

A PERFECT STORM: TRANSFER RESTRICTIONS, PAY-FOR-PLAY, AND THE FUTURE OF COLLEGIATE ATHLETICS

*Chase Browndorf**

INTRODUCTION

On Saturday, December 14, 2019, LSU quarterback Joe Burrow reached the pinnacle of college football before a ballroom crowded with family, friends, coaches, and competitors. In accepting the Heisman Trophy, Burrow's remarks discussed his journey to the Heisman stage and recognized the three Heisman semi-finalists in attendance:

My journey, I wouldn't have traded it for anything in the world. I think the story of this Heisman Trophy with me, Justin [Fields], Jalen [Hurts], and Chase [Young] . . . we have transfers who've all had different stories. That's three great players and both of those guys [Hurts and Fields] have pushed through adversity. It's awesome hearing their stories and sharing this weekend with them.¹

In many ways, Burrow, Fields, and Hurts represent an increasingly common trend in college football—student-athletes electing to transfer schools and achieving success at their new institutions.² In fact, Burrow was the third consecutive Heisman

* Juris Doctor, Harvard Law School, 2020. Bachelor of Arts in Government, The University of Texas at Austin, 2017. I would like to thank Professor Peter Carfagna for his consistent support and mentorship throughout my time at Harvard in his Sports Law courses and my clinical placements. I am also grateful to Professor Daron K. Roberts at The University of Texas, whose work inspired my interest in Sports Law.

** This Article was written prior to the announcement of new policy changes by the NCAA stemming from the COVID-19 pandemic. Because the longevity of such measures cannot fully be known at this time, they are not discussed herein.

¹ Kevin Foster, Full Transcript: Joe Burrow Heisman Trophy victory speeches, WAFB (December 16, 2019, 9:03 PM CST), <https://www.wafb.com/2019/12/17/full-transcript-joe-burrow-heisman-trophy-victory-speeches>.

² See e.g., Jake Lourim, Transfer Quarterbacks Are All The Rage, But Do They Deliver At Their New Schools?, FiveThirtyEight (Aug. 22, 2019, 12:11 PM), <https://www>

Trophy Winner—after Oklahoma quarterbacks Baker Mayfield and Kyler Murray—to receive the Award after having transferred to an institution at which he did not begin his collegiate athletic career.³

Although college football may be the most recognizable sport in which transferring athletes are commonplace, it is hardly the only sport; the NCAA’s own research indicates an uptick in the incidence of student-athlete transfers in men’s ice hockey, men’s and women’s basketball, baseball, and football in recent years.⁴ Astoundingly, NCAA research indicates that approximately 12% of Division I student-athletes across *all* sports competing during the 2017- 2018 academic year had previously transferred either from a two-year (or “junior”) college or a four-year college to their 2017-18 institution.⁵

Further research into the motivations behind a student-athlete’s decision to transfer provides even more insight into this “transfer phenomenon.” While certainly a decision to transfer is a highly personal one, research shows that student-athletes are more likely to transfer for athletic, rather than academic or personal reasons, including playing time, mismatches between their athletic experiences and expectations, coaching issues, and the hope of playing professionally in their sport.⁶

Given the research concerning the motivations behind student-athletes’ transfer decisions, it is important to consider the broader landscape within the NCAA that may be contributing to this trend. Specifically, this Note examines two central developments: (1) the general relaxation of transfer restrictions and (2) the NCAA’s indication that student-athletes may soon be able to earn profits while still participating at the collegiate level.

.fivethirtyeight.com/features/transfer-quarterbacks-are-all-the-rage-but-do-they-deliver-at-their-new-schools.

³ Chris Huston, Transfers and the Heisman, *The Heisman Trophy* (November 19, 2019), <https://www.heisman.com/articles/transfers-and-the-heisman>.

⁴ See 2018-19 NCAA Division I Manual § 14.5.5.2.10, at 187 (2018), <https://www.ncaapublications.com/p-4547-2018-2019-ncaa-division-i-manual-august-version-availab-leaugust-2018.aspx>.

⁵ Transfer Competition of Division I Teams, NCAA Research (August 2019), https://ncaaorg.s3.amazonaws.com/research/transfers/Aug2019RES_TransCompD1TeamsSlides.pdf.

⁶ Research on Student-Athlete Transfers, NCAA Research, <https://www.ncaa.org/about/resources/research-student-athlete-transfers>.

This Note will argue that, in conjunction with one another, the NCAA's longstanding aims of preserving amateurism and promoting competition⁷ will necessarily fail. In Part I, the evolution of transfer restrictions to their present-day form is discussed. In Part II, a similar analysis concerning amateurism and the NCAA's historical averseness to payment of student-athletes is included. Part III relies on quantitative data to show the effect that transferring student-athletes, specifically in college football, have had on talent distribution between NCAA conferences. Part IV will examine the policy and legal implications that the effect on competition discussed in Part III will have should the NCAA move forward with permitting student-athletes to profit from their names, images, and likenesses. Finally, Part V will discuss the viability of some possible reforms to the existing transfer regime and offer some concluding thoughts.

I. THE NCAA'S RELAXATION OF TRANSFER RESTRICTIONS

The current prevalence of transfers in collegiate athletics is undoubtedly linked to the general relaxation of transfer restrictions over the past half-decade. This marked change can best be understood by analyzing the legal challenges and policy considerations that have shaped the NCAA's thinking on this issue.

Historically, the NCAA mandated that student-athletes participating in Division I "revenue" sports⁸ wishing to transfer to another Division I institution had to sit out one year of athletic eligibility, in order to fulfill a "residency" obligation at the new

⁷ See Colin Dwyer, *NCAA Plans To Allow College Athletes To Get Paid For Use Of Their Names, Images*, NPR (October 29, 2019, 2:59 PM EST), <https://www.npr.org/2019/10/29/774439078/ncaa-starts-process-to-allow-compensation-for-college-athletes> (quoting NCAA President Mark Emmert's statement that "the NCAA is uniquely positioned to modify its rules to ensure fairness and a level playing field for student-athletes . . . [t]he board's action today creates a path to enhance opportunities for student-athletes while ensuring they compete against students and not professionals.").

⁸ "Revenue" sports are generally understood to be men's ice hockey, men's and women's basketball, baseball, and football. See e.g., 2018-19 NCAA Division I Manual § 14.5.5.2.10, at 187 (2018), <https://www.ncaapublications.com/p-4547-2018-2019-ncaa-division-i-manual-august-version-available-august-2018.aspx>.

institution.⁹ On the contrary, student-athletes participating in non-“revenue” sports were allowed a “one-time transfer exception,” whereby student-athletes could transfer to a new institution without having to sit out for one year.¹⁰ Central to this disparity between transfer restrictions governing “revenue” and “non-revenue” sports was the idea that lax transfer rules would enable championship-contending teams to “easily lure transfer student-athletes away from the institutions that originally recruited them.”¹¹ Indeed, the desire for the NCAA to “ensure that Division I talent in the major revenue generating sports is spread uniformly throughout the . . . membership to protect competitive balance” is certainly compelling.¹²

A. *The Early Cases*

The first legal challenge to NCAA Transfer Rules arose in *Weiss v. E. Coll. Athletic Conference*, in which a former Arizona State tennis player sought to enjoin the NCAA from imposing the one-year residency requirement against him after he had transferred to the University of Pennsylvania.¹³ The District Court ultimately held that the student-athlete had failed to establish that he would suffer irreparable harm if an injunction was not granted, speculating that it was unclear whether or not he would qualify for the varsity team or even play that season.¹⁴

A Louisiana state court in *English v. NCAA* denied a similar request from a student athlete for a preliminary injunction in 1983.¹⁵ In *English*, the student-athlete argued that the NCAA’s transfer restrictions violated state antitrust laws.¹⁶ The Court, however, opined that “constraints on [student-athletes] freedom to move about from college to college are a fair price to pay for

⁹ Ray Yasser & Clay Fees, Comment, Attacking the NCAA’s Anti-Transfer Rules as Covenants Not to Compete, 15 Seton Hall J. Sports & Ent. L. 221, 224–25 (2005).

¹⁰ Michael Aguirre, From Locker Rooms to Legislatures: Student-Athletes Turn Outside the Game to Improve the Score, 36 Ariz. St. L.J. 1441, 1465 (2004).

¹¹ William C. Martin, The Graduate Transfer Rule: Is the NCAA Unnecessarily Hindering Student Athletes from Traversing the Educational Paths They Desire, 15 Vill. Sports & Ent. L.J. 103, 114 (2008) (citing Yasser & Fees, supra note 9, at 226).

¹² Yasser & Fees, supra note 9, at 226.

¹³ *Weiss v. E. Coll. Athletic Conference*, 563 F.Supp. 192, 193 (E.D. Pa. 1983).

¹⁴ *Id.* at 196–97.

¹⁵ *English v. Nat’l Collegiate Athletic Ass’n*, 439 So.2d 1218, 1223 (La. App. 1983).

¹⁶ *Id.*

protection against the evils which would emerge from untrammelled recruiting practices and uncontrolled pirating of players among colleges” and that, even if the NCAA rules were anticompetitive, the rules were “reasonabl[y] . . . designed to prevent the[se] evils.”¹⁷

Two other cases saw student-athletes raise Constitutional challenges (related to the Equal Protection and Due Process clauses of the Fourteenth Amendment) to the transfer rules—*McHale v. Cornell Univ.*¹⁸ and *Graham v. NCAA*.¹⁹ In both of these instances, the plaintiffs’ cases were dismissed on the grounds that the NCAA was not a state actor.²⁰

B. Tanaka v. USC

The next legal challenge to the NCAA’s transfer restriction came in *Tanaka v. University of Southern California*.²¹ In *Tanaka*, the Ninth Circuit affirmed the dismissal of a suit challenging on antitrust grounds the then-Pacific-10 Conference’s rule discouraging transfers among member institutions.²² Rhiannon Tanaka, a women’s soccer player at the University of Southern California, had sought to transfer to the University of California, Los Angeles, but she was dismayed to learn that the PAC-10’s rule required student-athletes transferring from one conference institution to another to “fulfill a residence requirement of two full academic years” as well as “charge[d] the student with two years of eligibility in all Pacific-10 sports.”²³

The Ninth Circuit found that federal antitrust law preempted state law, due to the rule’s involvement with commercial activity,²⁴ and thus, Tanaka needed to demonstrate that the transfer rule encouraged “significant anticompetitive effects”

¹⁷ *Id.* at 1223–24.

¹⁸ *McHale v. Cornell Univ.*, 620 F.Supp. 67 (N.D.N.Y. 1985).

¹⁹ *Graham v. Nat’l Collegiate Athletic Ass’n*, 804 F.2d 953 (6th Cir. 1986). The U.S. Supreme Court would ultimately enshrine the principle that the NCAA was not a state actor in 1988, foreclosing this avenue for aggrieved student athletes to challenge transfer restrictions. *Nat’l Collegiate Athletic Ass’n v. Tarkanian*, 488 U.S. 179, 180 (1988).

²⁰ See *McHale*, 620 F.Supp. at 70; see also *Graham*, 804 F.2d at 954.

²¹ *Tanaka v. Univ. of Southern California*, 252 F.3d 1059 (9th Cir. 2001).

²² *Id.* at 1065.

²³ *Id.* at 1061.

²⁴ *Id.* at 1062.

within a “relevant market,” which the Court defined as women’s soccer in the City of Los Angeles.²⁵ Finding no actual harm to the relevant market, the Court emphasized that the rule applied only to intraconference transfers and “[had] no application to student-athletes who transfer to non-member institutions.”²⁶ Of note, the Ninth Circuit’s opinion sought to distinguish the facts of *Tanaka* from those of *Mackey v. National Football League*, in which the Eighth Circuit had held that the “Rozelle Rule” concerning free agency restrictions in the NFL violated federal antitrust laws.²⁷ The *Tanaka* Court noted that the Rozelle Rule had “applied to every NFL player regardless of his status,” indicating a concern for a larger number of athletes affected across a wider geographic area, in order for a restriction to be found to violate federal antitrust laws.²⁸ Given this, in the aftermath of *Tanaka*, some commentators wondered whether transfer restrictions in “larger, high-revenue markets—such as NCAA men’s football nationally” could have an anticompetitive effect.²⁹ Perhaps mindful of this, the NCAA sprung into action in 2005, seeking to revise its transfer rules to be more “athlete-friendly.”

C. *The First Graduate Transfer Rule*

From the introduction of the new “Graduate Transfer Rule” in June 2005 to its adoption on April 27, 2006 by the NCAA Board of Directors, controversy abounded. The Graduate Transfer Rule was intended to “permit a student-athlete who is enrolled in a specific graduate degree program of an institution other than the institution from which he or she previously received a baccalaureate degree to participate in intercollegiate athletics, regardless of any previous transfer.”³⁰ After the Graduate Transfer Rule was adopted, forty-six NCAA institutions

²⁵ *Id.* at 1063.

²⁶ *Id.* at 1064.

²⁷ *Id.* at 1063 (citing *Mackey v. National Football League*, 543 F.2d 606 (8th Cir. 1976)).

²⁸ *Tanaka*, 252 F.3d at 1064–65.

²⁹ Sarah M. Kinsky, Comment, An Antitrust Challenge to the NCAA Transfer Rules, 70 U. Chi. L. Rev. 1581, 1593 (2003).

³⁰ NCAA Proposal No. 2005-54 – Eligibility — Graduate Student or Postbaccalaureate Participation – Transfer Eligibility, http://www.ncaa.org/membership/governance/division1/management_council/2007/January/22.htm.

immediately sought to override the Board's decision to adopt the Rule at the 2007 NCAA Convention.³¹ Coaches seemed to be leading the charge against the Rule, speculating that student-athletes might transfer from small schools to larger schools to play for a national championship, creating a "free agency" market in college athletics.³² One editorial piece, which appeared in the Division I National Student-Athlete Advisory Committee Newsletter, countered arguments that the Graduate Transfer Rule would lead to the ruin of "competitive equity" and instead, the editorial's author cogently stated:

Correct me if I'm wrong, but the goal . . . was to hold institutions accountable for educating student-athletes and keeping them on track to graduate . . . Regardless of the intentions of transfer or any unintended consequences, we're talking about another major step in many student-athletes' lives and careers.³³

At the 2007 Convention, however, seventy percent of Division I institutions voted to overturn the Graduate Transfer Rule.³⁴

Nonetheless, many student-athletes had taken advantage of the Graduate Transfer Rule prior to the 2007 Convention vote, and thus, were allowed to compete at their new institutions. One such player was Ryan Smith, who left the University of Utah in August 2006—with an undergraduate degree and two years remaining of eligibility in-hand—for the University of Florida, where he reunited with his former football coach, Urban Meyer.³⁵ During Smith's first year in Gainesville, the Florida Gators won

³¹ Martin, *supra* note 11, at 117.

³² *Id.* at 118.

³³ Chas Davis, Give Competitive Equity a Backseat, In the SAAC: The Voice Of The D-1 National Student-Athlete Advisory Committee (Summer/Fall 2006), at 6, https://www.ncaa.org/membership/membership_svcs/saac/d1/newsletter/2006D1_summer.pdf.

³⁴ See Alan Schmatke, Recent Graduate Transfer Rule is Shot Down, Orlando Sentinel (January 7, 2007), <https://www.orlandosentinel.com/news/os-xpm-2007-01-07-ncaa07-story.html>.

³⁵ Martin, *supra* note 11, at 122 (citing Mark Long, Gators, Others Take Advantage of New Graduate Transfer Rule, Associated Press (August 17, 2006)).

the University's first national championship in a decade.³⁶ To some, this confirmed the worst fears surrounding the Graduate Transfer Rule—that it would contribute to a decline in competition.

With the repeal of the Graduate Transfer Rule at the 2007 Convention, aggrieved student athletes once again turned to the courts in a concerted effort to bring about changes in the NCAA's Transfer regime.

D. Recent Legal Developments

A trio of cases—*Pugh*,³⁷ *Deppe*,³⁸ and *Vassar*³⁹—were filed beginning in 2016 aimed at eliminating the NCAA's residency requirement for transferring student-athletes on antitrust grounds; however, each case ultimately failed to bring about any desired change. Since each of these three cases were filed in the Seventh Circuit, the reviewing panels were bound by the Seventh Circuit's decision in *Agnew v. NCAA*, which upheld the NCAA's rules concerning the amount of scholarships an athletic team was permitted to award.⁴⁰ In *Agnew*, the Seventh Circuit seized upon dicta in the U.S. Supreme Court's decision in *NCAA v. Board of Regents of the University of Oklahoma*, which had stated that “[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.”⁴¹ The *Agnew* panel took this language to mean that NCAA rules dealing with eligibility were “presumptively procompetitive,” thus shielding the majority of NCAA rules from strict antitrust review.⁴² As an example of the application of *Agnew*, in *Pugh*, the District Court

³⁶ David Whitley, Champs! UF swamps OSU to win national title, Orlando Sentinel (January 9, 2007), <https://www.orlandosentinel.com/orl-mgator1007jan09-story.html>.

³⁷ *Pugh v. Nat'l Collegiate Athletic Ass'n*, No. 1:15-cv-01747-TWP-DKL, 2016 WL 5394408 (S.D. Ind. Sept. 27, 2016).

³⁸ *Deppe v. Nat'l Collegiate Athletic Ass'n*, 893 F.3d 498 (7th Cir. 2018).

³⁹ *Vassar v. Nat'l Collegiate Athletic Ass'n*, No. 1:16-cv-10590-ARW (N.D. Ill. Aug. 14, 2018). ⁴⁰ *Agnew v. Nat'l Collegiate Athletic Ass'n*, 683 F.3d 328, 341 (7th Cir. 2012).

⁴⁰ *Agnew v. Nat'l Collegiate Athletic Ass'n*, 683 F.3d 328, 341 (7th Cir. 2012).

⁴¹ *Id.* (citing *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 117 (1984) (emphasis added)).

⁴² *Agnew*, 683 F.3d at 341.

held that the residency requirement, in relation to transfers, was an NCAA eligibility rule, because it was found in a chapter entitled “Academic Eligibility” in the NCAA manual.⁴³ Likewise, in *Deppe*, the Seventh Circuit concluded that the residency requirement was “clearly meant to preserve the amateur character of college athletics and is therefore presumptively procompetitive.”⁴⁴

Given the Seventh Circuit’s rigorous adherence to *Agnew*, some have pointed towards the Ninth Circuit as particularly fertile ground for challenging NCAA rules (including transfer restrictions) on antitrust grounds.⁴⁵ These advocates point towards *O’Bannon v. NCAA*,⁴⁶ in which the Ninth Circuit called into question the Seventh Circuit’s reliance on the dicta in *Board of Regents in Agnew*, rejecting the delineation of “eligibility rules” from all others and the “procompetitive presumption.”⁴⁷

E. The Current NCAA Transfer Regime

Spurred on by the legal challenges and policy considerations discussed above, in June 2018 the NCAA adopted a new “notification of transfer” rule, which allows Division I athletes to initiate the transfer process by simply providing his or her institution with a written notice of an intent to transfer.⁴⁸ Once the institution has received this notification, it must place the student-athlete’s name and contact information on a national transfer database, commonly known as the “Transfer Portal,” within two days.⁴⁹ Once entered into the Transfer Portal, athletic

⁴³ *Pugh*, No. 1:15-cv-01747-TWP-DKL, 2016 WL 5394408, at *3.

⁴⁴ *Deppe*, 893 F.3d at 499.

⁴⁵ Cameron Miller, *Go West, Young Man: Why the NCAA’s Transfer Regulations Can Be Defeated in the Ninth Circuit*, *Ariz. St. Sports & Ent. L.J.*, <http://asuselj.org/why-the-ncaas-transfer-regulations-can-be-defeated-in-the-ninth-circuit>.

⁴⁶ *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 802 F.3d 1049 (9th Cir. 2015). The *O’Bannon* decision is also heavily discussed in Part II of this Note.

⁴⁷ *Id.* at 1065 (stating that simply because an NCAA regulation could be stylized as an eligibility requirement “does not mean the rule is not a restraint of trade . . . the antitrust laws are not to be avoided by such ‘clever manipulation of words’”).

⁴⁸ 2018-

19 NCAA Division I Manual § 13.1.1.3.1, at 98 (2018), <https://www.ncaapublications.com/p-4547-2018-2019-ncaa-division-i-manual-august-version-available-august-2018.aspx>.

⁴⁹ *Id.*

officials from other institutions may contact the student-athlete about a potential transfer.⁵⁰ Despite claims that the 2018 rule change “puts the ball in the athlete’s court,” and that student athletes no longer need to “get consent from their coach, athletic department or anyone else” before testing the transfer waters,⁵¹ conferences may still restrict transfers within their own conference.⁵²

Prior to initiating the “notification of transfer” process, a student-athlete must achieve transfer status, which requires that the individual (1) be a full-time student at a two- or four-year college during a non-summer academic term, (2) practice with a college team, or (3) receive financial aid from a college during summer school.⁵³ Division I student-athletes must also ensure that they meet the eligibility standards at the new institution and register with the NCAA’s Eligibility Center.⁵⁴

The “year-in-residence” rule challenged by many of the cases discussed still survives today, although transferring student-athletes now have more options for bypassing the residency requirement. First, a student-athlete may be able to compete immediately if the student-athlete’s current school publicly announces that it will be dropping the respective sport or if the student-athlete has not participated in the sport for a period of two years at his or her current institution.⁵⁵ Second, as discussed *supra*, the NCAA does permit one-time transfer exceptions for athletes in non- “revenue” sports. Finally, the NCAA also operates a waiver process, whereby student-athletes can petition to have the residency requirement waived.⁵⁶ The waiver process has

⁵⁰ *Id.*

⁵¹ Matt Norlander, *NCAA Approves Rule that Ends Coaches’ Ability to Block Transfers*, CBS Sports (June 13, 2018), <https://www.cbssports.com/college-basketball/news/ncaa-approves-rule-that-ends-coaches-ability-to-block-transfers>.

⁵² *Id.* (“Conferences still have the freedom to enact transfer restrictions.”).

⁵³ Christopher J. Gerace, *The NCAA’s Transfer Conundrum*, 94 *Notre Dame L. Rev.* 1819, 1833 (2018) (citing 2018-19 NCAA Division I Manual I Manual, § 14.5.2–.3, at 181–82 (2018), <https://www.ncaapublications.com/p-4547-2018-2019-ncaa-division-i-manual-august-version-available-august-2018.aspx>).

⁵⁴ Gerace, *supra* note 53, at 1833.

⁵⁵ NCAA Eligibility Ctr., *2018-19 Guide for Four-Year Transfers* 7 (2018), <https://www.ncaapublications.com/productdownloads/TGONLINE42018.pdf>.

⁵⁶ 2018-19 NCAA Division I Manual, § 14.7.2, at 191 (2018), <https://www.ncaapublications.com/p-4547-2018-2019-ncaa-division-i-manual-august-version-available-august-2018.aspx>.

become increasingly controversial, especially in college football where it is most prevalent, with many criticizing the process for its lack of transparency.⁵⁷ Heisman semifinalist Justin Fields, as an example, was able to transfer from the University of Georgia to Ohio State in 2019 via the waiver process.⁵⁸ NCAA research indicates that since 2018, 64 FBS players have applied for immediate-eligibility waivers and 51 received approvals, equating to 79.7% of those who applied.⁵⁹ These numbers look likely to remain similar moving forward, as NCAA Vice President of Academic and Membership Affairs Dave Schnase, whose office handles waiver requests, has stated “We feel like the pendulum has swung back to the right place.”⁶⁰

1. The Present-Day Graduate Transfer Exception

After the repeal of the Graduate Transfer Rule in 2007, many players used the aforementioned waiver process as a backdoor mechanism to obtain the NCAA’s blessing to continue to compete in their respective sports at a new institution after enrolling as a graduate student.⁶¹ By 2010, so many waivers had been received (and granted) by the NCAA for graduate transfers that the NCAA membership passed Proposal 2010-52, which enshrined the Graduate Transfer Exception—with similar language to the Rule adopted in 2006—into the NCAA bylaws.⁶² The Graduate Transfer Exception has become increasingly prevalent, according to NCAA research.⁶³ Particularly in college football, the NCAA’s own

⁵⁷ See e.g., John Infante, Consistency, Fairness, and Transparency in NCAA Waivers, AthNet (Sept. 6, 2013), <https://www.athleticscholarships.net/2013/09/06/consistency-fairness-and-transparency-in-ncaa-waivers.htm>.

⁵⁸ Stewart Mandel, Justin Fields and the Advent of College Football Free Agency, *The Athletic* (Feb. 8, 2019), <https://theathletic.com/808717/2019/02/08/justin-fields-ohio-state-ncaaimmediate-eligibility-college-football-free-agency>.

⁵⁹ Adam Rittenberg and Tom VanHaaren, Portals, waivers and the future of college football free agency, *ESPN* (Feb. 11, 2019), https://www.espn.com/college-football/story/_id/25967506/portals-waivers-future-college-football-free-agency.

⁶⁰ *Id.*

⁶¹ John Infante, The Graduate Transfer Exception vs. the Graduate Transfer Waiver, <https://www.athleticscholarships.net/2013/05/09/the-graduate-transfer-exception-vs-the-graduate-transfer-waiver.htm>.

⁶² Division I Proposal – 2010-52, NCAA Legislative Services Database, <https://web3.ncaa.org/lstdbi/search/proposalView?id=2660>.

⁶³ Prevalence of Graduate Transfers in Division I, NCAA (last updated Sept. 2018), <http://www.ncaa.org/about/resources/research/prevalence-graduate-transfer-division-i>

research has indicated that the number of college football players taking advantage of the Graduate Transfer Exception jumped from 17 student-athletes in 2011 to 168 in 2017.⁶⁴ Both LSU quarterback Joe Burrow and Oklahoma quarterback Jalen Hurts were able to play immediately at their respective institutions due to the Graduate Transfer Exception.⁶⁵

2. Conference-Specific Actions

Although the NCAA Board of Directors placed a moratorium on transfer-related proposals for the entirety of the 2019-20 legislative calendar, the Big Ten Conference announced in January 2020 that it would propose legislation which would allow student-athletes in every sport to transfer one time without sitting out a year at their new school.⁶⁶ While some have labeled this proposal as “one-time free agency” and permitting “athletic mercenaries,” the proposal does seem to have wide support from athletic directors and coaches within the Big Ten.⁶⁷ Supporters point towards issues with the existing transfer regime, which they argue disfavors minorities, who are disproportionately student-athletes competing in the “revenue” sports where the residency rule remains in place, and is not transparent enough, especially in terms of the waiver process.⁶⁸ One notable supporter is Tom Mars, a lawyer who specializes in the NCAA’s transfer rules and was

(“Graduate transfers are most prevalent on a percentage basis in men’s basketball (2.1 percent of current players are grad transfers), women’s basketball, football, and men’s and women’s track and field.”).

⁶⁴ *Id.*

⁶⁵ See Brooks Kubena, *Joe Burrow Marks First for LSU Amid Spiking Trend—A Deep Dive into Grad Transfers*, *The Advocate* (Aug. 29, 2018), https://www.theadvocate.com/baton_rouge/sports/lsu/article_1a1cb42e-abba-11e8-8eef-530e6fdd701b.html; see also Cliff Brunt, *Former Alabama QB Jalen Hurts Transferring to Oklahoma, NCAA* (Jan. 16, 2019), <https://www.ncaa.com/news/football/article/2019-01-16/jalen-hurts-alabama-oklahomatransfer>.

⁶⁶ Jenna West, *Report: Big Ten Proposes One-Time Transfer Rule for All Student Athletes*, *Sports Illustrated* (Jan. 31, 2020), <https://www.si.com/college/2020/01/31/big-ten-one-time-transfer-proposal-all-athletes-sports>.

⁶⁷ *Id.* See also Dennis Dodd, *Big Ten proposal would allow every athlete to transfer once without sitting out a year*, *CBS Sports* (Jan. 31, 2020, 2:03 PM ET), <https://www.cbssports.com/college-football/news/big-ten-proposal-would-allow-every-athlete-to-transfer-once-without-sitting-out-a-year>.

⁶⁸ Dodd, *supra* note 67.

instrumental in securing waivers for Justin Fields and Michigan quarterback Shea Patterson, who has stated that “I’d be thrilled if the NCAA Legislative Council put me out of business. Nothing would make me happier than to have them [adopt] a fairer and more sensible rule.”⁶⁹

It is unclear just how much of an impact the Big Ten proposal would have on the current transfer climate, as waivers are granted at an astoundingly high rate.⁷⁰ However, the underlying theme inherent in the Big Ten’s decision to propose such a change is the increasing autonomy of the Power 5 conferences within the NCAA governance structure. Although in this instance, a member of the Power 5 has acted unilaterally, it is certainly foreseeable that the Big Ten’s implementation of such a rule would force other conferences to follow suit. This idea, relating to Power 5 autonomy and the dangers of continued relaxation of transfer restrictions, is explored in more detail in Part IV.

3. Other Proposals Aimed at Reform

In recent years, a number of proposals have been introduced as legislation to be considered by the NCAA. These include exceptions that would allow student-athletes to transfer and bypass the residency requirement if a student-athlete’s head coach leaves the school prior to the first day of fall classes⁷¹ and if the student-athlete was not recruited by the previous institution or the student-athlete was a walk-on at the previous institution (hence, he or she received no financial aid for athletic reasons from the institution he or she is trying to transfer from).⁷² Additionally, one reform is aimed at reducing the number of student-athletes taking advantage of the Graduate Transfer Exception by counting graduate transfer’s scholarships against the total number of scholarships a school may award for *two* years instead of one.⁷³

⁶⁹ Id.

⁷⁰ See Rittenberg & VanHaaren, *supra* note 59.

⁷¹ Michelle Brutlag Hosick, *DI Council Introduces Transfer Legislation*, NCAA (Oct. 5, 2018), <http://www.ncaa.org/about/resources/media-center/news/di-council-introducestransfer-legislation>.

⁷² Id.

⁷³ Id.

While these proposals creatively seek to address criticisms from both “pro-transfer” and “anti-transfer” forces, they miss the larger point: transfer restrictions (or exceptions to the restrictions) must be viewed in conjunction with the changing landscape of amateurism (as affected by pay-for-play) within the NCAA and the effect unbridled transfers will have on competition. This first concept is discussed in detail in Part II, which follows.

II. NCAA AMATEURISM AND PAY-FOR-PLAY

Although this Note is not primarily concerned with a legal analysis of the NCAA’s commitment to amateurism, it would be irresponsible to fail to discuss this important component and its relationship to the NCAA’s student-athlete transfer policies. Perhaps most importantly, the stunning announcement in October 2019 that the NCAA would begin to allow student-athletes to profit from uses of their names, images, and likenesses is likely to have significant consequences relating to student-athletes’ decisions to transfer.⁷⁴ A brief discussion of the evolution of the NCAA’s longstanding commitment to amateurism is included, in turn.

A. The Historical Overview of NCAA Amateurism

The NCAA has consistently held out amateurism as a “central goal of the organization.”⁷⁵ At the heart of the organization’s mission is the goal of “retain[ing] a clear line of demarcation between intercollegiate athletics and professional sports.”⁷⁶ The amateurism principles of the NCAA date to its creation over one hundred years ago, although the first mechanisms to enforce institutions’ adherence to amateurism emerged in the 1950s.⁷⁷ Over time, the NCAA has moved towards commercialization, with some commentators comparing the organization to a cartel that “regulat[es] both input (the student-

⁷⁴ See Dwyer, *supra* note 7.

⁷⁵ Kinsky, *supra* note 29, at 1583 (citing 2002-03 NCAA Manual Art. 1.3.1., <https://www.ncaa.org/library/membership/division-i-manual/2002-03/A01.pdf>).

⁷⁶ *Id.*

⁷⁷ Kevin E. Broyles, NCAA Regulation of Intercollegiate Athletics: Time for a New Game Plan, 46 Ala. L. Rev. 487, 491–99 (1995).

athletes themselves) and output (the number of games played and televised) in college athletics.”⁷⁸ In 2017, the NCAA surpassed \$1 billion in revenues for the first time, with \$800 million of that revenue coming from television rights deals.⁷⁹ Broadcast agreements with CBS and Turner Broadcasting alone, which run through 2032, are estimated to be worth a total of \$8.8 billion.⁸⁰ Nevertheless, the NCAA has affirmed its position that “[a] defining feature of [our organization] is (and has long been) that the players are unpaid (i.e., amateur) student-athletes rather than paid professionals.”⁸¹ It comes as no surprise that, like the transfer rules discussed in Part I, litigation concerning NCAA’s amateurism rules has arisen in the federal courts system.

As previously discussed, the U.S. Supreme Court waded into the amateurism waters in the *Board of Regents* decision in 1984.⁸² The *Board of Regents* Court acknowledged that the NCAA has “play[ed] a critical role in the maintenance of a *revered tradition of amateurism* in college sports,”⁸³ a position which the NCAA has seized upon in defending its actions ever since.⁸⁴ The NCAA, however, has had to defend its rules and policies against antitrust challenges on numerous occasions.

B. O’Bannon v. NCAA

Most recently, in *O’Bannon v. NCAA*, the NCAA’s amateurism principles were challenged by former FBS football and Division I men’s basketball players claiming that the NCAA had violated the Sherman Act by restricting student-athletes’ ability to receive compensation for the use of their names, images,

⁷⁸ Konsky, *supra* note 29, at 1585.

⁷⁹ Matthew Rocco, NCAA scores \$1B in revenue, driven by TV deals, FOX Business (Mar. 7, 2018), <https://www.foxbusiness.com/features/ncaa-scores-1b-in-revenue-driven-by-tv-deals>.

⁸⁰ *Id.*

⁸¹ Brief for Defendants, *In re Nat’l Collegiate Athletic Ass’n Athletic Grant-in-Aid Cap Antitrust Litigation*, 2019 WL 3992706 (C.A.9), at 1 [hereinafter, “NCAA Alston Brief”].

⁸² *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85 (1984) (emphasis added).

⁸³ *Id.* at 120.

⁸⁴ See e.g., NCAA Alston Brief, *supra* note 81, at 8.

and likenesses.⁸⁵ Although the District Court ultimately found that the NCAA had engaged in an “unlawful restraint of trade,”⁸⁶ the Ninth Circuit affirmed in part and reversed in part the District Court’s judgment, finding that the NCAA’s compensation rules were procompetitive because they helped to “preserv[e] the popularity of the NCAA’s product by promoting its current understanding of amateurism,”⁸⁷ but also affirming the District Court’s holding that the NCAA’s limits on benefits below the cost of attendance served “no relation whatsoever to the procompetitive purposes of the NCAA.”⁸⁸ The *O’Bannon* panel went on to state that the NCAA’s compensation rules could not be invalidated based on the availability of a less restrictive alternative, unless plaintiffs could prove that the rules were “patently and inexplicably stricter than is necessary to accomplish all of [their] procompetitive objectives.”⁸⁹ Using a student-athlete’s cost of attendance as a benchmark, the *O’Bannon* panel held that “by the NCAA’s own standards, student-athletes remain amateurs as long as any money paid to them goes to cover legitimate educational expenses.”⁹⁰ The payments that the District Court had sought to award to the former student-athletes were \$5,000 per year above the student-athletes’ cost of attendance.⁹¹ In a foreboding statement, the *O’Bannon* panel warned that even “small payments” above cost of attendance would be a “quantum leap,” and that if “that line [were] crossed, [there would be] no basis for returning to a rule of amateurism and no defined stopping point.”⁹²

C. *The Alston Litigation*

While *O’Bannon* was still pending before the Ninth Circuit, several plaintiffs, including former West Virginia running back

⁸⁵ *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 802 F.3d 1049, 1055–56 (9th Cir. 2015).

⁸⁶ *Id.* at 1053.

⁸⁷ *Id.* at 1073.

⁸⁸ *Id.* at 1075.

⁸⁹ *Id.*

⁹⁰ *Id.* at 1074–75.

⁹¹ *Id.* at 1076.

⁹² *Id.* at 1078–79.

Shawne Alston, filed antitrust class actions against the NCAA and eleven of its Division I conferences once again challenging the NCAA's compensation rules.⁹³ This time, however, the plaintiffs alleged that the defendants had violated antitrust law by capping the value of athletics scholarships *below* the actual cost of attendance at the relevant member institutions.⁹⁴ The claims were consolidated into one multidistrict litigation and transferred to the same District Court judge that had presided over *O'Bannon*.⁹⁵ While the NCAA and eleven member conferences sought to dismiss the case on the basis that *O'Bannon* had foreclosed the plaintiffs' claims, the District Court refused, distinguishing the *Alston* litigation from *O'Bannon* in a number of ways. First, the District Court stated its opinion that *O'Bannon* had simply foreclosed one type of benefit: cash compensation "unrelated to educational expenses."⁹⁶ Second, the District Court noted that the benefits at issue "[would] go to cover legitimate education-related costs."⁹⁷ Finally, the District Court asserted that the benefits would not exceed the cost of attendance, as was the case in *O'Bannon*.⁹⁸ Finding that the defendants "[had] not shown a procompetitive effect for NCAA rules that restrict inherently limited, non-cash, education-related benefits," the District Court denied the motion for dismissal and issued an injunction against the NCAA.⁹⁹

The *Alston* litigation is, at the time of this writing, on appeal to the Ninth Circuit.¹⁰⁰ The brief for the NCAA and the eleven member conferences largely argues that *O'Bannon* precludes the plaintiffs' arguments.¹⁰¹ The Ninth Circuit's (and, potentially, the U.S. Supreme Court's) decision will likely turn on whether *O'Bannon* was limited only to benefits related to the use of

⁹³ NCAA Alston Brief, *supra* note 81, at 15.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058, 1102 (N.D. Cal. 2019).

⁹⁷ *Id.* at 1105.

⁹⁸ *Id.* at 1106.

⁹⁹ *Id.* at 1104.

¹⁰⁰ See Ryan Boysen, *College Athletes Defend Win Over NCAA In 9th Circ.*, Law360 (Oct. 24, 2019, 8:28 PM EDT), <https://www.law360.com/articles/1213063>.

¹⁰¹ NCAA Alston Brief, *supra* note 81, at 30.

student-athletes' names, images, and likenesses, or applies to a wider swath of NCAA policies.¹⁰²

D. Pay-For-Play Efforts and the NCAA's October 2019 Announcement

On September 28, 2019, California Governor Gavin Newsom signed into law Senate Bill 206, which will allow student-athletes at California universities to profit from the use of their names, images, and likenesses.¹⁰³ At the signing ceremony attended by LeBron James, Governor Newsom stated that “[e]very single student in [a] university can market their name, image and likeness; they can go and get a YouTube channel, and they can monetize that. The only group that can’t are athletes.”¹⁰⁴ Although the bill would not take effect until 2023, numerous state legislators bucked the “wait and see” approach and introduced similar bills in statehouses across the country.¹⁰⁵ Likely in response to this, the NCAA Board of Governors in October 2019 voted unanimously to “permit” college athletes the “opportunity to benefit” from their names, images, and likenesses “in a manner consistent with the collegiate model.”¹⁰⁶

Given the legal uncertainty surrounding the *Alston* litigation, many have questioned how the NCAA can reverse its longstanding policies on the use of names, images, and likenesses and whether amateurism can survive. NCAA President Mark Emmert did little to address these questions in December 2019, when he stated that

¹⁰² *Id.*

¹⁰³ Carlie Porterfield, *California Goes Against NCAA To Allow College Athletes To Get Paid*, *Forbes* (Sept. 30, 2019, 12:17 PM), <https://www.forbes.com/sites/carlieporterfield/2019/09/30/california-goes-against-ncaa-to-allow-collegeathletes-to-get-paid/#7e46b2977f8e>.

¹⁰⁴ *Id.*

¹⁰⁵ Matt Norlander, *Fair Pay to Play Act: States bucking NCAA to let athletes be paid for name, image, likeness*, *CBS Sports* (Oct. 3, 2019, 5:43 PM ET), <https://www.cbssports.com/college-football/news/fair-pay-to-play-act-states-bucking-ncaa-to-let-athletes-be-paid-for-name-image-likeness>. States where similar legislation were introduced included Colorado, Florida, Illinois, Kentucky, Minnesota, Nevada, New York, Pennsylvania, South Carolina, and Washington. *Id.*

¹⁰⁶ Zachary Zagger, *Devil Is In The Details With NCAA Publicity Rights Change*, *Law360* (Oct. 30, 2019, 9:04 PM EDT), <https://www.law360.com/articles/1215284>.

There are a number of important legal cases that have been settled . . . some are still on appeal as we speak . . . [t]he two most important ones have been out in the Ninth Circuit and we have to be consistent with those. In those rulings, the NCAA has said anything the student-athletes receive has to be—their words—not mine, ‘tethered to education.’ OK, well what does that mean and how does that work and how does that move forward?¹⁰⁷

Emmert’s comments indicate that any reforms must be considered “within the context of the legal precedents that have been established.”¹⁰⁸ The NCAA began drafting and debating reforms at its annual convention in late-January 2020.¹⁰⁹ The most likely development, as reported, would allow student-athletes to create “work products,” with examples including writing a book, starting a small business, and/or teaching lessons within their sport.¹¹⁰ Another approach has been described as “licensing,” which would allow athletes to seek out sponsorships or endorsements, either as individuals or as part of a group.¹¹¹ Proposals are likely to be publicly introduced in April 2020 and adopted as bylaws at the 2021 Convention.¹¹²

Undoubtedly, both the NCAA’s announcement in October 2019 and the general relaxation of transfer restrictions, when taken together, threaten the NCAA’s adherence to the amateurism principle and threaten the future of collegiate sports as currently known.

III. A QUANTITATIVE APPROACH: THE 2019 COLLEGE FOOTBALL TRANSFER PORTAL DATA

The third part of this Note takes a quantitative approach to better understand *who* the transferring student-athletes are and

¹⁰⁷ Zachary Zagger NCAA Prez Says Rule Reforms Limited By Antitrust Cases, Law360 (Dec. 17, 2019, 10:15 PM EST), <https://www.law360.com/articles/1228621>.

¹⁰⁸ *Id.*

¹⁰⁹ See Pat Forde, NCAA Tiptoes Toward Change in Compensating Student Athletes, Sports Illustrated (Jan. 24, 2020), <https://www.si.com/college/2020/01/24/ncaa-convention-board-of-governors-change>.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

where they are transferring from and to. The dataset used for purposes of this analysis can be found in Appendix A.

A. Methodology

Given the 2018 rule change to the transfer process which simplified the “notification of transfer” process and decreased the role played in the transfer decision by coaches and university officials, as discussed *supra*, the dataset used only considers transfers that were initiated *after* the rule change. Additionally, since analyzing transfers taking place in *each* NCAA-sanctioned sport would generate an exorbitant number of records, the decision was made to focus on Division I college football—a sport whose relationship with the transfer restrictions has generated a large amount of media attention and which generates the bulk of the NCAA’s revenue. Unfortunately, but understandably, the NCAA’s College Football Transfer Portal is not publicly available. As a result, the dataset was produced from 247Sports’ 2019 College Football Transfer Portal tracker.¹¹³ 247Sports is owned by CBS Interactive Inc. and bills itself as “a top 10 digital sports media brand” that “reaches fans via team-specific online publications and websites.”¹¹⁴ The site is used by media outlets for its regularly updated college football and basketball recruiting rankings.¹¹⁵ Given that a third-party source was used, some information is unknown. As example, the dataset may indicate that a student-athlete entered his name into the Transfer Portal but may not indicate which institution the student-athlete is transferring from or which institution the student-athlete transferred to (if any).

For the purposes of this Note, transfer records were labeled as one of three types, depending on the characterization of the

¹¹³ 2019 College Football Transfer Portal, 247Sports (last visited Feb. 3, 2020), <https://247sports.com/Season/2019-Football/TransferPortal>.

¹¹⁴ About 247Sports, 247Sports (Feb. 11, 2013), <https://www.247sports.com/Article/About-247Sports-116092>.

¹¹⁵ See e.g., Alex Prewitt, Massachusetts RB Jonathan Thomas commits to Maryland, *The Washington Post* (May 9, 2013), <https://www.washingtonpost.com/news/terrapinsinsider/wp/2013/05/09/massachusetts-rb-jonathan-thomas-commits-to-maryland>.

transferor institution and the transferee institution.¹¹⁶ Type I transfers are those in which a student-athlete transferred from a Power 5 school to a non-Power 5 school. Type II transfers are those in which a student-athlete transferred from a non-Power 5 school to a Power 5 school. Finally, Type III transfers are those in which a student athlete's transfers from one Power 5 school to another Power 5 school, or from one non-Power 5 school to another non-Power 5 school. "Power 5" schools are identified as those institutions currently competing in the sport of football as members of the Atlantic Coast Conference, the Big Ten Conference, the Big 12 Conference, the Southeastern Conference, and the Pacific-12 Conference. For simplicity, three "independent" schools are included, for purposes of the analysis, within the Power 5: the University of Notre Dame, Brigham Young University, and the University of Connecticut. Non-Power 5 schools are all those institutions that are not members of the Power 5 conferences or the three listed "independents" and includes Football Championship Subdivision (FCS), Division II, and Division III schools.

One potential criticism of this approach to separating transferor and transferee institutions into only Power 5 and non-Power 5 categories is that it implies all non-Power 5 schools are comparable in various areas. This is obviously not the case. For example, schools in the "Group of 5" conferences—which include the American Athletic Conference (AAC), the Mid-American Conference (MAC), the Mountain West Conference, the Sun Belt Conference, and Conference USA—certainly have more resources and provide their student-athletes with more exposure than schools outside of the Group of 5 or even those schools in the FCS. Nevertheless, this route of dividing institutions into only these two categories was chosen as it comports with the analysis in Part IV of this Note, which explicitly discusses the autonomy of the Power 5 conferences within the NCAA governance structure and how this factor, along with others, is creating a power dichotomy within collegiate athletics.

¹¹⁶ For clarification, a "transferor institution" is one in which a student athlete ultimately seeks to leave from, whereas a "transferee institution" is one in which a student athlete ultimately enrolls at.

B. Discussion of Results

The dataset shows that 1,102 individuals entered their information into the Transfer Portal prior to the beginning of the 2019 Division I college football season. Only 52 of these individuals were reported as “sitting out” the 2019 season, indicating that the remaining 1,050 individuals (if they did indeed transfer) were able to circumvent the NCAA’s residency rule, via one of the processes discussed in Part I.

After removing any records where either the transferor or transferee institution was “unknown,” 720 records remained. These 720 records represent the number of student-athletes who were confirmed to have transferred from one college football program to another. Of these 720 transfers, where both a transferor and transferee institution were identified, 293 can be classified as Type I transfers, whereby a student-athlete transferred from a Power 5 school to a non-Power 5 school, representing approximately 40.7% of all identifiable transfers. On the other hand, of the 720 identifiable transfers, only 65 can be classified as Type II transfers, representing approximately 9% of all identifiable transfers. The remaining 342 identifiable transfers are classified as Type III transfers.

In regards to transferor institutions,¹¹⁷ the following Power 5 schools were identified in more than ten records: Texas A&M (12), Arizona (13), Arizona State (16), Arkansas (23), Auburn (12), Colorado (11), Illinois (15), Indiana (12), Louisville (17), LSU (13), Maryland (16), Memphis (15), Michigan (18), Nebraska (13), Oklahoma State (11), Oklahoma (14), Penn State (21), Rutgers (13), South Carolina (12), Texas (11), Texas Tech (14), UCLA (18), UNC (12), USC (11), Virginia Tech (18), and Washington State (15). Likewise, the following non-Power 5 schools had more than ten records: Cincinnati (12), Coastal Carolina (16), Marshall (11), Memphis (15), SMU (14), South Alabama (12), USF (15), Western Kentucky (11), and Wyoming (12).

¹¹⁷ Note that these figures include *all* individuals whose names were entered into the Transfer Portal. Even if the transferee institution is “unknown,” these individuals are still included.

In regards to transferee institutions,¹¹⁸ the results were more dispersed. The following Power 5 schools were identified in more than six records: Arkansas (8), Illinois (7), Miami (9), Oregon State (8), Texas Tech (7), Utah (8), and Vanderbilt (8). The following non-Power 5 schools had more than six records: Charlotte (7), Chattanooga (9), FAU (7), FIU (7), Houston (12), Illinois State (7), North Carolina A&T (8), Northwestern State (9), Prairie View A&M (7), SFA (7), SMU (15), Middle Tennessee State (8), UCF (9), and UTSA (8). As shown, more non-Power 5 schools were found to be the transferee institution for seven or more individuals than Power 5 schools—a result which is consistent with the finding that Type I transfers were more common than Type II transfers.

The 247Sports tracker only divides players into eight position types: quarterbacks, running backs, wide receivers/tight ends, offensive linemen, defensive linemen, linebackers, defensive backs, and special teams players. Of the 1,102 records, 123 were identified as quarterbacks, 97 as running backs, 249 as wide receivers/tight ends, 110 as offensive linemen, 146 as linebackers, 120 as defensive linemen, 217 as defensive backs, and 40 as special teams players. Although the number of players a team carries on its roster for each position necessarily varies based on scheme and other factors, the number of quarterbacks seeking transfers seems high compared to other positions. The most popular position in the Transfer Portal was wide receiver/tight end; the number of quarterbacks seeking transfers represents approximately half of the number of wide receivers *and* tight ends *combined*. Although data could not be found identifying the average number of quarterbacks which an NCAA Division I team places on its roster, one could probably safely predict that this number would not exceed half of the average number of wide receivers and tight end combined on such rosters,¹¹⁹ and would

¹¹⁸ Note that these figures include *all* individuals whose names were entered into the Transfer Portal. Even if the transferor institution is “unknown,” these individuals are still included.

¹¹⁹ See e.g., 2019 Football Roster, The University of Texas Athletics, <https://www.texassports.com/sports/football/roster>. In 2019, The University of Texas carried five quarterbacks on its 2019 roster, compared to twenty-one combined wide receivers and tight ends (15 wide receivers, 6 tight ends).

certainly not exceed half of the average number of offensive and defensive lineman. Given this information, media reports hailing 2019 as the “year of the transfer quarterback” are significantly well-grounded.¹²⁰

Finally, of note, sixty records identify a Historically Black College or University (or HBCUs) as their transferee institution.¹²¹ The unique impact which changes to the existing transfer regime and NCAA amateurism principles may, collectively, have on HBCUs is discussed to a significant extent later in this Note.

This data analysis is included to bolster the analysis in Part IV and to serve as a baseline for comparison as future changes in the NCAA transfer landscape, particularly in regards to transfer restrictions and pay-for-play principles, take place; if the number of college football student-athletes spikes after the NCAA adopts its “pay-for-play” variant in 2021, NCAA officials, university athletic directors, and legal professionals should analyze whether the prevalence of Type I and/or Type II transfers also changes, particularly as a percentage of the overall transfers taking place.

IV. THE INTERSECTION OF TRANSFER RESTRICTIONS AND PAY-FOR-PLAY AND THE FUTURE OF COLLEGIATE ATHLETICS

As the October 2019 announcement underscores, the NCAA is committed to allowing student-athletes to profit—in some way—from the use of their names, images, and likenesses. In this Part, however, I argue that this reform to NCAA policies, in conjunction with the relaxation of transfer restrictions witnessed over the past half-decade, will ultimately prove lethal to the NCAA’s tried and true argument that its rules and policies achieve “competitive balance.”

¹²⁰ See Gant Player, 2019 Is The Year of the Transfer Quarterback In College Football, *Forbes* (Oct. 28, 2019, 11:17 PM), <https://www.forbes.com/sites/gantplayer/2019/10/28/2019-is-the-year-of-the-transfer-quarterback>.

¹²¹ These transferee institutions include Alabama A&M, Alabama State, Alcorn State, Arkansas-Pine Bluff, Bethune-Cookman, Florida A&M, Grambling State, Hampton, Howard, Jackson State, Morgan State, North Carolina A&T, Prairie View A&M, Savannah State, South Carolina State, Southern University, and Texas Southern. In identifying HBCUs, the “Hundred-Seven” listing was used. See HBCU Listing, The Hundred-Seven, <https://www.thehundred-seven.org/hbculist.html>.

A. *The Threat to Competitive Balance*

Numerous law review articles and newspaper editorials have previously argued in favor of the NCAA's no-pay rules by arguing that these rules help achieve "competitive balance."¹²² Restraints on student-athletes achieve procompetitive effects by "spreading, and preserving in place, the supply of talented players and making games more interesting."¹²³

The federal courts are split as to whether "equalizing on-field competition" may serve as a relevant procompetitive benefit.¹²⁴ Both *Smith v. Pro Football, Inc.* and *Mackey v. NFL* support the proposition that competitive balance is not a relevant consideration.¹²⁵ On the contrary, dictum in the U.S. Supreme Court's decision in *American Needle, Inc. v. NFL* takes an opposing stance.¹²⁶ The *American Needle* majority noted that "the interest in maintaining competitive balance [among] athletic teams is legitimate and important."¹²⁷

It has previously been argued that one way of achieving competitive balance *could* come at the conference level.¹²⁸ This argument proceeds as such: "[since] most college sporting events are played by teams from within a single conference, a conference-wide salary cap would have much the same effect of equalizing . . . without having the same ubiquitous, anticompetitive effect on college sports labor markets as do the NCAA's current no-pay rules."¹²⁹ Further, under this argument, rules governing pay at the

¹²² See Michael H. LeRoy, An Invisible Union for an Invisible Labor Market: College Football and the Union Substitution Effect, 2012 Wis. L. Rev. 1077, 1093 (2012); see also David Brooks, The Amateur Ideal, N.Y. Times (Sept. 22, 2011), <https://www.nytimes.com/2011/09/23/opinion/the-amateur-ideal.html>.

¹²³ LeRoy, *supra* note 122, at 1093.

¹²⁴ Marc Edelman, A Short Treatise on Amateurism and Antitrust Law: Why the NCAA's No-Pay Rules Violate Section 1 of the Sherman Act, 64 Case W. Res. L. Rev. 61, 96 (2013).

¹²⁵ See *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1186 (D.C. Cir. 1978) (holding that the NFL Draft's "alleged 'procompetitive' . . . effect on the playing field" to be "nil"); see also *Mackey v. NFL*, 543 F.2d 606, 621 (8th Cir. 1976) ("[T]he possibility of resulting decline in the quality of play would not justify the Rozelle Rule.").

¹²⁶ *American Needle, Inc. v. NFL*, 130 S.Ct. 2201, 2217 (2010).

¹²⁷ *Id.* (internal quotations omitted).

¹²⁸ See Edelman, *supra* note 124, at 96.

¹²⁹ *Id.* at 96–97 (citing Eric Thieme, Note, You Can't Win 'Em All: How the NCAA's Dominance of the College Basketball Postseason Reveals There Will Never Be an NCAA Football Playoff, 40 Ind. L. Rev. 453 (2007)).

conference level would be “far less restrictive [under antitrust law] . . . because individual conferences lack sufficient ‘market power’ within any relevant market to illegally restrain trade.”¹³⁰ Indeed, college administrators advocated in favor of forming formal collegiate athletic conferences “[w]ith the goal of standardizing game rules and leveling the playing field of competition,” and among the first conferences to establish player eligibility rules, including no-payment policies, was the Big Ten Conference.¹³¹ In some ways, *Tanaka*, discussed *supra*, also stands for this proposition—that a college athletes’ labor market was “national in scope” and thus, the Pac-10 transfer restrictions were not anticompetitive.¹³²

I find this argument at this point in time to be unavailing; the collegiate athletic climate has changed in significant ways since this argument was first put forth in a 2013 law review article.¹³³ These developments are discussed, in turn.

1. The Autonomy of the Power 5 Conferences

The first key change in the collegiate athletic climate that may call into question the NCAA’s ability to achieve competitive balance is evident in the autonomy the Power 5 conferences have obtained within the NCAA power structure. In August 2014, the NCAA Division I Board of Directors voted 16-2 in favor of allowing schools in the Power 5 conferences to create rules on a variety of subjects, including cost of attendance stipends and insurance benefits for players, staff sizes, recruiting rules, and mandatory hours spent on individual sports, without being subjected to the NCAA.¹³⁴ In fact, the only requirement imposed by the NCAA on the conferences’ actions in these areas is that such legislation

¹³⁰ Edelman, *supra* note 124, at 97.

¹³¹ Thomas A. Baker III, et. al., *Debunking The NCAA’s Myth That Amateurism Conforms with Antitrust Law: A Legal and Statistical Analysis*, 85 *Tenn. L. Rev.* 661, 664 (2018) (citing Marc Edelman, *The NCAA’s ‘Death Penalty’ Sanction—Reasonable Self-Governance or an Illegal Group Boycott in Disguise?*, 18 *Lewis & Clark L. Rev.* 385, 389 (2014)).

¹³² *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1063 (9th Cir. 2001).

¹³³ See Edelman, *supra* note 124, at 96–98.

¹³⁴ Brian Bennett, *NCAA board votes to allow autonomy*, ESPN (Aug. 7, 2014), https://www.espn.com/college-sports/story/_/id/11321551/ncaa-board-votes-allow-autonomy-five-power-conferences.

“comports with the NCAA’s general purposes and principles” and “advance[s] the legitimate educational or athletics-related needs of student-athletes.”¹³⁵

At the time of the adoption of this so-called “autonomy rule,” which predated the Ninth Circuit’s decision in *O’Bannon*, news reporters expressed fears directly related to the cost of attendance stipends, arguing that “many schools won’t be able to afford measures like cost-of-attendance stipends. [This] could create an even larger competitive imbalance between schools in the power conferences and those in leagues like the Sun Belt, MAC or even in the FCS.”¹³⁶ Further, the August 2014 structural changes also changed the NCAA’s legislative process: after these changes, passage of a rule “requires either a 60 percent majority of the 80-member panel plus three of the five power conferences or a simple majority plus four of the five leagues.”¹³⁷ Then-Senator Orrin Hatch issued a statement in response to the adoption of the autonomy rule, stating that

The NCAA should be responsible for promoting fair competition among its participating institutions and their student-athletes. I am concerned that today’s actions could create an uneven playing field that may prevent some institutions from being able to compete fairly with other schools that have superior resources to pay for student-athletes. I also worry about . . . whether this consolidation of power will restrict competition and warrant antitrust scrutiny.¹³⁸

Perhaps the best example of the weight that Power 5 autonomy carries was seen in June 2018. In response to the NCAA’s adoption of the new “notification of transfer” rule, the Power 5 conferences passed a rule that “once a player notifies his current school of his intent to transfer, schools [may] cancel the

¹³⁵ Gerace, *supra* note 53, at 1829.

¹³⁶ Bennett, *supra* note 134.

¹³⁷ *Id.*

¹³⁸ Jon Solomon, NCAA adopts new Division I model giving Power 5 autonomy, CBS Sports (Aug. 7, 2014, 9:41 AM ET), <https://www.cbssports.com/college-football/news/ncaa-adopts-new-division-i-model-giving-power-5-autonomy>.

scholarship of that player at the end of the academic term.¹³⁹ Further, if a player ultimately chooses to stay at his or her original school, that institution *may*, but is not required, to re-award the scholarship.¹⁴⁰

2. The Power 5 Conferences' Revenue, Resources, and Exposure

The second key development in the post-2013 collegiate athletic environment concerns revenue and television exposure. As is expected, the Power 5 conferences generate significantly more revenue annually, and as such, the non-Power 5 conferences' distributions to their member schools pale in comparison to those of the Power 5.¹⁴¹ In the 2017 fiscal year, the SEC reported \$596.9 million in revenues, with the average amount distributed to each member school being slightly over \$40.9 million, excluding "bowl money" retained by those schools that participated.¹⁴² For the same fiscal year, the Big 12 reported nearly \$365 million in revenue, for an average distribution of \$34.8 million per school,¹⁴³ while the Big Ten Conference estimated a \$518 million haul, averaging distributions to about \$37 million for each of its fourteen member schools.¹⁴⁴ On the lower-end of the scale (in terms of distribution) in 2017 were the ACC, which generated \$418 million, leading to an average distribution of between \$25.3 million and \$30.7 million to each member school,¹⁴⁵ and the Pac-12

¹³⁹ Ron Higgins, Power 5 Conferences fire back on the new NCAA transfer rule, NOLA.com (June 20, 2018, 1:15 PM), https://www.nola.com/archive/article_6b8f09d5-200a-5d7e-950b-a0aaf37b8fe6.html.

¹⁴⁰ *Id.*

¹⁴¹ See e.g., Breaking Down Power Five Conference Revenue & Distribution In FY17, CollegeAD (June 1, 2018), <https://collegead.com/power-five-distribution>.

¹⁴² SEC announces 2016-17 revenue distribution, Southeastern Conference (Feb. 2, 2018), <https://www.secsports.com/article/22288070/sec-announces-2016-17-revenue-distribution>.

¹⁴³ Big 12 reports total revenue of \$365 million for academic year, USA Today (June 1, 2018), <https://www.usatoday.com/story/sports/ncaaf/2018/06/01/big-12-reports-365m-revenue-increases-for-12th-year-in-row/35586353>.

¹⁴⁴ Breaking Down Power Five Conference Revenue & Distribution, *supra* note 141.

¹⁴⁵ *Id.*

generated \$509 million with average pay-outs of \$30.9 to each member.¹⁴⁶

Comparatively, the Sun Belt Conference in 2018 generated about \$9 million in revenue, distributing a little over \$1 million to each of its nine member schools, and the Mountain West Conference distributed approximately \$3 million to each member.¹⁴⁷ Both the Sun Belt and Mountain West conferences are considered “members” of the “Group of Five,” the collection of conferences discussed earlier which also includes the American Athletic Conference (AAC), Conference USA, and the Mid-American Conference (MAC).¹⁴⁸

Undoubtedly related to revenue is the media exposure student-athletes in the Power 5 conferences have at their disposal, compared to their Group of Five counterparts. Television deals between the Power 5 conferences and broadcasters provide for much more revenue and exposure than Group of Five conferences.¹⁴⁹ The “resource gap” between Power 5 and non-Power 5 schools spills over into recruiting, coaches’ salaries, and expenditures on team travel.¹⁵⁰ Solidifying critics’ arguments, other than the one-time participation of FBS-independent Notre Dame, the College Football Playoff, first played in 2014, has yet to include a “true” non-Power 5 school.¹⁵¹ An ESPN Outside the Lines report acutely stated in 2016 that “[t]he gulf between college sports’ haves and have-nots has never been greater.”¹⁵² This

¹⁴⁶ Jon Wilner, Pac-12 takes a victory lap in announcing record revenues. But should it?, *The Seattle Times* (May 4, 2018, 11:14 AM), <https://www.seattletimes.com/sports/pac-12/pac-12-takes-a-victory-lap-in-announcing-record-revenues-but-should-it>.

¹⁴⁷ Mark Anderson, Rebels in Ruins: Most of the power, money in Power 5 conferences, *Las Vegas Review-Journal* (Nov. 21, 2018, 6:00 AM), <https://www.reviewjournal.com/sports/unlv/rebels-in-ruins-most-of-the-power-money-in-power-5-conferences-1532386>.

¹⁴⁸ *Id.*

¹⁴⁹ See Chris Smith, The Most Valuable Conferences In College Sports: Can The SEC Be Caught?, *Forbes* (July 18, 2016, 10:56 AM), <https://www.forbes.com/sites/chris-smith/2016/07/18/the-most-valuable-conferences-in-college-sports-can-the-sec-be-caught/#7e46f65b6ecf>.

¹⁵⁰ Paula Lavigne, Rich get richer in college sports as poorer schools struggle to keep up, *ESPN* (Sept. 2, 2016), https://www.espn.com/espn/otl/story/_id/17447429/power-5-conference-schools-made-6-billion-last-year-gap-haves-nots-grows.

¹⁵¹ Anderson, *supra* note 147.

¹⁵² Lavigne, *supra* note 150.

remains true today and will likely be exacerbated in the years to come.

B. A Perfect Storm

While relaxed transfer restrictions and reforms related to student-athletes' profiting of their names, images, and likenesses do assuage some fears that the NCAA is running afoul of federal antitrust law, the overlooked consequence of these two changes, working in coordination, will almost certainly be a marked decline in competitive balance. The "perfect storm" created by the convergence of these two threads will have significant consequences from both a policy and legal standpoint.

1. Policy Implications

As pointed out in the dataset included in [Appendix A](#), the number of Type I transfers (Power 5 to non-Power 5) far outweighs the number of Type II transfers (non-Power 5 to Power 5). Once student-athletes become able to profit from their names, images, and likenesses, two things become more likely to occur. First, student-athletes will take advantage of the relaxed transfer restrictions and the number of Type II transfers could rise. The desire to initiate a Type II transfer would largely be driven by a student-athlete's desire to maximize his or her media exposure, increasing the likelihood that he or she could profit from name, image, or likeness use. While this is certainly a possibility worth mentioning, the total number of roster spots and athletic scholarships available at Power 5 schools are certainly much less than those at non-Power 5 schools, owing to the sheer number of non-Power 5 schools that compete in collegiate athletics. Indeed, at present, Division I college football teams are capped at awarding 85 scholarships per year, and of those 85, no more than 25 may be "initial counters" or new scholarship players at the school.¹⁵³

¹⁵³ Andy Staples, *The Double-Edged Sword of the Transfer Portal*, Sports Illustrated (Feb. 18, 2019), <https://www.si.com/college/2019/02/18/transfer-portal-scholarship-limits-initial-counter-rule>. The "initial counter" rule was largely designed by the NCAA "[t]o keep a new coach from running off an entire team so he can replace the players with his own recruits." *Id.*

Perhaps more distressing is the second possibility, which would see the occurrence of Type I transfers drastically fall. As noted in Part III, more non-Power 5 schools were identified as the transferee institution for seven or more individuals than Power-5 schools. Student-athletes that would normally initiate a Type I transfer would already occupy a roster spot (and possibly a scholarship) at a Power 5 school, and given the ability to maximize one's profit off of their own name, image, and likeness at a Power 5 school, would surely hesitate to leave for a non-Power 5 institution, or even to *consider* initiating a transfer, as Power 5 schools are empowered to cancel scholarships in this situation, as previously discussed.¹⁵⁴ If this were to become a reality, the results would be devastating for non-Power 5 schools, who would lose out on talent they have come to depend upon in recent years. The effect of a decline in Type I transfers would be especially profound on HBCUs, who historically have reaped the benefits of transferring players, as noted in Part III. While some media outlets have proclaimed the powers of lax transfer restrictions as a "path to the pros" for HBCU players,¹⁵⁵ others note that football programs at a number of HBCUs are already in danger.¹⁵⁶ The gap between the Power 5 schools and their counterparts would widen even more.

2. Legal Implications

On its surface, this "perfect storm" may be welcomed with open arms by some members of the legal community. While coaches and university officials openly chastise the loosening of transfer restrictions as "collegiate free agency,"¹⁵⁷ to some, this change represents a victory akin to that experienced by NFL

¹⁵⁴ Higgins, *supra* note 139.

¹⁵⁵ See Donovan Dooley, Transferring to Power 5 schools is a path to the pros for HBCU basketball players, *The Undeclared* (June 19, 2018), <https://www.theundefeated.com/features/transferring-to-power-5-schools-is-a-path-to-the-pros-for-hbcu-basketball-players>.

¹⁵⁶ Tom Layberger, Integration, financial struggles putting HBCU football on the brink, *GlobalSportMatters* (Aug. 13, 2019), <https://www.globalsportmatters.com/culture/2019/08/13/integration-financial-struggles-putting-hbcu-football-on-the-brink>.

¹⁵⁷ See *e.g.*, Matt Wenzel, Two seasons in, NCAA transfer portal has been mostly a one-way street for Michigan State, *M Live* (Jan. 14, 2020), <https://www.mlive.com/Sports/2020/01/two-seasons-in-ncaa-transfer-portal-has-been-mostly-a-one-way-street-for-michigan-state.html>.

players in *Mackey*.¹⁵⁸ In a similar vein, the plaintiffs in *O'Bannon* and the *Alston* litigation were likely pleased with the NCAA's October 2019 announcement. Even the Ninth Circuit in early January 2020 issued an order asking for supplemental briefing from both sides in the *Alston* litigation, detailing California's Fair Pay to Play Act, and its impact on the pending litigation.¹⁵⁹

However, there is a very real possibility that the combination of relaxed transfer restrictions and reform to the NCAA's "no-pay" rules could produce further antitrust scrutiny. Even as transfer and payment restrictions are loosened for student-athletes, litigants could use *American Needle's* discussion of "competitive balance"¹⁶⁰ and a noticeably imbalanced athletic climate to argue that any procompetitive rationales offered by the NCAA to justify its rule are "insufficient to overcome the anticompetitive effects."¹⁶¹ As discussed, the influence of the Power 5 conferences has increased substantially in the past decade, and a litigant could easily distinguish the current athletic climate from that in *Tanaka*. The challenged actions in that case involved one conference, whereas here, five conferences are implicated, and the relevant "market" being restricted today is the much larger market which the Power 5 conferences occupy—nearly the entire continental United States.¹⁶² Tempered transfer restrictions, coupled with the ability to maximize one's profits from name, image, and likeness at a Power 5 school, may shrink a court's perception of the balance between the procompetitive and anticompetitive effects of the NCAA rules at issue.

V. CONCLUSION

In the aftermath of the passage of California's Fair Pay to Play Act, an op-ed in the San Diego Union-Tribune stated that

If the more than 24,000 student-athletes at 58 NCAA schools in California are allowed unregulated name, image and

¹⁵⁸ See *Mackey v. NFL*, 543 F.2d 606 (8th Cir. 1976).

¹⁵⁹ Zachary Zagger, 9th Cir. Tells Athletes, NCAA To Detail Calif. Pay Law's Impact, Law360 (Jan. 7, 2020, 6:28 PM EST), <https://www.law360.com/articles/1232034/9th-circ-tells-athletes-ncaa-to-detail-calif-pay-law-s-impact>.

¹⁶⁰ *American Needle, Inc. v. NFL*, 130 S.Ct. 2201, 2217 (2010).

¹⁶¹ Kinsky, *supra* note 29, at 1581.

¹⁶² See *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1063 (9th Cir. 2001).

likeness benefits . . . it would become impossible to conduct fair contests on a national scale for the hundreds of thousands of other student athletes throughout the United States . . . student-athletes at all levels, both in California and nationwide, must play by the same rules if they are to compete for the same national championships[.]¹⁶³

The same sentiment can be applied to the current collegiate athletic environment, more generally. Although we know that the power and resource disparity between the Power 5 and non-Power 5 conferences continues to grow, it is still possible to confront the greater competitive imbalance that will be produced ahead of the NCAA's adoption of rules designed to allow student-athletes to profit from their names, images, and likenesses in 2021.

A. Evaluating Potential Reforms to the Existing Transfer Regime

The NCAA appears committed to fulfilling the promise it made in its October 2019 announcement, possibly because it believes it is the right thing to do or possibly because it will mitigate some of the harshest criticisms aimed at the organization over the past several decades. As such, revisions to the existing transfer regime should be made to address the concerns raised in this Note.

1. Repealing the Graduate Transfer Exception

One common proposal consistently put forth involves repealing the Graduate Transfer Exception. Some coaches and university officials believe that this exception “penalizes schools for ‘doing their jobs well’ by supporting their student-athletes and helping them graduate on time.”¹⁶⁴ Research indicates that graduate transfers rarely complete the advanced degrees they are

¹⁶³ Sue Henderson, Gary Olson, and David Wilson, Why NCAA athletes marketing themselves would hurt college sports, *The San Diego Union-Tribune* (Sept. 20, 2019, 12:42 PM), <https://www.sandiegouniontribune.com/opinion/story/2019-09-20/student-athletes-marketing-themselves-would-hurt-college-sports>.

¹⁶⁴ Gerace, *supra* note 53, at 1822 (citing Jeff Goodman, The Graduate-Transfer Rule Is Causing All Kinds of Problems, *ESPN* (Sept. 8, 2016), http://www.espn.com/mens-collegebasketball/story/_/id/17487374/the-graduate-transfer-rule-hurting-college-basketball).

seeking, which led Big 12 Commissioner Bob Bowlsby to state that “[t]he so-called graduate degree is really not the aspiration . . . [t]he aspiration is to be featured, and usually featured at a higher level.”¹⁶⁵ Repealing the Graduate Transfer Exception may not serve a useful purpose, however; the previous repeal of a similar rule simply led to graduate transfers obtaining a waiver to compete immediately.¹⁶⁶ Additionally, in some respects, the idea that graduate transfers are “athlete[s] who [have] earned a degree” and “accomplished what [they] needed to do”¹⁶⁷ works against the argument that these particular student-athletes should be the ones to bear the brunt of the forces of change.

2. Banning all Type II Transfers

Commissioner Bowlsby’s statements, discussed *supra*, imply a concern about Type II transfers. A proposal, based on the data included in Part III, that would simply ban *all* Type II transfers likely would not withstand antitrust scrutiny, as such a rule would be a naked “restraint of trade” with implications in an expansive national market (banning transfer to *all* Power 5 schools across the country).¹⁶⁸ Additionally, from another standpoint, banning all Type II transfers could tie the hands of Power 5 coaches explicitly seeking to develop diverse rosters that “balance” transfers and homegrown talent, such as coach Manny Diaz at the University of Miami, whose efforts have led commentators to dub his team “Portal U.”¹⁶⁹

¹⁶⁵ Ralph D. Russo, To slow flow of grad transfers, NCAA could constrain schools, Associated Press (Apr. 16, 2019), <https://apnews.com/e4fbc74f9e7a454bb4f83954b243271e>.

¹⁶⁶ Infante, *supra* note 61.

¹⁶⁷ David Kenyon, Should College Football Eliminate Transfer Penalties Once and for All?, Bleacher Report (Feb. 13, 2019), <https://www.bleacherreport.com/articles/2820377-should-college-football-eliminate-transfer-penalties-once-and-for-all>.

¹⁶⁸ See *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1064–65 (9th Cir. 2001).

¹⁶⁹ David Kenyon, Manny Diaz’s ‘Portal U’ Jackpot Is Big Step to Returning Miami to CFB Relevance, Bleacher Report (Jan. 24, 2019), <https://www.bleacherreport.com/articles/2817100-manny-diazs-portal-u-jackpot-is-big-step-to-returning-miami-to-cfb-relevance>; see also Tom D’Angelo, Miami Hurricanes: Coach Manny Diaz may be King of the Transfer Portal, but the foundation to any program is recruiting the old-fashioned way, The Palm Beach Post (Feb. 7, 2019, 1:19PM), <https://www.palmbeachpost.com/sports/20190207/miami-hurricanes-coach-manny-diaz-may-be-king-of-transfer-portal-but-foundation-to-any-program-is-recruiting-old-fashioned-way>.

Other coaches certainly engage—to different extents—in practices similar to Manny Diaz, and the incidence of Type I and Type II transfers are certainly related, most likely in a cyclical way. As student-athletes engage in Type I transfers, they open up roster spots which can be filled by student-athletes seeking a Type II transfer; the opposite (Type II transfers spurring on Type I transfers) is also likely true, though probably to a lesser degree. Roster turnover, in some capacity, is a good thing, and banning all Type II transfers runs the risk of significantly decreasing—or even eliminating—roster turnover between Power 5 and non-Power 5 sports programs.

3. The Case for the Academic Exception

While the goal of tightening transfer restrictions while still complying with federal antitrust laws and achieving “sound policy” may seem out of reach, one proposal, which was previously submitted to the NCAA governance and rejected, does make sense in terms of both legal and policy strategy.

Commissioner Bowlsby’s statements, discussed in terms of repealing the Graduate Transfer Exception, get at the heart of the NCAA’s purported mission: to “interweav[e] intercollegiate athletics as part of a student-athlete’s educational experience.”¹⁷⁰ As such, a proposal that, in my opinion, stays true to this mission involves a prospective transfer’s Grade Point Average. The so-called “academic exception” was proposed in 2018 by the Division I Committee on Academics and would have set a benchmark GPA between 3.0 and 3.3 in order for transfer student-athletes to compete at their new schools immediately.¹⁷¹ This proposal was ultimately defeated, with a large contingent arguing that its implementation would have a disparate impact on African-American student-athletes.¹⁷² Studies indicated that with a 3.0

¹⁷⁰ Gerace, *supra* note 53, at 1827.

¹⁷¹ Michelle Brutlag Hosick, DI Committee on Academics considers transfer rule changes, NCAA (Apr. 5, 2018, 4:51 PM), [http://www.ncaa.org/about/resources/media-center/news/di-committee-academics-considers-transfer-rulechanges#.Wse2rkVtRhI.ttwitter](http://www.ncaa.org/about/resources/media-center/news/di-committee-academics-considers-transfer-rulechanges#.Wse2rkVtRhI.twitter).

¹⁷² Dennis Dodd, NCAA’s GPA-based transfer proposal faces potential backlash over racial inequality, CBS Sports (May 10, 2018, 2:12 PM ET), <https://www.cbssports.com/collegefootball/news/ncaas-gpa-based-transfer-proposal-faces-potential-backlash-over-racial-inequality>.

GPA benchmark, only 19% of African-American football and basketball players could transfer immediately; when the benchmark was raised to 3.3, only 6% of these players would be eligible.¹⁷³

I strongly believe that the academic exception provides the best route for reforming the transfer process and addressing the issues concerning competitive imbalance raised in this Note for three reasons. First, it will reduce the number of student-athletes that are eligible to transfer from where it is now. This will alleviate some of the concerns raised in Part IV of this Note relating to the effects a rise in Type II transfers and a decline in Type I transfers would have on competitive balance. Second, academic requirements relating to transfers are already in practice within the NCAA and can be easily transferred over to a broader range of institutions. The NCAA sets out a number of restrictions on Junior College (or JUCO) student-athletes seeking to transfer to Division I or Division II institutions.¹⁷⁴ These include a restriction that a JUCO transfer can only use two credit hours of Physical Education/Activity courses toward the required transferable degree credits and a limitation on the use of credits from remedial-level courses toward the eligibility requirement.¹⁷⁵ Third, and perhaps most importantly, the academic exception would likely survive antitrust scrutiny. As shown, any hurdle placed in the path of a student-athlete seeking a transfer is certain to be challenged on antitrust grounds.¹⁷⁶ Likewise, the NCAA's attempts to obtain an "antitrust exemption," similar to that of professional baseball, from Congress have thus far stalled.¹⁷⁷ While the academic exception could plausibly be

¹⁷³ *Id.* It is important to note, as discussed *supra*, that only student-athletes in the "revenue" sports may be required to sit out a season after transferring.

¹⁷⁴ NCAA Academic Requirements For JUCO Transfers, *Informed Athlete* (July 21, 2018), <https://informedathlete.com/ncaa-academic-requirements-for-juco-transfers>.

¹⁷⁵ *Id.*

¹⁷⁶ See *supra* Part I.

¹⁷⁷ See Ralph D. Russo, *As NCAA fends off challenges, antitrust exemption debated*, *The Washington Times* (May 21, 2015), <https://www.washingtontimes.com/news/2015/may/21/as-ncaa-fends-off-challenges-antitrust-exemption-d>; see also Kevin Trahan, *The NCAA Is Trying to Hustle Congress for an Antitrust Exemption*, *Vice* (Nov. 20, 2014, 3:16 PM), https://www.vice.com/en_us/article/vva8mx/the-ncaa-is-trying-to-hustle-congress-for-an-antitrust-exemption. Although this Note does not address the legal argument or the practicality of such an antitrust exemption for the NCAA, several law

characterized as a “restraint of trade,” the federal courts have already shown a willingness to uphold NCAA rules and policies, in relation to the “receipt of benefits” issue, with a clear link to education.¹⁷⁸ Further, in using the arguments made and the data presented in this Note, the NCAA can argue that its implementation of this new academic rule creates procompetitive effects that outweigh the anticompetitive nature of the rule.

To assuage fears that such an academic exception would disproportionately affect African-American student-athletes and possibly avoid challenges on Equal Protection or Civil Rights Act bases, the NCAA could implement a version of this rule across *all* sports, including non- “revenue” sports. Although student-athletes in these sports are not required to sit out a season, implementing a GPA benchmark in sports other than those with high levels of African American student-athlete participation would signal the NCAA’s commitment to consistency in achieving its educational mission.¹⁷⁹ Finally, since the waiver process still exists to make individual-specific determinations as to eligibility, student-athletes that fail to attain the GPA benchmark may still be able to compete immediately.

In summary, reasonable steps should be taken to ensure as equitable of a flow of talent between NCAA institutions as possible. Since the NCAA is unlikely to back down from its highly visible commitment to allowing some, albeit limited, form of pay-for-play, the rules and policies surrounding transfer eligibility should be tightened to some extent. Implementing the academic exception provides the best way forward for the NCAA.

review articles do. See e.g., Daniel E. Lazaroff, *An Antitrust Exemption for the NCAA: Sound Policy or Letting the Fox Loose in the Henhouse?*, 41 *Pepp. L. Rev.* 229 (2014).

¹⁷⁸ See e.g., *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 802 F.3d 1049, 1074–75 (2015).

¹⁷⁹ See Dodd, *supra* note 172.