirements for membership).

Self-regulation is a necessary component to establishing a successful cartel. Because production can only be controlled if each member institution complies, the cartel is only effective if its rules are aimed at curbing incentives to cheat. For the NCAA, one such rule is the Transfer Rule, which removes any potential incentive, on the part of both the student-athlete and the member institution, to recruit players from other programs. Viewing the Transfer Rule through the lens of cartel theory suggests that it is an anti-cheating mechanism designed to protect the interests of the cartel over the individual interests of member institutions.

With few exceptions, cartels are an illegal form of business organization. Courts have struggled with the application of this general rule to the NCAA, and have swayed between re-characterizing the system altogether and implicitly accepting the cartel structure but carving out an exception to the application of antitrust law. While *Tarkanian* largely forecloses constitutional challenges to the Transfer Rule, other legal grounds are available for student-athletes. As more courts begin to accept that the NCAA is a cartel and not a benign institution,<sup>37</sup> antitrust challenges may become more of a threat to the NCAA.<sup>38</sup>

## 2. NCAA v. Board of Regents

In *NCAA v. Board of Regents of the University of Oklahoma*,<sup>39</sup> considered “one of the most important court cases in sports history,”<sup>40</sup> the Supreme Court held that the “actions of the NCAA in the broadcast rights market for college football did violate the antitrust laws. Output was restricted and prices were raised above the level that would prevail under a more competitive bidding structure.”<sup>41</sup> While the Court firmly acknowledged that “[t]he NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports,” and that the NCAA “needs ample latitude to play that role,” the Court explained that this latitude is not absolute and held that “rules that restrict output are hardly consistent with this role.”<sup>42</sup>

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37. See, e.g., *Walters*, 997 F.2d at 1224-25 (describing the NCAA as a cartel suppressing athletes’ income below market value).

38. See *Konsky*, *supra* note 4, at 1589 (noting that, while the NCAA’s traditional immunity from antitrust challenge has been undermined, few of such challenges have been successful as of yet).

39. *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85 (1984).

40. RODNEY D. FORT, *SPORTS ECONOMICS* 435 (2003).

41. *Id.* at 436.

42. *Bd. of Regents*, 468 U.S. at 120.



This basic approach should be carried over to other antitrust challenges to NCAA rules and regulations given the nature of the NCAA. While latitude is appropriate, rules which are not “consistent” with the core function of the NCAA should be subject to heightened scrutiny, as they were in *Board of Regents*. To the extent that rules foster the “revered tradition of amateurism,” they should be examined with deference; to the extent that those same rules are used as a mechanism for strengthening the cartel, they should be viewed critically.

*Board of Regents* also illustrates the tension between the various conferences within the NCAA, which is a potential source of future conflict as the power of these conferences continues to grow. Recently, conferences have toiled with the prospect of modifying conference rules that may conflict with those of the NCAA.<sup>43</sup> As a cartel, the NCAA is likely to resist such challenges which represent a threat to its market control. Currently profits are controlled by a select group of “administrators, athletic directors, and coaches.”<sup>44</sup>

With the concept of the NCAA as a cartel and the logic of the *Board of Regents* opinion as focusing points, this note will now shift to the inner workings of the NCAA.

### *C. Defining Intercollegiate Athletics: The World in Which the NCAA Operates*

The world of intercollegiate athletics in 2006 is very different from what it was in 1906. “The NCAA is an association of schools which compete against each other to attract television revenues, not to mention fans and athletes” in a market worth billions of dollars.<sup>45</sup> According to the NCAA constitution, one of the central purposes of the NCAA is to “promote and develop educational leadership, physical fitness, athletics excellence and athletics participation as a recreational pursuit.”<sup>46</sup> Thus, amateurism and academic achievement are guiding principles underlying NCAA action.

43. Bud Withers, *Pac-10 Notebook: An Idea Eligible for the Dustbin*, SEATTLE TIMES, Nov. 19, 2004, available at [http://seattletimes.nwsource.com/html/sports/2002095197\\_withers19.html](http://seattletimes.nwsource.com/html/sports/2002095197_withers19.html) (“The Pac-10 is advancing a proposal to the NCAA that would allow the immediate transfer of athletes who currently are required to sit out a year before they become eligible at their new school.”).

44. Konsky, *supra* note 4, at 1585.

45. *Bd. of Regents*, 468 U.S. at 99.

46. NCAA CONST. § 1.2.

## 1. Amateurism

The NCAA traditionally has been portrayed by insiders and the courts alike as an organization regulating “amateur” athletics.<sup>47</sup> As an institution, the NCAA characterizes itself as a protector of amateur sports, holding “amateurism as a central goal.”<sup>48</sup> Despite the NCAA’s desire to “retain a clear line of demarcation between intercollegiate athletics and professional sports,”<sup>49</sup> it has been argued that this line “is faint and fading fast.”<sup>50</sup> Commentators and scholars challenge the “amateur” status of the NCAA.<sup>51</sup> Common sense and practical experience suggest that participation at the college level is required for a professional athletic career in revenue-generating sports. Such a system blurs the line between professional and college sports by its very nature.

The apparent shift away from pure amateurism is most profound in revenue-generating sports,<sup>52</sup> in which the NCAA enters into contracts worth billions of dollars.<sup>53</sup> While Justice White characterized the NCAA as an “unincorporated, nonprofit, educational association” in his *Board of Regents* dissent, the NCAA has arguably moved even further from that characterization since 1984.<sup>54</sup> This big business exists even where the NCAA “manages not to pay its principal producers a wage or a salary.”<sup>55</sup> Although the NCAA constitution requires delineation between professional and intercollegiate athletics, the current system (at least with regard to revenue-generating sports) is arguably one of “unpaid professionals.”<sup>56</sup>

The courts have allowed the NCAA freedom in organizing and applying its rules to both institutions and individual student-athletes.

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47. *Bd. of Regents*, 468 U.S. at 101.

48. Konsky, *supra* note 4, at 1583; see NCAA CONST. § 1.3.1 (“A basic purpose of this Association is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports.”).

49. NCAA CONST. § 1.3.1.

50. Melvin L. Braziel, *United We Stand: Organizing Student-Athletes for Educational Reform*, 4 SPORTS LAW J. 81, 83 (1997).

51. See generally Konsky, *supra* note 4, at 1584.

52. *Id.* at 1581 (stating that revenue-generating sports are typically men’s basketball, football, and ice hockey).

53. *Id.* at 1584 (“In revenue sports, amateurism is arguably a relic of the past.”).

54. Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 120 (1984) (White, J., dissenting).

55. ANDREW ZIMBALIST, UNPAID PROFESSIONALS: COMMERCIALISM AND CONFLICTS IN BIG-TIME COLLEGE SPORTS 6 (Princeton 1999).

56. *Id.* at 53.

The maintenance of amateurism as a central principle in all sports may be a vital component in ensuring the preservation of this freedom.<sup>57</sup> The dissent by Justices White and Scalia in *Board of Regents* was based on the understanding that the NCAA and its “members seek to provide a public good—a viable system of amateur athletics.”<sup>58</sup> This belief was used to justify their position that the NCAA’s actions were not “purely commercial.”<sup>59</sup> If the amateurism status of the NCAA is diluted, a court may question whether the NCAA is regulating a noncommercial market as its core function, which in turn could erode the deference traditionally granted by the courts, especially as to antitrust challenges.

## 2. The Education Principle

The second guiding principle of the NCAA constitution and bylaws is a commitment to operating the intercollegiate athletics systems “as an integral part of the educational program and the athlete as an integral part of the student body.”<sup>60</sup> The NCAA achieves this goal by establishing basic minimum academic requirements for all student-athletes.<sup>61</sup> This dedication to education is used by courts as a primary justification for recognizing amateurism in college athletics.

Individuals who choose to participate in intercollegiate athletics are required to have “minimum scores on college entrance exams and to have satisfactorily completed standard core high school courses.”<sup>62</sup> In addition, once enrolled and participating in a sport, the student-athlete is required to maintain a designated grade point average and to maintain a certain course load each semester.<sup>63</sup> While critics have challenged their rigor, these rules nonetheless represent a threshold of classroom competence, both before and during participation in college athletics.<sup>64</sup>

The major criticism of these academic requirements concerns both their centrality and legitimacy.<sup>65</sup> Critics argue that athletics are

57. *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 545 (1987) (“Neither the conduct nor the coordination of amateur sports has been a traditional governmental function.”).

58. *Bd. of Regents*, 468 U.S. at 122 (White, J., dissenting).

59. *Id.* at 121 (White, J., dissenting).

60. NCAA CONST. § 1.3.1.

61. *See* NCAA BYLAW § 14.01.2.

62. Konsky, *supra* note 4, at 1583 (citing ZIMBALIST, *supra* note 55, at 32-33).

63. *Id.*

64. *Id.*

65. *Id.* at 1583 n.16 (citing Christopher L. Chin, Comment, *Illegal Procedures: The NCAA’s Unlawful Restraint of the Student-Athlete*, 26 LOYOLA L. REV. 1213, 1234 (1993)

designed to be a part of the “educational system” of the students, and that the academic requirements are often mere puffery.<sup>66</sup> This is most likely the case in programs that consistently compete at the highest level.<sup>67</sup> Generally speaking, however, graduation rates indicate that education takes a back seat to athletic performance.<sup>68</sup> There has been growing concern that certain student-athletes “do just enough academically to remain eligible for athletic competition.”<sup>69</sup> The question is whether the NCAA facilitates this environment through a high stakes game where money and endorsements are awarded to winning teams. The balance between maximization of profit and adherence to guiding principles is a calculus that the members of the NCAA must make.

The rigor of these various academic requirements has also been called into question. The NCAA bylaws require minimum GPAs and enrollment hours, but there is evidence suggesting that loopholes allow athletes to mitigate the effect of these requirements by enrolling in “athlete” classes which are less strenuous than mainstream courses.<sup>70</sup> Such a system runs counter to the basic principle: “The admission, academic standing and academic progress of student-athletes shall be consistent with the policies and standards adopted by the institution for the student body in general.”<sup>71</sup> This arguably flawed system, full of loopholes, reinforces a “class system” in which athletes are seen as an entirely different class of students.<sup>72</sup> The maintenance of college athletics’ amateur status is invariably tied to

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(“[T]he NCAA’s academic goals are fallacious because neither the NCAA nor the student-athlete pursues them.”); Rick Telander, *Something Must be Done*, SPORTS ILLUSTRATED, Oct. 2, 1989, at 92) (asserting that “the nation’s universities are shamelessly exploiting the players and debasing themselves by perpetuating the myth of the ‘amateur student athlete’”).

66. Konsky, *supra* note 4, at 1583.

67. *Id.*

68. See Steve Weiberg, *BCS Schools Don’t Measure Up*, USA TODAY, Oct. 18, 2002, at 3C. *But see* Welch Suggs, *Athletes’ Graduation Rates Hit All-Time High*, CHRON. HIGHER EDUC., Oct. 4, 2002, at 47.

69. Konsky, *supra* note 4, at 1583; see Braziel, *supra* note 50, at 85 (suggesting that preparation time puts a burden on education).

70. See, e.g., Press Release, NCAA Infraction Appeals Committee, Howard University Public Infractions Appeals Committee Report (July 16, 2002), at § III.E, available at <http://www.ncaa.org/releases/infractions/2002071601in.htm> (providing an example of certain classes which are arranged for athletes, as well as an example of the type of investigation undertaken in these situations: “Student-athletes C and D were enrolled in a recreation course in the fall 1994 semester. The class was for three hours of credit. Both student-athletes were awarded grades of “A” even though they attended no classes and did not complete any assignments or examinations. . . .”).

71. NCAA CONST. § 2.5.

72. ZIMBALIST, *supra* note 55, at 12.

the connection between the student-athlete and the education he is receiving.

It is within this general framework that the NCAA Transfer Rule exists. The regulations adopted by the NCAA are designed to foster the goals of the NCAA, ensure the protection of the brand, and to further the interests of the individual member institutions.

#### *D. The NCAA Transfer Rule*

The Transfer Rule illustrates the competing interests between student-athletes and the member institutions that comprise the NCAA.<sup>73</sup> The Rule states that a “student who transfers . . . to a member institution from any collegiate institution is required to complete one full academic year of residence at the certifying institution before being eligible to compete for or to receive travel expenses from the member institution. . . .”<sup>74</sup> Eligibility is not lost during this transfer year, but all eligibility must be used within a five year period which begins at the original institution.<sup>75</sup> The NCAA “Transfer Regulations” also include a thorough explanation of the term “residence.”<sup>76</sup> In general, transfers between different four-year Division I schools are the most difficult and are the least likely to be exempted.<sup>77</sup> The Transfer Rule emphasizes the form of the transfer—for example, moving from Division I to Division II—rather than the motivations behind the transfer.<sup>78</sup> This section analyzes the ability of the Transfer Rule to further the rationales traditionally used to substantiate its use.

##### 1. Current Implementation of the Transfer Rule

In practice, the Transfer Rule restricts the movement of players between member institutions by placing a one-year penalty on a student-athlete for changing schools. The Transfer Rule gives both the individual institutions and the intercollegiate athletic system

73. See NCAA BYLAW § 14.5.

74. NCAA BYLAW § 14.5.11. The NCAA has recently adjusted the bylaws regulating whether students who transfer from a four-year college can receive financial aid during their transfer year; these modifications become effective August 1, 2007. See *id.* § 14.5.5.1.1-2.

75. NCAA BYLAW § 14.5; see Konsky, *supra* note 4, at 1586 (“Practically, then, a student-athlete wishing to use his maximum four years of athletic eligibility can transfer colleges only once.”).

76. NCAA BYLAW § 14.5.1.1.

77. Konsky, *supra* note 4, at 1586.

78. *Id.*

more stability and predictability by restricting player mobility. However, such a restriction also reduces the “optimal matching of players and teams.”<sup>79</sup> Without the one-year penalty, players would not be able to transfer to schools and teams that value them the most. With the penalty year, players are forced to consider academic and athletic costs of the one-year penalty when deciding whether to transfer. In this way, the Transfer rule actually undermines the basic purpose of the NCAA as an institution that “strives to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body.”<sup>80</sup> While input efficiency in the talent market should not be a driving force in a system with these goals at its core, the restriction should not be so burdensome that it inhibits student-athletes from seeking out the most optimal match along both academic and athletic lines.<sup>81</sup> Therefore, the rigor of the Transfer Rule needs to be examined to understand the dynamics of these competing interests.

The existence of the Transfer Rule supports the categorization of the NCAA as a cartel. Seeking to regulate inputs and outputs at a systemic level, the Transfer Rule’s rationales are likely to be analyzed and applied differently when viewed through the lens of cartel theory. The one broad Transfer Rule exception that exists is valid only for a “sport other than basketball, Division I-A football or men’s ice hockey.”<sup>82</sup> Thus, the sports that typically have the potential to create revenue are specifically excluded from the exception<sup>83</sup>—that is, they are specifically subject to the Transfer Rule. The structure of the Rule ensures stability in sports that generate the most revenue.

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79. *Id.*

80. *Id.* at 1582.

81. *Id.* at 1583.

82. NCAA BYLAW § 14.5.5.2.10(a); *see also id.* § 14.5.1 (“In the sport of basketball a transfer student-athlete who satisfies the applicable transfer requirements or receives an exception or waiver as set forth in this section, but initially enrolls as a full-time student subsequent to the first term of the academic year shall not be eligible for competition until the ensuing academic year.”).

83. *See id.* § 14.5.5.2.10(a).

## 2. Exceptions to the NCAA Transfer Rule

Besides the broad exception mentioned above, most of the exceptions to the Transfer Rule within the NCAA rules apply in very specific circumstances.<sup>84</sup> These specific exceptions are unlikely to apply to most student-athletes seeking to evade the Transfer Rule.<sup>85</sup> The “One-Time Exception” clause of the Transfer Rule requires the student-athlete to meet four conditions.<sup>86</sup> Unless each condition is satisfied, the exemption is not available and the student-athlete is left either to find another specific exemption or to seek a permissive waiver from the NCAA Management Council.<sup>87</sup>

The failure of the NCAA to institute an exception policy consistent with the very rationales that have been suggested for its legitimacy may dilute the Transfer Rule’s validity. While courts have been deferential to the NCAA in making policy, even in situations where the rule “may produce unreasonable results in certain situations,”<sup>88</sup> the changing dynamics of the NCAA should encourage courts to play a greater role in guaranteeing that the policy rationales for the Transfer Rule are realized.

Challenges to the Transfer Rule, as well as other NCAA rules and procedures, have been brought on antitrust grounds.<sup>89</sup> Such challenges are likely to continue given the holdings in *Tarkanian* and *Board of Regents*.<sup>90</sup> Despite this opposition, courts have consistently

84. See, e.g., *id.* § 14.5.5.2.2 (Exchange Student Exception); *id.* § 14.5.5.2.3 (Discontinued Academic Program Exception); *id.* § 14.5.5.2.5 (Military Service, Church Mission Exception).

85. Konsky, *supra* note 4, at 1586.

86. The rules require that:

(a) The student is a participant in a sport other than basketball, Division I-A football, or men’s ice hockey at the institution to which the student is transferring . . .

(b) The student has not transferred previously from one four-year institution . . .

(c) The student is in good academic standing and meets the progress toward degree requirements . . .

(d) If the student is transferring from a NCAA or NAIA member institution, the student’s previous institution shall certify in writing that it has no objection to the student’s being granted an exception to the transfer-residence requirement.

NCAA BYLAW § 14.5.5.2.10.

87. NCAA BYLAW § 14.8.1.2.

88. *Shelton v. Nat’l Collegiate Athletic Ass’n*, 539 F.2d 1197, 1198 (9th Cir. 1976).

89. See generally Konsky, *supra* note 4. For a definition of what constitutes “antitrust” grounds, see Sherman Act, 15 U.S.C. § 1 (2000) (making illegal “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States”).

90. See *Nat’l Collegiate Athletic Ass’n v. Tarkanian*, 488 U.S. 179, 198-99 (1988) (largely foreclosing constitutional challenges to NCAA rules, holding that the NCAA is not

ruled in favor of the NCAA and upheld application of the Transfer Rule.<sup>91</sup> While *Board of Regents*<sup>92</sup> may represent a shift in the way courts analyze antitrust challenges to NCAA policies, a general reluctance to subject the NCAA to full scrutiny remains.<sup>93</sup> The NCAA is a private institution that: “perform[s] a public function in overseeing the nation’s intercollegiate athletics.”<sup>94</sup> Claims challenging the Transfer Rule on antitrust grounds are generally dismissed because the Sherman antitrust laws govern commercial activity, and courts have reasoned that these challenges to the NCAA’s rules and procedures are “essentially ‘noncommercial’ in nature.”<sup>95</sup> Yet the evolution of the NCAA suggests that it is becoming an association rooted in the regulation of commercial activity. As the justification for weak application of the Sherman Act is diluted by the NCAA’s gradual movement away from solely protecting amateurism, courts will likely be more suspicious of the motivations behind the rules and its ability to promote its own policies.

## II. THE RATIONALES FOR THE TRANSFER RULE

Instead of offering a facial challenge to the residency requirement, this note will focus on whether the rationales of the Transfer Rule are furthered by the Rule as it exists today. These rationales, especially to “as applied” challenges, may become more significant as a result of the increasingly “commercial” nature of the activities of the NCAA.<sup>96</sup>

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a state actor); *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85 (1984) (representing a successful antitrust challenge brought against the NCAA, demonstrating the Court’s willingness to apply a quick look rule of reason analysis even to NCAA decisions when such an approach is warranted).

91. See, e.g., *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059 (9th Cir. 2001); *McHale v. Cornell Univ.*, 620 F. Supp. 67, 69 (N.D.N.Y. 1985).

92. *Bd. of Regents*, 468 U.S. 85.

93. *Konsky*, *supra* note 4, at 1589 (“While Board of Regents clearly overturned the presumption that the NCAA is automatically exempt from antitrust scrutiny, few successful antitrust challenges to the NCAA policies have been waged since. Courts often find NCAA regulations not to be antitrust violations because either: (1) they are not sufficiently commercial to be subject to antitrust scrutiny; or (2) their procompetitive effects trump their anticompetitive effects.”).

94. *McHale*, 620 F. Supp. at 70.

95. See, e.g., *Tanaka*, 252 F.3d at 1062 (citing the district court opinion)

96. See *Tibor Nagy, The “Blind Look” Rule of Reason: Federal Courts’ Peculiar Treatment of NCAA Amateurism Rules*, 15 MARQ. SPORTS L. REV. 331, 332-33 (2005) (recognizing that “[c]ollege athletes have repeatedly brought suit to challenge the NCAA’s bylaws, principally on antitrust grounds, and they will undoubtedly continue to do so . . . All of this, the courts have held, is justified not by any economic reasons but by the NCAA’s



### A. Traditional Rationales for the Transfer Rule

The NCAA was created to promote “the organization’s academic and amateurism goals.”<sup>97</sup> On its face, the regulation of transfers between member institutions helps to further these general goals.<sup>98</sup> It is rational for the NCAA to adopt some limitation on the transfer of student-athletes given the obvious adjustment costs associated with transferring to a different institution. . However, the rules and mechanisms adopted to curb transfers should be evaluated in accordance with their ability to promote the goals of the NCAA and the rationales for regulating transfers between member bodies.

In *McHale v. Cornell University*, the NCAA argued that the purposes of the Transfer Rule were: “(1) to prevent transfers solely for athletic reasons, (2) to avoid exploitation of student athletes, and (3) to allow transfer students time to adjust to their new environment.”<sup>99</sup> Thus, the residency requirement and its existing line-item exceptions should be examined in accordance with these three core rationales. The central issue is whether the current Rule serves the functions it was designed to perform.

#### 1. Preventing Transfers Solely For Athletic Reasons

The first rationale for the Transfer Rule—to prevent transfers solely for athletic reasons—is rooted in the NCAA’s core goal of amateurism. This goal is widely accepted as a legitimate purpose, but litigation surrounding amateurism has centered on the application of the “means chosen by the NCAA to achieve it.”<sup>100</sup> Disallowing transfers solely for athletic purposes furthers the goal of amateurism by penalizing student-athletes for making decisions without considering the externalities associated with transferring, such as harm to their academic pursuits. Yet, after examining the residency requirement penalty and specified exemptions, it is evident that this

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purported desire to ensure that college athletes ‘be protected from exploitation by professional and commercial enterprises.’”)

97. Konsky, *supra* note 4, at 1587 (noting the NCAA’s stated intent to “provide a better environment for the student-athlete’s collegiate experience and to establish appropriate standards to govern the manner in which institutions compete with each other both on and off the playing field” (quoting NCAA 2002-03 TRANSFER GUIDE at Introduction)).

98. *See id.*

99. *McHale*, 620 F. Supp. at 68 n.4.

100. *Shelton v. Nat’l Collegiate Athletic Ass’n*, 539 F.2d 1197, 1198 (9th Cir. 1976).

purported rationale for the Transfer Rule is “both chimerical and disingenuous.”<sup>101</sup>

A rational extension of this stated justification would be to exempt student-athletes who wish to transfer for laudable reasons completely unrelated to athletics, such as for purely academic pursuits. Within the Transfer Rule, however, there is no blanket exemption for those student-athletes who wish to transfer solely for academic reasons.<sup>102</sup> If one of the most “basic” purposes of the NCAA is to facilitate amateurism, i.e., “a clear line of demarcation between intercollegiate athletics and professional sports,” an exception for those student-athletes wishing to transfer solely for academic reasons seems to further this most “basic purpose.”<sup>103</sup> Despite this seemingly logical conclusion, the NCAA has not expanded the line-item exceptions to include an exception for those student-athletes wishing to transfer for academic reasons. The exceptions are mostly structural and focus largely on whether the transfer will result in a change in division.<sup>104</sup>

One potential problem could be the implementation of such an exemption. While an exception solely for academic reasons may be ideal in practice, it could theoretically be used by student-athletes as a catch-all exemption. The NCAA would have to engage in very case specific analyses and rely heavily on fact finding. However, there is no reason to suspect that an exception for academic reasons would not be as specific and demanding as the existing exemptions on the petitioner to establish facts consistent with the exception.<sup>105</sup> Applying an academic exception to the Transfer Rule would signal the NCAA’s recognition that transfers solely for academic reasons are perfectly legitimate.

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101. Ray Yasser, *A Comprehensive Blueprint for the Reform of Intercollegiate Athletics*, 3 MARQ. SPORTS L.J. 123, 148 (1993).

102. See NCAA BYLAW § 14.5.5.2.10. The rules do not allow a student-athlete to transfer schools as a way of avoiding academic requirements, nor do they allow for an exception to the residency requirement for those students who wish to transfer solely for academic reasons. There is no blanket exemption for such a purpose and academic exemptions are not one of the available waivers under bylaw § 14.8.1.2. See *id.* § 14.8.1.2. Given that “[o]ther than these, there shall be no waiver by the Association of any of the provision of this bylaw,” there is no exemption. See *id.* § 14.8.

103. NCAA CONST. § 1.3.1 (“The competitive athletics program of member institutions are designed to be a vital part of the educational system. A basic purpose of this Association is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body. . .”).

104. See generally NCAA BYLAWS § 14.5.5.2 (introducing the various exceptions for transfers from four-year colleges).

105. See, e.g., *id.* §§ 14.5.5.2.1–6.

As with many agencies, fact finding and case-by-case analysis are at the core of how NCAA Committees operate.<sup>106</sup> The difficulty in implementing an academic exemption would be mitigated by the fact that the current system is one predicated on narrow exemptions, and all cases outside of a few narrow circumstances are handled by committees.<sup>107</sup> Extending the Rule's exemption policies would narrow the discretion with which an appellate body can grant exemptions and make its findings appear more aligned with the NCAA's amateurism goals. In addition, the allowance of an exception for academic reasons would provide the student-athlete with an identifiable provision upon which to rest his claim for waiver. An academic exception for transfers would strengthen the NCAA's position that the Transfer Rule is designed in part to thwart attempts to transfer solely for athletic reasons.<sup>108</sup>

It is true that within the current system, student-athletes can appeal rulings against them, if their case does not fall within the narrow exceptions available under the rules.<sup>109</sup> However, case history suggests that the NCAA has not adopted a policy of granting exemptions in all cases where the student-athlete seeks to transfer solely on academic grounds. In *McHale v. Cornell University*, the plaintiff sought an exemption from the residency requirement in his request to transfer from the University of Maryland to Cornell University. McHale argued that he was transferring solely for "academic reasons" and thus "his competing [would] not subvert the purposes of the rule."<sup>110</sup> The NCAA advised Cornell that McHale did not "qualify for a waiver" and therefore would be required to sit out one year under the terms of the rule.<sup>111</sup> McHale's case exhibits the NCAA's apparent reluctance to grant waiver in situations where the student-athlete is transferring to a different school for non-athletic reasons.<sup>112</sup> Thus, a change in the exception policy would not be merely a codification of an informal policy that the NCAA has instituted through the traditional appeals process.<sup>113</sup>

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106. See, e.g., *id.* §§ 32.1-3 (detailing the requisite procedures to be taken during review of alleged violations).

107. See Konsky, *supra* note 4, at 1586.

108. See *McHale v. Cornell Univ.*, 620 F. Supp. 67, 68 (N.D.N.Y. 1985).

109. NCAA BYLAW § 14.12.1.

110. *McHale*, 620 F. Supp. at 68.

111. *Id.* Cornell University, as a member institution of the NCAA, is obligated to comply with the rulings of the NCAA as a condition to their membership. *Id.* While the plaintiff's claim was filed against Cornell and the NCAA, it is the decision of the NCAA that is at issue. See *id.*

112. *Id.* at 68-69.

113. *Id.* at 68.

By refusing to explicitly allow transfers for academic reasons, student-athletes may be persuaded not to transfer and thereby make a decision contrary to the best interests of their academic pursuits. Cases such as *McHale* demonstrate the NCAA's caution in granting such exceptions.<sup>114</sup> The difficulty in obtaining a waiver and the general uncertainty in the process may dissuade student-athletes from making decisions in their best interest.<sup>115</sup> The waiver system and cases like *McHale* suggest that the rules are designed to prevent transfers broadly, rather than to merely prevent those transfers based solely on athletic motivations.<sup>116</sup> "[T]he rigidity of the Transfer Rule" and the nature of its exceptions, coupled with the waiver system which accompanies it, "belies the argument that the NCAA is primarily concerned with academics."<sup>117</sup>

## 2. Avoiding the Exploitation of Student Athletes

A second rationale offered by the NCAA for the Transfer Rule is that it helps to avoid the exploitation of student-athletes.<sup>118</sup> To further this end, the NCAA must assume that the typical student-athlete has such a high degree of naiveté that it must act in a paternalistic fashion. This rationale also assumes that it is always in the best interest of the student-athlete to not seek a transfer.

While the NCAA was originally forged to address imminent concerns related to player safety on the field, its expansion into nearly every facet of college athletics has shifted its focus away from protecting student-athletes to becoming an organizing principle for its member institutions.<sup>119</sup> The original mandate of the NCAA was to address problems with the cohesion of rules of play and extraneous policies between colleges and universities, problems which were so profound that they affected the safety of student-athletes.<sup>120</sup> Yet today

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114. *Id.*

115. *Id.*

116. Until recently the only exception that explicitly dealt with a student's academic situation was Rule 14.5.5.2.3, Discontinued Academic Program Exception ("The student changed institutions in order to continue a major course of study because the original institution discontinued the academic program in the student's major."). NCAA BYLAW § 14.5.5.2.3. However, effective August 1, 2005, the rules now allow a student-athlete to transfer without the one-year penalty if that student-athlete has graduated and is transferring to pursue a graduate degree. *See* NCAA BYLAW § 14.1.9.1.

117. Kinsky, *supra* note 4, at 1598.

118. *McHale v. Cornell Univ.*, 620 F. Supp. 67, 68 (N.D.N.Y. 1985).

119. *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 99 (1984).

120. NCAA.org, History, *supra* note 3.

there is a strong argument that this original purpose for the NCAA has been supplemented by the somewhat paradoxical desire of the member institutions to work collectively in order to further individual interests.<sup>121</sup> A plain reading of the Transfer Rule fails to yield a clear connection between its strictures and avoiding the exploitation of student-athletes.

Most scholars sharply contrast the NCAA with a paternalistic organization that watches over the best interests of the student-athletes competing within the system.<sup>122</sup> The rules and regulations of the NCAA apply to the “member institutions,” rather than directly to the student-athletes.<sup>123</sup> While the NCAA’s interests are undoubtedly not in complete conflict with those of the student-athletes, the Transfer Rule is “arguably meant to further schools’ commercial interests in maintaining high-quality athletic programs at a low cost.”<sup>124</sup> The NCAA enforces the regulations it implements by sanctioning the member institutions who do not comply, thus protecting the interests of the collective.<sup>125</sup>

Restrictions on transfer in a system that upholds amateurism should be based on the best interest of the student-athlete rather than on the interests of member institutions. Ultimately, the Rule mitigates the possibility that member institutions will attempt to “cheat” the system by recruiting players already playing for competing member institutions.<sup>126</sup> Mechanisms designed to deter such “cheating” are often signals to economists that a cartel system is present.<sup>127</sup> When viewed as a cartel, the NCAA seems more concerned with preventing member institutions from exploiting the NCAA than with preventing the exploitation of student-athletes.

### 3. Allowing Transfer Students Time to Adjust to Their New Environment

The third rationale offered for the Transfer Rule is that the Rule provides transfer students with time to adjust to their new

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121. See generally FLEISHER, *supra* note 10 (hashing out the case for the NCAA as a cartel).

122. Konsky, *supra* note 4, at 1596.

123. NCAA CONST. § 1.3.2 (stating that the member institutions have the obligation to “apply and enforce this legislation”).

124. Konsky, *supra* note 4, at 1596.

125. *Id.* at 1585.

126. See discussion *supra* Part I.B.1.

127. See discussion *supra* Part I.B.1.

environment.<sup>128</sup> This rationale is similar to the last in its depiction of the NCAA as a paternalistic organization looking out for the best interests of the student-athletes.

While this purpose may be legitimate, the current exemptions and appeals process do not further its alleged rationale. Certain exceptions specifically allow students to forego this “necessary” period of adjustment. Waiver of the residency requirement is granted as a line-item exception to those students who are transferring from junior colleges to four-year colleges and universities in certain situations.<sup>129</sup> It seems inconsistent with the foregoing policy, however, to grant waivers in situations where students are transferring from community colleges to four-year institutions, as the academic, social, and athletic cultures of these two types of institutions are likely to be the most juxtaposed.<sup>130</sup> By refusing to grant exceptions to students who transfer to schools with dramatically different environments, the Transfer Rule is not aligned with its purpose.<sup>131</sup>

Requiring a year of residency before competing to justify a necessary adjustment period seems out of step with the general process of becoming a student-athlete. The NCAA is comfortable allowing a first-year student fresh out of high school to compete in his first semester of matriculation at a member institution, yet is wary that individuals transferring to often similar institutions are incapable of adjusting properly.<sup>132</sup> Requiring a full year of residency, as opposed to alternative time periods such as full or half semesters, thus significantly dilutes the relationship between the Transfer Rule and the best interest of the student-athletes.

*B. The “Real Rationale” Underlying the Residency Requirement of the NCAA Transfer Rule*

After analyzing these three rationales,<sup>133</sup> it does not appear that the existing Transfer Rule is designed to further them. Rather, it is likely that there is a fourth rationale not clearly embodied in case law or NCAA rhetoric. “Athletic looting,” or allowing members to recruit and compete for active players, is a destabilizing practice.<sup>134</sup> If student-athletes are allowed to transfer at-will with little

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128. *McHale v. Cornell Univ.*, 620 F. Supp. 67, 68 n.4 (N.D.N.Y. 1985).

129. See NCAA BYLAW §§ 14.5.4.1-2.

130. Konsky, *supra* note 4, at 1598.

131. *Id.*

132. *Id.*

133. *McHale*, 620 F. Supp. at 68.

134. Withers, *supra* note 43.

consequence, institutions may be forced to constantly compete for each other's players, resulting in an unstable system.<sup>135</sup> In addition, such a system increases the operating costs of athletic departments. Although never articulated by the NCAA, the rationale is to combat a potential floodgates problem and provide stability for member institutions who collectively act as a cartel.

Recognizing value in regulating the transfer of student-athletes, and recognizing that the current rule scheme fails to completely further its purported goals, it becomes apparent that change is needed. This is not to suggest that the NCAA should be forbidden from making rules that conflict with the interests of its student-athletes. While the NCAA serves a public function, it also serves the interests of the members themselves.<sup>136</sup> When the NCAA is engaged in legitimate rule making that promotes something other than amateurism, the standard of judicial review should be heightened.<sup>137</sup> Given the changing nature of the NCAA, some of its rationales no longer aim to serve a public function, which should have a dramatic impact when reviewing challenges to its policies.

### III. ADJUSTMENT: ALIGNING THE RULE WITH ITS RATIONALES

There are two likely paths to instigate change. First, advocates can rely on the NCAA to voluntarily change its rules and find a better balance of its stated rationales with the interests of student-athletes. For example, one recent decision allowed students who have graduated from an undergraduate institution to transfer to another institution without being subject to the residency requirement if they are pursuing graduate studies and have remaining eligibility. Like other exceptions, this rule is narrow and unlikely to affect the

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135. The NCAA has argued:

[N]ot only will the NCAA be harmed if the requested relief is granted, the NCAA's other member institutions will be harmed if this Court orders the NCAA to waive its transfer rules as to Plaintiff and orders the NCAA to allow Plaintiff to compete despite her ineligibility. . . . The uniform enforcement of the rules at all member institutions is necessary to preserve fair competition and the integrity of the respective sports (issues at the very center of the NCAA's mission and purpose).

Brief of Petitioner at \*17, *Nat'l Collegiate Athletic Ass'n v. Yeo*, 171 S.W.3d 863 (Tex. 2003) (No. 03-0753), 2004 WL 1810919 (citing NCAA Motion to Dissolve at 17).

136. *Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 198 n.18 (1988) ("Quite properly, [Tarkanian] does not point to the NCAA's overriding function of fostering amateur athletics at the college level. For while we have described that function as "critical," by no means is it a traditional, let alone an exclusive, state function") (citations omitted).

137. *Id.* at 198.

majority of student athletes. Nevertheless, the rule demonstrates that the NCAA can adjust its rules regulating transfer to better promote its stated goals.

Through the lens of cartel theory, the following would seem to hold: The NCAA, as a body of member institutions, benefits from a strict Transfer Rule because it allows for stability and predictability. Student-athletes benefit from a rule regulating transfer only to the extent that it furthers the overall utility of their experiences. Since the institutions that constitute the NCAA have a direct voice in the rules that it adopts, it is likely that the Transfer Rule will remain as it is unless outside bodies force change.

### A. Changing the Standard of Review

The NCAA of today is very different from the NCAA at its founding. The NCAA exists independent of its student-athletes and member institutions. It is unclear whether the interests of the student-athletes are completely aligned with the interests of the NCAA. As long as courts continue to give the traditional level of deference to the NCAA, which has evolved into a quasi-voluntary organization, the rules are unlikely to change. As a justification for heightened scrutiny, courts should recognize that the NCAA's concerns are not limited to the noble cause of creating a "public good."<sup>138</sup>

The characterization of the NCAA as an "unincorporated, nonprofit, educational association" has justified a loose rational basis standard of review.<sup>139</sup> Yet this description of the NCAA is no longer reasonable, and therefore must be changed. The change, however, need not be dramatic. Under the principle of *stare decisis*, it is unlikely and perhaps unwise to dramatically redefine the relationship between the NCAA and antitrust laws. Change can result by adjusting the level of deference. In fact, prior cases can be distinguished by simply recognizing that the NCAA itself has evolved into a different Association and therefore warrants a different standard of review.

Requiring the NCAA to evaluate its rationales for the Transfer Rule to specific cases in litigation may force the NCAA to rethink the Rule's legitimacy. The Supreme Court did this in a different context in *Board of Regents*. The Court declined to conclude that the NCAA's

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138. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 122 (1984).

139. *Id.*



interest in amateurism “justifies the regulation challenged.”<sup>140</sup> Instead, while still granting a certain degree of “latitude” to the NCAA, the Court balanced the NCAA’s justifications and rationales against those offered by the petitioner.<sup>141</sup> The Court held that “the NCAA has restricted rather than enhanced the place of intercollegiate athletics in the Nation’s life.”<sup>142</sup> An extension of this type of analysis to challenges of the residency requirement may force the NCAA to adjust its policies to ensure that it can justify the Rule. After *Tarkanian* it is clear that any such challenges will only be successful if waged under the Sherman Act.

In this way, all that may be required of courts is the recognition that the NCAA will no longer be granted the level of deference it has traditionally been granted on policy decisions affecting the interests of student-athletes. Student-athletes are not represented in the NCAA, have no voice in NCAA decision-making, and yet are dramatically affected by the actions of the NCAA. Member institutions, as members of a cartel, engage in rule-making, largely left to their own discretion. Such a power imbalance can be mitigated by engaging in a heightened standard of review. Simply requiring that the NCAA not only state its rationales for the Rule, but also explain how those rationales are furthered by the challenged policy in specific situations may initiate internal change. If courts continue to defer to the NCAA even when it produces “unreasonable results,” as in *Shelton*, it is unlikely that the Transfer Rule will ever be amended.<sup>143</sup>

### B. NCAA Action

Until pressure is placed on the NCAA to seriously reexamine the Transfer Rule, it is unlikely that any change will occur. If courts demand a showing of alignment between the Rule and its rationales, it is possible that the NCAA may take certain incremental steps to help align the reasons stated in *McHale* with the rules and procedures implemented.<sup>144</sup>

First, the interests would be aligned by an expansion of the Transfer Rule exceptions. As previously stated, one such example of this expansion is the “One-time Transfer Exception,” read in combination with general eligibility rules which allows for an

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140. *Id.* at 117.

141. *Id.* at 121.

142. *Id.*

143. *Shelton v. Nat'l Collegiate Athletic Ass'n*, 539 F.2d 1197, 1197 (9th Cir. 1976).

144. *McHale v. Cornell Univ.*, 620 F. Supp. 67, 68 (N.D.N.Y. 1985).

exception for graduate students with remaining eligibility. Further allowances for transfers rooted in academic purpose, would give guidance to student-athletes and create a system that recognizes the importance of educational aspirations in addition to preserving amateurism.

Second, greater detail and flexibility within the Transfer Rule would help to align the Rule with its rationales. A blanket one-year "adjustment period" seems arbitrary in certain situations, especially when a student-athlete transfers to a school that is similar to his or her former school, either geographically or academically.<sup>145</sup> Rule flexibility, designed in accordance with the specific factors that warrant an adjustment period, will strengthen the connection between the rationales for the Rule and the Rule itself. The current procedure is based on a case-by-case analysis. Such a system would allow for a smooth transition from a strict one-year requirement to an individual analysis in accordance with the rationales for the Rule.

Recently, there has been much debate over whether the "One-Time Transfer Exception" should be amended.<sup>146</sup> A proposal to waive the current restriction on Division I Football, Basketball, and Hockey was proposed for 2006, but it was rejected as in years past.<sup>147</sup> In addition, conferences may take a more active role by collectively modifying their own conference transfer rules and by voting on modifications to the current NCAA Transfer Rule.<sup>148</sup> Despite these potential avenues of change, the current Rule remains.

As recently as last year, the NCAA demonstrated its apparent unyielding commitment to the Rule. In the aftermath of Hurricane Katrina, student-athletes from Tulane, the University of New

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145. *Id.*

146. NCAA BYLAW § 14.5.5.2.10.

147. NCAA Division I Legislative Proposals (2006), available at <http://org.elon.edu/ncaafara/DI-LRC05.html> (last visited Jan. 3, 2007) (including the 2005-82 Proposal, "In basketball, football and men's ice hockey, to allow a student-athlete who was not recruited by the original four-year institution and who has never received institutional athletically related financial aid to be eligible for the one-time transfer exception.").

148. See, e.g., Antonya English, *SEC Coaches Aren't Sold on Transfer Rule*, ST. PETERSBURG TIMES, Aug. 2, 2006, [http://www.sptimes.com/2006/08/02/Sports/SEC\\_coaches\\_aren\\_t\\_so.shtml](http://www.sptimes.com/2006/08/02/Sports/SEC_coaches_aren_t_so.shtml) (describing the general sentiment of the Southeastern Conference that NCAA BYLAW § 14.5.5.2.3, see *supra* note 116, allowing graduate students an exemption from the Transfer Rule, should be repealed); see also NCAA TRANSFER 101: BASIC INFORMATION YOU NEED TO KNOW ABOUT TRANSFERRING TO AN NCAA COLLEGE 5-6 (2005-2006), available at [http://www.ncaa.org/library/general/transfer\\_guide/2005-06/2005-06\\_transfer\\_guide.pdf](http://www.ncaa.org/library/general/transfer_guide/2005-06/2005-06_transfer_guide.pdf) (detailing what student-athletes seeking transfer should be considering, including familiarizing themselves with both NCAA and conference transfer rules).

Orleans, and other schools in the Gulf Coast region were not granted blanket exemptions from the Transfer Rule.<sup>149</sup> Student-athletes in these areas were forced to make a difficult choice—remain at their current institution in an area of the country engaged in the largest rebuilding effort the United States has ever seen, or transfer to another institution and run the risk of sitting out one year if their waiver was not granted. A rule regulating transfer that forces a student-athlete to make this type of decision needs to be modified.

#### IV. CONCLUSION

An organization designed to regulate intercollegiate athletics amongst the nation's colleges and universities surely serves a "public function."<sup>150</sup> The NCAA was established to embody and promote the principles of amateurism and education, ideals which are still embodied in the NCAA constitution today.<sup>151</sup> However, there is some concern that the NCAA has drifted away from performing a public function and towards promoting the interests of its representative member institutions. Although these functions are legitimate, they are unworthy of the traditional deference courts have granted the NCAA. As Justice Barry dissented in *English v. NCAA*, "The NCAA virtually controls football in over 900 colleges. Its purpose is to regulate sports programs and maintain the integrity of amateur athletics. . . . Considering the NCAA's enormous control (and its laudable purposes), it must also bear some burden to account for its heavy hand options."<sup>152</sup>

Regulating the transfer of student-athletes between member institutions certainly furthers the core goals of amateurism and promotion of education. At some point, however, that regulation may infringe upon the very principles it was designed to protect. An analysis of the Transfer Rule in light of the rationales as set forth in *McHale* casts serious doubt on whether the Rule, in its current state furthers the goals it was designed to promote.<sup>153</sup> Both the courts and the NCAA should take affirmative steps to more completely align the Rule with its rationales.

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149. Associated Press, *NCAA to Consider Transfer Waivers Case-By-Case*, ESPN.COM, Sept. 17, 2005, <http://sports.espn.go.com/ncaa/news/story?id=2164128>.

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

151. See NCAA CONST. § 1.3.

152. *English v. Nat'l Collegiate Athletic Ass'n*, 439 So.2d 1218, 1226 (La. Ct. App. 1983).

153. *McHale v. Cornell Univ.*, 620 F. Supp. 67, 69 (N.D.N.Y. 1985).

The courts can do this by implementing a higher standard of review. Traditionally courts have embraced the NCAA as an institution serving a public purpose, one that seeks to ensure the safety of participants and the furtherance of amateurism.<sup>154</sup> However, if courts engage in the type of analysis used in *Board of Regents*, recognizing the current practices of the NCAA, there may be grounds for engaging in a heightened standard of review.<sup>155</sup> Shifting from rational basis to a heightened standard would require the NCAA to describe how the Transfer Rule and decisions made on appeal are furthered by the rationales the NCAA offered in *McHale*.<sup>156</sup> A deferential standard of review makes challenging the NCAA's rules and procedures difficult as courts are reluctant to overturn the policy decisions of the NCAA. Unless courts mandate reform, it seems unlikely that the NCAA will be under any pressure to modify their existing rules.

The NCAA can also take steps to align the Transfer Rule with the rationales provided in *McHale*.<sup>157</sup> First, interests would be aligned by an expansion of the exceptions available under the Rule. Providing more line item exceptions to the Rule, such as allowing transfers solely for academic reasons, would add legitimacy to the Rule and transparency to the process. Second, relaxing the rigidity of the one-year residency requirement may help further the rationales given for the Rule. Students transferring to similarly-situated schools with a similar degree of academic rigor are unlikely to require an entire year of adjustment. Without such flexibility, the stricture of the Rule looks more like a penalty than concern for the student-athlete's wellbeing. Adjusting the Transfer Rule to specify factors that would warrant a reduction in the one-year adjustment period would help to ensure that the Rule and its rationales are aligned.

As with most organizations, the NCAA has evolved over time. It has adapted to the needs of its member institutions and the markets related to college athletics. Courts too should adapt by taking an active role in assuring that the public function of the NCAA is being furthered by requiring a rational connection between the NCAA's rules and its rationales. This heightened standard is required

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154. *Tanaka*, 252 F.3d at 1062.

155. *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 87 (1984).

156. *McHale*, 620 F. Supp. at 69.

157. *Id.*

to ensure that the NCAA continues to facilitate the production of a “public good.”<sup>158</sup>

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158. *Bd. of Regents*, 468 U.S. at 122.

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