The John Marshall Law Review

Volume 52 | Issue 4 Article 6

2019

Changing the NCAA's "Year-in-Residency" Rule: Narrowing Supreme Court Precedent from Below, 53 UIC J. MARSHALL L. REV. 1085 (2019)

Evan Kanz

CHANGING THE NCAA'S "YEAR-IN-RESIDENCY" RULE: NARROWING SUPREME COURT PRECEDENT FROM BELOW

EVAN KANZ*

Abstract

The NCAA's year-in-residency requirement dictates that any student-athlete who plays a revenue-generating sport and transfers to another Division I institution must complete one full academic year before regaining eligibility for competition. While NCAA regulations like the year-in-residency requirement restrict output, the "pro-competitive presumption" precedent established by the Supreme Court mandates that NCAA regulations like the year-in-residency requirement are deemed inherently pro-competitive, and automatically not in violation of the Sherman Act. Importantly, the "pro-competitive presumption" was established in dictum and the

concept of stare decisis has a limited application in the field of antitrust law. For these reasons, among others, lower federal courts should follow the lead of the Ninth Circuit in *O'Bannon v. NCAA* and narrow the "pro-competitive presumption" precedent from below. Although precedent may not be on the lower federal courts side, the lower federal courts have the power and opportunity to narrow NCAA antitrust from below and force the NCAA to fully defend its anti-competitive regulations in a court of law.

I. INTRODUCTION

The National Collegiate Athletic Association ("NCAA") reported more than $1 billion in annual revenue for the 2017 fiscal year, a number that only continues to grow as the number of collegiate students and student-athletes increase.[1] Although the NCAA is an enormous economic market, federal courts generally grant the NCAA an antitrust exemption because of the "amateur" designation given to college athletes.[2] In other words, the amateur designation allows the NCAA to profit immensely off the backs of student-athletes, while student-athletes are left with few options, especially when wishing to transfer schools.[3]

Student-athletes are considered amateurs and therefore the NCAA regulations that aim to promote amateurism are generally deemed to be presumptively procompetitive.[4] Because the regulations are considered procompetitive, federal courts generally refuse to apply the antitrust framework when evaluating challenges to NCAA regulations.[5] While the NCAA faced antitrust claims before, it has prevailed on nearly all regulations with any connection to amateurism and eligibility.[6] By declaring NCAA

---

* J.D. Candidate, UIC John Marshall Law School, 2020; M.A., Eastern Illinois University, 2017; B.S., Eastern Illinois University, 2016.

1. Steve Berkowitz, *NCAA Reports Revenue of More Than $1 Billion in 2017*, USA TODAY (Mar. 7, 2018), www.usatoday.com/story/sports/college/2018/03/07/ncaa-reports-revenues-more-than-1-billion-2017/402486002/.

2. *See* John Niemayer, *The End of an Era: The Mounting Challenges to the NCAA's Model of Amateurism*, 42 PEPP. L. REV. 883, 899 (2015) (analyzing how dicta in the Court's decision in *NCAA v. Bd. of Regents* has formed binding precedent rejecting suits challenging NCAA amateurism rules); *see also* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 102 (1984) (stating "[i]n order to preserve the character and quality of the [NCAA's] 'product,' athletes must not be paid, must be required to attend class, and the like").

3. *See* Kendall K. Johnson, *Enforceable Fair and Square: The Right of Publicity, Unconscionability, and NCAA Student-Athlete Contracts*, 19 SPORTS L. J. 1, 12 (2012) (examining the NCAA's lucrative television and advertising contracts and the increased dissatisfaction of student-athletes).

4. *Bd. of Regents*, 468 U.S. at 117.

5. Deppe v. NCAA, 893 F.3d 498, 503-04 (7th Cir. 2018).

6. *See* Agnew v. NCAA, 683 F.3d 328, 347-48 (7th Cir. 2012) (holding the NCAA scholarship limit and prohibition on multi-year scholarships are

regulations presumptively procompetitive, federal courts continue to allow the giant market of NCAA athletics to operate in a non-competitive and monopolistic manner.

In a recent challenge to the NCAA antitrust exemption, *Deppe v. NCAA*, the Seventh Circuit dismissed a student-athlete's claim challenging the NCAA's transfer regulations.[7] Specifically, *Deppe* challenged the anti-competitiveness of the year-in-residency requirement, which requires student-athletes transferring schools to complete one full year of residence at his or her new school before being eligible for athletic competition.[8] The Seventh Circuit dismissed the year-in-residency challenge because it considered the regulation to be an eligibility rule, and therefore presumptively procompetitive pursuant to the precedent set in *National Collegiate Athletic Ass'n* v. *Bd. of Regents*.[9]

Part II of this Comment will provide a background of the NCAA, antitrust laws, and the history of NCAA antitrust challenges. Then, Part III will analyze the Seventh Circuit's decision to dismiss Deppe's antitrust challenge to the NCAA's year-in-residency regulation and further will show why the procompetitive designation applied to the year-in-residency regulation is inappropriate. Part III will also discuss the lower federal courts' power to narrow precedent from below, as well as the arguments for and against it. Part IV of this Comment will propose a practical solution. Ideally, the NCAA should take independent action and amend the year-in-residency regulation to allow for a uniform one-time transfer exception tied to academic performance. While the NCAA has the perfect opportunity to make independent change and adopt a uniform one-time transfer exception, that change is unlikely. Therefore, as the NCAA continues to evade real and necessary change, it is vital that lower federal courts take matters into their own hands and narrow the *Bd. of Regents* precedent from below.

The procompetitive presumption refers to the notion that NCAA regulations that aim to preserve the tradition of *amateurism* in college sports would be deemed inherently procompetitive, and not in violation of the Sherman Act.[10] In other words, if the challenged regulation relates to the preservation of amateurism it is automatically not in violation of the Sherman Act. Other scholars

---

eligibility rules and therefore procompetitive); *see also* Pugh v. NCAA, 2016 WL 5394408, at *6 (S.D. Ind. Sept. 27, 2016) (dismissing the challenge of NCAA year-in-residency requirement because it is an eligibility rule and therefore not subject to antitrust laws).

7. *Deppe,* 893 F.3d at 503.

8. *Id.* at 499. The Seventh Circuit determined otherwise and held that rule of reason antitrust framework need not be applied because the NCAA year-in-residency requirement is an eligibility rule and therefore procompetitive. *Id.* at 503.

9. *Id.* at 503.

10. *Bd. of Regents*, 468 U.S. at 117.

have previously advocated for federal courts to forego the procompetitive presumption in NCAA antitrust cases, however, none have truly analyzed why the federal courts have the inherent power to narrow NCAA antitrust precedent from below.[11] In addition, recent increases in NCAA student-athlete transfers, as well as the NCAA's increasingly inconsistent enforcement of the year-in-residency regulation, provides federal courts the perfect opportunity to narrow NCAA antitrust precedent from below.[12]

In short, the procompetitive presumption should not apply to the year-in-residency requirement. Rather, the rule of reason framework must be applied to minimize the impact of the immense power given to the NCAA by way of the anticompetitive regulations and actions of its member institutions. Although precedent may not be on the lower federal courts side, the lower federal courts have the power and opportunity to narrow NCAA antitrust from below, finally forcing the NCAA to fully defend its anticompetitive regulations in a court of law.[13]

II. BACKGROUND

A. Overview of the NCAA

The NCAA, an organization comprised of four-year institutions and athletic conferences, imposes certain regulations regarding student-athlete eligibility of which its member institutions must comply.[14] The NCAA is built on the principle of amateurism and must retain "a clear line of demarcation between college athletics and professional sports."[15] Because of the NCAA's commitment to amateurism, the organization enacted bylaws with which student-athletes must comply in order to be eligible for competition, as well as the process by which bylaws are enforced.[16] Although the NCAA and student-athletes do not have an ordinary contractual

11. *See* Joseph W. Shafer, *NCAA Division I Transfers "Are Now Basically Screwed": The Battle Against the NCAA's Year in Residence Rule in the Seventh Circuit*, 66 BUFF. L. REV. 481 (2018) (advocating for the court to forego the procompetitive presumption and apply a rule of reason analysis to NCAA regulations).

12. Berkowitz, *supra* note 1.

13. Richard M. Re, *Narrowing Supreme Court Precedent From Below*, 104 GEO. L. J. 921, 923 (2016).

14. *See* J. Winston Busby, *Playing For Love: Why The NCAA Rules Must Require A Knowledge-Intent Element To Affect The Eligibility Of Student-Athletes*, 42 CUMB. L. REV. 135, 141 (2011/2012) (providing an overview of NCAA membership and regulatory enforcement guidelines).

15. NCAA, DIVISION I MANUAL: AUGUST 2018-19, § 12.01.1 (2018), www.ncaapublications.com/productdownloads/D119.pdf [hereinafter NCAA MANUAL].

16. *See id.* at § 14.1.1 (requiring institutions to ensure their staff and student-athletes are compliant with NCAA rules).

relationship, the relationship is implied by way of scholarship agreements which student-athletes and their respective collegiate institutions enter into annually.[17]

As previously mentioned, the NCAA enacts a number of regulations and bylaws to foster its goal of amateur interscholastic competition.[18] The specific bylaw at issue in this Comment is NCAA Bylaw 14.5.5.1, otherwise known as the "year-in-residency" requirement. The text of Bylaw 14.5.5.1 states, "[a] transfer student from a four-year institution shall not be eligible for intercollegiate competition at a member institution until the student has fulfilled a residence requirement of one full academic year (two full semesters or three full quarters) at the certifying institution."[19]

In 1973, the NCAA established three separate divisions: Division I; Division II; and Division III.[20] These divisions were established to "align like-minded campuses in the areas of philosophy, competition, and opportunity."[21] Division I, the focus of this Comment, encompasses most of the country's largest universities and is seen by many as the first step to a professional sports career.[22]

The year-in-residency requirement mandates that any student-athlete who plays a revenue-generating sport and transfers to another Division I institution must complete one full academic year before regaining eligibility for competition.[23] The year-in-residency regulation aims to ensure that student-athletes are comfortable at their new institution before adding increased pressures of athletic competition, and also seeks to curtail free agency among the member institutions.[24] While on its face, the year-in-residency requirement promotes the NCAA's objective of interscholastic athletics, its practical effects are problematic.[25] On

17. *See* Josephine R. Potuto & Matthew J. Mitten, *Comparing NCAA And Olympic Athlete Eligibility Dispute Resolution Systems in Light of Procedural Fairness and Substantive Justice*, 7 HARV. J. SPORTS & ENT. L. 1, 13 (2016) (detailing the process of student-athletes annually agreeing in writing to abide by certain NCAA bylaws, and before signing are directed to review a summary of pertinent NCAA bylaws and receive regular education on the scope and meaning of the bylaws that affect them).

18. *See* Busby, *supra* note 14 (providing an overview of NCAA membership and regulatory enforcement guidelines).

19. NCAA MANUAL, *supra* note 15, at § 14.5.5.1.

20. *Our Three Divisions*, NCAA, www.ncaa.org/about/resources/media-center/ncaa-101/our-three-divisions (last visited Sept. 29, 2019).

21. *Id.*

22. *Athletic Divisions of the NCAA*, C. SPORTS SCHOLARSHIPS, www.collegesportsscholarships.com/ncaa-divisions-differences.htm (last visited Sept. 29, 2019).

23. NCAA MANUAL*, supra* note 15, at § 14.5.5.1.

24. *See* Shafer, *supra* note 11, at 483 (reiterating that the year-in-residency regulation "seeks to ensure student-athletes are adequately situated at their new institution before balancing the pressures of competing in Division I intercollegiate competition").

25. *See id.* (reasoning that the current state of collegiate athletics has left

one hand, coaches often leave athletic programs in search of lucrative contracts and face no penalties for doing so.[26] However, when a student-athlete seeks to leave a school for a better opportunity, they must fulfill an entire academic year-of-residency before being eligible to compete.[27]

What makes the year-in-residency requirement even more problematic is that it only applies to Division I institutions, and only applies to revenue-generating sports (football, basketball, baseball, and men's hockey).[28] The NCAA made this distinction due to the increased danger of free agency in NCAA Division I revenue-generating sports.[29] However, this distinction shows that the year-in-residency requirement's real objective may in fact be to promote and protect the NCAA's revenue, not student-athlete eligibility and amateurism.[30]

B. The History of NCAA Antitrust Challenges

While the NCAA is classified as a tax-exempt, non-profit organization, it reported $1.1 billion in revenue during 2017, none of which was received by the student-athletes.[31] Like nearly any trade association, athletic associations can raise extremely complex issues for an antitrust analysis.[32] In the case of the NCAA, some amount of collaboration among member institutions is required to achieve its intended outcomes.[33] For instance, the NCAA enacts rules that inherently restrict output and competition, such as the year-in-residency requirement.[34] Horizontal agreements amongst competitors, such as the year-in-residency regulation, are generally considered per se unlawful and a violation of Section I of the Sherman Act.[35] However, the Seventh Circuit in *Deppe* determined

---

student-athletes expendable).

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *See* Ray Yassar & Clay Fees, *Attacking the NCAA's Anti-Transfer Rules as Covenants Not to Compete*, 15 SETON HALL J. SPORT L. 221, 225-26 (2005) (reasoning that the NCAA enforces the year-in-residency regulation on specific sports because those sports generate the bulk of the NCAA's interest and revenue).

31. Scooby Axson, *NCAA Reports $1.1 Billion in Revenue*, SPORTS ILLUSTRATED (Mar. 7, 2018), www.si.com/college-basketball/2018/03/07/ncaa-1-billion-revenue.

32. *See* Wendy T. Kirby & T. Clark Weymouth, *Antritrust and Amateur Sports: The Role of Noneconomic Values*, 61 IND. L. J. 31, 32-33 (1985) (discussing the different factors and approaches used to analyze NCAA antitrust challenges).

33. Herbert J. Hovenkamp, *The NCAA and The Rule of Reason*, 52 REV. INDUS. ORG., 323, 324 (2018).

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

35. *Id.* at 100.

otherwise.[36]

Antitrust challenges, such as *Deppe's* year-in-residency challenge, are governed by federal antitrust laws, widely known as the Sherman Act.[37] The Sherman Act promotes and protects competition within markets.[38] Further, it broadly prohibits anti-competitive agreements and unilateral conduct that monopolizes or attempts to monopolize the relevant market.[39] The Sherman Act is designed to protect consumers from injury that results from diminished competition.[40] Antitrust concerns are established when regulations produce outcomes that leave customers worse off than having no regulations at all.[41] In other words, for an NCAA regulation to violate antitrust law, the regulation's beneficial purpose must be insufficient to offset the restraint on the market.[42]

To succeed on an antitrust challenge, a plaintiff must allege an injury to not only himself, but to the market as well.[43] Accordingly, a plaintiff must prove three elements to succeed under § 1 of the Sherman Act: "(1) a contract, combination, or conspiracy; (2) a resultant unreasonable restraint of trade in [a] relevant market; and (3) an accompanying injury."[44] Federal courts analyze antitrust challenges through three separate frameworks: rule of reason, per se, and quick-look analysis.[45]

The per se rule is employed when a law or regulation facially appears to be one that will "almost always tend to restrict competition or decrease output."[46] Under the per se framework, a

---

36. *Deppe*, 893 F.3d at 503-04.

37. *See* The Sherman Antitrust Act of 1890, 15 U.S.C. § 1 (2018) (establishing the federal antitrust law known as the "Sherman Act" which prohibits anti-competitive agreements and conduct).

38. *See* Thomas Baker, *Why The Latest NCAA Lawsuit Is Unlikely To Change Its Amateurism Rules - But Should*, FORBES (Sept. 11, 2018), www.forbes.com/sites/thomasbaker/2018/09/11/the-economics-of-amateurism-breaking-down-the-latest-lawsuit-against-the-ncaa/ (arguing a recent challenge to NCAA anti violation "represents an opportunity for the court to put an end to the manipulated market for student-athlete services, even if doing so means disrupting the way the NCAA currently does business").

39. Sherman Act, 15 U.S.C. § 1 (2018).

40. *See* Banks v. NCAA, 977 F.2d 1081, 1087 (7th Cir. 1992) (establishing the relationship between antitrust laws and NCAA regulations).

41. Kirby & Weymouth, *supra* note 32.

42. *Id.*

43. *See* Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1107 (7th Cir. 1993) (determining a plaintiff must also allege an injury to the market as a whole).

44. *See* Denny's Marina, Inc. v. Renfro Prods., Inc., 8 F.3d 1217, 1220 (7th Cir. 1993) (creating the required elements a plaintiff must prove in an antitrust challenge).

45. *Agnew,* 683 F.3d at 335.

46. *See* Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 19-20 (1979) (employing a per se framework when the "practice facially appears to be one that would always or almost always tend to restrict competition and decrease output").

restraint is deemed unreasonable without considering the market context in which the restraint operates.[47] The second framework, the quick-look analysis, is used when the per se framework is inappropriate.[48] Specifically, the quick-look approach is used when an ordinary observer could determine that the practice would have an anti-competitive effect on the market.[49] Neither the per se nor quick-look framework is generally applicable to NCAA antitrust challenges.[50] This is because a certain level of cooperation is necessary for the NCAA and its member institutions to preserve its market.[51]

Rule of reason is the framework most frequently applied in cases involving the NCAA.[52] The rule of reason framework requires a plaintiff to show the defendant has "market power," and the defendant would not be able to cause anti-competitive effects on market pricing without that power.[53] Further, the rule of reason analysis requires the court to determine "the circumstances of the alleged restraint and balance the anticompetitive and procompetitive effects of the alleged restraint."[54] If the plaintiff meets his burden, then the defendant can show the restraint actually has a procompetitive effect, while the plaintiff can dispute this claim or show the restraint is not reasonably necessary to achieve the procompetitive balance.[55]

Not surprisingly, the NCAA has faced countless lawsuits over the years, challenging whether NCAA regulations violate federal antitrust laws by restricting competition.[56] These lawsuits have ranged from challenges to NCAA transfer rules, television restrictions, and student-athlete compensation.[57] However, success

47. *See Bd. of Regents*, 468 U.S. at 104 (holding restrictions on NCAA television rights violate antitrust laws because they substantially decrease market output).

48. *Id.* at 100.

49. *E.g.*, Cal. Dental Ass'n v. FTC, 526 U.S. 756, 770 (1999) (determining the quick-look analysis is used when "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anti-competitive effect on customers and markets").

50. *See Bd. of Regents*, 468 U.S. at 103 (determining that the restrictions should be analyzed under a rule of reason analysis).

51. *Id.* at 117.

52. *See id.* at 103 (determining Rule of Reason framework should be applied to the NCAA's television restrictions).

53. *See* Valley Liquors, Inc. v. Renfield Importers, Ltd., 822 F.2d 656, 666 (7th Cir. 1987) (defining market power as the "power to raise prices significantly above the competitive level without losing all of one's business").

54. Sarah M. Konsky, *An Antitrust Challenge to The NCAA Transfer Rules,* 70 U. CHI. L. REV. 1581, 1588 (2003).

55. *Banks*, 977 F.2d at 1087.

56. *See generally* Richard E. Kaye, *Application of Federal Antitrust Laws to Collegiate Sports*, 87 A.L.R. Fed. 2d 43 (2014) (detailing the successes and failures of antitrust challenges to NCAA regulations).

57. *Deppe*, 893 F.3d 498; *Bd. of Regents*, 468 U.S. 85; O'Bannon v. NCAA, 802 F.3d 1049 (9th Cir. 2015).

on those claims has been minimal as the NCAA continues to be exempt from antitrust laws in almost every situation.[58] The seminal case in NCAA antitrust precedent is *National Collegiate Athletic Ass'n v. Bd. of Regents*.

1. Establishment of NCAA Antitrust Precedent

In *Bd. of Regents*, the NCAA developed television restrictions on college football games which allowed only a certain number of games to be televised each week, and forbade teams from appearing in televised games more than twice a year.[59] When two universities challenged the television restrictions under § 1 of the Sherman Act, the Supreme Court determined the television restrictions violated the Sherman Act because they substantially restricted output.[60]

Although the Court sided with the plaintiffs in *Bd. of Regents* and determined the television restrictions violated the Sherman Act, the Court also established crucial precedent that NCAA regulations aimed at preserving the tradition of *amateurism* in college sports would be deemed inherently procompetitive, and not in violation of the Sherman Act.[61] Since the Court's decision in *Bd. of Regents*, NCAA regulations have continuously been challenged as violating antitrust laws.[62] However, because of the procompetitive designation given to regulations by the Court in *Bd. of Regents*, the lower federal courts generally adhere to the *Bd. of Regents* precedent and allow the NCAA to prevail in nearly every antitrust challenge.[63]

2. Affirmance of Bd. of Regents' Precedent

The precedent set in *Bd. of Regents* carried over to the Seventh Circuit's decision in *Agnew v. NCAA*.[64] In *Agnew*, the Seventh

58. Gregory M. Krakau, *Monopoly and Other Children's Games: NCAA's Antitrust Suit Woes Threaten Its Existence*, 61 OHIO ST. L. J. 399, 400 (2000).

59. *Bd. of Regents*, 468 U.S. at 92-94.

60. *See id.* at 120 (holding "rules that restrict output are hardly consistent" with preserving the tradition of the NCAA and amateurism).

61. *See id.* at 117 (declaring that any NCAA regulation aimed at promoting amateurism will be deemed procompetitive and not subject to antitrust laws).

62. *Id.* at 120.

63. *See Agnew*, 683 F.3d at 347-48 (holding that the plaintiffs failed to establish the existence of a market in challenging NCAA scholarship cap regulations); *see also* Bassett v. NCAA, 528 F.3d 426, 433 (6th Cir. 2008) (holding recruiting and academic regulations are non-commercial in nature and cannot be subject to antitrust laws); *see also* Pocono Invitational Sports Camp, Inc. v. NCAA, 317 F. Supp. 2d 569, 584 (E.D. Pa. 2004) (holding that recruiting regulations are non-commercial and therefore not subject to antitrust laws).

64. *Agnew*, 683 F.3d at 348. Former college football players appealed the decision of the United States District Court for the Southern District of Indiana which granted a motion by the appellee, NCAA, to dismiss an action that alleged that two of the association's bylaws had an anticompetitive effect on the market

Circuit dismissed a college football player's antitrust challenge to the NCAA regulations which limited the amount of scholarships given per team and prohibited multi-year scholarship agreements.[65] Interestingly, the Seventh Circuit determined the scholarship regulations were not presumptively procompetitive and therefore subject to antitrust scrutiny.[66] However, the Seventh Circuit dismissed the complaint because it determined the student-athlete failed to identify a relevant commercial market in which the anticompetitive effects may be felt.[67] The Seventh Circuit's decision not to apply the procompetitive presumption to the scholarship regulations gave hope to future NCAA antitrust challenges that courts would apply full antitrust analysis to NCAA regulations.[68] However, the Seventh Circuit also displaced much of that hope when it opined that "[m]ost—if not all—eligibility rules, on the other hand, fall comfortably within the presumption of procompetitiveness afforded to certain NCAA regulations."[69]

In addition to *Agnew*, numerous other federal courts have consistently applied the procompetitive presumption to any NCAA regulation that was considered an eligibility rule or "fit into the same mold" as such.[70] For instance, in *Gaines v. NCAA*, a college football player challenged NCAA regulations which declared "a student-athlete loses his amateur status when he enters a professional draft or enters into an agreement with an agent."[71] The

---

for student-athletes in violation of § 1 of the Sherman Act. *Id.* at 332.

65. *Id.* at 348. The plaintiffs in *Agnew* were Joseph Agnew and Patrick Courtney. *Id.* at 332. Both student-athletes suffered career ending football injuries and lost their scholarships because of the scholarship regulations imposed by the NCAA. *Id.*

66. *Id.* at 343. The Seventh Circuit concluded the scholarship regulations did not "fit into the same mold" as eligibility rules. *Id. (*citing In re NCAA I-A Walk-on Football Players Litigation, 398 F. Supp. 2d 1144, 1149 (W.D. Wash. 2005) (finding that the limit on the number of scholarships a collegiate team can offer does not implicate student-athlete eligibility "in the same manner as rules requiring students to attend class or rules revoking eligibility for entering a professional draft")).

67. *Agnew*, 683 F.3d at 347-48. Plaintiff's request to amend his complaint was denied because the plaintiff had multiple opportunities to state a claim for which relief could be sought. *Id.*

68. Steve Eder & Ben Strauss, *Understanding Ed O'Bannon's Suit Against the N.C.A.A.*, N.Y. TIMES (June 9, 2014), www.nytimes.com/2014/06/10/sports/ncaabasketball/understanding-ed-obannons-suit-against-the-ncaa.html. The long-term impact of the *O'Bannon* decision could give colleges and conferences the option to offer financial incentives to recruits for their publicity rights. *Id.*

69. *Agnew*, 683 F.3d at 343. Although the Seventh Circuit determined the scholarship regulations were not presumptively procompetitive, the *Agnew* opinion has been read to reinforce the precedent set in *Bd. of Regents* that most eligibility rules will be considered presumptively procompetitive. *Id.*

70. *Id.*

71. Gaines v. NCAA, 746 F. Supp. 738, 740 (M.D. Tenn. 1990); NCAA MANUAL, *supra* note 15, at § 12.2.4.2:

district court dismissed the complaint after determining the regulations at issue were eligibility rules aimed at maintaining the integrity of amateur athletics and were therefore presumptively procompetitive.[72] Further, the district court reasoned that the purpose of the NCAA rules at issue were "to preserve the unique atmosphere of competition between student-athletes."[73]

In addition, in *Smith v. NCAA*, the Third Circuit applied the procompetitive presumption to an NCAA bylaw which provided that a student-athlete may not participate in intercollegiate athletics at a post-graduate institution different from the institution in which the student earned his or her bachelor's degree.[74] Once again, the

---

> 12.2.4.2 Draft List. An individual loses amateur status in a particular sport when the individual asks to be placed on the draft list or supplemental draft list of a professional league in that sport, even though:
>
> (a) The individual asks that his or her name be withdrawn from the draft list prior to the actual draft,
>
> (b) The individual's name remains on the list but he or she is not drafted, or
>
> (c) The individual is drafted but does not sign an agreement with any professional athletics team

§ 12.3.1:

> 12.3.1 General Rule. An individual shall be ineligible for participation in an intercollegiate sport if he or she ever has agreed (orally or in writing) to be represented by an agent for the purpose of marketing his or her athletics ability or reputation in that sport. Further, an agency contract not specifically limited in writing to a sport or particular sports shall be deemed applicable to all sports and the individual shall be ineligible to participate in any sport.

72. *Gaines*, 746 F. Supp. at 744. "According to the NCAA Constitution, the purpose of eligibility rules are to maintain amateur collegiate athletics 'as an integral part of the education 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.'" *Id.*

73. *Id.*

74. Smith v. NCAA, 139 F.3d 180, 187 (3d Cir. 1998); NCAA MANUAL, *supra* note 15, at § 14.1.8.2:

> [a] student-athlete who is enrolled in a graduate or professional school of the institution he or she previously attended as an undergraduate (regardless of whether the individual has received a United States baccalaureate degree or its equivalent), a student-athlete who is enrolled and seeking a second baccalaureate or equivalent degree at the same institution, or a student-athlete who has graduated and is continuing as a full-time student at the same institution while taking course work that would lead to the equivalent of another major or degree as defined and documented by the institution, may participate in intercollegiate athletics, provided the student has eligibility remaining and such participation occurs within the applicable five-year or 10-semester period . . . .

Third Circuit determined that the challenged regulation was an eligibility regulation and therefore, not subject to antitrust scrutiny.[75] The Third Circuit reasoned that eligibility rules are presumptively procompetitive because they "are not related to the NCAA's commercial or business activities."[76]

Finally, the federal courts extended the procompetitive presumption even further in *McCormack v. NCAA*.[77] In *McCormack*, a suspended college football program brought an antitrust suit against the NCAA alleging the restrictions on compensation to college football players constituted illegal price-fixing.[78] The Fifth Circuit determined the NCAA compensation regulations were not subject to antitrust scrutiny because they were eligibility rules, and therefore presumptively procompetitive.[79] The Fifth Circuit reasoned eligibility rules are necessary to create and allow for the survival of college sports "in the face of commercializing pressures."[80]

3. Courts Wavering from NCAA Antitrust Precedent

Although the Supreme Court in *Bd. of Regents* established the procompetitive presumption, the Court also found that the NCAA-imposed television restrictions violated antitrust laws.[81] While it does not happen frequently, in certain cases the NCAA has refused to apply the procompetitive presumption.[82] For instance, in *Law v. NCAA*, a class of college basketball coaches challenged an NCAA bylaw which limited the amount of earnings specific assistant coaches could earn.[83] The Tenth Circuit refused to apply the

---

75. *Smith*, 139 F.3d at 185.

76. *Id.*

77. *See* McCormack v. Nat'l Collegiate Athletic Assoc., 845 F.2d 1338, 1340 (5th Cir. 1988) (detailing the suspension of the 1987 Southern Methodist University football program after the NCAA found the program exceeded restrictions on compensation for student-athletes).

78. *Id.*

79. *Id.* at 1345.

80. *Id.*

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

82. Law v. NCAA, 134 F.3d 1010 (10th Cir. 1998); *In re NCAA I-A Walk-On Football Players Litig.*, 398 F. Supp. 2d 1144; *O'Bannon*, 802 F.3d 1049.

83. *Law v. NCAA*, 134 F.3d at 1014; NCAA MANUAL, *supra* note 15, at § 11.02.3:

> Restricted-Earnings Coach. A restricted-earnings coach is any coach who is designated by the institution's athletics department to perform coaching duties and who serves in that capacity on a volunteer or paid basis with the following limitations on earnings derived from the member institution:
>
> (a) During the academic year, a restricted-earnings coach may receive compensation or remuneration from the institution's athletics department that is not in excess of either $ 12,000 or the actual cost of

procompetitive presumption to the challenged regulation because there was no evidence that salary restrictions actually enhanced competition.[84] The Tenth Circuit further determined that the regulation was "nothing more than a cost-cutting measure" that was not directed towards competitive balance in any way.[85]

In addition, *In re NCAA I-A Walk-On Football Players Litig.*, a district court once again refused to apply the procompetitive presumption to an NCAA regulation.[86] A group of college football players challenged the NCAA bylaw that restricted the number of scholarships awarded by each school.[87] The district court found that the challenged bylaw was not exempt from antitrust scrutiny because it did not fit into the same mold as the eligibility

---

educational expenses incurred as a graduate student.

(b) During the summer, a restricted-earnings coach may receive compensation or remuneration (total remuneration shall not exceed $ 4,000) from:

(1) The institution's athletics department or any organization funded in whole or in part by the athletics department or that is involved primarily in the promotion of the institution's athletics program (e.g., booster club, athletics foundation association);

(2) The institution's camp or clinic,

(3) Camps or clinics owned or operated by institutional employees, or

(4) Another member institution's summer camp.

(c) During the summer or the academic year, the restricted-earnings coach may receive compensation for performing duties for another department or office of the institution, provided:

(1) The compensation received for those duties outside the athletic department is commensurate with that received by others performing those same or similar assignments,

(2) The ratio of compensation received for coaching duties and any other duties is directly proportionate to the amount of time devoted to the two areas of assignment, and

(3) The individual is qualified for and is performing the duties outside the athletic department for which the individual is compensated.

(d) Compensation for employment from a source outside the institution during the academic year or from sources other than those specified under 11.02.3-(b) and 11.02.3-(c) above during the summer shall be excluded from the individual's limit on remuneration.

84. *Law v. NCAA*, 134 F.3d at 1024.

85. *Id.*

86. *In re NCAA I-A Walk-On Football Players Litig.*, 398 F. Supp. 2d at 1151-52.

87. *Id.* at 1146-47. The class of plaintiffs were "walk-ons." *Id.* Walk-ons are players who do not receive any athletic scholarship from their school. Joe Leccesi, *The 5 Most Commonly Asked Questions About Being a College Walk-On*, USA TODAY SPORTS (Apr. 13, 2017), www.usatodayhss.com/2017/the-5-most-commonly-asked-questions-about-being-a-college-walk-on.

regulations courts have previously declared to be presumptively procompetitive.[88] In line with the Tenth Circuit's decision in *Law*, the district court in this case reasoned that the scholarship restrictions were developed to reduce costs, not to promote amateurism.[89] While the NCAA appeared to be losing momentum in its defense of antitrust challenges, *Agnew* re-solidified the procompetitive presumption established in *Bd. of Regents* and recaptured the momentum for the NCAA.[90]

While *Law* and *In Re Walk-Ons* were important for *Deppe's* likelihood of success, the most important case was *O'Bannon v. NCAA*.[91] Prior to the Seventh Circuit's decision in *Deppe*, the NCAA was thought to be in its most vulnerable state, due in large part to the Ninth Circuit's decision in *O'Bannon*.[92] In *O'Bannon*, a former All-American college basketball player initiated an antitrust challenge to the NCAA's amateurism rules which prohibited student-athletes from receiving compensation for their services.[93]

In *O'Bannon*, the Ninth Circuit determined the procompetitive presumption did not apply to the amateurism regulations and that NCAA rules must be analyzed under a rule of reason antitrust framework.[94] After applying the rule of reason framework to the facts in *O'Bannon*, the Ninth Circuit reasoned that NCAA regulations are subject to federal antitrust laws and must be analyzed under the rule of reason framework when challenged.[95]

The decision in *O'Bannon* established a new framework for analyzing NCAA antitrust challenges, impacting the future of such challenges to NCAA regulations. However, the Supreme Court's decision not to grant certiorari to hear *O'Bannon* meant that the *Bd.*

---

88. *In re NCAA I-A Walk-On Football Players Litig.*, 398 F. Supp. 2d at 1149. NCAA regulations that the court has considered "eligibility" regulations include revoking a student-athlete's amateur status for entering a professional draft and rules limiting compensation paid to student-athletes. *Id.*

89. *Id.*

90. *Bd. of Regents*, 468 U.S. at 117; *Agnew*, 683 F.3d at 343.

91. *O'Bannon*, 802 F.3d 1049.

92. Michael McCann, *What the Appeals Court Ruling Means For O'Bannon's Ongoing NCAA Lawsuit*, SPORTS ILLUSTRATED (Sept. 30, 2015), www.si.com/college-basketball/2015/09/30/ed-obannon-ncaa-lawsuit-appeals-court-ruling (explaining that "[a]mateurism in college sports may be on life support, but it's not dead yet").

93. *O'Bannon*, 802 F.3d at 1055. Plaintiff Ed O'Bannon initiated a lawsuit against the NCAA after his friend's son told him that he was depicted in a college basketball game although he never consented to the use of his likeness in the video game. *Id.*

94. *See* Ted Tatos, *Deconstructing The NCAA's Procompetitive Justifications to Demonstrate Antitrust Injury and Calculate Lost Compensation*, 62 ANTITRUST BULL. 184, 218-20 (Feb. 15, 2017) (detailing the Ninth Circuit's decision to analyze NCAA regulations under rule of reason and the NCAA's arguments in defense of procompetitive purpose).

95. *See O'Bannon*, 802 F.3d at 1079 (holding that "NCAA regulations are subject to antitrust scrutiny and must be tested in the crucible of the Rule of Reason").

of Regents precedent would remain intact, effectively leaving the state of NCAA antitrust challenges in limbo heading into the Seventh Circuit's hearing of *Deppe*.[96]

4. Deppe's Year-in-Residency Challenge

The most recent challenge to NCAA eligibility regulations came in the Seventh Circuit case of *Deppe v. NCAA*.[97] In *Deppe*, a college football player challenged the NCAA's year-in-residency requirement, which requires student-athletes transferring schools to complete one year of residency at a school before being eligible for competition.[98] Deppe's complaint alleged that the year-in-residency requirement restrained the ability of players to make the best decision for themselves including those decisions based on "financial considerations, academic considerations, athletics considerations, and personal circumstances."[99]

Once again, the Seventh Circuit dismissed *Deppe's* claims because it considered the year-in-residency bylaw to be an eligibility rule, and therefore presumptively procompetitive.[100] In determining that the year-in-residency requirement did not violate antitrust laws, the Seventh Circuit reinforced the precedent set in *Bd. of Regents*, that regulations aimed at protecting eligibility and promoting amateurism are presumptively procompetitive and therefore not subject to antitrust laws.[101] In short, the Seventh

---

96. Michael McCann, *In Denying O'Bannon Case, Supreme Court Leaves Future of Amateurism in Limbo*, SPORTS ILLUSTRATED (Oct. 3, 2015), www.si.com/college-basketball/2016/10/03/ed-obannon-ncaa-lawsuit-supreme-court. The denial was expected as the Supreme Court only accepts about one percent of cases for review and frequently declines to hear class action suits. *Id.*

97. *See* Steve Berkowitz, *Judge Sides With NCAA in Lawsuit Challenging D1 Football Transfer Rules*, USA TODAY SPORTS (Mar. 7, 2017), www.usatoday.com/story/sports/college/2017/03/07/judge-sides-with-ncaa-lawsuit-challenging-transfer-rules-division-i-schools/98877526/ (analyzing a federal judge's decision to dismiss case of college football player challenging NCAA year-in-residency transfer regulation).

98. *See Deppe*, 893 F.3d at 500; *see also* NCAA MANUAL, *supra* note 15, at § 14.5.1.1(a) (requiring year-in-residency before competing unless:

> (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. A participant in Division I-AA football at the institution to which the student is transferring may utilize this exception only if the participant transferred to the certifying institution from an institution that sponsors Division I-A football or the participant transfers from a Division I-AA institution that offers athletically related financial aid in the sport of football to a Division I-AA institution that does not offer athletically related financial aid in football).

99. Class Action Compl. at ¶ 4, *Deppe v. NCAA*, No. 1:16-cv-00528, 2016 WL 888119 (S.D. Ind. Mar. 6, 2017).

100. *Deppe*, 893 F.3d at 502.

101. *See Id.* (reasoning that "most NCAA eligibility rules are entitled to the

Circuit refused to apply the antitrust analysis to the case in *Deppe* because the precedent set in *Bd. of Regents* categorizes the year-in-residency requirement as presumptively procompetitive.[102]

III. ANALYSIS

While the NCAA was arguably most vulnerable prior to the Seventh Circuit's hearing of *Deppe*, the Seventh Circuit nonetheless took the safe route and adhered to the procompetitive presumption established in *Bd. of Regents* and re-affirmed in *Agnew*.[103] The procompetitive precedent has survived the test of time, however, recent decisions such as *O'Bannon* indicate time is running out for the NCAA's freedom from antitrust scrutiny.[104] This section will provide an analysis into the origin, history, and application of the procompetitive presumption. Further, this section will examine how Deppe's case and the year-in-residency requirement do not fit the mold of traditional eligibility rules, and why federal courts should follow the lead of the Ninth Circuit in *O'Bannon*, foregoing the application of the procompetitive presumption. This section concludes by analyzing the concept of stare decisis, and the arguments for and against lower federal courts narrowing precedent from below.

A. Origin of the Procompetitive Presumption

The procompetitive presumption originated not from the Supreme Court's holding, but rather from a portion of dicta in the case of *NCAA v. Bd. of Regents*.[105] In *Bd. of Regents*, the NCAA developed television restrictions on college football games which allowed only a certain number of games to be televised each week, and also forbade teams from appearing in televised games more than twice a year.[106] The Supreme Court determined that the

procompetitive presumption announced in *Bd. of Regents* because they define what it means to be a student-athlete and thus preserve the tradition and amateur character of college athletics").

102. *Id.*; *Bd. of Regents,* 468 U.S. at 117.

103. Shafer, *supra* note 11, at 538.

104. Jon Solomon, *Q&A: What The O'Bannon Ruling Means For NCAA, Schools And Athletes*, CBS SPORTS (Aug. 9, 2014), www.cbssports.com/college-football/news/qa-what-the-obannon-ruling-means-for-ncaa-schools-and-athletes/ (explaining that "a federal judge has confirmed what many people have stated for decades: College football and men's basketball are not amateur endeavors, they're big business). "[Judge] Wilken had no use for the amateurism defense to justify the restraints on paying players." *Id.*

105. James S. Arico, *NCAA v. Bd. of Regents of The University of Oklahoma: Has The Supreme Court Abrogated The Per Se Rule of Antitrust Analysis,* 19 LOY. L.A. L. REV. 437, 450 (1985). "[T]he Supreme Court found that that NCAA's role in the preservation of college football's character could be viewed as procompetitive." *Id.*

106. *Bd. of Regents*, 468 U.S. at 91.

television restrictions violated antitrust laws because the restrictions were an unreasonable and unjustifiable restraint of trade.[107] What separates the *Bd. of Regents* decision from antitrust challenges like *Deppe*, is the group that was negatively affected in each circumstance. In *Bd. of Regents*, the unreasonable restraint of trade negatively affected a group of universities, not student-athletes.[108] Federal courts are more prone to invalidate NCAA regulations when they negatively affect a group other than student-athletes.[109] In turn, student-athletes are negatively impacted solely because the NCAA considers them to be amateurs.

The Court in *Bd. of Regents* likely made its decision because both a group of universities as well as television viewers were negatively affected.[110] Essentially, the decision in *Bd. of Regents* did not necessarily concern student-athletes or NCAA amateurism, therefore the Supreme Court determined it could invalidate the regulation.[111] Despite this fact, the *Bd. of Regents'* decision has been consistently extended to any NCAA antitrust challenge, regardless of who the negatively affected parties are.[112] While uniformity and predictability in the law are important, this expansion has led to federal courts applying a, possibly, inadequate standard of review to most NCAA antitrust challenges simply because student-athletes are involved.[113]

Although the Supreme Court in *Bd. of Regents* found the NCAA television restrictions violated antitrust laws, the Supreme Court also established crucial precedent that NCAA regulations aimed at preserving the tradition of amateurism in college sports would be deemed inherently procompetitive, and not in violation of the Sherman Act.[114] In a single sentence that has stood the test of time, Justice Stevens stated "[i]t is reasonable to assume that most of the

---

107. *Id.* at 98.

108. *Id*. Many of the NCAA antitrust challenges have come from student-athlete plaintiffs. *Id.* However, in *Bd. of Regents* the challenge came directly from NCAA member universities, specifically the University of Oklahoma and the University of Georgia. *Id.*

109. *Bd. of Regents*, 468 U.S. at 91; *Law v. NCAA*, 134 F.3d at 1010; *O'Bannon*, 802 F.3d at 1049.

110. Taylor Branch, *The Shame of College Sports*, ATLANTIC (Oct. 2011), www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/.

111. *Id.*

112. Daniel E. Lazaroff, *The NCAA in Its Second Century: Defender of Amateurism or Antitrust Recidivist?*, 86 OR. L. REV. 329, 337 (2007). "Even when the plaintiff was not a student-athlete challenging amateurism or eligibility standards, the NCAA generally prevailed." *Id.*

113. Jonathan Jenkins, *A Need for Heightened Scrutiny: Aligning the NCAA Transfer Rule with its Rationales*, 9 VAND. J. ENT. & TECH. L. 439, 461-62 (2006).

114. *See Bd. of Regents*, 468 U.S. at 117 (determining that "most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive").

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."[115] While this dicta may have been well-reasoned at the time of the Supreme Court's decision in *Bd. of Regents*, the current state of the NCAA is far different than it was in 1984, and thus courts should take this into consideration.[116] Throughout the 1983 NCAA Division I football season only 242 football games were nationally televised.[117] Today, every major Division I football conference is tied to long-term television deals in which the majority of the games are televised.[118] If the Supreme Court thought the NCAA could unreasonably restrain trade in 1984, then its capability to do so now is surely far greater.[119]

Because of the procompetitive presumption established in *Bd. of Regents*, the majority of NCAA antitrust challenges have been dismissed at the pleadings stage.[120] In turn, student-athletes like Peter Deppe are forced to abide by the "cartel-like" regulations set by the NCAA without ever having the opportunity to force the NCAA to defend its unlawful restraints of trade under a full rule of reason analysis.[121] However, it is important to note that although

115. *Id.* The Supreme Court made the decision not to apply the per se antitrust framework because a "certain degree of cooperation is necessary if the type of competition that petitioner and its member institutions seek to market is to be preserved." *Id.*

116. Emma Kerr, *The NCAA as Modern Jim Crow? A Sports Historian Explains Why She Drew the Parallel*, CHRON. OF HIGHER EDUC. (Jan. 12, 2018), www.chronicle.com/article/The-NCAA-as-Modern-Jim-Crow-A/242240. Student-athletes, coaches, and the general public are becoming increasingly aware of the unfair and oppressive nature of the NCAA and its treatment of student-athletes. *Id.*

117. Fred Barbash, *Supreme Court Breaks NCAA Hold On Televised College Football Games,* WASH. POST (June 28, 1984), www.washingtonpost.com/archive/politics/1984/06/28/supreme-court-breaks-ncaa-hold-on-televised-college-football-games/35c9aace-baf7-4dfd-af14-f7bcc702b0c9/. Not only did universities benefit from the decision in *Bd. of Regents*, but many independent networks and local television stations will benefit as well. *Id.*

118. Jeremy Fowler, *In Big-Money Marriage Of TV And College Football, Who Has Most Say,* CBS SPORTS (Jul. 4, 2013), www.cbssports.com/college-football/news/in-big-money-marriage-of-tv-and-college-football-who-has-most-say/ (stating that "the Big Ten used to broadcast 16 to 18 football games a year" but "[n]ow, the Big Ten Network alone nearly triples that total").

119. *See* B. David Ridpath, *The College Football Playoff and Other NCAA Revenues Are an Exposé of Selfish Interest*, FORBES (Jan. 17, 2017), www.forbes.com/sites/bdavidridpath/2017/01/17/college-football-playoff-and-other-ncaa-revenues-is-an-expose-of-selfish-interest/#33ac757e4e1a (referring to current spending of Division I colleges as "out of control commercialism").

120. Babette Boliek, *Is the NCAA Dam About to Burst*, AM. ENTERPRISE INST. (Apr. 5, 2018), www.aei.org/publication/is-the-ncaa-dam-about-to-burst/. From 1973-2015 there were thirty-seven antitrust cases brought against the NCAA, only six cases made it past the motion to dismiss stage and only one case, *O'Bannon*, succeeded on part of its merits. *Id.*

121. *See* Jenkins, *supra* note 113. Although the NCAA is technically a "non-

the Supreme Court's decision in *Bd. of Regents* has been applied as binding precedent, the amateurism issue was dealt with merely in dicta.[122] Therefore, NCAA amateurism has technically yet to receive the Court's "full attention and analysis."[123] So while most federal courts have generally adhered to the procompetitive presumption established in *Bd. of Regents*, they may not actually be bound by it.[124] In fact, dicta are sometimes not followed, and can often be narrowed.[125] In short, absent the Supreme Court granting certiorari to hear a NCAA amateurism case, the lower courts' only option is to adhere to the *Board of Regents* precedent, or make the bold decision to narrow the precedent from below.[126]

B. The "Year-in-Residency" Regulation is Not an Eligibility Rule

The Supreme Court in *Bd. of Regents* ultimately determined that any regulation "defining the conditions of the contest, the eligibility of the participants, or the manner in which members of a joint enterprise shall share the responsibilities and benefits of the total venture" will be considered presumptively procompetitive.[127] After the decision in *Bd. of Regents*, federal courts have consistently held that any NCAA regulation relating to eligibility is considered presumptively procompetitive, and therefore no antitrust analysis is necessary.[128]

Agnew was one of the most recent and crucial cases for the NCAA and its defense of its anti-competitive regulations.[129] At first glance, the Seventh Circuit's holding in *Agnew* appears to be a blow to the NCAA and the procompetitive presumption that has long been applied to NCAA's "amateurism" bylaws.[130] However, just as

---

profit" organization, it operates similarly to a cartel by controlling every aspect of the competitive process. *Id.*

122. *Bd. of Regents*, 468 U.S. at 117.

123. Asim S. Raza, *Should the NCAA's Eligibility Rules Be Subjected to The Sherman Antitrust Act*, 4 DEPAUL J. ART. TECH. & INTELL. PROP. L. 113, 117 (1993). In *NCAA v. Bd. of Regents*, the Court did not directly decide the legality of NCAA amateurism rules but rather considered the rules necessary to preserve the NCAA's product. *Id.*

124. *See* Re, *supra* note 13 (explaining how narrowing from below allows a lower court judge to "acknowledge that the precedent must remain binding in circumstances where it unmistakably applies, while also reducing the precedent's scope of application in cases of precedential ambiguity").

125. Andrew C. Michaels, *The Holding-Dicta Spectrum*, 70 ARK. L. REV. 661 (2017).

126. *Id.*

127. *Bd. of Regents*, 468 U.S. at 117.

128. *Gaines,* 746 F. Supp. at 748; *McCormack*, 845 F.2d at 1346-47; *Smith*, 139 F.3d at 190.

129. *Agnew*, 683 F.3d at 328.

130. *See id.* at 347-48 (determining the cap on scholarships and prohibition of multi-year scholarships were not presumptively procompetitive but the court

in the case of *Agnew*, various federal courts have used the procompetitive presumption to dismiss claims at the outset that they feel do not warrant a full antitrust analysis.[131]

In effect, after *Agnew*, the procompetitive presumption applies any time that the NCAA bylaw in question helps to "preserve a tradition that might otherwise die" or to "preserve the student-athlete in higher education."[132] Even more, the Seventh Circuit in *Agnew* determined that almost every eligibility rule will fit within the presumption of procompetitiveness.[133] What makes this precedent troublesome is that federal courts will determine a given NCAA regulation is an eligibility rule merely because it is featured in the eligibility section of the NCAA Manual.[134] This creates the notion that any given NCAA regulation will be considered an eligibility regulation simply because the NCAA says it is.[135]

While the procompetitive presumption may have increased the efficiency of the courts in deciding NCAA antitrust challenges quickly, it has also denied many complainants the right to force the NCAA to justify its anticompetitive actions under a full rule of reason antitrust analysis.[136] In fact, *O'Bannon* was the sole NCAA amateurism challenge in which the plaintiffs won on the merits of the case.[137] Surely with the vast amount of NCAA amateurism challenges consistently presented to various federal courts, one would assume the plaintiffs would have occasional success. However, that is not the case.[138]

Following the procompetitive presumption set in *Bd. of Regents*, numerous federal courts have consistently applied the procompetitive presumption to any NCAA regulation that was

---

still reinforced the *Bd. of Regents* precedent).

131. *Gaines,* 746 F. Supp. at 748; *McCormack*, 845 F.2d at 1346-47; *Deppe*, 893 F.3d at 503-04.

132. *See Agnew*, 683 F.3d at 342 (citing *Bd. of Regents*, 468 U.S. at 120 (declaring that the NCAA must have "ample latitude" to preserve amateurism in college sports)).

133. *See id.* at 343 n. 6 (stating "[w]e need not touch upon the debate of whether all eligibility rules or just most eligibility rules are due a presumption, as the Bylaws at issue in this case are not, in fact, eligibility rules").

134. *See Deppe*, 893 F.3d at 502 (determining that the year-in-residency regulation was an eligibility regulation because it was listed in the "Eligibility" section of the NCAA Manual).

135. Joshua Senne, *A Review of the NCAA's Business Model, Amateurism, and Paying the Players*, SPORT J. (Dec. 23, 2016), www.thesportjournal.org/article/a-review-of-the-ncaas-business-model-amateurism-and-paying-the-players/ (declaring that "[i]t can be stated that the NCAA sought to strengthen its governing power over amateurism by the slow integration and adoption of more rules and regulations").

136. Boliek, *supra* note 120. From 1973-2015 there were thirty-seven antitrust cases brought against the NCAA. *Id.* Only six cases made it past the motion to dismiss stage and only one case, *O'Bannon* succeeded on part of its merits. *Id.*

137. *O'Bannon*, 802 F.3d at 1079.

138. Boliek, *supra* note 120.

considered an eligibility rule or "fit into the same mold" as eligibility rules.[139] In effect, the procompetitive presumption has been applied to caps on the number of scholarships available, transfer regulations, and compensation for student-athlete name and likeness.[140] Of course, these regulations do touch on eligibility and amateurism, however, that does not mean that they are necessary to preserve the nature of collegiate athletics.[141] Nearly every regulation enacted by the NCAA will indirectly affect amateurism, as amateurism is the basis of collegiate athletics.[142] The year-in-residency regulation certainly concerns eligibility because it denies a student-athlete immediate eligibility when transferring from one school to another.[143] However, it also concerns the amount of scholarship funding available to a transferring student-athlete.[144] While the year-in-residency requirement concerns eligibility, it is not solely an eligibility regulation.[145] In effect, the NCAA is allowed to completely control every aspect of the market in an unreasonably restrictive manner, just because its regulations indirectly concern eligibility.[146] This shows why the NCAA should be forced to defend its unreasonable restraints of trade under a full rule of reason analysis.

C. "Year-in-Residency" Regulation is Not the Least Restrictive Alternative

The Ninth Circuit in *O'Bannon* determined that even if a regulation serves a procompetitive purpose, it can still be invalid under a rule of reason analysis if a less restrictive alternative is

139. *Id.*

140. *Gaines,* 746 F. Supp. at 748; *McCormack*, 845 F.2d at 1346-47; *Deppe*, 893 F.3d at 503-04.

141. *Cf.* Audrey C. Sheetz, *Student-Athletes vs. NCAA: Preserving Amateurism in College Sports Amidst the Fight for Player Compensation*, 81 BROOK. L. REV. 865, 869 (2016) (opining that "[i]n order to maintain student-athletes' amateur status while simultaneously complying with antitrust law, this note argues that the NCAA should develop a more hands-off regulatory approach that best serves student-athletes by allowing schools to enter into a revenue sharing system similar to the model used by the International Olympic Committee").

142. Zachary Stauffer, *NCAA President Defends Amateurism in College Sports*, PBS (June 19, 2014), www.pbs.org/wgbh/frontline/article/ncaa-president-defends-amateurism-in-college-sports/.

143. NCAA MANUAL, *supra* note 15, at § 14.5.5.1.

144. *See* Kay Jennings, *What's a College Football Scholarship Worth, Anyway?,* BLEACHER REP. (Mar. 8, 2012), www.bleacherreport.com/articles/1094781-so-whats-a-college-football-scholarship-worth-anyway (stating the amount of scholarship aid given to student-athletes varies depending on the university).

145. *Id.*

146. Joe Nacora, Opinion, *The College Sports Cartel*, N.Y. TIMES Dec. 31, 2011, at A23. www.nytimes.com/2011/12/31/opinion/nocera-the-college-sports-cartel.html.

available.[147] So while the year-in-residency regulation serves a procompetitive purpose in prohibiting free-agency and preserving amateurism, if a less restrictive alternative could serve the NCAA's purpose just as well then the regulation should be invalid under a rule of reason analysis.[148] The less restrictive alternative element is of utmost importance to NCAA antitrust challenges, like the year-in-residency challenge in *Deppe*. This is because it is clear that numerous less restrictive alternatives to the year-in-residency regulation are available and the NCAA would likely lose if forced to defend against a full rule of reason analysis.[149]

Numerous alternatives to the year-in-residency rule have been suggested, many of which would serve the NCAA's objective of promoting amateurism and prohibiting free agency just as well.[150] For instance, a uniform academic transfer rule allowing for a one-time unrestricted transfer would accommodate student-athletes, while still preserving amateurism and limiting the NCAA's free agency concerns.[151] This one-time transfer exception would likely be a proper less restrictive alternative, because it is currently permitted in all other NCAA sports, aside from the Division I revenue-generating sports.[152] If the rest of NCAA athletics can survive and prosper without the year-in-residency requirement, then it is likely not necessary for the preservation of amateurism.[153]

D. Narrowing NCAA Antitrust Precedent from Below

While the numerous federal courts have applied the procompetitive presumption to any NCAA regulation relating to eligibility, courts have refused to apply the procompetitive presumption when dealing with a regulation that does not "fit into the same mold" of an eligibility regulation.[154] Not surprisingly, federal courts have given extreme deference to the NCAA's definition of eligibility which has led to seemingly unfair and inadequate results.[155] However, recent cases have narrowed the

147. *O'Bannon*, 802 F.3d at 1063-64 (holding "a restraint that serves a procompetitive purpose can still be invalid under the Rule of Reason if a substantially less restrictive rule would further the same objectives equally well").

148. *Id.*

149. *See* Shafer, *supra* note 11, at 541-52 (proposing a form of controlled free agency where students would be allowed a one-time transfer if they meet certain criteria such as good academic standing).

150. *See id.* at 547 (outlining a less restrictive alternative to the year-in-residency rule that is tied to academic performance).

151. *Id.* at 548-53.

152. Alex Kirshner, *NCAA Transfer Rules, Explained Quickly and Honestly*, SB NATION (May 9, 2018), www.sbnation.com/college-football/2018/5/9/17311748/ncaa-transfer-rules-change-guide-list-sit-out.

153. *Id.*

154. *Bd. of Regents*, 468 U.S at 117.

155. *See* Kristen R. Muenzen, *Weakening Its Own Defense? The NCAA's*

scope of the procompetitive presumption.[156]

In *Law* and *In Re Walk-Ons*, the respective federal courts refused to apply the procompetitive presumption to NCAA regulations that did not "fit into the same mold" of an eligibility regulation.[157] Like the case in *Law* and *In Re Walk-ons*, a strong argument can be made that the year-in-residency regulation does not "fit into the same mold" of eligibility regulations either.[158] In affirming the *Bd. of Regents* precedent, the Seventh Circuit in *Agnew* reasoned that an eligibility regulation is one that is "essential to the very existence of the product of college [athletics]."[159] When applying this reasoning to the year-in-residency regulation, it does not appear that the year-in-residency regulation is "essential to the very existence of college [athletics]."[160] Of course, the NCAA's concerns of uncontrolled free agency are valid, however the year-in-residency regulation can hardly be said to be "essential to the very existence of college [athletics]."[161] Division II and Division III sports are able to operate effectively without the year-in-residency requirement.[162] Even more, every non-revenue generating Division I sport operates effectively without the year-in-residency requirement.[163] In short, while the year-in-residency requirement may be essential to preserving the NCAA's profit, it is not "essential to the very existence of college [athletics]."[164]

Version of Amateurism, 13 MARQ. SPORTS L. REV. 257, 261 (2003) (arguing "if the NCAA is to use the amateurism defense in antitrust claims, it must note that it is the NCAA's definition of amateurism that is being used, and that this definition incorporates non-traditional exceptions to the amateurism ideal").

156. *O'Bannon*, 802 F.3d at 1079.

157. *Law v. NCAA*, 134 F.3d at 1024; *In re NCAA I-A Walk-On Football Players Litig.*, 398 F. Supp. 2d at 1144.

158. *Law v. NCAA*, 134 F.3d at 1024; *In re NCAA I-A Walk-On Football Players Litig.*, 398 F. Supp. 2d at 1144.

159. *Agnew*, 683 F.3d at 343; Darren Heitner, *7th Circuit Sides With NCAA, Finds Year-In-Residence Rule Presumptively Procompetitive*, FORBES (June 26, 2018), www.forbes.com/sites/darrenheitner/2018/06/26/7th-circuit-sides-with-ncaa-finds-year-in-residence-rule-presumptively-procompetitive/#395b4280664a.

160. *Agnew*, 683 F.3d at 343.

161. *Id.* The NCAA recently allowed a transferring Division I football player an exception to the year-in-residency requirement for "documented mitigating circumstances." David Kenyon, *How NCAA Transfer Rules Incentivize Players to Expose CFB's Dark Side*, BLEACHER REP. (Aug. 23, 2018), www.bleacherreport.com/articles/2792151-how-ncaa-transfer-rules-incentivize-players-to-expose-cfbs-dark-side.

162. Konsky, *supra* note 54, at 1586. "The broadest exception to the transfer rules, allowing student-athletes a one-time transfer without penalty, specifically excludes participants in Division I basketball, football, and men's ice hockey. *Id.* Other exceptions, such as those for discontinued sports, military service, or discontinued academic programs, are quite narrow and unlikely to apply to many students." *Id.*

163. *Id.*

164. *Agnew*, 683 F.3d at 343.

While these cases are important, their precedential value is of little importance to complainants like Peter Deppe.[165] Because these decisions came from federal district courts, federal courts are essentially still bound by the Supreme Court's decision in *Bd. of Regents*.[166] However, the Ninth Circuit's decision in *O'Bannon* provided encouragement for future NCAA antitrust challenges.

In *O'Bannon*, the Ninth Circuit took the NCAA antitrust analysis in a different direction by refusing to apply the procompetitive justification.[167] The Ninth Circuit's decision appeared to be the final straw for the NCAA and its defense of amateurism and antitrust challenges, however, because the Supreme Court refused to grant certiorari to hear the case, the Ninth Circuit's holding is not binding precedent and the fate of NCAA amateurism is essentially in limbo.[168]

In effect, *O'Bannon* overruled the procompetitive presumption created in *Bd. of Regents*, and established that every NCAA regulation is subject to antitrust scrutiny, and even procompetitive regulations can be invalid under a rule of reason analysis.[169] So while the Seventh Circuit in *Deppe* had a chance to follow the Ninth Circuit's lead in *O'Bannon*, the Seventh Circuit played the safe route, and adhered to the procompetitive presumption established in *Bd. of Regents*.[170] Because the Supreme Court continues to evade the issue of NCAA amateurism, lower federal courts are sadly left with very few options in deciding NCAA antitrust challenges.[171] Perhaps lower federal courts could begin to narrow the *Bd. of Regents* decision from below, however, courts are ever-so reluctant to engage in such a practice.[172]

Based on the continuous NCAA antitrust challenges flooding federal district courts, it seems that it may be time for Supreme Court to revisit NCAA amateurism and decide the NCAA

---

165. Michael Wells, *The Unimportance of Precedent in the Law of Federal Courts*, 39 DEPAUL L. REV. 357, 359 (1990). The Supreme Court has low regard for precedent. *Id.*

166. *Id.*

167. *O'Bannon*, 802 F.3d at 1063-64 (holding "a restraint that serves a procompetitive purpose can still be invalid under the Rule of Reason if a substantially less restrictive rule would further the same objectives equally well").

168. McCann, *supra* note 92. "Amateurism in college sports may be on life support, but it's not dead yet." *Id.*

169. *Id.*

170. Dave Stafford, *7th Circuit Affirms Tossing Suit Challenging NCAA 1-Year Rule,* IND. LAW. (June 26, 2018), www.theindianalawyer.com/articles/47414-th-circuit-affirms-tossing-suit-challenging-ncaa-1-year-rule.

171. Daniel Fisher, *Right Or Wrong, Precedent Will Decide O'Bannon Case In Favor Of NCAA*, FORBES (July 21, 2014), www.forbes.com/sites/danielfisher/2014/07/21/right-or-wrong-precedent-will-decide-obannon-case-in-favor-of-ncaa/#7dc5c74f70a1.

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

amateurism issue directly.[173] However, with the Supreme Court's refusal to grant certiorari to hear *O'Bannon*, it is unlikely the NCAA will be forced to defend itself, and its anti-competitive rules in the Supreme Court.[174]

E. Lower Federal Courts' Power to Narrow Precedent from Below

There is a strong legal argument that lower courts must adhere to Supreme Court precedent, however, as evidenced by the Ninth Circuit's decision in *O'Bannon*, lower federal courts have the inherent power to narrow Supreme Court precedent from below.[175] In fact, the principal values behind *stare decisis* indicate narrowing is legitimate, so long as the conditions are right.[176]

Stare decisis refers to the courts' practice of deferring to past precedent.[177] Importantly, *stare decisis* has been relied on by the federal courts since the nation's founding, reflecting a policy judgment that "in most matters it is more important that the applicable rule of law be settled than that it be settled right."[178] The United States' legal system was designed to promote *stare decisis* because it provides consistency by way of "predictability, fairness, appearance of justice, and efficiency."[179] While these values are certainly important, opponents of *stare decisis* criticize the fact that "none of these values depend on the precedent being correct."[180] In effect, strict adherence to *stare decisis* "can tend to calcify the law, causing age-old precedent to linger despite developments in other areas of law and society."[181] NCAA antitrust precedent is the perfect example of an age-old precedent remaining intact, despite developments in antitrust law and the nature of the NCAA's operations.

"Narrowing" is defined as "interpreting a precedent not to apply when it is best read to apply."[182] Although the *Bd. of Regents*

---

173. *See* Michael McCann, *NCAA Amateurism to Go Back Under Courtroom Spotlight in Jenkins Trial*, SPORTS ILLUSTRATED (Apr. 2, 2018), www.si.com/college-football/2018/04/02/ncaa-amateurism-trial-judge-wilken-martin-jenkins-scholarships (arguing the *Jenkins* case is a long way from the finish line but it may be the best opportunity for a change in NCAA amateurism laws).

174. *Id.*

175. *O'Bannon*, 802 F.3d at 1079.

176. Re, *supra* note 13, at 936. The principal values of vertical stare decisis are correctness, practicality and candor. *Id.*

177. Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 NEV. L.J. 787, 789 (2012).

178. *Id.* at 792 (quoting Agostini v. Felton, 521 U.S. 203, 235 (1997)).

179. Mead, *supra* note 177, at 792.

180. *Id.* at 793.

181. *Id.* at 794.

182. Re, *supra* note 13, at 927-28.

precedent may be best read to apply in the case of a year-in-residency challenge, the circumstances surrounding the issue suggest narrowing is legitimate.[183] The procompetitive presumption was established in dicta in *Bd. of Regents*.[184] Importantly, *stare decisis* applies only to holdings of announced precedents, not dicta.[185] Nonetheless, federal courts have consistently treated the procompetitive presumption as binding precedent.

Not only is the *Bd. of Regents* precedent built on dicta, but the entire field of antitrust law is vulnerable to becoming outdated and inapplicable, and therefore, courts are more willing to overrule antitrust precedent than other areas of law.[186] Even more, the lower federal courts' inconsistent treatment of NCAA antitrust challenges shows that it may be time to place practicality and correctness over adhering to precedent.[187] While *stare decisis* is an integral element of American jurisprudence, sometimes precedent must be narrowed in the interest of uniformity, practicality and correctness.[188]

IV. PROPOSAL

While the procompetitive presumption established in *Bd. of Regents* has stood the test of time, the current state of the NCAA and the continuous antitrust challenges it faces, indicate that change is inevitable.[189] In terms of the year-in-residency regulation, there are a number of ways to achieve the necessary change. Ideally, the NCAA would take the proactive approach and amend the year-in-residency regulation to allow for a one-time transfer exception and adopt a uniform policy across all divisions and sports. In the alternative, the lower federal courts can follow the Ninth Circuit's lead in *O'Bannon* and take matters into their own hands and narrow NCAA antitrust precedent from below.[190]

---

183. *Id.* at 936. The principal values of vertical stare decisis are correctness, practicality, and candor. *Id.*

184. *Bd. of Regents,* 468 U.S. at 117.

185. *Id.*

186. Daniel M. Tracer, *Stare Decisis in Antitrust: Continuity, Economics, and the Common Law Statute*, 12 DEPAUL BUS. & COMM. L.J. 1, 2 (2013).

187. Barrett Sallee, *Miami QB Tate Martell Granted NCAA Hardship Waiver for Immediate Eligibility in 2019 Season*, CBS SPORTS (Mar. 19, 2019), www.cbssports.com/college-football/news/miami-qb-tate-martell-granted-ncaa-hardship-waiver-for-immediate-eligibility-in-2019-season/. In the most recent inconsistent application of the year-in-residency rule, the NCAA recently granted University of Miami quarterback, Tate Martell, immediate eligibility after transferring from Ohio State University. *Id.* Martell received a hardship waiver despite having any real hardship. *Id.*

188. Re, *supra* note 13, at 936.

189. *Bd. of Regents*, 468 U.S. at 117.

190. *See Narrowing Second Amendment Precedent From Below*, RE'S JUDICATA (Jan. 14, 2016), www.richardresjudicata.wordpress.com/2016/01/14/narrowing-second-amendment-precedent-from-below/ (defining "narrowing" as when a court interprets a precedent not to apply where the precedent is best

Scholars have argued against the federal court application of the procompetitive presumption in the past, however, none have specifically analyzed the lower federal court's power to take matters into its own hands, and narrow NCAA antitrust precedent from below.[191] Importantly, the procompetitive presumption was established in dicta rather than the holding of *Bd. of Regents*.[192] In addition, antitrust law is constantly evolving, as it is prone to becoming outdated rather quickly.[193] The NCAA has inconsistently applied the year-in-residency regulation which makes the year-in-residency regulation the ideal NCAA regulation for the courts to narrow NCAA antitrust precedent from below.[194] The lower courts do not owe outdated antitrust dicta precedential weight and should be encouraged to forego the procompetitive presumption, thereby forcing the NCAA to fully defend its year-in-residency regulation in a court of law.

A. NCAA Action - Impose an Academic Transfer Standard

The obvious solution to the NCAA antitrust problem is for the NCAA to take action to amend the year-in-residency rule and adopt a uniform transfer policy allowing for a one-time transfer exception across all divisions and sports. The NCAA has recently implemented significant changes to its transfer rules, however, the changes were not as sweeping as many had hoped.[195] Although one source indicated there was a "95%" chance that changes to the current transfer legislation would be adopted in 2018, the NCAA ultimately moved away from extending the one-time transfer exception to all sports.[196] However, the NCAA did implement a

read to apply).

191. Shafer, *supra* note 11.

192. *Bd. of Regents*, 468 U.S. at 117; Thomas A. Baker III & Natasha T. Brison, *From Bd. of Regents to O'Bannon: How Antitrust and Media Rights Have Influenced College Football*, 26 MARQ. SPORTS L. REV. 331, 333 (2016) (arguing if Justice Stevens had to decide *O'Bannon v. NCAA*, he would not have sided with the NCAA's reliance on his dicta from *NCAA v. Bd. of Regents*).

193. Barak Orbach, *Antitrust Stare Decisis*, 15 ANTITRUST SOURCE 1 (2015).

194. Matthew J. Mitten, *Why and How the Supreme Court Should Have Decided O'Bannon v. NCAA*, 62 ANTITRUST BULL. 62 (2017). The Supreme Court denied the petition to hear *O'Bannon v. NCAA* despite conflicting rulings among courts regarding whether eligibility rules are unlawful restraints of trade. *Id.*

195. Ralph D. Russo, *As Leagues Debate Transfer Rules, NCAA Moves Toward Reform*, USA TODAY (May 31, 2018), www.usatoday.com/story/sports/ncaaf/2018/05/31/as-leagues-debate-transfer-rules-ncaa-moves-toward-reform/35557657/. "The NCAA is about two weeks away from finally making some substantial reforms to transfer rules. The changes will not be quite as extensive as some had hoped and the work is not complete, but considering previous failed attempts, getting anything accomplished on transfers can be counted as a success." *Id.*

196. Matt Schick (@ESPN_Schick), TWITTER (Jan. 17, 2018, 8:54 AM),

change in the transfer rules which prohibited coaches from blocking a student-athlete's decision to transfer to a specific school.[197] Bob Bowlsby, Commissioner of one of the NCAA's most influential conferences, The Big 12 Conference, indicated that the change came as a way to diminish control from the coaches and institutions, and give the power to the student-athletes.[198]

The NCAA also recently amended its "red-shirt" rule. A "red-shirt" refers to a student-athlete who is enrolled full time at a university but does not participate in his or her sport for an entire academic year for the exclusive purpose of saving a year of competition.[199] The changes to the red-shirt rule allow Division I football players the option to play in up to four games in a season before invoking their "red-shirt" and therefore preserving a year of athletic eligibility.[200] The Chairman of the Division I Council, University of Miami Athletic Director, Blake James, said the rule change "promotes not only fairness for college athletes, but also their health and well-being."[201]

While these changes were incremental, it clearly shows that there are indeed less restrictive alternatives to the NCAA's transfer rules that should be analyzed by federal courts under a full rule of reason analysis.[202] The NCAA should adopt uniform transfer rules for all sports and divisions because it will continue to face antitrust challenges in the future, and action is likely needed to keep those attacks at bay. The simplest and most cost-efficient way to limit future attacks is to change the year-in-residency rule and adopt uniform transfer rules allowing for a one-time transfer.[203]

The best way to structure this new transfer policy would be to

---

twitter.com/ESPN_Schick/status/953671983866277888.

197. Associated Press, *As Leagues Debate Transfer Rules, NCAA Moves Toward Reform*, SALT LAKE TRIB. (May 31, 2018), https://www.sltrib.com/sports/2018/06/01/as-leagues-debate-transfer-rules-ncaa-moves-toward-reform/.

198. *Id.*

199. *Transfer Terms*, NCAA, www.ncaa.org/student-athletes/current/transfer-terms (last visited Oct. 1, 2019).

200. Alex Kirshner, *College Football Players Can Now Play Up To 4 Games Without Burning a Redshirt,* SB NATION (June 13, 2018), www.sbnation.com/college-football/2018/6/13/17460076/ncaa-redshirt-rule-change-2018.

201. *Id.*

202. *NCAA Looking At More Changes To Transfer Rules*, USA TODAY (Oct. 7, 2018), www.usatoday.com/story/sports/ncaaf/2018/10/05/ncaa-looking-at-more-changes-to-transfer-rules/38063937/ (explaining that "the NCAA Division I Council has introduced legislation that would allow some athletes to transfer during the summer and be immediately eligible to play for a new school if there is a head coaching change before the first day of fall classes").

203. *Cf.* Jared Anderson, *New Proposal Would Require All NCAA Transfers To Sit Out One Year*, SWIM SWAM (May 11, 2018), www.swimswam.com/new-proposal-would-require-all-ncaa-transfers-to-sit-out-one-year/ (detailing a new proposal that "would extend the NCAA's 'year in residence' requirement to all sports, requiring all transfers to sit out a full year before rejoining NCAA competition").

install an academic transfer standard that would tie immediate eligibility for competition after transfer to a set of academic benchmarks, regardless of what sport or division the athlete participates in.[204] While the NCAA is concerned about uncontrolled free agency, extending the one-time transfer exception would not reach that result.[205] Enacting a uniform one-time transfer exception rule to all sports will not create unlimited free agency.[206]

The NCAA would obviously need to install certain procedures to ensure that student-athletes are not able to transfer at-will.[207] Most importantly, student-athletes would need to meet specific academic requirements to be eligible to transfer.[208] Specifically, any athlete seeking to utilize the one-time transfer exception would need to maintain a GPA of 2.5 or higher.[209] Also, the window of time in which student-athletes can transfer would have to be limited to ensure student-athletes are not commandeered mid-season.[210] Finally, student-athletes would have to initiate the transfer themselves, and coaches would not be allowed to contact student-athletes first.[211] Just as in the NCAA's recent "notification of transfer" rule change, players will inform their school of their decision to transfer and the student's name will be entered into a national database.[212] This change is legitimately possible because the one-time transfer exception is currently available to all Division II and III student-athletes, as well as Division I student-athletes who do not participate in revenue-generating sports.[213] In short, student-athletes would get a one-time pass to change schools within their five-year eligibility clock, but would not be able to transfer at-will. If this change was implemented, cases like *Deppe* would not exist.

Not only would the one-time transfer exception help the student-athletes, but it would also benefit the market because a

---

204. Shafer, *supra* note 11, at 548.

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. *Division I Two-Year College Transfer Requirements*, NCAA, www.ncaa.org/about/division-i-two-year-college-transfer-requirements (last visited Oct. 1, 2019). The NCAA currently requires all two-year college student-athletes maintain a 2.5 GPA before being eligible to play immediately at a four-year Division I institution. *Id.*

210. Shafer, *supra* note 11, at 548.

211. *Id.*

212. *See* Michelle Brutlag Hosick, *New Transfer Rule Eliminates Permission-To-Contact Process*, NCAA (June 13, 2018), www.ncaa.org/about/resources/media-center/news/new-transfer-rule-eliminates-permission-contact-process (detailing the national transfer database for transfers).

213. Anderson, *supra* note 203. The year-in-residency regulation "is only in place for five NCAA sports: football, hockey, baseball, men's basketball and women's basketball. In all other sports, an athlete is immediately eligible to compete, provided they receive a release from their former school." *Id.*

whole new market for student-athlete services would arise.[214] Although the one-time transfer exception may be used by some to advance their careers, numerous other factors influence student-athletes to transfer.[215] For example, student-athletes may elect to transfer because of disagreements with a harsh coach, academic reasons, or personal reasons.[216] The NCAA's concerns about unlimited free-agency are legitimate, however, student-athletes should be allowed the opportunity to make a calculated decision about what is in their best interest without being penalized with a year of lost eligibility.[217]

Even more, the market would benefit because the one-time transfer exception would place important decisions in the hands of student-athletes rather than the coaches, who currently have too much power and leverage in the NCAA transfer process.[218] The academic transfer rule would go a long way in lessening the gap in power between the coaches and student-athletes.[219] In effect, just as coaches are able to leave a school and participate immediately at a new school, student-athletes would be able to as well.[220]

In addition to the one-time academic transfer exception, the NCAA should allow for one-time transfer exception in the event a student-athlete's head coach leaves the school. The year-in-residency bylaw currently allows for a waiver of the year-in-residency if the student-athlete can show substantial adversity or other mitigating circumstances.[221] While in the past the NCAA has very rarely granted such waivers,[222] in more recent years the NCAA has granted waivers for circumstances such as NCAA sanctions, coaches leaving, and racist events.[223] While it is encouraging to see

214. Shafer, *supra* note 11, at 551.

215. *See* Jared K. Richards, Shelley L. Holden, & Steven F. Pugh, *Factors That Influence Collegiate Student-Athletes to Transfer, Consider Transferring, or Not Transfer*, 21 SPORT J. (2016), thesportjournal.org/article/factors-that-influence-collegiate-student-athletes-to-transfer-consider-transferring-or-not-transfer/ (listing the reasons student athletes transfer "include choosing the wrong school socially or academically, choosing the wrong coach or playing style, losing interest in the sport, getting injured, or having poor academic performance").

216. *Id.*

217. *Id.*

218. *Id.*

219. *See* John Grupp & Scott Brown, *Can Anything Be Done To Stop College Football Coaches From Jumping Ship?*, TRIB LIVE (Dec. 8, 2012), www.triblive.com/sports/college/ncaa/3084026-85/coach-coaches-texas (finding that at least twenty percent of FBS football teams had a head coaching change between the 2011 and 2012 football seasons).

220. *Deppe*, 893 F.3d 498. Peter Deppe would be allowed to leave his school for a better opportunity just as his coach did. *Id.*

221. NCAA MANUAL, *supra* note 15, at § 12.8.4.

222. Shafer, *supra* note 11, at 493.

223. Tony Barnhart, *Mr.CFB/Tony Barnhart: Martell Case Could Change Landscape of College Football*, TMG SPORTS (Jan. 30, 2019), www.collegesportsmaven.io/tmg/tony-barnhart/mr-cfb-tony-barnhart-martell-

the NCAA increasingly grant waivers, it would be beneficial for both the NCAA and student-athletes to have clearly established criteria for what constitutes substantial adversity or mitigating circumstances. A student-athlete's head coach leaving the school should qualify as a mitigating circumstance and the NCAA should be encouraged to solidify this.

The NCAA has implemented incremental change in its transfer rules, however, the change may not be enough to keep the legal attacks at bay.[224] The NCAA is built solely off of student-athletes, and would not exist without them.[225] Surely, granting student-athletes a fair and level playing field would be in the best interest of the student-athletes, the NCAA, and the market altogether.

B. What the Lower Federal Courts Should Do

If NCAA action does not come willingly, a class of student-athletes should challenge the year-in-residency requirement in the Ninth Circuit, where the court has already determined the *Bd. of Regents'* precedent can be narrowed from below.[226] In support of its challenge, the student-athletes should be sure to emphasize three factors. First, the *Bd. of Regents* precedent is built on dicta.[227] Second, *stare decisis* has a limited application in the field of antitrust.[228] And third, the *O'Bannon* decision should provide encouragement to the lower federal courts to continue to narrow NCAA antitrust precedent from below.[229] While the NCAA, Congress, and the Supreme Court each have the opportunity to change the outdated NCAA antitrust precedent, each group appears uneager to do so. For that reason, lower federal courts should follow the lead of the Ninth Circuit in *O'Bannon* and narrow the *Bd. of Regents* precedent from below.

---

case-could-change-landscape-of-college-football-7T4tIjquJEC9q_AjrnMi1g/.

224. Alex Kirshner, *The NCAA Just Made It A Lot Riskier For Players To Seek Transfers*, SB NATION (June 19, 2018), www.sbnation.com/college-football/2018/6/19/17481492/ncaa-transfer-rule-changes-2018. Although there were numerous benefits to the NCAA's transfer changes, players are at risk of losing their scholarship upon notifying their school of their intent to transfer. *Id.*

225. Ramogi Huma, *The NCAA Empire Is Built On The Sweat, Talent -- And Harm -- Of Its Players*, L.A. TIMES (Jan. 11, 2015), www.latimes.com/opinion/op-ed/la-oe-huma-ncaa-football-union-lawsuits-20150111-story.html (stating that "those who run NCAA sports — administrators, coaches and universities — enjoy multimillion-dollar salaries in a multibillion-dollar industry built on the talent, sweat and hard work of college athletes").

226. *Bd. of Regents*, 468 U.S. at 117.

227. *Id.*

228. Orbach, *supra* note 193.

229. *O'Bannon*, 802 F.3d at 1079.

1. Narrow the Procompetitive Presumption Precedent from Below

Lower federal courts narrowing the procompetitive presumption from below is the most likely way real change will come to the NCAA's transfer rules and, specifically, the year-in-residency rule. While the Supreme Court appears disinterested in hearing a NCAA antitrust case, lower federal courts can force the Supreme Court's hand, or at the very least put pressure on the NCAA to implement change on its own.[230] The Ninth Circuit's decision in *O'Bannon* was certainly a step in that direction, and should be followed in future NCAA antitrust cases.

There are generally two reasons why lower federal courts will narrow Supreme Court precedent. First, lower federal courts narrow ambiguous precedents that have become outdated as a result of new events or technologies.[231] Second, lower federal courts sometimes narrow from below to force the Supreme Court to reconsider its own decisions.[232] The possibility of narrowing from below is possible in the case of NCAA antitrust challenges for two reasons. To start with, the *Bd. of Regents* precedent was established in dicta, rather than the Supreme Court's actual holding.[233] In addition, the Supreme Court has shown it will overturn antitrust doctrines that it considers no longer consistent with competition policy or economic theory.[234]

a. Dicta Are Not Binding

As mentioned throughout this Comment, the procompetitive presumption was established in dicta in *Bd. of Regents*.[235] Importantly, stare decisis applies only to holdings of announced precedents.[236] For that reason, the Ninth Circuit in *O'Bannon* determined it was not bound by the precedent and that NCAA regulations must be analyzed under rule of reason framework.[237] The Ninth Circuit's opinion was a perfect example of a lower federal court narrowing from below, and is also an example that should be followed in the future. In narrowing the *Bd. of Regents'* application, the Ninth Circuit determined "we are not bound by *Bd. of Regents* to conclude that every NCAA rule that somehow relates to

230. Re, *supra* note 13, at 956. "[B]y construing higher court precedent narrowly, courts can provoke higher court review." *Id.*

231. *Id.*

232. *Id.*

233. *Bd. of Regents*, 468 U.S. at 117.

234. Tracer, *supra* note 186.

235. *Bd. of Regents*, 468 U.S. at 117.

236. Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 955 (2005).

237. *O'Bannon*, 802 F.3d at 1063.

amateurism is automatically valid."[238] The Ninth Circuit's decision was made possible by the fact that the procompetitive presumption was dicta, rather than the Supreme Court's actual holding.[239]

Dicta is defined as "[a] judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential."[240] There's a very clear distinction between holdings and nonessential dicta in that holdings are entitled to deference from future courts, while dicta are expendable.[241] This distinction has allowed the Ninth Circuit in *O'Bannon* to narrow the *Bd. of Regents* precedent, and should encourage lower federal courts to do so in the future.

b. Antitrust Precedent is Easiest to Narrow/Overturn

It is important to note that *stare decisis* has a somewhat modified application in the area of antitrust.[242] The Supreme Court has opted to reexamine and change antitrust laws on numerous occasions.[243] The Supreme Court's treatment of antitrust precedent should encourage lower federal courts to adopt a modified application of stare decisis to NCAA antitrust challenges as well. The modified application of *stare decisis* in antitrust, as well as the fact that the procompetitive presumption was built on dicta, makes it likely that lower federal courts can continue to narrow the *Bd. of Regents'* precedent from below.

c. Ninth Circuit Narrowed the Procompetitive Presumption in *O'Bannon*

In *O'Bannon*, the Ninth Circuit narrowed NCAA antitrust precedent by declining to apply the procompetitive presumption to NCAA student-athlete licensing restrictions.[244] Likewise, when the next year-in-residency challenge reaches a federal court, the court should decline to apply the procompetitive presumption. By declining to apply the procompetitive presumption, the court will force the NCAA to defend the year-in-residency regulation under a full rule of reason analysis. Under a rule of reason analysis, the NCAA will have to show that the year-in-residency rule is the least-

238. *Id.*

239. *Id*. "The Court's long encomium to amateurism, though impressive-sounding, was therefore dicta." *Id.*

240. *Dicta*, BLACK'S LAW DICTIONARY (8th ed. 2004).

241. *See, e.g.*, *Dicta*, BLACK'S LAW DICTIONARY (9th ed. 2009) (defining dicta as "not precedential").

242. Tracer, *supra* note 186.

243. *Id.*

244. *O'Bannon*, 802 F.3d at 1063-64 (holding "a restraint that serves a procompetitive purpose can still be invalid under the Rule of Reason if a substantially less restrictive rule would further the same objectives equally well").

restrictive alternative. Consequently, it is unlikely that the NCAA will be able to show that the year-in-residency rule is the least-restrictive alternative because much less restrictive alternatives are already in place for every college sport and division besides the Division I revenue-generating sports.

2. The Plan of Attack Going Forward

A class of student-athletes should challenge the year-in-residency requirement in the Ninth Circuit, where the court has already determined the Bd. of Regents' precedent can be narrowed from below.[245] In support of its challenge, the student-athletes should be sure to emphasis three factors. First, the Bd. of Regents precedent is built on dicta. Second, *stare decisis* has a limited application in the field of antitrust. And third, the O'Bannon decision should encourage the court to continue to narrow NCAA antitrust precedent from below.[246] It is clear that the circumstances surrounding NCAA antitrust challenges leaves the precedent prone to narrowing by the lower federal courts. But, would a year-in-residency challenge have any real likelihood of that treatment from the courts? Because the sole purpose of the year-in-residency rule is to restrict the athletes, and there are numerous less restrictive alternatives available, a year-in-residency challenge does have a chance to receive favorable treatment from below.

V. CONCLUSION

The year-in-residency regulation is an outdated regulation that restricts the ability of student-athletes, like Peter Deppe, to do what is best for their athletic, academic, and personal livelihood. Although the Seventh Circuit's decision in *Deppe* was discouraging for the future of changing the year-in-residency rule, there is hope for subsequent challenges. While it would be ideal for the NCAA to take a proactive approach and adopt a uniform one-time transfer exception across all sports and divisions, there is no real likelihood that the NCAA will take action without pressure from the courts.

Because the NCAA will likely not act on its own, the lower federal courts should follow the Ninth Circuit's lead and narrow NCAA antitrust precedent from below. Not only has the Supreme Court supported a modified application of antitrust *stare decisis*, but the procompetitive precedent is founded on dictum.[247] Further,

245. Mark Brnovich & Ilya Shapiro, *Split Up the Ninth Circuit-But Not Because It's Liberal*, CATO INST. (Jan. 11, 2018), www.cato.org/publications/commentary/split-ninth-circuit-not-because-its-liberal. The Ninth Circuit is the favored court by many plaintiffs because it has shown a willingness for progressivism. *Id.*

246. *O'Bannon*, 802 F.3d at 1079.

247. *Bd. of Regents*, 468 U.S. at 117.

the lower federal courts should be encouraged by the Ninth Circuit's decision in *O'Bannon* and determine that the procompetitive presumption does not apply.

Justice Scalia once said that, even if dicta are "repeated" over time, they are "not owed stare decisis weight."[248] Scalia went on to say that dicta are not binding on the Supreme Court or the inferior courts.[249] Hopefully, a new class of plaintiffs will be inspired by the Ninth Circuit's decision in *O'Bannon* and will continue to fight for the rights of student-athletes, like Peter Deppe. The procompetitive presumption established in *Bd. of Regents* is outdated and inapplicable to an NCAA antitrust challenge like the year-in-residency rule. The only way real change will come, is if the lower federal courts utilize their inherent power and take matters into their own hands.

248. CIGNA Corp. v. Amara, 131 S. Ct. 1866, 1884 (2011) (Scalia, J., concurring).

249. *Id.*