

THE GRADUATE TRANSFER RULE: IS THE NCAA
UNNECESSARILY HINDERING STUDENT-ATHLETES
FROM TRAVERSING THE EDUCATIONAL
PATHS THEY DESIRE?

“If we’re going to say that the goal is education, if a player has fulfilled that part of the obligation, they got a degree, which is what they went to college for, as well as playing ball, I think that opportunity should be there. . . . That’s something players can respect.”¹

I. INTRODUCTION

In April 2006, the National Collegiate Athletic Association (“NCAA”) adopted legislation allowing student-athletes who had earned their undergraduate degree and maintained eligibility in their sport to enroll as graduate students at different institutions, continuing their athletic participation at the new institution immediately.² As expected, the parties most impacted by the graduate transfer rule, student-athletes, coaches, and athletic directors, initially reacted with an assortment of diverging opinions regarding the rule’s necessity and overall value.³ In particular, critics argued

1. Mike Knobler, *NCAA Rule Change Would Hinder Transfers; Tech Tackle’s Future On Line If Repeal Goes Through*, ATLANTA J.-CONST., Jan. 5, 2007, at 1H [hereinafter Knobler, *NCAA Rule Change*] (quoting Darryl Richard, Georgia Tech football player supporting penalty-free transfer rule for student-athletes desiring to continue athletic and academic pursuits at graduate level).

2. See Gregg Doyel, *Strange New NCAA Transfer Rule Has Everybody Saying ‘What??’*, CBS SPORTSLINE.COM, May 24, 2006, <http://www.sportsline.com/college-basketball/story/9459096> (on file with author) (revealing details of recently-adopted NCAA rule allowing for transfers of college graduates who remain athletically eligible and who desire to pursue graduate-level education). The rule allows student-athletes to immediately resume their athletic career without “sitting out a year. It’s graduate, transfer and play.” *Id.*

3. See Dave Curtis, *SEC Considers Fight of Transfer Rule*, ORLANDO SENTINEL, June 1, 2006 (quoting University of Florida football coach Urban Meyer describing rule as “loophole that needs to be closed”). *But see* Mark Long, *Gators, Others Take Advantage of New Graduate-Transfer Rule*, ASSOCIATED PRESS, Aug. 17, 2006 [hereinafter Long, *Gators, Others Take Advantage*] (citing Meyer’s response to rule after receiving transfer Ryan Smith from Utah as “I like it this year. I won’t like it next year.”). The Vanderbilt University football program received an experienced quarterback, Richard Kovalcheck, from the University of Arizona when Kovalcheck decided to pursue a graduate degree there beginning in the fall of 2006. See Ron Higgins, *SEC Favors Grad-Student ‘Free Agency’*, KNOXVILLE NEWS-SENTINEL, June 1, 2006, at D1 (discussing Vanderbilt football coach Bobby Johnson’s predicted im-

that the rule essentially created a free agency market at the collegiate level within the NCAA's "revenue" sports: football, men's basketball, and ice hockey.⁴ Another criticism, in addition to the free agency argument asserted by numerous NCAA coaches, is that the rule required the re-recruitment of student-athletes known to desire a transfer to a new institution as a graduate student.⁵ Student-athletes reacted favorably to the graduate transfer rule as a beneficial means not only to continue their educations, but also to attend the institutions they believe would best utilize and appreciate their athletic talents.⁶ Student-athletes favoring the graduate transfer rule stress the objective of obtaining a degree as paramount whereas others, such as coaches and athletic directors, may primarily revere loyalty to an institution's athletic program.⁷ The disagreement has become a moot point since representatives from NCAA Division I institutions voted to override the graduate transfer rule on January 6, 2007, less than one year after its adoption.⁸ Al-

part of rule as "[not] that big a deal"). Coach Johnson further approved of the rule because, although it is difficult to receive one's bachelor's degree in just three years, "if a guy can get to a good graduate school and finish out one last year of eligibility, why not let him do it?" *Id.*

4. See Sarah M. Konsky, Comment, *An Antitrust Challenge to the NCAA Transfer Rules*, 70 U. CHI. L. REV. 1581, 1581 (2003) (designating NCAA "revenue" sports); see also Earl C. Dudley, Jr. & George Rutherglen, *Ironies, Inconsistencies, and Intercollegiate Athletics: Title IX, Title VII, and Statistical Evidence of Discrimination*, 1 Va. J. Sports & L. 177, 229 (1999) (noting emergence of women's basketball as "revenue" sport). To some of the rule's opponents, the ability of star student-athletes to transfer to "higher-profile conferences. . . . 'encourag[es] disloyalty' adverse to smaller athletic programs. See Knobler, *NCAA Rule Change*, *supra* note 1 (presenting critics' position that rule produces eligible student-athlete "free agents").

5. See Higgins, *supra* note 3 (indicating University of Arkansas football coach Houston Nutt's opinion that re-recruitment efforts are undesirable). In particular, coaches fear a dynamic where eligible student-athletes have an upper hand over their undergraduate athletic programs by potentially being able to transfer to a more favorable or more competitive institution. See Josh Kendall, *Transfer Rule Leaves Coaches Concerned*, MACON TELEGRAPH (Ga.), June 2, 2006 (hypothesizing situation where football player with undergraduate degree desires to play another position and, because of leverage created by graduate transfer rule, "can threaten to leave [undergraduate institution] if they aren't swapped.").

6. See Jay Heater, *Rule Change Gave Krieg A Chance to Play at Cal*, CONTRA COSTA TIMES (Walnut Creek, Cal.), Aug. 11, 2006 (describing former Duke University football player Tyler Krieg's desire to play for more-competitive University of California team during his last year of athletic eligibility).

7. See Chas Davis, *Give Competitive Equity a Backseat, IN THE SAAC: THE VOICE OF THE D-I NATIONAL STUDENT-ATHLETE ADVISORY COMMITTEE* (Indianapolis, Ind.), Summer/Fall 2006, at 6, available at http://www1.ncaa.org/membership/membership_svcs/saac/d1/newsletter/2006DI_summer.pdf (commenting that, from student-athlete's perspective, athletic directors' and coaches' wishes should not override "those of the student-athlete at a critical time in their lives.").

8. See Mike Knobler, *NCAA Report: Grad Transfers Must Sit A Year*, ATLANTA J.-CONST., Jan. 7, 2007, at 9E (noting repeal of rule by seventy percent to thirty percent vote).

though Division I institutions reached what could be described as a consensus, the thirty-one-member Student-Athlete Advisory Committee (“SAAC”) unanimously disagreed with the vote’s outcome.⁹

This Comment examines the validity of the graduate transfer rule as utilized throughout the 2006-07 collegiate school year.¹⁰ Section II provides an account of the rule’s history, its application by some student-athletes, and the reasons for the vote that ended its short existence.¹¹ More generally, Section II explores the structure of the NCAA as a legislative body, as well as how a proposal such as the graduate transfer rule becomes a bylaw of the organization.¹² Examining the “free agency of collegiate athletics” challenge asserted by many of the graduate transfer rule’s opponents, Section III presents an argument in favor of the rule based on free agency and antitrust principles developed in professional sports.¹³ Finally, Section IV concludes that the NCAA Division I institutions should reconsider the interests of their student-athletes and re-adopt the graduate transfer rule for a longer period of time than one academic year in order to discern the actual impact of the rule on student-athletes and institutions alike.¹⁴

9. *See id.* (indicating student committee’s recommendation to voting institutions at NCAA Convention); *see also* Michelle Brutlag Hosick, *Association Gets Down to Business - Division I Overrides Graduate Transfer Rule*, THE NCAA NEWS (Indianapolis, Ind.), Jan. 15, 2007, available at <http://www.ncaa.org/> (follow “The NCAA News” hyperlink; then follow “NCAA News Archive” hyperlink; then follow “2007” hyperlink; then follow “Division I” hyperlink; then follow “Association gets down to business – Division I overrides graduate transfer rule” hyperlink) (quoting student-athlete advocating preservation of graduate transfer rule because “[t]he (competitive) impact is minimal when compared to what student-athletes gain from continuing their education.”).

10. For a survey of the graduate transfer rule’s short-lived availability to eligible graduate student-athletes wishing to transfer, see *infra* notes 92-113 and accompanying text.

11. For a discussion of the history of the graduate transfer rule and specific instances of student-athletes who took advantage of the rule, see *infra* notes 92-126 and accompanying text.

12. For a discussion of NCAA governance and the organization’s legislative process, see *infra* notes 18-44 and accompanying text.

13. For a discussion of the free agency and antitrust aspects of the graduate transfer rule, see *infra* notes 127-42 and accompanying text.

14. For a discussion of the graduate transfer rule’s beneficial role in encouraging student-athletes to pursue both academic and athletic interests to their fullest potential, see *infra* notes 114-26 and accompanying text.

II. BACKGROUND

A. NCAA Overview, Purpose, and Functions

The 101-year-old NCAA currently maintains a membership of 1,281 institutions spanning three divisions.¹⁵ This Comment focuses on the graduate transfer rule's applicability to Division I, which encompasses the most prominent college athletic programs.¹⁶ During the 2004-05 academic year, 384,742 student-athletes from NCAA institutions participated in NCAA championship sports.¹⁷ The NCAA operates similarly in structure to a corporation through the NCAA Council, Executive Committee, and President's Commission.¹⁸ Considered the organization's ruling body, the NCAA Council "consists of a president, secretary-treasurer, and forty-four institutional representatives who set general policy and oversee the various committees."¹⁹ The twenty-person Executive Committee sits atop the hierarchy of the Association-wide committees, "composed of institutional chief executive officers that oversee Association-wide issues."²⁰ The Committee oversees the NCAA's three divisions, ensuring that each functions according to the organization's principles, purposes, and policies.²¹ Lastly, the forty-

15. See NCAA Membership Breakdown, http://www1.ncaa.org/membership/membership_svcs/membership_breakdown.html (last visited Oct. 24, 2007) (organizing member institutions arranged by division as of September 1, 2007). Division I, Division II and Division III base their memberships according to factors such as "the number of sports offered at the institution, and whether and to what extent athletic scholarships are available." Sean M. Hanlon, Comment, *Athletic Scholarships as Unconscionable Contracts of Adhesion: Has the NCAA Fouled Out?*, 13 SPORTS LAW. J. 41, 48 (2006); see also Ray Yasser & Clay Fees, Comment, *Attacking the NCAA's Anti-Transfer Rules as Covenants Not to Compete*, 15 SETON HALL J. SPORTS & ENT. L. 221, 223 (2005) (breaking down NCAA football divisions); see generally Michael Aguirre, *From Locker Rooms to Legislatures: Student-Athletes Turn Outside the Game to Improve the Score*, 36 ARIZ. ST. L.J. 1441, 1444 (2004) (describing NCAA's 1973 "trifurcat[ion] [of] intercollegiate athletics").

16. See NCAA Membership Breakdown, *supra* note 15 (indicating that Division I membership includes 384 institutions).

17. See NCAA Miscellaneous Facts and Figures, http://www.ncaa.org/about/fact_sheet.pdf (last visited Oct. 24, 2007) (specifying total student-athlete participants organized by gender and race). Of the 384,742 student-athlete participants in 2004-05, 219,744 were male student-athletes and 164,998 were female student-athletes. See *id.* Of the Division I student-athlete participants in 2003-04, 79,541 received grants-in-aid during the academic year. See *id.*

18. See Hanlon, *supra* note 15, at 48 (analogizing NCAA structure to large business organization).

19. Konsky, *supra* note 4, at 1582 (describing composition of Council).

20. NCAA Executive Committee, <http://www.ncaa.org/> (follow "Legislation & Governance" hyperlink; then follow "Committees - Association-wide" hyperlink; then follow "NCAA Executive Committee" hyperlink) (last visited Oct. 24, 2007).

21. See *id.* (describing Executive Committee's supervisory role as NCAA's highest governance body).

four member President's Commission maintains a supervisory role over the organization "conducts studies of intercollegiate athletics issues with the purpose of gaining knowledge to urge certain courses of action, and proposes legislation."²²

A heavily regulated organization, the NCAA administers many different areas within its ever-growing sets of rules, including regulation of athletic competitions, athletic eligibility rules, recruitment process guidelines, athletic championship events and tournaments, television contracts, and licensing agreements.²³ With respect to television contracts alone, the NCAA 2006-07 budget reflects television and marketing rights revenue of more than \$508 million.²⁴ The NCAA also regulates how student-athletes can be compensated for their services.²⁵

1. *The Legislative Function*

The NCAA employs a legislation process in order "to promote student-athlete welfare."²⁶ Each NCAA division maintains its own bylaws, which reflect legislation providing "rules and regulations not inconsistent with the provisions of the [NCAA] constitu-

22. Hanlon, *supra* note 15, at 48 (referencing 2004-05 NCAA Division I Manual, art. 4.5.3-4.5.3.7 (July 2004), available at http://www.ncaa.org/library/membership/division_i_manual/2004-05/2004-05_d1_manual.pdf).

23. *See id.* at 47 (cataloging extensive NCAA rules and regulations in various aspects of college athletics).

24. *See* The National Collegiate Athletic Association Revised Budget for Fiscal Year Ended August 31, 2007, http://www1.ncaa.org/finance/2006-07_budget.pdf (last visited Oct. 24, 2007) (indicating roughly 90% of total NCAA operating revenue reflects television and marketing rights); *see also* Konsky, *supra* note 4, at 1584 (deeming NCAA "a major commercial entity").

25. *See* Aguirre, *supra* note 15, at 1458 (defining "grant-in-aid" as "tuition and fees, room and board, and required course-related books" (quoting 2004-05 NCAA Division I Manual, *supra* note 22, at art. 15.02.5)). The maximum amount a student-athlete can receive as a grant-in-aid typically differs slightly from the amount of a full scholarship covering a student's complete attendance cost. *See id.* According to the NCAA, the organization "awards up to 174 postgraduate scholarships annually, 87 for men and 87 for women." NCAA Postgraduate Scholarship Program, http://www1.ncaa.org/membership/ed_outreach/prof_development/post_grad_scholarships.html (last visited Oct. 24, 2007) (specifying that such scholarships, granted to student-athletes three times per year for each athletic season, are "one-time, non-renewable grants" of \$7,500). To be eligible for a postgraduate scholarship, a student-athlete must be nominated by a faculty athletics representative during their last season of athletic eligibility, maintain a certain grade point average, and "[i]ntend to continue academic work beyond the baccalaureate degree . . . [as] a part- or full-time [graduate student]." *Id.* (follow "Who is Eligible?" hyperlink).

26. NCAA, Legislation & Governance, <http://www.ncaa.org/> (follow "Legislation & Governance" hyperlink) (last visited Oct. 24, 2007) (describing organization's governing bodies—including Student-Athlete Advisory Committees—and purposes in enacting NCAA legislation).

tion. . . .”²⁷ When adopting or amending the NCAA bylaws, the Management Council initially reviews the proposal and approves, defeats, or forwards it to the membership for review.²⁸ Next, assuming the proposal survives initial review and membership review, the Management Council votes to send the NCAA Board of Directors the proposal after considering any reactions or suggestions.²⁹ The Board of Directors receives the proposed legislative changes and can adopt the measure with a majority vote of present-voting members.³⁰ Dissatisfied member institutions may “override” a legislative change or “the failure of a legislative change,” if at least thirty member institutions request such a measure within sixty days of the Board’s vote.³¹ Receiving enough override requests triggers further review by the Board of Directors, as the body convenes to evaluate the legislative decision and to vote once again to determine the potential change in position.³² To override the Board’s legislative action, a five-eighths majority of member institutions must vote accordingly at the annual NCAA Convention, “based on the principle of one institution, one vote.”³³ If the voting member institu-

27. 2006-07 NCAA Division I Manual, Constitution, art. 5.2.2 (July 2006), available at http://www.ncaa.org/library/membership/division_i_manual/2006-07/2006-07_d1_manual.pdf [hereinafter NCAA Const.]. The rules and regulations dictated by the NCAA Operating Bylaws include, but are not to be limited to:

- (a) The administration of intercollegiate athletics by members of the Association;
- (b) The establishment and control of NCAA championship (games, matches, meets and tournaments) and other athletic events sponsored or sanctioned by the Association;
- (c) The procedures for administering and enforcing the provisions of the constitution and bylaws; and
- (d) The adoption of rules of play and competition in the various sports, and the delegation of authority in connection with such subjects to individuals, officers and committees.

Id.

28. *See id.* at art. 5.3.2.2.1 (listing options of Management Council during “Initial Review” stage of adopting or amending bylaws).

29. *See* Hanlon, *supra* note 15, at 51 (noting that Management Council’s approval results in notification of proposal to all NCAA member institutions).

30. *See* NCAA Const., *supra* note 27, at art. 5.3.2.2.3 (“A proposed change shall be considered adopted if it receives the favorable vote of a majority of those Board members present and voting.”); *see also id.* at art. 5.3.2.2.2.1 (noting that if Board makes substantial changes to proposal that “increase[] the modification beyond that initially approved,” Board must return proposal to Council to allow for review and comment by member institutions “before taking final action”).

31. *See id.* at art. 5.3.2.3.1 (describing membership “override” process). NCAA conferences may file override requests on behalf of their multiple member institutions. *See id.*

32. *See id.* at art. 5.3.2.3.2 (noting that if Board’s decision remains unchanged, active member institutions next vote on proposed legislation).

33. *See id.* at art. 5.3.2.3.3 (indicating NCAA membership’s mechanism to override legislation, trumping Board of Director’s prior vote).

tions fail to deliver the required five-eighths majority, the legislation is implemented.³⁴

In addition to these contours of the NCAA legislative process affecting student-athlete welfare, peer advocacy has recently been implemented.³⁵ Student-Athlete Advisory Committees (“SAACs”) were established “to review and offer student-athlete input on NCAA activities and proposed legislation that affected student-athlete welfare.”³⁶ In 1997, the NCAA-wide SAAC grew into three separate, more specific organizations reflecting the three NCAA divisions.³⁷ Today, the NCAA bylaws contain regulations involving the SAAC,³⁸ which reports directly to the NCAA Management Council, as well as mandate that NCAA institutions maintain their own SAACs on campus.³⁹ National SAACs strive “to enhance the total student-athlete experience by promoting opportunity, protecting student-athlete welfare and fostering a positive student-athlete image.”⁴⁰ Selection of SAAC members is subject to final approval by the NCAA Management Council upon recommendation by the SAAC.⁴¹ NCAA bylaws provide that two SAAC student-athlete representatives will be designated to attend and participate at each Management Council meeting; however, these representatives “shall be nonvoting members.”⁴² Arguably, the SAAC’s existence provides a check on the NCAA from implementing legislation without student-athlete input by encouraging engagement and re-

34. See Hanlon, *supra* note 15, at 51-52 (detailing legislation’s survival of Convention override vote).

35. See NCAA Student-Athlete Advisory Committees, http://www1.ncaa.org/membership/membership_svcs/saac/index.html (last visited Oct. 24, 2007) (reflecting on 1989 adoption of committees to “provide insight” on student-athlete experience).

36. *Id.*

37. See *id.* (discussing expansion of Student-Athlete Advisory Committees (“SAAC”) after eight years in existence).

38. See 2006-07 NCAA Division I Manual, Operating Bylaws, art. 21.7.7.5 (July 2006), available at http://www.ncaa.org/library/membership/division_i_manual/2006-07/2006-07_d1_manual.pdf [hereinafter NCAA Bylaws] (proscribing composition, term of office, role with Management Council, and duties of SAAC).

39. See NCAA Const., *supra* note 27, at art. 6.1.4 (“Each institution shall establish a student-athlete advisory committee for its student-athletes. The composition and the duties of the committee shall be determined by the institution.”).

40. NCAA Student-Athlete Advisory Committees, *supra* note 35.

41. See Aguirre, *supra* note 15, at 1448-49 (presenting communication with NCAA Director of Membership Services regarding standards used when determining acceptance of SAAC nominees or recommendations).

42. NCAA Bylaws, *supra* note 38, at art. 21.7.7.5.3.

sponse to proposed legislation.⁴³ Nevertheless, some SAACs at individual institutions lack cohesion due to weak and unfocused NCAA bylaws and “provide for virtually no student-athlete influence or empowerment.”⁴⁴

2. *Amateurism*

Striking an appropriate balance between educational development and athletic integrity reflects a core concept advocated by the NCAA’s mission of guiding hundreds of thousands of student-athletes in their pursuit of higher education.⁴⁵ The NCAA cites its purpose of integrating “intercollegiate athletics into higher education so that the educational experience of the student-athlete is paramount.”⁴⁶ Stated differently, the NCAA aims to utilize such an integration “to promote and develop educational leadership, physical fitness, athletics excellence and athletics participation as a recreational pursuit.”⁴⁷ In particular, the NCAA stresses amateurism—the idea that intercollegiate athletics explicitly differ from professional sports—as central to its intentions.⁴⁸ Amateurism reflects educational and moral qualities, arguably absent from professional sports, that the NCAA seeks to instill in all student-athletes.⁴⁹ References to amateurism can be found throughout the NCAA Operating Bylaws, with Article 12 being the most relevant provision.⁵⁰

43. See Aguirre, *supra* note 15, at 1449 (indicating Division I SAAC’s stated purpose of “solicit[ing] student-athlete response to proposed NCAA legislation” (quoting NCAA Student-Athlete Advisory Committees, *supra* note 35)).

44. *Id.*

45. See NCAA, Our Mission, http://www2.ncaa.org/portal/about_ncaa/overview/mission.html (last visited Oct. 24, 2007) (outlining NCAA’s core ideology, purpose, and values).

46. *Id.*

47. NCAA Const., *supra* note 27, at art. 1.2(a).

48. See Kinsky, *supra* note 4, at 1583-84 (indicating history of NCAA’s primary focus and eventual enforcement). In order to clearly differentiate college athletics from professional sports, the NCAA regulates areas such as student-athlete payment, employment during the school year, and grant size, as well as maintaining “a regulation mandating that athletes cannot retain eligibility once they sign with an agent.” *Id.* at 1584.

49. See Kristin R. Muenzen, Comment, *Weakening It’s [sic] Own Defense? The NCAA’s Version of Amateurism*, 13 MARQ. SPORTS L. REV. 257, 261-62 (2003) (indicating amateurism’s presence at college level). Specifically, the NCAA purports “to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports.” NCAA Const., *supra* note 27, at art. 1.3.1.

50. See Marc Jenkins, Comment, *The United Student-Athletes of America: Should College Athletes Organize in Order to Protect Their Rights and Address the Ills of Intercollegiate Athletics?*, 5 VAND. J. ENT. L. & PRAC. 39, 43 (2003) (discussing NCAA’s governing document referencing amateurism). Article 12.01.2 indicates that the

That bylaw, in general, establishes the basic premise that amateur student-athletes are entitled to compete athletically in the NCAA; however, a student-athlete's amateur status depends on fulfilling a host of assorted provisions involving financial aid receipt, expenses, awards, and various benefits.⁵¹ For example, under Article 15 of the Operating Bylaws, a student-athlete who receives improper financial aid becomes ineligible to participate in intercollegiate athletics.⁵² Additionally, student-athletes are not allowed to accept a promise of payment or sign contracts of commitment dealing with any activities pursued after the conclusion of their collegiate athletic eligibility, such as playing professional sports.⁵³ Interestingly, student-athletes are permitted to maintain amateur status in one sport while participating as a professional in another.⁵⁴ In light of, or perhaps despite, that interesting loophole, student-athletes may not receive "a salary, reimbursement of expenses or any other form of financial assistance from a professional sports organization."⁵⁵

Critics challenge the actual value of amateurism's goal of student-athlete achievement due to the large amount of revenue the NCAA earns each year.⁵⁶ Many argue that the NCAA amateurism

NCAA considers student-athletes an "integral part of the student body, thus maintaining a clear line of demarcation between college athletics and professional sports." NCAA Bylaws, *supra* note 38, at art. 12.01.2.

51. See Jenkins, *supra* note 50, at 43 (describing guidelines dealing with amateur status as "cumbersome and vague").

52. See NCAA Bylaws, *supra* note 38, at art. 15.01.2 (indicating penalty for receipt of improper financial aid). Numerous other provisions included in Article 15 of the operating bylaws spell out specifics involving the required conformity financial aid must have to the organization's rules of amateurism. See Jenkins, *supra* note 50, at 44 (suggesting employment at-will relationship between student-athletes and collegiate institutions due to contours of various grant-in-aid renewal rules).

53. See NCAA Bylaws, *supra* note 38, at art. 12.1.2(b)-(c) (providing two of seven ways student-athletes can lose amateur status and thereby lose eligibility for intercollegiate competition).

54. See *id.* at art. 12.1.3 (stating that dual-sport athletes, even though participating in one sport professionally, may also receive financial aid for the other collegiate sport); see also Jenkins, *supra* note 50, at 44 n.105 (revealing most common situation entails minor league baseball player competing in another sport during school year).

55. NCAA Bylaws, *supra* note 38, at art. 12.1.2(d). The bylaw provision seems to indicate that Article 12.1.3, which provides for the dual student-athlete-and-professional situation, constitutes an exception; however, one scholar has indicated that the provision prohibiting financial assistance from a professional organization seems contradictory to the thrust of amateurism. See Jenkins, *supra* note 50, at 44 ("Since NCAA rules allow athletes to be a professional in one sport while maintaining amateur status in another, these rules seem contradictory and hypocritical.").

56. See Muenzen, *supra* note 49, at 262 (commenting "[t]he commercial aspect of college athletics - television contracts and bowl game revenue, for example - counteracts the nonprofit, amateur motives of the [NCAA].")

rule violates United States antitrust law, specifically the Sherman Act,⁵⁷ because the organization and its member institutions prohibit student-athletes from engaging in activities relevant to a professional career, such as consultation with sports agents and entering professional drafts, as well as from sharing revenue generated by intercollegiate competition.⁵⁸ Generally, courts have either failed to invalidate the rules under antitrust law or have determined that the Sherman Act is inapplicable to NCAA amateurism rules.⁵⁹ The Supreme Court, in *NCAA v. Board of Regents of the University of Oklahoma*,⁶⁰ held that NCAA rules are subject to antitrust scrutiny and should be upheld if they foster economic competition.⁶¹ Discussing amateurism, the Court described the television plan at issue as fostering “the goal of amateurism by spreading revenues among various schools and reducing the financial incentives toward professionalism.”⁶² Because the amateurism rules are non-commercial in nature and strive to sustain NCAA athletics, courts are reluctant to accept a challenge based on antitrust laws.⁶³ Despite criticism over the NCAA’s massive generation of profit,⁶⁴ which is one of the organization’s paramount activities, one can make a strong case regarding the importance of amateurism in the lives of student-athletes, as evidenced by those who desire to continue their educations beyond receipt of their undergraduate degree.⁶⁵

57. See 15 U.S.C. § 1 (2007) (stating “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is hereby declared to be illegal.”).

58. See Jenkins, *supra* note 50, at 45 (indicating that challenges to amateurism rules resting on antitrust grounds have failed in courts).

59. See *id.* (suggesting reasons for unsuccessful pursuit of antitrust claims before courts).

60. 468 U.S. 85 (1984).

61. See Jenkins, *supra* note 50, at 45 (discussing holding of case dealing exclusively with NCAA rights to televise intercollegiate football games).

62. Nat’l Collegiate Athletic Ass’n v. Board of Regents of the Univ. of Okla., 468 U.S. 85, 135 (1984).

63. See Jenkins, *supra* note 50, at 45 (indicating lower federal case decisions which rely on notion that amateurism rules are “necessary to preserve intercollegiate athletics.”).

64. See *id.* at 46 (suggesting that NCAA amateurism rules are inconsistent with present-day state of intercollegiate athletic affairs). The NCAA’s projected budget for the 2006-07 academic year anticipated roughly \$563 million in revenue, with over \$500 million of that money stemming from the organization’s television contract with CBS. See Steve Wieberg, *NCAA’s Tax Status Questioned; Congressman Asks for Response About Exemption*, USA TODAY, Oct. 5, 2006, at 3C.

65. See Muenzen, *supra* note 49, at 262-63 (“College sports can provide an important educational opportunity to the student-athletes . . . Played with integrity and in line with the educational mission of our schools, college sports can serve both as entertainment and even as educational lessons for our broader soci-

B. NCAA Transfer Rules

1. *The Mechanics of the Transfer Rules*

The NCAA Constitution contains, among many other provisions, rules governing the process by which student-athletes transfer from one institution to another.⁶⁶ Specifically, the regulations applicable to transfer are found in Article 14.5.⁶⁷ Generally stated, the NCAA mandates that those student-athletes participating in “revenue” sports wishing to transfer to another Division I institution must sit out one year of athletic eligibility, fulfilling a “residency” obligation at the new institution.⁶⁸ After transferring, student-athletes maintain their athletic eligibility without losing one of their four years; however, student-athletes have a five-year window in which to conclude their athletic careers.⁶⁹ The NCAA, however, grants student-athletes participating in non-“revenue” sports a “one-time transfer exception,” which provides for a transfer without the penalty of sitting out one year of athletic eligibility at the new institution.⁷⁰

The NCAA transfer rule more severely impacts those participating in Division I men’s and women’s basketball, football, and ice hockey, as transferring student-athletes playing other sports are not penalized by their move under the rule’s exception.⁷¹ Justifying its transfer policy, the NCAA rationalizes that “[t]o be a true student-athlete, you’ll need a basic academic foundation before you are eli-

ety.” (quoting JAMES J. DUDERSTADT, *INTERCOLLEGIATE ATHLETICS AND THE AMERICAN UNIVERSITY* at ix (University of Michigan Press 2000)).

66. See NCAA Bylaws, *supra* note 38 (indicating source of relevant bylaws).

67. See Yasser & Fees, *supra* note 15, at 224 (stating that Article 14 generally governs athlete eligibility).

68. See *id.* at 224-25 (explaining contours of “[o]ne-[t]ime [t]ransfer [e]xception” as applied to student-athletes not required to sit out year when transferring).

69. See Konsky, *supra* note 4, at 1586 (suggesting that student-athletes looking to exercise full athletic eligibility can transfer only one time).

70. See Aguirre, *supra* note 15, at 1465 (providing general rule applicable to majority of student-athletes wishing to transfer from one four-year institution to another). A student-athlete can utilize the one-time transfer exception provided they transfer “1) from one four-year institution to another; 2) to play a sport other than [‘revenue’ sport]; 3) from one four-year institution to another for the first time; 4) while in good academic standing at the current institution.” *Id.*; see also NCAA Bylaws, *supra* note 38, at art. 14.5.5.2.10 (listing requirements of one-time transfer exception).

71. See *id.* (speculating that NCAA regulations discourage student-athletes from transferring because penalty is relatively severe); see also Yasser & Fees, *supra* note 15, at 226 (“[T]he NCAA has set up a ‘price’ which must be paid by athletes engaged in the specified sports if they want to transfer.”).

gible to play sports.”⁷² In addition, the NCAA maintains an interest in guaranteeing a relatively uniform competitive atmosphere whereby all of its institutions, particularly those consistently contending for championships in the more lucrative and prominent sports of football and men’s basketball,⁷³ are not able to easily lure transfer student-athletes away from the institutions that originally recruited them.⁷⁴ Lastly, coaches and athletic directors prefer a somewhat restrictive transfer system that forces student-athletes contemplating a change of institution to consider the system’s deterrents.⁷⁵ For example, University of Arkansas men’s basketball coach Stan Heath initially reacted to learning about the graduate transfer rule by stating that, from an academic perspective, a student-athlete “gets rewarded, but in some ways it penalizes [an institution’s] program. As a coach, now you’re thinking that maybe your players shouldn’t take so many summer courses, that you might want to slow down the progress toward a degree a bit.”⁷⁶ Heath’s remark succinctly summarizes the contrasting attitudes present between student-athletes and coaches.

72. 2006-07 NCAA Transfer 101, 6 (Feb. 2007), *available at* http://www.ncaa.org/library/general/transfer_guide/2006-07/2006-07_transfer_guide.pdf. In *McHale v. Cornell University*, the NCAA defended its transfer policy on the ground that the organization wished to dissuade transfers “solely for athletic reasons,” as well as to allow for adjustment time in a new environment free of added pressure. 620 F. Supp. 67, 68 n.4 (N.D.N.Y. 1985); *see also* Konsky, *supra* note 4, at 1587 (citing NCAA’s rationale as “not without merit”).

73. *See* Rodney K. Smith & Robert D. Walker, Comment, *From Inequity to Opportunity: Keeping the Promises Made to Big-Time Intercollegiate Student-Athletes*, 1 NEV. L.J. 160, 161 (2001) (deeming football and men’s basketball “big-time” intercollegiate athletics because of teams’ substantial, multi-million dollar profits). “Other men’s and women’s sports at all levels typically are not profitable. Indeed, it is clear that funds generated by profitable Division I-A men’s basketball and football programs are being diverted to cover expenses generated by nonrevenue-producing programs.” *Id.*

74. *See* Yasser & Fees, *supra* note 15, at 226 (speculating that NCAA’s goal “is to ensure that Division I talent in the major revenue generating sports is spread uniformly throughout the NCAA Division I membership to protect competitive balance.”).

75. *See id.* at 227 (suggesting that NCAA’s transfer rules “empower coaches” who are generally confident rules will deter student-athletes from transferring).

76. Higgins, *supra* note 3. Recognizing this quandary, Tennessee women’s basketball coach Pat Summit noted that any kind of coaching technique designed to discourage student-athletes from rapidly completing their academic requirements “would contradict what we’re trying to do – encourage them to excel academically. You’d think, ‘Wait a minute. If I do this, you’re leaving me. No, don’t leave me.’” Jon Solomon, *Transfer Rule Under Scrutiny; NCAA Vote Allows Grad Students to Move*, BIRMINGHAM NEWS (Ala.), June 1, 2006, at 1C.

2. *Tanaka v. University of Southern California: An Unsuccessful Antitrust Challenge to the NCAA Transfer Rules*

In *Tanaka v. University of Southern California*,⁷⁷ the U.S. Court of Appeals for the Ninth Circuit (“Ninth Circuit”) affirmed a lower court decision to dismiss a student-athlete’s suit challenging, on antitrust grounds, a Pacific-10 (“Pac-10”) Conference rule discouraging transfers to member institutions.⁷⁸ The Pac-10 transfer rule required a student-athlete transferring from one conference institution to another to “fulfill a residence requirement of two full academic years” and required the student-athlete’s new institution to “charge the student with two years of eligibility in all Pacific-10 sports.”⁷⁹ During this period of ineligibility, the student-athlete’s new institution was prohibited from “offer[ing], provid[ing], or arrang[ing]. . . any. . . athletically related financial aid.”⁸⁰ In *Tanaka*, a women’s soccer player at the University of Southern California (“USC”) was dissatisfied with the athletic and academic programs at that institution and chose to transfer to another Pac-10 institution, the University of California, Los Angeles (“UCLA”).⁸¹ The District Court for the Central District of California held that the Pac-10 transfer rule was noncommercial in nature; therefore, relevant antitrust law was inapplicable to the facts of the case.⁸²

On appeal, the Ninth Circuit took a different stance; it began its analysis by subjecting the Pac-10 transfer rule to federal antitrust law because of the rule’s involvement with commercial activity.⁸³ To succeed, the student-athlete had to demonstrate that the Pac-10 transfer rule encouraged “‘significant anticompetitive effects’ within a ‘relevant market.’”⁸⁴ The court held that the transfer rule

77. 252 F.3d 1059 (9th Cir. 2001).

78. *See id.* at 1065 (dismissing plaintiff’s claim because she failed to allege that challenged transfer rule had significant anticompetitive effect in defined geographic and product markets).

79. *See id.* at 1061 (citing Pacific 10 (“Pac-10”) Rule C 8-3-b).

80. *Id.*

81. *See id.* (relaying factual circumstances of suit against University of Southern California).

82. *See Tanaka*, 252 F.3d at 1062 (noting district court’s reasoning that transfer rule “is more tied to defendants’ noncommercial rather than commercial activities.”). Further, the district court stated that even if the plaintiff’s claim could satisfy the “commercial” hurdle and trigger implication of the Sherman Act, she would likely lose because the rule of reason would not regard the transfer rule as unreasonable. *See id.* (referring to district court’s dicta that transfer rule probably would not be “unreasonable under the rule of reason”).

83. *See id.* (“For purposes of our analysis, we assume, without deciding, that the transfer rule is subject to the federal antitrust laws.”).

84. *See id.* at 1063 (quoting *Hairston v. Pac. 10 Conference*, 101 F.3d 1315, 1319 (9th Cir. 1996)).

did not cause actual harm to the student-athlete's market, defined as women's soccer in the city of Los Angeles, specifically because she asserted that the enforcement of the rule arose as "an isolated act of retaliation" against her personal decision to transfer to another Pac-10 institution.⁸⁵ Moreover, "the Pac-10 transfer rule applies only to *intraconference* transfers; it has no application to student-athletes who transfer to non-member institutions."⁸⁶ Despite some elucidation regarding the challenge of an intercollegiate transfer rule, *Tanaka* failed to address larger antitrust issues at stake, such as whether similar transfer rules are commercial in nature enough to require antitrust scrutiny.⁸⁷

One final relevant aspect of *Tanaka* found the Ninth Circuit drawing a loose analogy between "restrictions on student-athlete transfers" and National Football League ("NFL") free agency restrictions which, in *Mackey v. National Football League*,⁸⁸ did not survive antitrust analysis.⁸⁹ The court in *Tanaka* distinguished between the Pac-10 transfer rule and the "Rozelle Rule" present in *Mackey*, as the latter applied to all NFL players and substantially restricted the relevant market.⁹⁰ Finally, the Ninth Circuit indicated that even if a student-athlete could successfully draw an adequate analogy to the situation of the NFL players in *Mackey*, the relevant geographic and product markets allegedly affected by a restrictive transfer rule would have to be broad enough to survive analysis.⁹¹

C. The "Graduate Transfer Rule": From Proposal to Repeal

Proposal 2005-54, which emerged as a recommendation by the NCAA Academics/Eligibility/ Compliance Cabinet in June, 2005, intended "[t]o permit a student-athlete who is enrolled in a specific

85. *See id.* at 1064 (indicating that plaintiff merely asserted personal injury to herself, not to ascertainable market).

86. *Id.* (discussing plaintiff's failure to show UCLA was only available option for women's soccer players in her situation).

87. *See* Kinsky, *supra* note 4, at 1593 (recognizing that Ninth Circuit failed to address issue of "whether transfer rules affecting larger, high-revenue markets—such as NCAA men's football nationally—could have an anticompetitive impact.").

88. 543 F.2d 606 (8th Cir. 1976).

89. *See Tanaka*, 252 F.3d at 1063 (indicating that NFL free agency restrictions failed antitrust "rule of reason" analysis).

90. *See id.* at 1064-65 ("[U]nlike the Pac-10 transfer rule, the 'Rozelle Rule' applied to every NFL player regardless of his status . . ." (quoting *Mackey v. NFL*, 543 F.2d 606, 622 (8th Cir. 1977))); *see also Mackey*, 543 F.2d at 620 (stating that NFL rule discouraged players from seeking free agency, among other deterrents).

91. *See Tanaka*, 252 F.3d at 1065 (describing plaintiff's failure to allege effect on "properly defined geographic and product market"); *see also* Kinsky, *supra* note 4, at 1594 (contending that courts should rely upon precedent dealing with professional sports antitrust issues when faced with collegiate sports situation).

graduate degree program of an institution other than the institution from which he or she previously received a baccalaureate degree to participate in intercollegiate athletics, regardless of any previous transfer.”⁹² The proposal purported to amend Article 14.1.9 of the NCAA Operating Bylaws by revising the language specifically contained in Article 14.1.9.1, entitled “Graduate Student in Specific Degree Program Transfer Exception,” which can be found in the 2006-07 NCAA Division I Manual.⁹³ On April 27, 2006, the NCAA Board of Directors adopted Proposal 2005-54 after much consideration;⁹⁴ however, during the override period, forty-six NCAA institutions—enough to trigger an override—requested that a vote occur at the 2007 NCAA Convention.⁹⁵ The call for a final consideration of the graduate transfer rule by Division I institutions was only the second override vote in the history of the NCAA.⁹⁶ In

92. NCAA Proposal No. 2005-54 – Eligibility – Graduate Student or Postbaccalaureate Participation – Transfer Eligibility, http://www1.ncaa.org/membership/governance/division_I/management_council/2007/January/22.htm (last visited Oct. 24, 2007) [hereinafter NCAA Transfer Eligibility Proposal]. “The Division I Academics/Eligibility/ Compliance Cabinet shall consist of 42 members, including 22 representing [the Football Subdivision] . . . and one representative from each Divisions I and [Football Championship Subdivision] conference . . . [as well as] [t]wo financial aid officers.” Division I Academics/Eligibility/Compliance Cabinet, http://web1.ncaa.org/committees/committees_roster.jsp?CommitteeName=AECCABINET (last visited Oct. 24, 2007) (delineating breakdown of Cabinet). The Cabinet unanimously championed the proposal, stating that “student-athletes that complete their degrees and have eligibility remaining should be able to transfer and enroll in the graduate program of their choice without NCAA transfer restrictions.” NCAA Transfer Eligibility Proposal, *supra*.

93. See NCAA Bylaws, *supra* note 38, at art. 14.1.9.1. The amended text of Article 14.1.9.1 in existence during the 2006-07 academic year read:

A graduate student-athlete who is enrolled in a specific degree program in a graduate or professional school of an institution other than the institution from which he or she previously received a baccalaureate degree may participate in intercollegiate athletics, provided the student-athlete has eligibility remaining and such participation occurs within the applicable five-year period set forth in Bylaw 14.2 (see also Bylaw 14.1.8.2.1.4).

Id.

94. See NCAA Transfer Eligibility Proposal, *supra* note 92 (reflecting vote to adopt by thirteen to four margin among present Board members); see also Ray Melick, *How Nice to See the Coaches Squirm*, BIRMINGHAM NEWS (Ala.), June 10, 2006, at 1E (specifying date NCAA passed measure).

95. See NCAA Transfer Eligibility Proposal, *supra* note 92 (providing overview of proposal’s history leading to successful override vote by member institutions); see also Few Take Advantage of Graduate-Transfer Rule, THE NCAA NEWS (Indianapolis, Ind.), Dec. 7, 2006, <http://wbca.org/upload/DILegislationDec06GradTransfer.pdf> (last visited Oct. 24, 2007) (specifying number of NCAA member institutions calling for override of graduate transfer legislation).

96. See Ken Tysiac, *Have Degree; Will Transfer*, THE CHARLOTTE OBSERVER, Aug. 23, 2006 (noting rarity of override votes by Division I institutions). The five-eighths majority of institutions voting at the January NCAA Legislative Forum was enough to override the rule. See Elton Alexander, *How It Works*, PLAIN DEALER REP.

response to the rule's adoption, some coaches immediately reacted with disfavor, while others initially withheld judgment, stating that they required more information about the graduate transfer rule.⁹⁷ Of the latter group, University of Tennessee football coach Phillip Fulmer cautiously indicated approval of a student-athlete using the graduate transfer rule to move from a more high-profile institution to a smaller one offering the opportunity of more playing time, although he also believed that student-athletes from small schools "transfer[ing] in [to] play for a national championship. . . could take a lot of planning. So I think we need to sort through it a little bit more."⁹⁸

During the summer of 2006, prior to the eventual repeal of the graduate transfer rule, an editorial appeared in the Division I National Student-Athlete Advisory Committee newsletter devoted to "competitive equity" and its potential ruin in the wake of the transfer legislation.⁹⁹ Instead of joining the criticism of the rule, Chas Davis, the editorial's author, characterized the graduate transfer rule as having a positive impact on student-athletes, particularly in light of the goals and commitments the NCAA normally undertakes.¹⁰⁰ Davis indicated that only a slight risk of abuse of the rule could exist, as non-recruitment regulations would be enforced until the NCAA granted a student-athlete the permission to transfer.¹⁰¹ In closing, Davis' argument echoed the consensus of many NCAA student-athletes: at a pivotal time in student-athletes' lives, the choices they make regarding their educational path must overcome

(Cleveland, Ohio), Dec. 12, 2006, at D8 (discussing legislation's future in hands of voting institutions in early 2007).

97. See Antony A. English, *SEC Coaches Aren't Sold on Transfer Rule*, ST. PETERSBURG TIMES (Fla.), Aug. 2, 2006, at 1C (indicating "[c]oaches generally fall into two categories: those who want more information to form an opinion; and those who already have decided the rule is a bad idea.").

98. *Id.* (quoting football coach desiring more information of ramifications of use of graduate transfer rule before deciding on its worth).

99. See Davis, *supra* note 7, at 6 (answering claims from coaches and others deeming graduate transfer rule vehicle of unfairness).

100. See *id.* (stating graduate transfer rule reflects fundamental purpose of collegiate pursuits). "Correct me if I'm wrong, but the goal of the recently implemented Academic Progress Report was to hold institutions accountable for educating student-athletes and keeping them on track to graduate." *Id.* In addition, Davis maintained that "[r]egardless of the intentions of [student-athletes'] transfer or any unintended consequences, we're talking about another major step in many student-athletes' lives and careers." *Id.*

101. See *id.* (indicating downside of top athletic program losing valuable team member to smaller, yet more academically appealing institution).

the biases of coaches and athletic directors concerned about loyalty.¹⁰²

At the Convention, held on January 6, 2007, seventy percent of Division I institutions voted in favor of overturning the graduate transfer rule.¹⁰³ Speaking on behalf of the Student-Athlete Advisory Committee, Boise State University student-athlete Katie Street advised the voting institutions that voting to override the rule would hinder the educational benefits provided to student-athletes throughout the 2006-07 academic year.¹⁰⁴ Despite Ms. Street's appeal from a student-athlete's perspective, the passing of the override pleased numerous NCAA coaches who feared a "free agency" market in college athletics that was predicted to increase, as more student-athletes were likely to discover the graduate transfer rule in years to come.¹⁰⁵ Student-athletes sincere about transferring to a new institution for graduate school can apply for such a transfer under a waiver process still in effect despite the institutions' vote overriding the graduate transfer rule.¹⁰⁶ The NCAA will most likely grant waivers for applicants who are rising graduate student-athletes and wish to transfer to another institution because their undergraduate institution does not offer their degree of choice.¹⁰⁷ The student-athletes who took advantage of the graduate transfer rule during the 2006-07 academic year were not affected by the override; however, those wishing to make such a transfer after the summer of

102. *See id.* (concluding "[i]t is unfortunate that some now believe that the interests of the athletic department and coach trump those of the student-athlete at a critical time in their lives.").

103. *See* Alan Schmadtke, *Recent Graduate Transfer Rule is Shot Down*, ORLANDO SENTINEL, Jan. 7, 2007 (indicating vote of 196 to 83 in favor of override); *see also* Hosick, *supra* note 9 (acknowledging vote's outcome despite student-athlete organization's advocacy in favor of maintaining rule).

104. *See* Hosick, *supra* note 9 (quoting Street's call to preserve graduate transfer rule because benefits reaped by student-athletes outweigh potential for impact on competition among institutions).

105. *See id.* (referring to executive director of National Association of Basketball Coaches who predicted that students' knowledge of rule, along with escalation of recruiting, would increase in coming years). Several months prior to the override vote, Grant Teaff, executive director of the American Football Coaches Association, stressed his concern with the graduate transfer rule, stating that "[t]here is an organizing effort to overturn this This is legislation that is not a good fit." Dennis Dodd, *Football Coaches Start Pushback Against New Transfer Rule*, CBS SPORTSLINE.COM, May 26, 2006, <http://www.sportsline.com/print/collegefootball/story/9463380>.

106. *See* Hosick, *supra* note 9 (quoting associate commissioner of Big Ten Conference who believes "quality control" approach offered by waiver process is in best interest of student-athletes).

107. *See id.* (suggesting likelihood of waiver grant to "student-athletes who truly want[] to transfer for academic reasons").

2007 will be subject to NCAA's transfer rules in place prior to the temporary enactment of Proposal No. 2005-54.¹⁰⁸

In preparation for the override vote, the NCAA research staff initiated a survey asking Division I member institutions to respond to questions based on student eligibility and exercise of the graduate transfer rule.¹⁰⁹ Ninety-two percent of Division I institutions responded to the survey, with roughly twenty-eight percent of those institutions indicating that student-athletes enrolled as transfer students in a graduate program during the 2006-07 academic year.¹¹⁰ Of the twenty-eight percent of institutions enrolling transfers, twenty-five out of 112 transfer graduate student-athletes participated in the NCAA's "revenue" sports.¹¹¹ Among those sports, football had the largest number of graduate transfer student-athletes taking advantage of the rule throughout 2006-07, followed by, in declining order, men's basketball, women's basketball, and ice hockey.¹¹² While a substantial majority of transferring graduate stu-

108. See 2006-07 NCAA Division I Legislative Proposals Question and Answer Document, http://www2.ncaa.org/portal/legislation_and_governance/rules_and_bylaws/legislative_actions_and_issues/2007_d1_legislation_fa_q_.pdf (last visited Oct. 24, 2007) ("If the adoption of the proposal is overridden, student-athletes who transfer on or after August 1, 2007, will be subject to the legislation in place prior to the adoption of Proposal No. 2005-54.").

109. See NCAA Transfer Eligibility Proposal, *supra* note 92 (indicating method research staff used to conduct survey). The administrators of the survey provided an overview of Proposal 2005-54 to preface their findings:

In April 2006, the Division I Board of Directors adopted Proposal No. 2005-54, which created an exception to the transfer year-in-residence rule and allows a student-athlete who has graduated with his or her undergraduate degree to transfer to another institution and be immediately eligible for financial aid, practice and competition, regardless of previous transfer history, provided they have been accepted to a specific graduate program at the second institution.

During the override period, the required number of member institutions requested an override and the legislation will be voted on by the membership at the 2007 NCAA Convention. In preparation for the upcoming override vote and to help inform future decisions related to this legislation, the following information has been prepared regarding the use of the newly adopted exception during the 2006-07 academic year.

The NCAA research staff conducted a survey of the Division I membership via an online survey sent to compliance coordinators at all Division I institutions and follow-up phone calls to non-respondents.

Id.

110. See *id.* (specifying that 217 of 301 responding institutions did not "have incoming transfer student-athletes in any sport entering a graduate program who will be competing in 2006-07").

111. See *id.* (noting that student-athletes participating in "men's and women's basketball, . . . football, and men's ice hockey . . . are those most significantly impacted by the proposal").

112. See *id.* (estimating that sixteen football players is likely high figure because some would have been eligible under standard one-time transfer exception). During the 2006-07 academic year, eight reported men's basketball players, one

dent-athletes during the 2006-07 academic year did not participate in “revenue” sports, therefore not requiring the use of the graduate transfer rule, several high-profile college athletes did decide to take advantage of the rule.¹¹³

D. The Graduate Transfer Rule in Use in 2006-07

Completing his undergraduate studies at the University of Utah in August 2006, Ryan Smith maintained two years of football eligibility as a result of “redshirting”¹¹⁴ his freshman year.¹¹⁵ The cornerback decided to take advantage of the graduate transfer rule by applying to the University of Florida’s Educational Leadership

reported women’s basketball player, and no reported men’s ice hockey players transferred to new institutions under the graduate transfer rule. See NCAA Transfer Eligibility Proposal, *supra* note 92.

113. See Knobler, *NCAA Rule Change*, *supra* note 1 (reporting NCAA’s acknowledgement of only twenty-five student-athletes who utilized graduate transfer rule, including the four “most publicized”: Ryan Smith, Richard Kovalcheck, Tyler Krieg, and Kevin Kruger). The graduate transfer rule survey indicated the rarity of the rule’s use by student-athletes graduating from their undergraduate institution with remaining eligibility:

According to data from the 2004-05 APR submission, 94,445 student-athletes received athletics aid or were recruited for a NCAA Division I championship sport team (were in the APR cohort) in the 2004-05 academic year. It was reported that 14,457 of these student-athletes (15.3% of the total) graduated during the 2004-05 year and that 4,830 (33.4% of all graduates) graduated with remaining eligibility. Based on this information, approximately two percent of graduates with remaining eligibility continued their participation at an institution different from where they graduated.

NCAA Transfer Eligibility Proposal, *supra* note 92. “APR” refers to Academic Progress Rate, an NCAA academic-reform initiative that reflects a “real-time assessment of teams’ academic performance” by collecting data and awarding points to institutions’ athletic teams whose student-athletes meet certain eligibility standards. NCAA, *Defining Academic Reform*, http://www2.ncaa.org/portal/academics_and_athletes/education_and_research/academic_reform/defining_academic_reform.html (last visited Oct. 24, 2007).

114. NCAA, *Frequently-Asked Questions on Redshirts, Age Limits, and Graduate Participation*, http://www.ncaa.org/eligibility/faqs/faqs_eligibility_seasons.html (last visited Oct. 24, 2007). A student-athlete “redshirts” when he or she does not participate in athletic competition for one academic year, thus permitting the student-athlete to maintain a season of eligibility. See *id.* “NCAA rules indicate that any competition, regardless of time, during a season counts as one of your seasons of competition in that sport.” *Id.*

115. See Mark Long, *Utah Grad Transfers to Florida*, ASSOCIATED PRESS, Aug. 8, 2006 (describing Smith’s transfer to University of Florida (“Florida”) after acceptance in graduate degree program). Smith redshirted the 2003 season at the University of Utah (“Utah”) but started eighteen games throughout 2004 and 2005. University of Florida Athletics: Ryan Smith Biography, http://www.gatorzone.com/football/bios.php?year=2006&player_id=114 (last visited Oct. 24, 2007) (identifying Smith as junior transfer).

graduate program.¹¹⁶ Interestingly, University of Florida head football coach Urban Meyer, a vocal opponent of the graduate transfer rule soon after its adoption, coached Smith at the University of Utah during Smith's first season of eligibility in 2004.¹¹⁷ Smith's first season on the University of Florida football team ended with the institution's first national championship victory in a decade.¹¹⁸

Two additional notable college football players took advantage of the graduate transfer rule in 2006: Tyler Krieg and Richard Kovalcheck.¹¹⁹ Krieg received his undergraduate degree in four years from Duke University, where he used three years of his athletic eligibility playing offensive guard and one year redshirting.¹²⁰ The University of California, a school that originally recruited him in high school, accepted Krieg into the institution's Master's in Education Program.¹²¹ Deviating from the attitude of many other NCAA Division I coaches, University of California coach Jeff Tedford cautiously agrees with the graduate transfer rule in certain cases, stating that "[i]f we had a fifth-year guy who wasn't completely happy, I would be OK with him transferring. Of course, you

116. See Long, *Gators, Others Take Advantage*, *supra* note 3 (describing Smith's quick transfer from Utah to Florida). Prior to learning about the graduate transfer rule, Smith anticipated transferring to Howard University, a Division I-AA institution, so he would not lose one of his remaining years of eligibility. See Kelly Whiteside, *Secondary Duo Primary Reason Florida 6-0; Thanks to New Rule, Transfer Smith, Nelson in Position to Shine*, USA TODAY, Oct. 12, 2006, at 1C (detailing Smith's heavy load of summer coursework to graduate from Utah).

117. See Long, *Gators, Others Take Advantage*, *supra* note 3 (noting dual motivating factors, coaching staff and interest in graduate degree program, which helped Smith choose Florida for remaining seasons of athletic eligibility). Although pleased with Smith on the Florida team, Coach Meyer nonetheless believes that "anytime [sic] you use the word free agency in college football it's bad, and that's what it is . . . Ryan Smith was a free agent. That shouldn't happen in college football." Whiteside, *supra* note 116.

118. See Roger Rubin, *Gators Swamp OSU for Title: Take Grid Crown to Add to Hoopla*, DAILY NEWS (N.Y.), Jan. 9, 2007, at 49 (discussing outcome of Florida's national championship victory over Ohio State University); see also Whiteside, *supra* note 116 (suggesting that Smith's transfer improved Florida's defense).

119. See Melick, *supra* note 94 (naming Krieg and Kovalcheck as student-athletes immediately taking advantage of graduate transfer rule). Krieg and Kovalcheck received their undergraduate degrees from Duke University ("Duke") and the University of Arizona, respectively. See *id.*

120. See Heater, *supra* note 6 (indicating Duke's lack of success had much to do with Krieg's initial desire to transfer to Division I-AA program with graduate school where Krieg could be eligible to compete immediately).

121. See Doug Binder, *Diploma Not End of Line*, OREGONIAN, May 15, 2006, at E01 (presenting Krieg's history with coaching staff at University of California); see also Heater, *supra* note 6 (describing Krieg's adjustment to University of California, athletically and academically). Before the 2006 season began, Krieg noted: "I feel like a freshman all over again. I'm getting to know the guys and I'm learning a new offense. Then there's the part of not knowing where anything is on campus." *Id.*

would hope that a guy in his fifth year would have an investment in the program.”¹²² Kovalcheck, a former starting quarterback with two years of athletic eligibility remaining, transferred to Vanderbilt University to study management at the graduate level after completing his undergraduate degree at the University of Arizona in three years.¹²³

Football players were not the only prominent graduate student-athletes taking advantage of the graduate transfer rule in 2006, as basketball player Kevin Kruger transferred from Arizona State University to the University of Las Vegas after receiving his bachelor's degree.¹²⁴ Kruger admitted that he could not “see why the rule was even proposed [or]. . . see too many players taking use of it.”¹²⁵ The graduate transfer rule has allowed Kruger to play his final year of eligibility during the 2006-07 college basketball season under his father, coach Lon Kruger, an option which would not have been possible under the NCAA's previous transfer rules requiring a student-athlete in Kruger's situation to sit out a year of eligibility before playing.¹²⁶

122. Heater, *supra* note 6 (quoting Tedford regarding acceptance of graduate transfer rule in situations similar to Krieg's unhappiness at Duke).

123. See Bradley Handwerker & Kyle Veazey, *Coaches See Few Changes from New Transfer Rule: Abuses Aren't Expected Now*, DECATUR DAILY (Ala.), July 27, 2006 (describing Kovalcheck's taking advantage of graduate transfer rule); see also Jack Carey, *College Football Coaches Oppose Rule Easing Transfers*, USA TODAY, June 5, 2006, at 3C (noting amount of time it took Kovalcheck, including summer coursework, to receive his undergraduate degree). Bobby Johnson, Vanderbilt University's football coach, who has a rare favorable opinion regarding the graduate transfer rule stated:

If you've got a guy on your team . . . producing at a great rate, I doubt if he's going to want to go somewhere else and play football. . . . Plus, he's got to graduate, then he's got to be accepted in that other school, and he's got to get a release from his previous school.

Handwerker, *supra*. “[I]f a guy can get to a good graduate school and finish out one last year of eligibility, why not let him do it?” Higgins, *supra* note 3.

124. See Matt Youmans, *Coach's Son Bolsters Rebels*, LAS VEGAS REV.-J., July 8, 2006, at 1C (naming Kruger as highest-profile player to use graduate transfer rule); see also *An Academic Incentive*, LAS VEGAS REV.-J., July 19, 2006, at 8B (opining that coaches who criticize graduate transfer rule “have the freedom to leave their schools and lead other teams on a moment's notice.”).

125. Matt Youmans, *Rule is Blessing for New Rebel Kruger*, LAS VEGAS REV. J., July 16, 2006, at 1C (quoting Kruger on his skepticism of graduate transfer rule's use).

126. See Michael Schwartz, *Former ASU Guard Kruger Now Playing for His Dad at UNLV*, ARIZ. DAILY WILDCAT, Nov. 28, 2006 (illustrating graduate transfer rule provided for father-son reunion at UNLV, yet acknowledging rule's disfavor by “affected schools”).

E. The Free Agency Model in Professional Athletics

Athletes participating in the four major professional sports leagues (i.e., Major League Baseball, the National Football League, the National Basketball Association, and the National Hockey League) become parties to personal services contracts with teams in a number of different situations.¹²⁷ Depending on the sports league and the mechanics of its respective “drafting” process, an athlete, with the help of an agent, initially sacrifices their playing rights to a particular team for a specific period of time.¹²⁸ At this point, an athlete may decide to sign a player contract with the team or may attempt to re-enter a future draft hoping to be selected by another franchise.¹²⁹ Professional athletes who satisfy a required amount of playing time in their league and are aware of the impending expiration of their player contracts may wish to obtain “free agency” status, of which there are two types: unrestricted and restricted.¹³⁰

“Unrestricted” free agency indicates that a professional athlete is essentially free from all contractual ties to their former team.¹³¹ As a “restricted” free agent, a professional athlete may negotiate and enter into a new contract with another team in the league but may still be retained by their old team if it matches the new team’s offer.¹³² Thus, professional athletes prefer to be “unrestricted” free agents because that situation affords them an ideal bargaining position and an opportunity to be lucratively compensated.¹³³ Profes-

127. See Michael A. McCann, *It’s Not About the Money: The Role of Preferences, Cognitive Biases, and Heuristics Among Professional Athletes*, 71 BROOKLYN L. REV. 1459, 1484-85 (2006) (presenting notion of professional athletic “employment” by sports teams).

128. See *id.* at 1486 (indicating draft processes in four major professional leagues have specific rules on “exclusive property” rights of athletes). For example, an athlete chosen in a draft typically is under contractual control of the drafting team for a set period time, usually at least one year. See *id.* Drafts in professional sports serve as “the exclusive entrance for amateur players into professional sports.” *Id.*

129. See *id.* (revealing variations and intricacies of drafts and subsequent signing processes in different professional sports leagues, as well as on agreements established by players’ unions).

130. See *id.* at 1487 (suggesting motivation behind becoming free agent is maximizing “earning potential”).

131. See *id.* (defining “unrestricted” free agency and deeming it “optimal bargaining position” of professional athlete).

132. See *id.* (detailing “restricted” free agency where teams may receive draft picks as compensation if one of their players signs with another team).

133. See Stephen M. Yoost, Comment, *The National Hockey League and Salary Arbitration: Time for A Line Change*, 21 OHIO ST. J. ON DISP. RESOL. 485, 495 (2006) (indicating exponential increase of NHL players’ salaries over ten-year period despite league’s declining popularity). Typically, professional athletes will arrive at

sional teams with higher payrolls, or more availability under a league-mandated salary cap, are most often able to offer the more impressive contracts to free agents; however, in some cases professional athletes are drawn to a team's opportunity for success and not a more lucrative contract.¹³⁴

As noted above, in *Tanaka*, the Ninth Circuit discussed *Mackey v. NFL*, a 1977 decision by the U.S. Court of Appeals for the Eighth Circuit ("Eighth Circuit").¹³⁵ In *Mackey*, an NFL player successfully sued NFL owners arguing that the "Rozelle Rule,"¹³⁶ "requir[ing] a team signing a player from another team to work out a 'mutually satisfactory arrangement' with the former team," constituted an unreasonable restraint of trade violating the Sherman Act.¹³⁷ In the year that the rule was enacted, only thirty-four of 176 eligible players were able to sign contracts with new teams.¹³⁸

The Eighth Circuit, in rejecting the NFL owners' argument that the Rozelle Rule was justifiable on business grounds, applied a "rule of reason" analysis to determine whether the Rozelle Rule violated the Sherman Act.¹³⁹ Because the lower court acknowledged that the Rozelle Rule was not "essential to the maintenance of competitive balance," the Eighth Circuit determined that the Rule did not satisfy rule of reason analysis.¹⁴⁰

Furthermore, the Eighth Circuit held that the Rozelle Rule constituted an unreasonable restraint of trade under the Sherman Act because "it was overly broad, unlimited in duration, unaccompanied by procedural safeguards, and employed in conjunction

free agency eligibility at the peaks of their careers, a period of time arguably limited to only a few years. See McCann, *supra* note 127, at 1490 (noting "relatively brief earnings curve" for majority of professional athletes).

134. See McCann, *supra* note 127, at 1504 (discussing professional basketball player Alonzo Mourning's preference to play for teams with championship potential over possibility of earning extra millions of dollars on less successful teams).

135. For a discussion of the *Tanaka* case, see *supra* notes 77-91 and accompanying text.

136. See *Mackey v. NFL*, 543 F.2d 606, 611 (8th Cir. 1977) (indicating that "ostensible purposes of the rule are to maintain competitive balance among the NFL teams and protect the clubs' investment in scouting, selecting and developing players.").

137. Scott E. Backman, *NFL Players Fight for Their Freedom: The History of Free Agency in the NFL*, 9 SPORTS LAW. J. 1, 10 (2002) (quoting *Mackey*, 543 F.2d at 611).

138. See *id.* (suggesting owners' satisfaction with Rozelle Rule's restrictive result).

139. See *Mackey*, 543 F.2d at 620 ("The focus of an inquiry under the Rule of Reason is whether the restraint imposed is justified by legitimate business purposes, and is no more restrictive than necessary.").

140. See *id.* at 621-22 (acknowledging league's "strong and unique interest in maintaining competitive balance among its teams").

with other anticompetitive practices. . . .”¹⁴¹ Most importantly, the Eighth Circuit minimized the importance of NFL owners’ claims that such a ruling would hinder the league’s ability to maintain relatively equal competition among its teams; the court concluded that without the Rozelle Rule, there would be “no immediate or future disruptive effects on the League.”¹⁴²

F. Educational Hindrance

Another potential avenue worth consideration when evaluating the graduate transfer rule is the claim of educational malpractice, “a tort theory beloved of commentators, but not of courts.”¹⁴³ More specifically, a plaintiff bringing a suit against an institution, or an organization such as the NCAA, may allege that the quality of the education they received was poor or that certain opportunities to make the education more meaningful were unavailable.¹⁴⁴ One predominant problem regarding this issue is the perception that institutions, particularly those with dominant athletic programs that find substantial success at the lucrative championship levels of certain sports, do not provide their student-athletes with adequate academic means.¹⁴⁵ Such institutions, despite their often-stated principal goal of fostering academic achievement, arguably have

141. *Id.* at 621.

142. Backman, *supra* note 137, at 16. The Eighth Circuit, referencing the lower court’s determinations, stated:

As to the clubs’ investment in player development costs, Judge Larson found that these expenses are similar to those incurred by other businesses, and that there is no right to compensation for this type of investment. With respect to player continuity, the court found that elimination of the Rozelle Rule would affect all teams equally in that regard; that it would not lead to a reduction in the quality of play; and that even assuming that it would, that fact would not justify the Rozelle Rule’s anticompetitive effects. As to competitive balance and the consequences which would flow from abolition of the Rozelle Rule, Judge Larson found that the existence of the Rozelle Rule has had no material effect on competitive balance in the NFL. Even assuming that the Rule did foster competitive balance, the court found that there were other legal means available to achieve that end — e.g., the competition committee, multiple year contracts, and special incentives.

Mackey, 543 F.2d at 621.

143. *Ross v. Creighton Univ.*, 740 F. Supp. 1319, 1327 (N.D. Ill. 1990), *aff’d in part, rev’d in part*, 957 F.2d 410 (7th Cir. 1992).

144. See Monica L. Emerick, Comment, *The University/Student-Athlete Relationship: Duties Giving Rise to a Potential Educational Hindrance Claim*, 44 UCLA L. REV. 865, 869 (1997) (describing educational hindrance as complaint alleging institution’s conduct, either active or passive, resulted in unfavorable effect on educational opportunity).

145. See *id.* at 875 (presenting findings of NCAA’s Knight Commission that athletic aspirations are placed above educational value of academic programs).

been unable to adequately reconcile that goal with the additionally important notions of athletic success, notoriety, and marketability.¹⁴⁶

Challenging the NCAA, as opposed to individual institutions, on this issue may lead to success because of the organization's emphasis on amateurism and educational opportunity for student-athletes studying at the collegiate level.¹⁴⁷ For example, the NCAA Constitution specifies requirements relating to student-athletes' academic performances.¹⁴⁸ One scholar has indicated, however, that the NCAA has thus far failed to adequately balance the conflicting goals of strong athletics and extensive academic options for student-athletes.¹⁴⁹

III. ANALYSIS

In order to examine the issue of whether a student-athlete may challenge the NCAA's repeal of the graduate transfer rule, let us hypothesize a situation involving Richie, a highly-regarded defensive tackle who plays football for a consistently successful "powerhouse" Division I institution.¹⁵⁰ Following a successful high school career, both on the football field and in the classroom, Richie determined that attending South-Central Louisiana State University ("SCLSU") would further his dual goals of pursuing football at a highly competitive collegiate level and owning his own business in the near future. Richie made numerous contributions to his team throughout his freshman season; however, a knee injury forced him to redshirt the following season.¹⁵¹ Despite the injury, Richie excelled academically toward a management degree, and with the

146. See *id.* at 878 (indicating that institutions often must choose between "winning and educational values").

147. For a discussion of amateurism, see *supra* notes 45-65 and accompanying text.

148. See NCAA Const., *supra* note 27, at art. 2.5 (specifying fulfillment of "sound academic standards"). "The admission, academic standing and academic progress of student-athletes shall be consistent with the policies and standards adopted by the institution for the student body in general." *Id.*

149. See Emerick, *supra* note 144, at 883 (speculating that from NCAA's perspective financial benefits stemming from successful athletic programs outweigh academic endeavors).

150. See Knobler, *NCAA Rule Change*, *supra* note 1 (detailing one student-athlete's views on graduate transfer rule and rule's impact on his educational aspirations at graduate level). These circumstances and the hypothetical Richie are loosely based on the situation of Georgia Institute of Technology ("Georgia Tech") student-athlete Darryl Richard, who began his undergraduate career at Georgia Tech in 2004.

151. See Player Bio: Darryl Richard, http://ramblinwreck.cstv.com/sports/m-footbl/mtt/richard_darryl00.html (on file with author) (mentioning Richard's

help of summer classes was able to graduate in just three years. Returning to the football field following rehabilitation of his knee, Richie participated in only the second of his allotted four years of athletic eligibility.¹⁵² Richie received his undergraduate degree in the spring of that year and was eager to immediately pursue a master's degree in business administration ("MBA") while continuing to play football.¹⁵³

A student-athlete member of SCLSU's men's cross-country team alerted Richie to a recently-enacted and rather controversial NCAA rule allowing student-athletes who have completed their undergraduate studies to transfer to another Division I institution to pursue a graduate degree and immediately continue their athletic eligibility without missing a beat.¹⁵⁴ Unfortunately, Division I institutions recently met at the NCAA's annual convention and repealed the graduate transfer rule, seemingly appeasing calls from concerned coaches and athletic directors labeling the rule problematic and an invitation to be disloyal to the institution that recruited the student-athlete.¹⁵⁵ Due to the repealed rule, if Richie transfers into an MBA program at another institution he may have to sacrifice one of his two remaining years of athletic eligibility. Richie applied to SCLSU's MBA program and would gladly enroll there if accepted; however, gaining entrance is a long shot because the school typically requires several years of full-time work experience from its applicants.¹⁵⁶

Richie's available options in the wake of the NCAA institutions' decision to overturn the graduate transfer rule are three-fold: 1) continue at SCLSU with his remaining two years of athletic eligibility while enrolled in another of the institution's graduate programs; 2) attend an MBA program at another institution with a competitive football team, while being forced to sacrifice one year of ath-

redshirt season caused by reconstructive knee surgery prior to his second year of play).

152. For a further discussion of "redshirting" and the mechanics of athletic eligibility, see *supra* note 114.

153. See Knobler, *NCAA Rule Change*, *supra* note 1 ("Georgia Tech defensive tackle Darryl Richard wants to play two more years of major college football and earn an MBA at the same time.")

154. For a further discussion of the graduate transfer rule's origin and framework, see *supra* notes 92-102 and accompanying text.

155. For a further discussion of the graduate transfer rule's repeal, see *supra* notes 103-13 and accompanying text.

156. See Knobler, *NCAA Rule Change*, *supra* note 1 (quoting Georgia Tech College of Management admission director's statement indicating only five percent of admitted students arrive in MBA program immediately after receiving bachelor's degree).

letic eligibility; or 3) attend an MBA program at a Division II or Division III institution and resume his collegiate football career immediately for two more years.¹⁵⁷ Unfortunately, none of these choices are exactly optimal, as Richie believes he should not be penalized for wanting to immediately begin his studies in an MBA program while continuing to play competitive Division I football. In short, the NCAA has hampered Richie's pursuit of his academic and athletic goals by necessitating that he consider less attractive options because of the graduate transfer rule's repeal.¹⁵⁸

A. Refutation of Free Agency Claims

As mentioned throughout this Note, one major justification for the repeal of the graduate transfer rule voiced by non-student-athletes, particularly NCAA coaches and athletic directors of member institutions, is that allowing graduate students to transfer will generate a market of "free agent" talent available only to the most attractive athletic programs.¹⁵⁹ In the hypothetical situation, it is highly likely that Richie's football coach at SCLSU would be apprehensive about allowing one of his most capable players, who has only provided the school with two years of service, to transfer and immediately become a possible division opponent.¹⁶⁰ Using terminology linked to professional sports, a rising graduate student-athlete may reflect an "unrestricted" free agent because after receiving their undergraduate degree they would be free to transfer elsewhere without their undergraduate institution interfering.¹⁶¹ While the motivations of student-athletes will differ, it is likely that their intentions to utilize the graduate transfer rule throughout the 2006-07 season stemmed from their desires to both reap the benefits of a graduate degree and open a new chapter of their athletic ca-

157. *See id.* (providing other options available to Richards if he is not accepted into Georgia Tech's MBA program).

158. *See id.* (noting Richard's intention to obtain his MBA, "if not from Tech than [sic] from somewhere else.").

159. For a discussion of coaches and athletic directors' concerns urging the NCAA's repeal of the graduate transfer rule, see *supra* notes 105-13 and accompanying text.

160. *See Doyel, supra* note 2 (quoting one Big East Conference coach's statement that graduate transfer rule is "the dumbest rule I've ever heard.").

161. For a discussion of the differences between "restricted" and "unrestricted" free agency, see *supra* notes 130-34 and accompanying text. One could argue, of course, that a student-athlete's undergraduate institution may liken the situation to one of "restricted" free agency, perhaps granting that institution an advantage over other potential institutions where the student-athlete could pursue graduate studies.

reers.¹⁶² Therefore, one could posit that the “earning potential” motivating professional athletes anxious to pursue their free agency can be analogized to a more elaborate student-athlete’s balancing approach, taking into account not only the likelihood of athletic success, but also a “total package” that affords them a quality graduate level education.¹⁶³

In *Mackey*,¹⁶⁴ the Eighth Circuit was not persuaded by the NFL’s competitive league rationale for implementation of the “Rozelle” Rule and deemed the rule non-essential to maintaining competition and to be more restrictive than necessary.¹⁶⁵ Applied to the graduate transfer rule, the NCAA clearly has an interest in protecting student-athletes’ well-being.¹⁶⁶ Compared to the professional free agency situation, placing a check upon graduate student-athletes wishing to transfer institutions appears to be an overly restrictive means of maintaining competition among NCAA institutions.¹⁶⁷ Arguably, the repeal of the graduate transfer rule reflects the NCAA effectively dropping the ball when it comes to the organization’s principle, indicated in its Constitution and its Operating Bylaws, of providing an environment capable of fostering a student-athlete’s overall educational experience. Similarly, in *Mackey*, the Eighth Circuit’s holding which minimized the NFL owners’ cries that the end of the “Rozelle Rule” would erase any sort of competitive balance is relevant to the argument that allowing rising graduate student-athletes to transfer without penalty may have a detrimental effect on athletic programs’ abilities to recruit student-athletes.¹⁶⁸ Even NCAA coaches opposed to the graduate transfer rule saw firsthand in 2006 that the rule’s implementation benefited athletic programs and student-athletes’ educations in ways which

162. See Melick, *supra* note 94 (noting coaches’ panic that rule “allows players who have done everything right to leave for a better opportunity somewhere else.”).

163. See Davis, *supra* note 7, at 6 (opining that vast majority of student-athletes know value of education, not possibility of becoming professional athlete, will be ultimate reward of collegiate experience).

164. *Mackey v. National Football League*, 543 F.2d 606, 611 (8th Cir. 1976).

165. See *id.* at 621-22 (acknowledging district court’s findings on issue of NFL’s need for competitive balance applied to rule of reason analysis).

166. See NCAA Const., *supra* note 27, at art. 2.2 (stressing importance of maintaining well-being through overall educational experience, diversity, health and safety, among other principles).

167. For a discussion of the rationale behind the NCAA’s decision to repeal the graduate transfer rule, see *supra* notes 103-13 and accompanying text.

168. See *Mackey*, 543 F.2d at 621-22 (rejecting argument that NFL team owners’ need to “recoup player development costs” supports restraining free agency of professional athletes).

otherwise would not have been possible or which would have required sacrificing a year of athletic eligibility.¹⁶⁹ In addition, even if assuming, *arguendo*, the graduate transfer rule did cause coaching staffs to be concerned about potentially losing their rising graduate student-athletes, the Eighth Circuit in *Mackey* acknowledged that removing anti-competitive restraints affecting player movement among a league's professional teams would not "lead to a reduction in the quality of play."¹⁷⁰ The fact that some in the NCAA community believe the graduate transfer rule would create a free agency market should not insulate the organization from legal critique and analogy to situations in the professional sports environment, which lacks amateurism ideals.¹⁷¹ Rather, the voices of student-athletes claiming unfairness should survive anti-competition scrutiny.

B. Potential of Educational Hindrance

The unique effects of repealing the graduate transfer rule admittedly do not impact a great deal of NCAA student-athletes.¹⁷² While student-athletes are hindered because they cannot immediately transfer and compete, concerns also arise related to the educational opportunities student-athletes may have to forego when weighing their athletic and educational obligations at the graduate level.¹⁷³ With regard to NCAA institutions with dominant athletic programs, one could argue that many do not provide their student-athletes with adequate academic means.¹⁷⁴ Collegiate institutions, regardless of the amateurism standards imposed by the NCAA, have done a poor job of providing adequate educations, which is often overshadowed by what athletic programs may perceive as the more important notion of athletic success.¹⁷⁵ Bringing an educational

169. See Long, *Gators, Others Take Advantage*, *supra* note 3 (detailing Coach Meyer's disapproval of rule despite receiving quality cornerback Ryan Smith because of it).

170. *Mackey*, 543 F.2d at 621.

171. For a discussion of the NCAA's principle of amateurism, see *supra* notes 45-65 and accompanying text.

172. For a discussion of student-athlete eligibility and use of graduate transfer rule throughout 2006-07 academic year, see *supra* notes 92-126 and accompanying text.

173. See Emerick, *supra* note 144, at 869-70 (indicating institution's potential liability when action or failure to act results in degradation of educational experience).

174. See *id.* at 875 (presenting findings of NCAA's Knight Commission regarding placement of athletic aspirations above educational value of academic programs).

175. See *id.* at 878 (discussing how institutions often must choose between "winning and educational values").

hindrance claim against the NCAA, as opposed to against individual institutions, may be successful because the organization focuses on the pursuit of educational opportunity for student-athletes.¹⁷⁶ Such a challenge may only receive a lukewarm reception, however, as courts have been unenthusiastic to embrace educational hindrance claims.¹⁷⁷ Admittedly, student-athletes unable to take advantage of the now-repealed graduate transfer rule likely do have viable graduate-level educational opportunities at their undergraduate institutions.

IV. CONCLUSION

Because it has been repealed, the graduate transfer rule may reflect a failed experiment—a tinkering with the NCAA’s complicated transfer rules.¹⁷⁸ Several examples of the rule’s use during the 2006-07 academic year indicate the benefits of allowing graduate student-athletes to choose where they wish to use their athletic eligibility.¹⁷⁹ Coaches at the collegiate level are permitted to choose where they coach, and often their decisions to pursue more lucrative employment contracts cannot be compared with a student-athlete’s decision to find their preferred course of graduate study.¹⁸⁰ Unless NCAA athletic programs have a change of heart regarding the graduate transfer rule, the organization’s underlying goal of amateurism will continue to fall short of being achieved; however, this could be remedied by providing for a trial period longer than one year to determine the rule’s effects on the “mar-

176. For a discussion of amateurism, see *supra* notes 45-65 and accompanying text.

177. See Emerick, *supra* note 144, at 870 n.23 (indicating that “courts have recognized scholarship agreements between student-athletes and their universities as constituting contracts.”).

178. See Schmadtke, *supra* note 103 (quoting North Carolina-Charlotte athletic representative that “[f]ear [of the rule] drove the circumstances and won”).

179. For a discussion of the graduate transfer rule’s use while implemented, see *supra* notes 114-26 and accompanying text.

180. See Jenkins, *supra* note 50, at 40 (commenting on Duke men’s basketball coach Mike Krzyzewski’s million dollar signing bonus and Nike stock options he received for agreeing to continue coaching Duke basketball team).

ket” of rising graduate student-athletes seeking to transfer institutions.¹⁸¹

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181. *See* Hosick, *supra* note 9 (quoting SAAC representative pleading with NCAA institutions to not allow impact of rule on competition to outweigh life-long benefits of continuing education at graduate level).

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