



4-1-2014

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Recommended Citation

Matthew R. Cali, *The NCAA's Transfer of Power: An Analysis of the Future Implications the Proposed NCAA Transfer Rules Will Have on the Landscape of College Sports*, 21 Jeffrey S. Moorad Sports L.J. 217 (2014).

Available at: <https://digitalcommons.law.villanova.edu/mslj/vol21/iss1/9>

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THE NCAA'S TRANSFER OF POWER: AN ANALYSIS OF THE
FUTURE IMPLICATIONS THE PROPOSED NCAA TRANSFER
RULES WILL HAVE ON THE LANDSCAPE OF
COLLEGE SPORTS

I. INTRODUCTION

The age of National Collegiate Athletic Association (“NCAA”) basketball free agency is upon us¹ Growing up, athletes have the ability to change Amateur Athletic Union (“AAU”) teams or high school teams whenever there is a hint of trouble.² That desire for instant gratification has made its way into the NCAA and has manifested itself in the NCAA’s proposal to change the current transfer rules.³ Student-athletes transfer for many reasons: lack of playing time, poor performance, head coaching changes, reduced scholarships, mom’s home cooking, et cetera.⁴ However, a student-athlete cannot simply fill out a few forms and be on his way to a new program.⁵ The NCAA has a long list of complex rules regarding the

1. See Nicole Auerbach & Eric Prisbell, *College Basketball’s Free Agency Era*, USA TODAY (Nov. 6, 2012, 8:56 PM), <http://www.usatoday.com/story/sports/ncaab/2012/11/06/ncaa-mens-college-basketball-transfers/1679115/> (drawing comparisons between high profile basketball players switching AAU and high schools when they “think they’re [not] getting enough shots – or free shoes” to college student-athletes desiring to change schools for similar reasons). Overall, there are mixed opinions amongst both players and coaches at the college level regarding such frequent transfers. See *id.* (quoting Eric Snow, “It was a bad sign [to transfer] when I was in college”). Snow played for the Michigan State Spartans from 1991-1995. See *id.* (noting different approach to transferring in early to mid-1990s). Although some former and current players and coaches agree with Snow, many do not actually encourage “free agency” in college basketball because “coaches can move freely from job to job with no penalty, but players cannot.” *Id.* (explaining Duke University Head Coach Mike Krzyzewski advocates free transfers in college basketball).

2. See *id.* (explaining stigma once associated with transferring universities has been eliminated because of mass amounts of transfers that have occurred in athletes’ lives growing up).

3. See *id.* (quoting University of Texas El Paso’s Head Coach Tim Floyd who called amount of transfers “epidemic” that reflects players’ desire to “seek [] instant gratification”).

4. See Rick Allen, *Athletic Scholarships and Transfer Issues*, INFORMED ATHLETE, <http://www.informedathlete.com/athletic-scholarships-transfer-issues#> (last visited Dec. 19, 2013) (listing potential reasons student-athletes want to transfer schools in middle of their college career).

5. See *Get the Facts About Transfer*, NCAA.ORG, <http://www.ncaa.org/about/resources/media-center/news/get-facts-about-transfers> (last visited Feb. 19, 2014) [hereinafter *Transfer Facts*] (providing frequently asked questions regarding transferring between schools).

procedure and protocol a student-athlete must follow in order to transfer.⁶

Recently, the NCAA transfer rules have been under fire and there has been a movement for change, especially in NCAA basketball.⁷ Statistics show that about forty-percent of men's basketball players will not play for their original school by the end of their sophomore year.⁸ This has become a growing concern and the NCAA has plans to make changes to its transfer rules.⁹

The most controversial aspect of the current transfer rules has been the restrictive "permission to contact" rule.¹⁰ This rule states that in order for a student-athlete to transfer schools and maintain his scholarship, he must receive permission from his original school to contact the school to which he wishes to transfer.¹¹ If the student-athlete does not receive permission to contact another school, then the student-athlete may transfer, but will lose his scholarship in the process.¹² This rule has been subject to much criticism because it gives universities unlimited discretion over whether to allow a student-athlete the ability to transfer to a different university while maintaining his scholarship.¹³

6. See generally *Transfer 101: Basic Information You Need to Know About Transferring to an NCAA College*, NCAA, May 2012, available at <http://www.ncaapublications.com/productdownloads/TGONLINE2012.pdf> [hereinafter *Basic Transfer Rules*] (providing "basic" rules for transferring between NCAA schools for Divisions I, II, and III).

7. See Dana O'Neil, *NCAA: It's Time to Look at Transfers*, ESPN.COM (Jul. 13, 2012), http://espn.go.com/mens-college-basketball/story/_/id/8157631/ncaa-turns-attention-transfers-eye-penalties-tampering (explaining flaws with current NCAA transfer rules).

8. See *Transfer Epidemic: 40 Percent of Basketball Players Change Schools*, SPORTING NEWS (Nov. 3, 2012, 1:46 PM), <http://aol.sportingnews.com/ncaa-basketball/story/2012-11-03/transfer-epidemic-40-percent-of-basketball-players-change-schools> [hereinafter *Transfer Epidemic*] (describing amount of interest men's college basketball players have in transferring to well-known schools after successful season).

9. See *id.* (predicting potential changes in NCAA's transfer rules will include alterations to "permission to contact rules, the one-time transfer exception and [other] academic concerns").

10. See Dana O'Neil, *supra* note 7 (stating difficulty in reconciling requirement that some student-athlete transfers sit out one year and some do not depending on sport).

11. See *Basic Transfer Rules*, *supra* note 6, at 9-10 (providing overview of "permission to contact" rule for NCAA transfers).

12. See *id.* (noting when permission to contact another school is required and what potential results when NCAA protocol is not followed).

13. See Michelle Brutlag Hosick, *Membership Modifies Transfer Waiver Guidelines*, NCAA.ORG (Nov. 2, 2012), <http://www.ncaa.org/wps/wcm/connect/public/ncaa/resources/latest+news/2012/november/membership+modifies+transfer+waiver+guidelines> (stating NCAA's Division I Legislative Council's Subcommittee for Legislative Relief made changes in response to "current waiver trends and a

Early in 2012, NCAA President Mark Emmert announced that the NCAA recognized these problems and inconsistencies with its transfer rules.¹⁴ The NCAA is not a state actor, and therefore, when the NCAA and its member institutions make decisions regarding transfers, student-athletes cannot bring due process or other claims against the NCAA to counter its rulings.¹⁵ This disproportionate distribution of power, along with high profile media coverage of its inconsistent application, led President Emmert to establish a task force to amend and change the transfer rules while maintaining a focus on academics.¹⁶ He admitted that “some of our rules were made with competitive intent rather than academic concern” and that the NCAA needed to consider making changes to the transfer rules while considering all potential implications of potential changes.¹⁷

The NCAA’s Leadership Council (“Council”) began brainstorming ideas for transfer rule changes in October 2012.¹⁸ Among other changes, the Council planned on rewarding student-athletes who possess a strong grade-point average by eliminating the

belief among the membership that waiver decisions were not consistent from case to case”); *see also* William C. Martin, Comment, *The Graduate Transfer Rule: Is the NCAA Unnecessarily Hindering Student-Athletes from Traversing the Educational Paths They Desire?*, 15 VILL. SPORTS & ENT. L.J. 103 (2008) (examining NCAA’s application and validity of graduate transfer rule utilized throughout 2006-07 collegiate school year); Heather Dinich, *NCAA Transfer Rules Too Inconsistent*, ESPN.COM (Jul. 13, 2012, 4:30 PM), http://espn.go.com/blog/nfnation/post/_/id/62891/ncaa-transfer-rules-too-inconsistent (noting inconsistencies in transfer rules in college football).

14. *See Transfer Rules Won’t Be Easily Lifted*, ESPN.COM (May 17, 2012, 8:19 PM), http://espn.go.com/college-sports/story/_/id/7942963/ncaa-transfer-restrictions-easily-lifted (stating Emmert has said “something should be done to make transfer rules less onerous for athletes”).

15. *See generally* Nat’l Collegiate Athletic Ass’n v. Tarkanian, 488 U.S. 179 (1988) (holding NCAA is not state actor despite state-school University of Nevada Las Vegas complying with NCAA’s standards and rules). *But see* Cohane v. Nat’l Collegiate Athletic Ass’n ex rel. Brand, 215 F.App’x 13, 15-16 (2d Cir. 2007) (holding it improper for district court to “interpret *Tarkanian* as holding categorically that the NCAA can never be a state actor when it conducts an investigation of a state school”).

16. *See Transfer Facts*, *supra* note 5 (explaining NCAA’s understanding of significance of transferring student-athletes and NCAA’s desire to tailor rules to “make sure student-athletes are academically successful”).

17. *Id.* (providing President Emmert’s understanding importance for considering alterations in transfer rules and that it is “not a quick fix”).

18. *See* Matt Norlander, *Why/When a New Transfer Rule Could Have Big Effects on College Hoops*, CBS SPORTS (Jan. 4, 2013, 2:29 PM), <http://www.cbssports.com/collegebasketball/blog/eye-on-college-basketball/21494783/whywhen-a-new-transfer-rule-could-have-big-effects-on-college-hoops> (emphasizing possibility of transfer rule changes and significant impact it will have in all NCAA sports).

mandatory sit-out year should they decide to transfer.¹⁹ After its initial proposal in April 2013, the Council decided it should focus its reform on altering the imbalance of power between universities and their student-athletes through altering the “permission to contact” rule.²⁰ These potential changes will significantly alter the rules and could have potential consequences on student-athletes, universities and the fans watching at home.²¹

Although the Council has only provided principles that will guide its eventual proposal, the proposed rules will ultimately lead to the end of amateurism in college sports.²² The new transfer rules will lead to the creation of free agency in college sports because student-athletes will be able to transfer from university to university without restrictions from their original schools or losing their scholarships.²³ The creation of a free agency system will create the desire for student-athletes to protect their rights against the NCAA and other legislative bodies that may attempt to limit or infringe upon those rights.²⁴ Thus, once there is free agency, student-athletes will collectively act as a union to bargain with the NCAA for better rights, playing conditions, and ultimately monetary compensation.²⁵

19. See *id.* (noting significance of this potential change on academic year-in-residence rule).

20. See *Report of the National Collegiate Athletic Association Division I Leadership Council, April 11, 2013, Meeting*, NCAA, at 3 (2013), available at <http://www.athletic-scholarships.net/wp-content/uploads/2013/05/LDC+Report+and+Att.+4.11.13.pdf> (last visited Dec. 19, 2013) [hereinafter *Meeting*] (providing detailed notes on Council’s desire to alter transfer rules including desire to tie academics to waiver of “the Basic Transfer Rule,” and revision of “the permission to contact” rules).

21. For a more detailed discussion on the consequences of the changes to the NCAA Transfer Rules, see *infra* notes 105-232 and accompanying text.

22. For a detailed discussion of the NCAA’s proposed transfer rules, see *infra* notes 90-104 and accompanying text. For a detailed discussion of the end of amateurism in college sports as a result of the NCAA’s change in transfer rules, see *infra* notes 105-206 and accompanying text.

23. See Matt Norlander, *supra* note 18 (providing NCAA’s awareness that alterations with transfer rules may lead to “full-blown free agency in transfers”).

24. See Nicholas Fram & T. Ward Frampton, Article, *A Union of Amateurs: A Legal Blueprint to Reshape Big-Time College Athletics*, 60 BUFF. L. REV. 1003, 1004 (2012) (detailing instance in 1994-95 season where NCAA basketball player formulated plan to strike before major post-season game). The players on both teams wanted to strike and not compete unless “they received an equitable share of the revenue their labor generated.” See *id.* (explaining student-athletes desire to strike when their rights are infringed upon).

25. See *id.* at 1070-71 (noting “potential of unionization of college athletes is, of course, closely tied to” providing monetary compensation). Although it may be difficult to speculate how much college athletes would be paid, the agreement distributing money would be similar to those revenue sharing agreements negotiated by unions in professional football and basketball. See *id.* (explaining in pro-

Currently, no practical model exists for the NCAA to provide monetary compensation to all of its student-athletes.²⁶ Universities will lose money trying to provide for their student-athletes and, as a result, funding to academics may suffer.²⁷ Many universities may need to cut some or all of their athletic programs and sacrifice the invaluable benefits such athletic programs bring to universities in order to pay revenue-earning student-athletes.²⁸ Thus, the solution to this problem is to create independent institutions, related to the universities, which hire athletes out of high school and run the universities' large revenue earning sports, such as basketball and football.²⁹ This solution will completely change college sports off the field; however, to the fans, student-athletes and universities, college sports will be just as competitive, profitable, and exciting as ever.³⁰

This Comment provides an overview of the current and proposed transfer rules—explaining that the creation and implementation of these rules will result in free agency, unionization and the destruction of amateurism in college sports—and proposes the creation of independent, privatized institutions for revenue sports as

fessional basketball and football, “player’s associations have salary agreements that fix total athlete compensation as a percentage of league and club revenues”).

26. See Dennis A. Johnson & John Acquaviva, *Point/Counterpoint: Paying College Athletes*, THE SPORT JOURNAL, <http://www.thesportjournal.org/article/pointcounterpoint-paying-college-athletes>, (last visited Dec. 19, 2013) (providing multiple models for paying college athletes more than just scholarship money).

27. See Liz Clarke, *Olympics 2012: As Colleges Struggle to Support Non-Revenue Sports, the United States’ Olympic Future Is Threatened*, WASH. POST, June 2, 2012, available at http://articles.washingtonpost.com/2012-06-02/sports/35460272_1_college-sports-olympic-sport-college-campus (explaining non-revenue sports have become “an endangered species” at many major universities). Most of these large colleges are dropping non-revenue earning varsity sport teams in order to “invest more heavily in the revenue-generating sports of football and men’s basketball.” See *id.* (relating this cut of non-revenue sports to potential long-term effects it may have on United States’ Olympic competitiveness).

28. See Joe Drape, *Cal-Berkeley Cuts 5 Athletic Programs*, N.Y. TIMES, Sept. 28, 2010, at B16, available at http://www.nytimes.com/2010/09/29/sports/29cal.html?_r=0 (stating University of California, Berkeley eliminated five of its intercollegiate sports due to necessity of subsidizing those sports with academic money); see also Tyler Weyant, *Around the University System: Towson Will Likely Cut Sports Teams*, THE DIAMONDBACK (Oct. 5, 2012, 10:28 AM), http://www.diamondbackonline.com/blogs/article_e3a984a8-0ef8-11e2-826e-001a4bcff6878.html (noting recent trend in most universities of cutting sports programs to “maintain their financial stability”).

29. See Donald H. Yee, *Privatize College Football? Let’s Treat Sport for What It Is – Professional*, THE NEWS TRIB., Aug. 22, 2010, available at <http://www.thenewstribune.com/2010/08/22/1309979/privatize-college-football-lets.html> (providing proposal to privatize big, revenue-making sports at universities).

30. For a discussion on the consequences of privatizing big revenue sports, see *infra* notes 207-232 and accompanying text.

the resolution to those issues.³¹ Section II dives into the current transfer rules and explains the current protocol a student-athlete must follow if he wishes to transfer, including abiding by the permission to contact rule.³² Further, Section II analyzes the inequities of the current transfer rules due to universities' unrestricted power determine whether a student-athlete can transfer to a different university.³³ Section III presents the proposed set of rules which the NCAA expects will remedy the imbalance of power between the NCAA and its member institutions, and student-athletes.³⁴ Section IV analyzes the impact that the new rules will have on college basketball and other sports and explains how these rules will lead to free agency, players' unions, and ultimately the destruction of amateurism in college sports.³⁵ These changes to college sports will force universities to either get rid of large revenue-generating sports teams in order to maintain a well-balanced institution with academic programs and smaller non-revenue sports teams, or maintain large revenue-generating sports programs while discarding the smaller non-revenue sports teams and potentially sacrificing the quality of the institution's academics.³⁶ Section IV concludes with a proposition that will remedy those consequences by having universities establish independent, yet related, institutions for sports.³⁷

31. For an explanation of the proposed solution to the potential destruction of amateurism in NCAA revenue sports, see *infra* notes 207 to 232 and accompanying text.

32. For a more detailed discussion on the current NCAA transfer rules, see *infra* notes 43-67 and accompanying text.

33. For a discussion on the inequities in the NCAA and examples of NCAA coaches unnecessarily preventing their players from transferring, see *infra* notes 68-89 and accompanying text.

34. For a more detailed discussion on the proposed NCAA transfer rules, see *infra* notes 90-104 and accompanying text.

35. For a more detailed discussion on the impact and consequences the proposed transfer rules will have on college sports, see *infra* notes 105-206 and accompanying text.

36. See Clarke, *supra* note 27 (detailing that shifting priorities in college athletic departments are leading to decline of smaller non-revenue-earning sports despite benefits those sports programs provide in developing athletes into productive members of society).

37. For a more detailed discussion on the creation of independent athletic institutions as a resolution to the issue of rationalizing paid student-athletes and unpaid student-athletes at the same university, see *infra* notes 207-232 and accompanying text.

II. CURRENT COLLEGE SPORTS TRANSFER RULES

A. The NCAA

The NCAA was originally formed to protect student-athletes from potential physical dangers in college sports.³⁸ As time went on, the NCAA's protection expanded to include more than just the physical risks in collegiate athletics.³⁹ Today, the NCAA continues to protect amateur college student-athletes with an increased emphasis on both athletics and academic excellence.⁴⁰ Of the more than one thousand colleges and universities that compete within the NCAA, each must comply with the rules and guidelines that the NCAA posits in order to remain a member school and compete.⁴¹ Thus, compliance with the NCAA's rules is a key aspect in maintaining order and structure within collegiate sports.⁴²

B. Current Transfer Rules

In maintaining uniformity with its rules, the NCAA has specific regulations for those student-athletes who wish to transfer schools during their collegiate career.⁴³ The NCAA transfer rules begin by

38. See *History*, NCAA.ORG, <http://www.ncaa.org/wps/wcm/connect/public/ncaa/about+the+ncaa/history> (last visited Dec. 19, 2013) (stating President Roosevelt encouraged reform of college athletics, resulting in creation of Intercollegiate Athletic Association of the United States ("IAAUS"), which sought to protect students from dangers of college sports); see also J. Trevor Johnston, *Show Them the Money: The Threat of NCAA Athlete Unionization in Response to the Commercialization of College Sports*, 13 SETON HALL J. SPORT L. 203, 205-06 (2003) (providing overview and purpose of NCAA).

39. See *History*, *supra* note 38 (providing history of NCAA and role it played in forming divisions, administering women's programs and protecting amateurism in college sports).

40. See *id.* (explaining emphasis NCAA places on academic success despite its intended purpose of protecting young people from "the dangerous and exploitive athletics practices of the time"); see also Sarah M. Konsky, *An Antitrust Challenge to the NCAA Transfer Rules*, 70 U. CHI. L. REV. 1581, 1583 (2003) (questioning sincerity of NCAA's claims that it exists to promote academics in collegiate athletics).

41. See *Who We Are*, NCAA.ORG, <http://www.ncaa.org/wps/wcm/connect/public/ncaa/about+the+ncaa/who+we+are+landing+page> (last visited Dec. 19, 2013) (providing number of colleges and universities currently competing in NCAA).

42. See *Rules Compliance: Enforcement*, NCAA.ORG, <http://www.ncaa.org/wps/wcm/connect/public/ncaa/enforcement/index.html> (last visited Dec. 19, 2013) (providing that NCAA enforcement staff "holds member institutions accountable by seeking out and processing information about possible violations of NCAA rules, giving schools an opportunity to respond and presenting facts to membership-led committees").

43. See *Transfer Facts*, *supra* note 5 (explaining that "[b]ecause transferring can impact a student-athlete's academic performance, NCAA member institutions have established rules that require a student-athlete to seriously consider the decision to transfer before leaving for another campus").

identifying whether a student-athlete is eligible for competing in the NCAA.⁴⁴ In order for a student-athlete to compete in the NCAA, his amateurism eligibility will be determined through a certification process.⁴⁵ Once a student-athlete is determined to be eligible to compete in the NCAA, he must then be granted "permission-to-contact" other schools by his current school's coach and athletic director in order to notify potential new schools of his desire to transfer.⁴⁶ The NCAA does not allow outside schools' coaches to contact potential transferees because it contradicts the NCAA's mission of "governing competition in a fair . . . and sportsmanlike manner and [integrating] intercollegiate athletics into higher education."⁴⁷

These regulations create two possible scenarios: 1) a student-athlete's coach and athletic director give him or her permission to contact another school or 2) a student-athlete's coach and athletic director do not give him or her permission to contact another school.⁴⁸ In the first scenario, once a student-athlete is given permission-to-contact another NCAA university, he becomes subject to the "Basic Transfer Rule" and must spend one academic year at the new school before being eligible to compete.⁴⁹ The length of one

44. See *Basic Transfer Rules*, *supra* note 6, at 8 (expressing importance of knowing one's eligibility status prior to taking further steps to transfer schools).

45. See *id.* at 9 (listing potential pre-collegiate enrollment activities that could render student-athlete ineligible). Among those activities are contracts with a professional team, salary for participating in athletics, prize money, play with professionals, tryouts with a professional team, benefits from an agent or prospective agent, agreement to be represented by an agent and delaying full-time collegiate enrollment to participate in organized sports competition. See *id.* (noting various actions student-athletes may take which render them ineligible for NCAA competition).

46. See *id.* (stating student-athlete may write to any NCAA school expressing interest in transferring, but that new school's coach may not discuss transfer opportunities). If the student-athlete's current school will not grant permission-to-contact the new school, another school cannot contact the student-athlete and, if the student-athlete does decide to transfer to another NCAA Division I or II school, the student-athlete cannot receive an athletics scholarship until he has been at the school for one academic year. See *id.* (explaining burden placed on student-athletes when deciding to transfer). Further, if the student-athlete's current school denies permission-to-contact, then the student-athlete may appeal the decision to a panel of individuals from the current school who are not involved in athletics. See *id.* (providing details of intricacies of transfer rules).

47. See *Transfer Facts*, *supra* note 5 (explaining equal protection in preventing outside coaches from recruiting potential transfers from opposing schools).

48. See *Basic Transfer Rules*, *supra* note 6, at 9 (providing explanation of rules governing written permission to contact). For a detailed discussion on the inequity this rule may have on a student-athlete wishing to transfer, see *infra* notes 68-80 and accompanying text.

49. See *Basic Transfer Rules*, *supra* note 6, at 10 (providing Basic Transfer Rule protocol as being that when student-athletes transfer from two-year school and

academic year is determined by the new university and is either two full-time semesters or three full-time quarters.⁵⁰ The academic year-in-residence is a requirement because it gives the student-athlete time to adjust to his new school and ensure that academics was a key motivation for his transfer.⁵¹ Despite having to sit out for one academic year, a student-athlete who transfers after being granted permission to contact another school can receive an athletic scholarship during the year that he sits out of competition.⁵²

In the second scenario, despite the lack of permission to contact another university, the student-athlete still has the ability to transfer to another university; however, eligibility is limited.⁵³ First, no other universities may contact the student-athlete and encourage him to transfer.⁵⁴ Second, once the student-athlete contacts the other school and has transferred, he will be unable to receive an athletic scholarship until he has been at the university for one full year.⁵⁵ This deters transferees from contacting other schools without permission because it requires transferees to pay for school themselves.⁵⁶ Additionally, as in the first scenario, the Basic Transfer Rule requires transfer student-athletes to sit out of

does not meet the transfer requirements, or if student-athletes transfer from four-year school, then he must spend one academic year-in-residence at the new school before he becomes eligible to compete). The one academic year-in-residence is often referred to as "sitting out." *See id.* (providing terminology relating to academic year-in-residence).

50. *See id.* (explaining length of time student-athletes must be enrolled at their new university before becoming eligible to compete).

51. *See Transfer Facts, supra* note 5 (responding to frequently asked question of why "football and basketball players have to sit out a year after they transfer?").

52. *See id.* (providing general overview of permission to contact rules which allow student-athletes who have received permission to contact to transfer while receiving athletic scholarship in first year he is at new university).

53. *See Basic Transfer Rules, supra* note 6, at 9 (providing explanation of what student-athlete must do when not granted permission to contact another university prior to transferring).

54. *See Transfer Facts, supra* note 5 (explaining if student-athlete is not granted permission to contact another university, other universities may not contact them regarding transferring). Moreover, each athletic conference has its own set of rules regarding permission to contact and special conditions for releasing a student-athlete from their first school. *See id.* (noting conferences may have more lenient or more stringent rules regarding release from first school).

55. *See Basic Transfer Rules, supra* note 6, at 9 (explaining that not receiving permission to contact "does not preclude you from transferring; however, if the new school is in Division I or II, you cannot receive an athletics scholarship until you have attended the new school for one academic year").

56. *See Transfer Facts, supra* note 5 (explaining coaches have ability to withhold permission to contact requiring transferring student-athlete to pay for his education at his new university).

competition for one full year, only this time without the support of a scholarship.⁵⁷

For most sports, a student-athlete is granted a one-time transfer exception, which allows him to compete immediately after he first transfers if he meets all other transfer requirements.⁵⁸ However, student-athletes that participate in sports in which student-athletes historically underachieve academically are not eligible for such exception.⁵⁹ Further, the NCAA requires student-athletes enrolled in classes to meet specific criteria showing they are progressing towards a degree.⁶⁰ Thus, even if a student-athlete is determined to be eligible, he may only have his eligibility for a certain period of time.⁶¹

Up until this point, all of the NCAA transfer rules are applicable to all student-athletes that are considering transferring, regardless of school or Division.⁶² However, there are specific rules applicable to each student-athlete depending on the type of school from which he is transferring (two-year or four-year; Division I, II, or III) and the type of school to which he will be transferring (two-year or four-year; Division I, II, or III).⁶³ Focusing on those athletes transferring between two Division I four-year schools, there are few exceptions to the Basic Transfer Rule that apply to all collegiate sports.⁶⁴ For example, because these exceptions do not apply to

57. See *Basic Transfer Rules*, *supra* note 6, at 10 (providing detailed explanation of Basic Transfer Rule in college sports requiring one academic year-in-residence).

58. See *id.* (explaining one of many exceptions to the academic year-in-residence rule allowed for most student-athletes).

59. See *Transfer Facts*, *supra* note 5 (listing sports with student-athletes who historically underperform academically as: "basketball, football, baseball and men's ice hockey").

60. See *Basic Transfer Rules*, *supra* note 6, at 8 (noting NCAA determines definition of "progress toward degree").

61. See *id.* at 12 (explaining each Division I student-athlete has five years to complete four seasons beginning when he enrolls full-time at two or four-year school; Division II and III student-athletes have ten semesters or 15 quarters in which to complete all seasons of competition).

62. For a discussion on the basic NCAA transfer rules, see *supra* notes 43-61 and accompanying text.

63. See generally *Basic Transfer Rules*, *supra* note 6, at 14-27 (providing rules for scenarios such as student-athletes transferring from two-year school to four-year school; from four-year school to another four-year school; and four-year school to two-year school and then to four-year school). For the purposes of this article, only the scenario in which a student-athlete currently enrolled in a four-year school and is transferring into another four-year school will be analyzed. See *id.*

64. See *id.* at 20-21 (stating exceptions to Basic Transfer Rule for Division I student-athletes, including exceptions if it is student-athlete's first transfer, if student-athlete returns to his first school without participating at second school, if student-athlete's sport is discontinued, if student-athlete has never been recruited, and if student-athlete did not practice or play in his sport for two years).

college basketball, whenever a student-athlete that plays basketball wants to transfer schools, he is not subject to the same exceptions as similar student-athletes in other sports.⁶⁵ The NCAA claimed that this was due to basketball transferees' historical academic underachievement.⁶⁶ However, in keeping with the times, the NCAA has decided to make changes to this rule and has taken steps towards easing the transfer regulations to allow for free flow of transfers between schools in college sports such as basketball.⁶⁷

C. Desire to Change the Rules

The current rules have led to many high-profile universities becoming subject to negative media attention because they used the rules coercively to either prevent a student-athlete from transferring or limited the schools to which they may transfer.⁶⁸ Jarrod Uthoff, a former redshirt freshman at the University of Wisconsin, informed the coaching staff of his intent to transfer somewhere closer to his home in Iowa.⁶⁹ However, Wisconsin's head basketball coach Bo Ryan severely limited the amount of schools Uthoff could

65. See *id.* at 20 (noting first transfer exception to Basic Transfer Rule may only be used if student-athletes are playing sports other than Division I sports).

66. See *Transfer Facts*, *supra* note 5 (providing NCAA's reasoning behind not allowing exceptions to Basic Transfer Rule for basketball players).

67. See Hosick, *supra* note 13 (presenting NCAA's altered guidelines when determining which student-athletes will receive waivers of Basic Transfer Rule). The NCAA decided that relief from the Basic Transfer Rule will be provided when:

The school presents medical documentation of a debilitating injury or illness to a student-athlete's immediate family member that is debilitating and requires ongoing medical care. . . . The student-athlete demonstrates he or she will be responsible for regular, ongoing caregiving (sic) responsibilities. . . . The school is within a 100-mile radius of the immediate family member's home, which demonstrates the ability for the student-athlete to provide regular, ongoing care. . . . The school to which the student-athlete is transferring must submit a statement from the athletics director and faculty athletics representative confirming that the student-athlete will be relieved of responsibilities to the team in order to care for the injured or ill family member, and that the coaching staff will support such a departure.

Id.

68. See Jeff Eisenberg, *Wisconsin Severely Restricts Forward Jarrod Uthoff's Transfer Options*, YAHOO.COM (Apr. 17, 2012, 2:02 PM), <http://sports.yahoo.com/blogs/ncaab-the-dagger/wisconsin-severely-restricts-forward-jarrod-uthoff-transfer-options-180208129.html> (presenting Wisconsin's unfair restrictions placed on red-shirt freshman Jarrod Uthoff upon discovering his intent to transfer).

69. See *id.* (stating one of key reasons why Uthoff wanted to transfer was to be closer to home); see also *Jarrod Uthoff to Transfer to Iowa*, ESPN.COM (Jun. 7, 2012, 5:44 PM), http://espn.go.com/espn/otl/story/_/id/8018874/jarrod-uthoff-transferring-wisconsin-badgers-iowa-hawkeyes (noting Uthoff wanted to transfer to Iowa because he believed "[Wisconsin] Badgers methodical style didn't fit his skill set, and he said he feels the [Iowa] Hawkeyes up-tempo pace will").

contact by not granting permission to contact specific schools.⁷⁰ Disappointingly, the only contender that Uthoff was granted permission to contact was Creighton University, a smaller, lesser-known university located in Nebraska.⁷¹

According to the NCAA transfer rules, Uthoff could either transfer to Creighton, sit out a year, and still receive an athletic scholarship; or he could transfer to another school, sit out for a year, and lose his scholarship only to re-gain a scholarship and his competitive eligibility the following year.⁷² In both scenarios, however, he would have to sit out for the entire 2012-2013 season.⁷³ Ultimately, Uthoff ended up choosing the latter option, and transferred closer to home to the University of Iowa.⁷⁴ Under the NCAA transfer rules, Uthoff was left to pay for his own tuition and living expenses for the year.⁷⁵

In response to the many cases similar to Uthoff's, President Emmert created a task force, led by university presidents and NCAA members from across the country, to determine whether the Basic Transfer Rule is "meaningful, enforceable and advances student-athlete well-being."⁷⁶ The NCAA is re-assessing the current transfer rules in light of other high-profile cases such as St. Joseph's University decision to block Todd O'Brien from transferring to the University of Alabama at Birmingham, and Florida International University's denying Dominique Ferguson from a scholarship release, rejecting his transfer, and forcing him to declare for the NBA draft instead of returning to college.⁷⁷ Either option the school

70. See Eisenberg, *supra* note 68 (explaining Bo Ryan prohibited Uthoff from transferring to "the entire Big Ten [Conference], the entire ACC, Iowa State and Marquette").

71. See *id.* (stating Uthoff's surprise and disappointment after learning that only opportunity Wisconsin offered was transferring to Creighton).

72. For a discussion of the current transfer rules for collegiate student-athletes, see *supra* notes 38-67 and accompanying text.

73. For a discussion of the Basic Transfer Rule in transferring schools, see *supra* notes 49-67 and accompanying text.

74. See *Jarrod Uthoff to Transfer to Iowa*, *supra* note 69 (providing Uthoff's ultimate decision to transfer to Iowa, in his home state). Fortunately for Uthoff, he was in a position where he could afford to pay for his tuition and living expenses for a year. See *id.* ("We can afford to pay for my education for a year," said Uthoff, 19.).

75. See *id.* (stating Uthoff will sit out one year and pay for that year on his own).

76. See *Transfer Facts*, *supra* note 5 (providing answer to frequently asked question, "Is the NCAA going to change the transfer rules?").

77. See *Transfer Rules Won't Be Easily Lifted*, *supra* note 14 (explaining that "critics [are] saying too much power is in the hands of athletic directors and coaches" and therefore NCAA needs to examine its transfer rules).

takes is unfair to the student-athlete.⁷⁸ On the one hand, if a school grants permission-to-contact and the student-athlete ultimately transfers, the student-athlete must sit out for a year in accordance with the Basic Transfer Rule.⁷⁹ On the other hand, if a school does not grant permission-to-contact, the student-athlete can still transfer to another school; however, that student cannot receive an athletic scholarship and must still sit out for one year.⁸⁰

The NCAA and President Emmert may not see the reasons why schools are preventing student transfers.⁸¹ President Emmert has expressed his concerns with the current rules and has questioned their efficiency asking, “What’s the rationale for constraining someone to move from school to school?”⁸² From the universities’ perspective, coaches are prevented from allowing their players to change schools because of the academic progress rate (“APR”).⁸³

The APR holds universities accountable for maintaining their athletes’ eligibility and academic excellence.⁸⁴ Each student-athlete that receives athletic-based financial aid earns one retention point for staying in school, i.e. not transferring, and one eligibility point for being academically eligible.⁸⁵ Typically, a university is docked retention points if their student-athletes transfer and are not academically eligible; however, if the student-athlete has a cumulative grade-point average of 2.6 or greater at the time of the transfer, then the school is not docked a retention point when that student-

78. *See id.* (presenting alternatives for student-athletes: either be granted permission to transfer and sit out for one year, or being denied permission to transfer, transferring anyway, and not receiving athletic scholarships).

79. *See id.* (noting for many players, sitting out for one year is very burdensome and onerous).

80. *See id.* (explaining impracticality of transferring to another school but not receiving any athletics scholarship to majority of student-athletes).

81. *See id.* (quoting Emmert stating, “What’s the rationale for constraining someone to move from school to school?”).

82. *Id.* (quoting President Emmert’s “biggest concern” about “whether it’s fair or not to the young men and young women” to sit out one year or not receive scholarships).

83. *See Transfer Rules Won’t be Easily Lifted, supra* note 14 (“[T]ransfer requests are scrutinized more by coaches now because of the possible effect they can have on a program’s Academic Progress Rate.”).

84. *See Academic Progress Rate (APR), NCAA*, <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Academics/Division+I/Academic+Progress+Rate> (last visited Dec. 19, 2013) (stating this metric accounts for “the eligibility and retention of each student-athlete, each term”).

85. *See id.* (stating that “[a] team’s total points are divided by points possible and then multiplied by one thousand to equal the team’s Academic Progress Rate score”).

athlete transfers.⁸⁶ Further, the NCAA uses the APR to determine a program's postseason eligibility.⁸⁷ Thus, many schools are hesitant to allow their players to transfer to a competing school because the team will lose retention points and impact the team's chances to participate in postseason play.⁸⁸

To summarize, the flaws that critics have pointed out regarding the current transfer rules are: 1) the Basic Transfer Rule requiring a mandatory academic year-in-residence if the former school grants the transfer, 2) the loss of athletic scholarship after a transfer if the former school does not grant a transfer, and 3) the APR's impact which often steers coaches away from letting their student-athletes transfer.⁸⁹

III. THE NCAA'S MODEST PROPOSAL

In light of the critiques of the current transfer system, coupled with controversial transfer cases that yielded unfair results towards student-athletes, in October 2012, NCAA President Mark Emmert created a Leadership Council ("Council") to analyze and assess the current transfer rules and provide proposed rules to resolve current issues with the transfer rules.⁹⁰ Although the Council has yet to formally propose any changes to the rules, the Council established a set of principles for updated transfer rules to guide their decision-making.⁹¹ Those principles state:

86. See Gerald S. Gurney and Richard M. Southall, *College Sports' Bait And Switch*, ESPN.COM (Aug. 9, 2012), http://espn.go.com/college-sports/story/_/id/8248046/college-sports-programs-find-multitude-ways-game-ncaa-apr (defining APR exemption). Transfers who leave a university in good academic standing, i.e., with a grade-point average over 2.600, result in no loss of an APR retention point to the school the transfer is leaving. See *id.* (explaining universities' attempts to inflate student-athletes' GPA through enrolling those student-athletes in summer classes in order to prevent loss of APR points if student-athlete decides to transfer).

87. See *Academic Progress Rate (APR)*, *supra* note 84 (stating team must achieve minimum APR benchmark requirement or face postseason bans).

88. See *Transfer Rules Won't be Easily Lifted*, *supra* note 14 (stating that schools lose single retention points "if the departing player does not have a grade-point average of at least 2.6").

89. For a detailed summary of the current NCAA transfer rules and their inequities, see *supra* notes 38-88 and accompanying text.

90. See *Transfer Facts*, *supra* note 6 (explaining President Emmert's efforts to review existing rules by establishing task force designed to "specifically work on transfer rules"); see also John Infante, *New Transfer Model Would Reduce Eligibility Consequences*, ATHNET (Jan. 3, 2013), <http://web.archive.org/web/20130325080453/http://www.athleticscholarships.net/2013/01/03/new-transfer-model-would-reduce-eligibility-consequences.htm> (detailing source of creation of Council in October 2012 as "highly publicized transfer battles").

91. See John Infante, *supra* note 90 (noting despite no formal proposal, principles exist which Council is following in updating transfer rules).

(1) Athletes would still need to get permission to contact another school before transferring. But permission would be tied to practice and competition, not athletics aid. So even if permission was denied, the student-athlete would still be able to receive a scholarship.

(2) Athletes who qualify for the transfer exemption in the APR would be permitted to play immediately at the new school. That would make a 2.600 GPA the magic number to play immediately.

(3) Athletes who do not qualify to play immediately at the next school would still receive an extension of their five-year clock so they can use all their eligibility.

(4) Tampering with an athlete by another school would be considered a severe breach of conduct, a Level I violation, the highest in the NCAA's new enforcement structure.⁹²

This model for the transfer rules was slated to be officially proposed to the NCAA in August 2013 and was likely to become effective for student-athletes starting in August 2014.⁹³ These proposed principles address the major criticisms leveled against the current rules.⁹⁴ With the exception of the fourth principle relating to NCAA violations and sanctions, when analyzing these principles, the theme of easing transfer restrictions while emphasizing academics can be seen.⁹⁵

Unfortunately, at the April 11, 2013 Council meeting, a uniform overhaul of the transfer rules was rejected; however, the Council agreed the transfer rules needed to be changed and stated its goals to alter the over-restrictive "permission to contact" rules, and tie academics to the waiver of transfer rules.⁹⁶ Prior to these considerations, a student-athlete's current school severely limited that student-athlete's ability to transfer.⁹⁷ Wisconsin University severely limited Jarrod Uthoff's ability to transfer when it denied him permission to contact the University of Iowa, thus forcing Uthoff to

92. *Id.* (providing list of principles Council presented and model their proposal will be framed after).

93. *See id.* (producing timeline for NCAA's proposed transfer rules to take effect).

94. For a detailed discussion of the major critiques of the NCAA's current transfer rules, see *supra* notes 38-89 and accompanying text.

95. For a detailed discussion on desires to change the current transfer rules, see *supra* notes 68-89 and accompanying text.

96. *See Meeting, supra* note 20, at 3 (providing Council's initiatives for altering and ultimately changing NCAA transfer rules).

97. For a detailed discussion on the current transfer rules for Division I student-athletes, see *supra* notes 38-67 and accompanying text.

lose his scholarship when he transferred.⁹⁸ However, the most recent proposal for change suggests that permission to contact another school will not be related to athletic financial aid, which may prevent universities from forcing student-athletes, like Jarrod Uthoff, to pay for his enrollment at another school.⁹⁹

Further, the new proposal seeks to reevaluate the ties between academics and transferring and consider future changes that will waive the Basic Transfer Rule in a wider and more consistent range of situations.¹⁰⁰ By tying academics into the transfer rules, the NCAA will implement an academic standard that it wishes its student-athletes to abide by without blatantly creating strict academic requirements.¹⁰¹ Further, considering waiving the academic year-in-residence requirement may allow those student-athletes with sufficient grades to transfer to a new school and begin playing immediately.¹⁰² Finally, removing the strict permission to contact rule would provide student-athletes with more freedom to select which school they wish to transfer to and serve as the beginning of balancing power between student-athletes and universities.¹⁰³ Although these principles are merely proposals to alter the current transfer rules, the potential effects they can have on the current landscape of college sports will be widespread.¹⁰⁴

98. For a discussion on Wisconsin's unfair treatment of Jarrod Uthoff, see *supra* notes 69-75 and accompanying text.

99. See *Transfer Facts*, *supra* note 5 (explaining that transfer rules mandate that "in order to receive an athletics scholarship at another school, a student-athlete must receive permission to contact another school . . . from the initial school"). The new principles seek to eliminate the possibility of a school denying permission to contact another school by coercing the student-athlete not to transfer because of a lack of scholarship, thus making it easier for a student-athlete to transfer and while still maintaining her scholarship. See Jon Infante, *supra* note 90 (stating popular opinion for new rules was modeled off of desire to prevent coaches from blocking where student-athletes could transfer).

100. See *Meeting*, *supra* note 20, at 3 (noting each initiative NCAA's Leadership Council is considering for altering its transfer rules).

101. See *Transfer Facts*, *supra* note 5 (stating NCAA's research has shown that "student-athletes who transfer with at least a 2.6 grade-point average have the same likelihood of academic success as a student-athlete who remains at his or her original institution").

102. See Joe Christensen, *NCAA Ponders New Standards*, STARTRIBUNE (Jan. 16, 2013, 12:13 PM), <http://www.startribune.com/sports/gophers/187049331.html?refer=y> (analyzing proposed rule that student-athletes would not have to sit out one year with grade-point average of 2.6 and greater in light of NCAA's research).

103. See *Meeting*, *supra* note 20, at 3 (presenting NCAA's acknowledgement of necessary alterations to its transfer rules, with emphasis on changing permission to contact rules).

104. For a detailed discussion on the proposed principles for alterations in the NCAA transfer rules, see *supra* notes 90-103 and accompanying text.

IV. ANALYZING FUTURE IMPLICATIONS OF THE PROPOSED TRANSFER RULES

A. Resulting Consequences

The NCAA is making an effort to ease the restrictions on college basketball student-athletes that wish to transfer; however, these changes will bring many consequences.¹⁰⁵ Despite the NCAA's good intentions, potentially allowing student-athletes to freely transfer between schools without being restricted by the "permission to contract" and with potential waivers of the academic-year-in-residence period will lead to student-athletes transferring at a much higher rate.¹⁰⁶ This may ultimately lead to the creation of a system similar to the free agency system in professional sports.¹⁰⁷ A free agency system in college basketball will likely lead to players, in

105. For a detailed discussion on the proposed NCAA transfer rules, see *supra* notes 90-104 and accompanying text. For a detailed discussion on the potential consequences of the proposed NCAA transfer rules, see *infra* notes 113-206 and accompanying text.

106. See Patrick Rishe, *Growing Transfer Rates Exacerbate Hypocrisy of Student-Athlete Moniker In Basketball*, FORBES.COM (Nov. 7, 2012, 11:53AM), <http://www.forbes.com/sites/prishe/2012/11/07/growing-transfer-rates-exacerbate-hypocrisy-of-student-athlete-moniker-in-revenue-sports/> (noting trends in transfer rate in men's college basketball). The key statistics about men's basketball transfer rates are that ten percent of the 4,433 scholarships available from NCAA Division I men's basketball teams are switching universities through transfer; men's college basketball has more than double the transfers of college football and more than triple that of college baseball; and the transfer rate in men's basketball is thirty-six-percent greater than the rate of the overall student-athlete population. See *id.* (providing statistics regarding men's college basketball transfers); see also Luke Winn, *Examining The Biggest Trend To Hit College Basketball Transfers*, SPORTS ILLUSTRATED (July 18, 2012, 11:29AM), http://sportsillustrated.cnn.com/2012/writers/luke_winn/07/18/up-transfers-NCAA-basketball/index.html (explaining increase in up-transferring in college basketball). Up-transferring is the transfer of one college basketball student-athlete to another school that meets one of the following three criteria:

1. Moved from a mid-major school or conference to a major school or conference;
2. Moved from a less-decorated major school or conference to a recent national champion school (such as University of Kentucky, University of Connecticut, Duke University, University of North Carolina, Kansas University, University of Florida, and Syracuse University);
3. Moved from a lesser-known school to an elite mid-major school (such as Xavier University, Gonzaga University and Butler University).

See *id.* (providing details of recent increase in "up-transferring" over years due to athlete's desire to play more and coaches desire to recruit student-athletes after they have been in college).

107. See Matt Norlander, *supra* note 18 (explaining NCAA's awareness of potential creation of free agency in college basketball). The NCAA is trying to find a compromise between having a full-blown free agency system for transfers and providing student-athletes some equity in transferring while maintaining an emphasis on the student's academic progress. See *id.* (explaining NCAA's plan to reward transfers who excel in classroom); see also Sarah M. Kinsky, *supra* note 40, at 1586-

both college basketball and all other college sports, banding together in an effort to protect their rights and form a college athletes' union.¹⁰⁸ Moreover, once a players' union or similar entity is formed, student-athletes will use their collective power to make universities and the NCAA compensate them monetarily for their play.¹⁰⁹ As a result of players unionizing and being compensated for their play, major college sports, including basketball and football, may become too big for the colleges and universities they represent due to increased salaries, inequity between revenue earning and non-revenue earning sports, and ultimately the difficulty in balancing amateur and non-amateur sports.¹¹⁰ The solution to the problem of reconciling paying some student-athletes and not others will be the creation of a separate, but related, corporate institution where high school players that wish to play professionally will attend in order to hone their athletic skills and focus on sports.¹¹¹

87 (stating, "Free movement within the market would ultimately reflect an optimal matching of players and teams.").

108. See Jon Solomon, *College Athletes' Rights: Why Don't Athletes Strike Back at NCAA System?* AL.COM (Apr. 3, 2011, 9:08 AM), http://www.al.com/sports/index.ssf/2011/04/college_athletes_rights_why_do.html (arguing that college athletes should organize and eventually "boycott" NCAA in order to get more rights in creating rules for college athletes); see also *Mission & Goals*, NCPA, <http://www.ncpanow.org/more?id=0004> (last visited Dec. 19, 2013) (presenting National College Players Association's (NCPA) mission and goals). One of the stated missions of the NCPA is to "[g]uarantee that college athletes are granted an athletic release from their university if they wish to transfer schools." See *id.* (providing players' perspective on inequity in NCAA's current transfer rules); see also Sarah M. Konsky, *supra* note 40, at 1595 (describing current NCAA transfer rules as violating Sherman Antitrust Act because of restriction of market).

109. See Rachel Cohen & Ralph D. Russo, *Paying College Athletes: Not If, But How*, HUFFINGTON POST (Jan. 6, 2013, 4:24 PM), http://www.huffingtonpost.com/2013/01/07/paying-college-athletes_n_2424429.html (stating student-athletes, coaches, and NCAA President Mark Emmert all believe college athletes should be compensated monetarily for playing for their schools); see also Joe Nocera, *Let's Start Paying College Athletes*, N.Y. TIMES, Dec. 30, 2011, at MM30, available at http://www.nytimes.com/2012/01/01/magazine/lets-start-paying-college-athletes.html?pagewanted=all&_r=0 (advocating pay for college athletes and providing a five point plan to implementing pay in college sports); Michael Wilbon, *College Athletes Deserve to be Paid*, ESPN.COM (July 18, 2011), http://espn.go.com/college-sports/story/_/id/6778847/college-athletes-deserve-paid (explaining inequity college athletes experience based on millions of dollars in revenue they provide for their universities through television contracts, but not receiving any portion of it).

110. For a detailed discussion on the rise of free agency in college sports and the potential destruction of amateurism resulting from the change in transfer rules, see *infra* notes 113-232 and accompanying text.

111. See Bill Maloney, *Separate College Sports From Academics*, KENTUCKY.COM, June 27, 2010, <http://www.kentucky.com/2010/06/27/1325645/separate-college-sports-from-academics.html> (proposing divorcing college sports from academic side of university to, *inter alia*, save university money and stop one-and-done basketball players from being "a mockery of a student-athlete"); see also Laura Pappano, *How Big-Time Sports Ate College Life*, N.Y. TIMES, Jan. 20, 2012, at ED22, available at

Although these consequences may seem extreme, by loosening the restrictions on transfers for NCAA basketball, the NCAA is taking the first step to dividing academics and athletics across all sports in all universities.¹¹²

1. *The Creation of Collegiate Free Agency*

The proposed NCAA transfer regulations will allow students to transfer more easily to a different university and, in certain instances, play immediately, thereby creating free agency in college basketball.¹¹³ Student-athletes with higher grades will have the ability choose which university he wishes to play for even after he has been recruited from high school or prep school.¹¹⁴ This free transfer of student-athletes creates a system similar to free agency seen in professional leagues.¹¹⁵ Free agency is a state where a player is no longer under a contract with his original team and he may sign a contract with another team for the following season.¹¹⁶ Currently, this is not possible due to the one academic year-in-residence requirement; however, under the proposed initiatives, if a player has a requisite GPA, then he may transfer to a different school, sign off

<http://www.nytimes.com/2012/01/22/education/edlife/how-big-time-sports-ate-college-life.html?pagewanted=all> (explaining that college sports dominate all aspects of collegiate life for students at schools with big athletic programs). William E. Kirwan, chancellor of the University of Maryland system and co-director of the Knight Commission on Intercollegiate Athletics has said, "We've reached a point where big-time intercollegiate athletics is undermining the integrity of our institutions, diverting presidents and institutions from their main purpose." *See id.* (noting shift in focus from academics to athletics in universities with big sports programs).

112. For a detailed discussion on the consequences of loosening the transfer regulations on college basketball players, see *infra* notes 113-206 and accompanying text.

113. For a detailed discussion on the proposed new transfer rules and regulations, see *supra* notes 90-104 and accompanying text.

114. *See* Matt Norlander *supra* note 18 (explaining many coaches under new regulations will ask, "Who's a good player with good grades whom we might be able to lure?").

115. *See id.* (arguing that only key aspect preventing full-blown free agency is GPA qualification). Those student-athletes with good GPAs can transfer immediately but those with lower GPAs will not want to sit out a year and therefore will not want to transfer. *See id.* (stating reasoning NCAA is implementing this rule – improve grades of transfers and prevent those with lower GPAs from transferring).

116. *See A Glossary of NBA Terms*, NBA.COM (Oct. 22, 2001, 6:56 PM), <http://www.nba.com/analysis/00422966.html> (providing a definition of free agency, among other various terms used in NBA); *see also* William C. Martin, *supra* note 13, at 125 (providing descriptions and explaining differences of restricted and unrestricted free agents in professional free agency).

on a new scholarship, and play immediately, just like a free agent.¹¹⁷

Unlike free agency, a student-athlete's grades may restrict him or her.¹¹⁸ The 2.6 benchmark the NCAA considered will likely be used in future transfer rule reform because the NCAA has found that student-athletes with this average have the same likelihood of academic success as student-athletes who remain at their original school.¹¹⁹ In most universities a 2.6 GPA is roughly equivalent to a letter grade of a low "B" or a "B-."¹²⁰ While this may not be as easily attainable for some student-athletes, for those that reach this benchmark, free agency awaits.¹²¹

The new proposed transfer rules, have both potential benefits and potential detriments that could change the landscape of college basketball and, potentially all college sports.¹²² First, student-athletes will be more likely to keep their grades at or above the 2.6 benchmark in case they suddenly desire to transfer.¹²³ This is the NCAA's primary goal with implementing the rule, and this result is likely to occur in the immediate years following its implementation.¹²⁴

Moreover, allowing free transfers will lead to an increase in parity in college basketball.¹²⁵ With the rise of the mid-major conference universities ("mid-majors"), college basketball has become

117. For a discussion on the NCAA's proposed rule changes, see *supra* notes 90-104 and accompanying text.

118. See Ty Duffy, *NCAA Considering Transfer Changes: Players With 2.6 GPA Would Not Have to Sit Out a Year*, BIG LEAD SPORTS (Jan. 4, 2013, 12:53 PM), <http://www.thebiglead.com/index.php/2013/01/04/ncaa-considering-transfer-changes-players-with-2-6-gpa-would-not-have-to-sit-out-a-year/> (presenting new 2.6 GPA benchmark as "Free Transfer With a 2.6 GPA").

119. See *Transfer Facts*, *supra* note 5 (providing NCAA's research on GPA and academic success with transfers).

120. See *Semester GPA*, GPA CALCULATOR, <http://gpacalculator.net/how-to-calculate-gpa/semester-gpa/> (last visited Dec. 19, 2013) (providing chart comparing GPA to letter grades).

121. For a discussion on the potential benefits and detriments of free agency for student-athletes with at least a 2.6 GPA, see *infra* notes 122-148 and accompanying text.

122. See Matt Norlander, *supra* note 18 (explaining potential effects alterations in transfer rules can have on college basketball).

123. See *Transfer Facts*, *supra* note 5 (explaining desire NCAA has in making "sure student-athletes are academically successful" and that NCAA's transfer rules "help [student-athletes] achieve that goal").

124. See *id.* (expressing NCAA's understanding that some old rules were made with "competitive intent" rather than "academic concern").

125. See generally MICHAEL LITOS, *CINDERELLA: INSIDE THE RISE OF MID-MAJOR COLLEGE BASKETBALL* (Sourcebooks, Inc., 1st ed. 2007) (explaining difficult path mid-majors have had in securing games against high-profile teams on grandest of stages in order to promote their team, school, and recognition).

more exciting and enjoyable to watch.¹²⁶ Mid-majors that historically would not stand a chance against perennial powerhouses are now winning at a more frequent rate, largely due to the increase in talent on their teams.¹²⁷ Players that are highly recruited out of high school may not be given the role on their college team that they were originally promised and therefore may wish to transfer elsewhere to become the star of the team.¹²⁸ Thus, student-athletes from top schools may seek to transfer to smaller schools to go from being the small fish in the big pond to becoming the big fish in the small pond.¹²⁹

Finally, the rule change may limit or even end the frowned-upon “one-and-done” crop of student-athletes.¹³⁰ “One-and-done” student-athletes are those who attend college and play basketball for a single year in order to satisfy the NBA age requirement for the NBA Draft.¹³¹ Although there have been some great talents that only played for a single season and have had great success on both the college and professional levels (e.g. Carmelo Anthony), this practice is frowned upon because it prevents the development of

126. See Maxwell Ogden, *Gonzaga Basketball: Bulldogs Complete Rise of the Mid-Major with No. 1 Ranking*, BLEACHER REPORT (Mar. 4, 2013), <http://bleacherreport.com/articles/1553387-gonzaga-basketball-bulldogs-complete-rise-of-the-mid-major-with-no-1-ranking> (focusing on Gonzaga University’s rise to prominence to claim number one ranking in college basketball). Gonzaga’s number one ranking in 2013 is the first time since 2008 that a mid-major school achieved a number one ranking. See *id.* (stating although Gonzaga may be mid-major, it is likely to win national championship in 2013).

127. See Michael Litos, *supra* note 125, at 260 (stating that George Mason’s run to Final Four in 2006 was “merely step one” in push for mid-majors to compete against major conference powerhouses).

128. See *Incoming Mid-Major Transfers for 2012/2013*, COLLEGE BASKETBALL BLOG (Mar. 16, 2012, 12:49 AM), <http://ncaabblog.wordpress.com/2012/03/16/incoming-mid-major-transfers-for-20122013/> (providing list of over thirty players transferring from major schools to mid-major schools to play basketball this year).

129. See *id.* (presenting scouting report for new roles of players in their new, smaller schools). For example, Isaiah Armwood left Villanova University, a member of the Big East, for George Washington and is described as being a “rotation player at Villanova,” but “could play a starring role [at George Washington].” See *id.* (providing example of student-athlete who transferred schools for larger role).

130. See Myron Medcalf, *Roots Of One-And-Done Rule Run Deep*, ESPN.COM (June 26, 2012), http://espn.go.com/mens-college-basketball/story/_/id/8097411/roots-nba-draft-one-done-rule-run-deep-men-college-basketball (explaining impact one-and-done rule has on college basketball).

131. See Charlie Zegers, *One and Done*, ABOUT.COM, <http://basketball.about.com/od/collegebasketballglossary/g/oneanddone.htm> (last visited Dec. 19, 2013) (defining “one-and-done” as “a slang term used to describe a player who stays in college for a single year before bolting for the NBA”).

players preparing for the NBA.¹³² For every successful “one-and-done-er,” there are dozens of student-athletes that do not succeed in the NBA and do not have the requisite academic background on which to fall back.¹³³ The new transfer rule may limit the one-and-done trend in college basketball because those athletes that believe they can succeed at the next level may not get the exposure or accolades required to catch the eyes of the NBA teams and scouts in their first year.¹³⁴ Therefore, they will transfer and become the “top-dog” at a new school and use at least one more year to improve their game and fame.¹³⁵ Thus, the new transfer rules have the potential to improve the academics of college basketball student-athletes, increase the parity of teams across America and limit the amount of one-and-done student-athletes.¹³⁶

Despite these potential benefits, there are many potential detriments to the changes in the transfer rules.¹³⁷ First, athletes may get preferential treatment in order to keep their GPA above the proposed 2.6 benchmark to dissuade them from transferring.¹³⁸ The 2.6 benchmark is just higher than most Division I universities’ minimum GPA requirement for eligibility, and therefore, some athletes may receive special considerations in course selection and grade distribution in order to maintain eligibility or reach the 2.6

132. See *id.* (describing Carmelo Anthony as one of most significant “one-and-done” athletes in recent memory because he led Syracuse to 2003 National Title in his first year and was then selected third overall in 2003 NBA Draft).

133. See Loud Cloud, *NBA One and Done Rule: The Effects*, LOUDCLOUD (Jul. 3, 2012) <http://loud-cloud.net/2012/nba-one-and-done-rule-the-effects/> (stating that since “one-and-done” rule has been in effect since 2006, forty-eight players left for draft after only one year in college, but only five have become solid, contributing players).

134. See Myron Medcalf, *supra* note 130 (explaining coaches such as Duke Head Coach Mike Krzyzewski, believe one-and-done student-athletes add to instability of college basketball). Coach Krzyzewski stated that the one-and-done rule has produced an abundance of transfers in college basketball; “Kids don’t stick to the school that they pick and they want instant gratification.” See *id.* (emphasizing student-athletes’ search for instant gratification at collegiate level).

135. See *id.* (quoting Coach Krzyzewski as saying, “It’s not just those elite players that might be able to go after one year. There’s just the mentality out there that if you don’t achieve after one year, maybe you should go someplace else.”). Coach Krzyzewski states that for those elite players, they turn to the NBA; but for the other players, they turn to another school via transfer. See *id.* (showing problematic aspect of one-and-done mentality in NCAA basketball).

136. For a discussion of the benefits of a free agency system in college basketball, see *supra* notes 113-135 and accompanying text.

137. For a discussion on the detriments of a free agency system in college basketball, see *infra* notes 138-148 and accompanying text.

138. See generally Dana O’Neil, *College Basketball Doesn’t Pass the Test*, ESPN.COM (May 21, 2010), http://sports.espn.go.com/ncb/columns/story?columnist=oneil_dana&id=5206806 (explaining inequity in college basketball academics).

benchmark.¹³⁹ Further, without a school's ability to grant or deny "permission to contract," an athlete can transfer wherever they want at any sign of discomfort they feel at their original school.¹⁴⁰ This policy runs counter to the NCAA's goals and will be punished severely with harsh new penalties, as well as fines for tampering.¹⁴¹ However, with the pressure of maintaining eligibility and keeping up with alumni and school demand for the best athletes, some schools may go to great lengths, even compromise the integrity of their athletic program and violate NCAA policy, in order to keep a student-athlete content.¹⁴² This drawback resulting from the rule change would likely be prevented by the aforementioned harsher penalties for all involved in player tampering.¹⁴³

Another possible detriment will be the lack of loyalty between student-athletes, coaches, and schools.¹⁴⁴ With the development of a free agency system, players will be motivated to achieve NBA success and only serve their own self-interests.¹⁴⁵ This can really dam-

139. See *id.* (providing that college basketball players are not incentivized to perform well academically and current NCAA rules allow eligibility to those in their first year so long as they pass six credits). It is not until the end of the student-athlete's first year that the GPA kicks in as a limiting factor and some institutions will do whatever it takes to keep their star players on the court or out in the field to keep the athletic program going strong. See *UNC Eyes Julius Peppers Controversy*, ESPN.COM (Aug. 14, 2012, 12:40 PM), http://espn.go.com/college-football/story/_/id/8265076/north-carolina-tar-heels-probe-online-posting-possible-julius-peppers-transcript (providing details into Julius Peppers' scandal at University of North Carolina which showed leaked transcript indicating Peppers' best grades came from classes in Department of African and Afro-American Studies, which were predominantly comprised of student-athletes and did not require attendance).

140. See John Infante, *NCAA Leadership Council Scales Back Potential Transfer Changes*, ATHNET (May 2, 2013), <http://www.athleticscholarships.net/2013/05/02/ncaa-leadership-council-scales-back-potential-transfer-changes.htm> (presenting synopsis of NCAA's understanding and desire to change transfer rules).

141. See John Infante, *supra* note 90 (stating new, stricter rules regarding tampering student-athletes).

142. See Dana O'Neil, *supra* note 138 (explaining current investigation into University of North Carolina's Julius Peppers' academic treatment).

143. See *id.* (equating tampering to illegally recruiting student-athletes).

144. See Myron Medcalf, *supra* note 130 (reiterating Coach Krzyzewski's view that student-athletes' mentalities seek instant gratification for themselves and not for team).

145. See Mike Strange, *Mike Strange: College Basketball Experiencing Transfer Epidemic*, GOVOLS.COM (Apr. 28, 2012, 8:12 PM), <http://www.govolsxtra.com/news/2012/apr/28/mike-strange-college-basketball-experiencing/> (quoting Tennessee basketball coach Cuonzo Martin, "I think a lot of young guys, they want it now. Nobody wants to sit on the bench, regardless of talent level."). As society changes into a world of instant gratification, college basketball players constantly desire instant gratification such as the freshman that wants to start over one of the five returning senior starters. See *id.* (expressing lack of patience young players have and therefore their high and sudden desire to transfer to see more floor action).

age the culture of college basketball and lead student-athletes to believe they should have more individual rights when making decisions regarding college basketball.¹⁴⁶ Thus, an initial fear the NCAA has regarding the rule change is increased coaches' tampering with student-athletes.¹⁴⁷ Ultimately, the free agency system that will develop from the rule change will cause student-athletes to band together across the country to form a union so their voices will be heard when the NCAA makes decisions regarding student-athlete rights.¹⁴⁸

2. *Student-Athletes Unionizing*

Once student-athletes realize their power to freely transfer schools, just as a free agent does in professional leagues, they will decide to band together as a cohesive unit to protect their rights from being infringed upon and fight for more rights.¹⁴⁹ Imagine just prior to the start of the NCAA National Championship game, after a 68-team tournament, the two championship teams refuse to suit up and walk off the court, to make a stand declaring their recognition as employees, and not simply student-athletes, of the universities they play for.¹⁵⁰ This may be a foreseeable result once the transfer rules are applied and free agency in college basketball be-

146. See Eamon Brennan, *Transferring Isn't What It Used to Be*, ESPN.COM (Jul. 19, 2012, 2:59 PM), http://espn.go.com/blog/collegebasketballnation/post/_/id/61328/transferring-isnt-what-it-used-to-be (explaining change in culture as more transferring occurs in college basketball). The NCAA is attempting to remedy this situation and provide for more rights to the student-athletes, who do not have many rights to begin with. See *id.* (suggesting NCAA make new transfer rule that preserves student-athletes' already scant rights to seek out better situations).

147. See Matt Norlander, *supra* note 18 (stating that new transfer rules will result in increased tampering by coaches and potentially more coaches "tattling on their peers").

148. For a detailed discussion of the potential of players unionizing to better represent their interest in college basketball, see *infra* notes 149-169 and accompanying text.

149. For a more detailed discussion of the potential unionization of college athletes, see generally Nicholas Fram and T. Ward Frampton, *supra* note 24 (providing detailed analysis of unionizing of college athletes under both federal and state law). Cf. Tim Keown, *Grambling Football Team Not Bluffing*, ESPN.COM (Oct. 19, 2013, 10:16 PM), http://espn.go.com/college-football/story/_/id/9845583/grambling-football-players-not-bluffing (providing details regarding Grambling State University's football team which refused to get on buses to travel to an away game in protest of conditions within football program).

150. See Eric Savitz, *Should College Basketball Players Unionize – and Strike?*, FORBES.COM (Mar. 25, 2012, 7:40 PM), <http://www.forbes.com/sites/ericsavitz/2012/03/25/should-college-basketball-players-unionize-and-strike/> (hypothesizing potential impact unionizing in college basketball could have on student-athletes' rights).

gins.¹⁵¹ Many people are beginning to realize the unchecked power the NCAA has over student-athletes and are beginning to take a stand in the name of student-athlete rights.¹⁵² Although there have been attempts to band players together, such as the National College Players Association (“NCPA”), there will not be any real change to student-athletes rights until they begin to effectively organize into a bona fide players’ union.¹⁵³

The growing belief that universities and the NCAA are taking advantage of student-athletes is the impetus for reforming the NCAA’s current amateurism structure.¹⁵⁴ Currently, the NCPA serves as a nonprofit advocacy group and is the only independent voice for college athletes throughout the country.¹⁵⁵ Despite the

151. For a more detailed discussion on the potential creation of free agency in college basketball, see *supra* notes 114-148 and accompanying text.

152. See Dennis Dodd, *California Passes Student-Athlete Bill of Rights*, CBS SPORTS (Oct. 9, 2012, 5:18 PM), <http://www.cbssports.com/collegefootball/blog/dennis-dodd/20525847/california-passes-student-athlete-bill-of-rights> (explaining new California law implementing Bill of Rights for student-athletes protecting them from inequities that they cannot change due to lack of resources). Ramogi Huma, president of the NCPA (based out of California) recognizes college athlete’s lack of ability to make change and commends California for having an interest in protecting its students. See *id.* (providing California is only state to pass such Bill of Rights while similar proposals have been discussed but were unsuccessful in Oklahoma, Iowa and Indiana); see also S.B. 1525, 2011 625th Reg. Sess. (Ca. 2011) (providing text for California Student-Athletes’ Bill of Rights); see also Andy Staples, *NCAA Puts Power in Question with Rapid Decision Regarding Penn State*, SPORTS ILLUSTRATED (Jul. 22, 2012, 5:36 PM), http://sportsillustrated.cnn.com/2012/writers/andy_staples/07/22/ncaa-penn-state-decision/index.html (detailing NCAA’s abuse of power regarding its handling of Penn State University college football sanctions).

153. See *About NCPA*, NCPA.ORG, <http://www.ncpanow.org/about/> (last visited Dec. 19, 2013) (providing details of creation and recognition of NCPA); see also J. Trevor Johnston, *supra* note 38 at 232 (explaining student-athletes have unequal bargaining power and unequal economic relationship with NCAA because student-athletes need NCAA competition to attain professional athletic careers and therefore student strikes may not be effective in gaining rights).

154. See Robert Wheel, *Miami, the NCAA and America’s Last Plantation*, SB NATION (Nov. 21, 2012, 2:40 PM), <http://www.sbnation.com/college-football/2012/11/21/3676496/americas-last-plantation-ncaa-miami-shapiro> (analogizing NCAA and student-athletes’ relationship as plantation-owner and slave relationship); see also Kathleen Miles & Patt Morrison, *Are College Athletes Taken Advantage of? Should They Be Paid?*, 89.3KPC (Sept. 28, 2011, 12:00 PM), <http://www.scpr.org/programs/patt-morrison/2011/09/28/20850/collegesportsshametaylorbranchpaycollegeathletes/> (implying college athletes do not receive sufficient compensation for services they provide to their universities); see also Warren K. Zola, *The Year in Review: College Sports Reform Reaches the Tipping Point*, HUFFINGTON POST (May 20, 2012, 4:00 PM), http://www.huffingtonpost.com/warren-k-zola/the-year-in-review-colleg_b_1530210.html (stating it is apparent that as universities and the NCAA chase television revenue, they do so without looking out for student-athlete interests).

155. See *About NCPA*, *supra* note 153 (detailing that since inception of NCPA in 2001, it has been featured on many media outlets and has over 17,000 members from over 150 Division I campuses throughout country).

NCPA's stated mission and victories it has already won for college athletes, a more specified players' labor union will need to develop for higher-profile sports, namely football and basketball, in order to provide student-athletes the leverage needed to stand against the NCAA and its rulemaking.¹⁵⁶

By definition, a labor union is an association, combination, or organization of employees who band together to secure favorable wages, improved working conditions, better work hours, and to resolve grievances against employers.¹⁵⁷ Negotiations between student-athletes and the NCAA would allow the student-athletes to discuss the working conditions, practice times, class times, settle grievances and ultimately discuss monetary compensation.¹⁵⁸ However, the key issue here is that NCAA student-athletes are technically not employees and therefore would not be able to unionize under current law.¹⁵⁹ Nevertheless, some states, California in par-

156. See *NCPA Wins Victories for College Athletes*, NCPA, http://www.ncpanow.org/news_articles?id=0003 (last visited Dec. 19, 2013) (listing reforms NCPA has either led or advocated to benefit student-athletes' rights). The list includes providing for a \$10 million fund to aid former athletes that wish to complete their undergraduate or graduate degrees, sponsoring the California Student-Athlete Bill of Rights, as well as being a key advocate for eliminating limits on health care for college athletes, expanding the NCAA Catastrophic Injury Insurance policy, expansion on the types of scholarships players can receive and the elimination of the \$2,000 salary cap on money student-athletes earn from part-time jobs. See *id.* (noting that "as the NCPA succeeds, college athletes gain the basic protections they so desperately need"). On January 28, 2014, Cain Kolter of Northwestern University took the first steps towards creating a student-athlete players union when he, alongside his football teammates, filed paperwork with the National Labor Relations Board ("NLRB") in an attempt to create the first student-athlete's players union. See Zac Ellis, *Northwestern Football Players Seek to Unionize; What Does the Development Mean?*, SI.COM, (Jan. 28, 2014), <http://college-football.si.com/2014/01/28/northwestern-football-kain-kolter-labor-union/> (explaining developments in Northwestern football team's attempts to unionize and subsequent steps needed to ensure proper unionization).

157. See *Labor Union Definition*, THE FREE DICTIONARY, <http://legal-dictionary.thefreedictionary.com/Labor+Union> (last visited Dec. 19, 2013) (providing detailed definition and history of labor unions in United States).

158. See Robert Wheel, *supra* note 154 (arguing college athletes, football players in particular, need to be paid so they can unionize like NFL teams can, negotiate their rights to earn wages, and have due process rights); see also Robert A. McCormick & Amy Christian McCormick, Article, *A Trail of Tears: The Exploitation of the College Athlete*, 11 FLA. COASTAL L. REV. 639 (2010) (explaining how student-athletes are taken advantage of by NCAA and its member universities). See generally David Warta, Comment, *Personal Foul: Unnecessary Restriction of Endorsement and Employment Opportunities for NCAA*, 39 TULSA L. REV. 419, 424 (2003) (stating, "The NCAA and its member institutions control, among other things, the minimum number of credit hours in which a student must be enrolled, awards and gifts that the athlete may receive, and with whom the athlete may consult about professional opportunities.").

159. See generally *Waldrep v. Texas Emp'rs Ins. Assoc.*, 21 S.W.3d 692 (Tex. App. 2000) (holding student-athletes are not employees of private universities they

ticular, are taking steps in developing and recognizing student-athletes' rights and providing them with compensation for the services rendered to their universities.¹⁶⁰

The creation of the California student-athlete Bill of Rights may be the first step down a slippery slope of providing and protecting the rights of student-athletes.¹⁶¹ Since the NCAA is not considered a "state-actor," the NCAA is not subject to constitutional mandates such as due process.¹⁶² Thus, when the NCAA rules on a decision or issues sanctions regarding student-athletes, there are no viable legal courses of action student-athletes can take to prevent their rights from being infringed.¹⁶³ With a predictable free-flow of student-athletes transferring via an NCAA-made free agency, it is

attend); *see also* Robert Wheel, *supra* note 154 (comparing NFL and its labor negotiations to modern-America and NCAA and its stranglehold on student-athletes to pre-1865 America). Despite the loyalty that student-athletes provide to their universities and the NCAA, they have no leverage to negotiate with the NCAA and thus must be paid and considered employees so they can have due process against the NCAA's decisions. *See id.* (explaining how due process is tied to right to earn money); *see also* Tibor Nagy, Article, *The "Blind Look" Rule of Reason: Federal Courts' Peculiar Treatment of NCAA Amateurism Rules*, 15 MARQ. SPORTS L. REV. 331, 342-44 (2005) (providing legal history of amateurism in NCAA sports). The first case prohibiting NCAA athletes from receiving monetary compensation for playing sports was *Jones v. NCAA*. *See id.* at 343-46 (claiming court took naïve look at lack of monetary compensation for college athletes).

160. *See* Rohith A. Parasuraman, Note, *Unionizing NCAA Division I Athletics: A Viable Solution?*, 57 DUKE L.J. 727, 728 (2007) (explaining currently, NCPA cannot form labor union with college student-athletes because under National Labor Relations Act ("NLRA"), only employees can form valid labor organizations). The NCPA could only form a labor organization or union if "college athletes were 'employees' and the NCAA or its member institutions were 'employers.'" *See id.* (continuing to provide definition of "employee" under NLRA as simply being "something distinct from an 'employer'"); *see also* Robert A. McCormick and Amy Christian McCormick, *supra* note 158, at 644 (explaining origin of term "student-athlete"). The term "student-athlete" was the NCAA's response to the "1953 Colorado Supreme Court decision that found an injured football player was an employee and consequently entitled to workers' compensation for his injuries." *See id.* (citing *Univ. of Denver v. Nemeth*, 257 P.2d 423, 429-30 (Colo. 1953)).

161. *See* Dennis Dodd, *supra* note 152 (noting other states have already looked into providing Bill of Rights for their student-athletes). *Cf. Advocates: Student Athletes Need Bill of Rights*, SALON.COM (Feb. 6, 2013, 9:16 AM), http://www.salon.com/2013/02/06/advocates_student_athletes_need_bill_of_rights/ (noting states are beginning to seek protection for student-athletes in secondary schools).

162. *See generally* Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179 (1988) (providing Supreme Court of United States' opinion stating NCAA's action was not state action).

163. *See* Joe Nocera, *Standing up to the N.C.A.A.*, N.Y. TIMES, Mar. 23, 2012, at A19, available at <http://www.nytimes.com/2012/03/24/opinion/nocera-standing-up-to-the-ncaa.html> (analyzing holding in *N.C.A.A. vs. Tarkanian* and arguing that because NCAA is not state actor, "its members have no constitutional rights").

foreseeable the NCAA will seek to unilaterally limit the transfers and cause student-athletes to respond to protect their rights.¹⁶⁴

In professional leagues, when the players see inequity between the league and themselves, the players' union strikes and the league locks the players out.¹⁶⁵ Then both sides negotiate the Collective Bargaining Agreement ("CBA"), which is used to determine the conditions of employment, such as compensation.¹⁶⁶ In the case of student-athletes, a strike is possible, but because student-athletes are technically not employed by the NCAA and there is no CBA, the NCAA would not be able to negotiate a labor agreement that protects the rights, such as compensation, of student-athletes.¹⁶⁷ Thus, in order for the student-athletes to be successful in creating a labor union to bargain with the NCAA, the NCAA, local and national labor boards, or courts will have to take steps to determine that amateur student-athletes are in fact employees.¹⁶⁸ This will likely be done through the recently popularized idea that college athletes should be monetarily compensated for their play.¹⁶⁹

164. See *Mission & Goals*, *supra* note 108 (listing one of NCPA's missions and stated goals is to "allow college athletes of all sports ability to transfer schools one time without punishment"). This shows the awareness student-athletes and the NCPA have of the discriminatory effects limiting a student-athlete's right to transfer can have and is ultimately a right the NCPA is willing to fight to protect. See *id.* (stating denial of one-time, no-penalty transfer option provided to many other sports but not to football, basketball, baseball and ice hockey is "coercive and discriminatory").

165. See *Collective Bargaining and Labor Arbitration: An Overview*, WEX LEGAL INFO. INST., http://www.law.cornell.edu/wex/collective_bargaining (last visited Dec. 19, 2013) (providing definition and explanation of CBAs in labor negotiations).

166. See *id.* (defining process of collective bargaining as, "negotiations between an employer and a group of employees so as to determine conditions of employment").

167. See Eric Savitz, *supra* note 150 (expressing idea that it is likely federal law may allow college athlete strike to gain more rights against NCAA); see also Nicholas Fram & T. Ward Frampton, *supra* note 24 (proposing student-athletes may have right under both federal and state labor laws to unionize and be treated as employees of NCAA).

168. See Rohith A. Parasuraman, *supra* note 160, at 746-48 (detailing potential options student-athletes have in becoming recognized employees of NCAA); see also J. Trevor Johnston, *supra* note 37, at 223-35 (noting NLRB applies two tests to determine whether group of students are employees for unionization purposes). The "Compensated Services Test," and the "Primary Purpose Test," are currently used by the NLRB as the determining factors of whether a students receiving compensation are employees of the universities they attend for union purposes. See *id.* (explaining NLRB has determined graduate assistants, teaching assistants, and research assistants to not be employees because those groups are "primarily students").

169. For a discussion on the push for college student-athletes to be monetarily compensated for their services at their respective universities, see *infra* notes 170-206 and accompanying text.

3. *Paying the Players*

Once student-athletes understand they can freely transfer on the college market to meet other universities' demand for superior athletes, the student-athletes will unionize to protect their rights.¹⁷⁰ However, this can only be done if student-athletes as a group are recognized as employees working for the NCAA and its member institutions.¹⁷¹ The primary characteristic that distinguishes college student-athletes and professional athletes is monetary compensation.¹⁷² Thus, if student-athletes can receive monetary compensation for their athletic performance for universities, then the courts, as well as the NCAA, will have to recognize student-athletes as employees and allow them to unionize.¹⁷³

The proposed transfer rules will be the final push needed to provide monetary compensation to student-athletes because allowing student-athletes to transfer without penalty opens up a market for student-athletes and puts value on their skills.¹⁷⁴ Recognizing student-athletes are the driving force behind hundreds of universities' financial success, providing the student-athletes with economic compensation seems to be the realistic next step for stu-

170. For a detailed discussion of the potential of student-athletes unionizing, see *supra* notes 149-169 and accompanying text.

171. See Jon Solomon, *supra* note 108 (noting "labor laws would not recognize any group of athletes as a union because they are not legally employees."); see also Kathleen Miles & Patt Morrison, *supra* note 154 (noting one analyst's belief that NCAA may be using term "student-athlete" as guise so student-athletes do not receive workers' rights including worker's compensation). Kent Waldrep, former running back for Texas Christian University ("TCU"), was paralyzed from the neck down on the field and received limited help when paying for health-related bills from TCU and no help from the NCAA. See *id.* (providing example of student-athlete case similar to employee injury case that resulted in no workers' compensation due to injured party's status as student-athlete).

172. See Timothy Wyatt, *Amateurism in College Sports: The "Pay for Play" Debate*, EXAMINER.COM (Nov. 30, 2012), <http://www.examiner.com/article/amateurism-college-sports-the-pay-for-play-debate> (explaining that main barrier between college athletics and professional sports is pay). While Wyatt goes on to explain other intangible differences between college student-athletes and professionals, pay is the major difference between amateurs and professionals. See *id.* (expressing intrigue of collegiate sports is the exorbitant amount of "pageantry," "heart," and "competition" despite student-athletes not being monetarily compensated); see also *Jones v. Nat'l Collegiate Athletic Ass'n*, 392 F. Supp. 295, 302-03 (D. Mass. 1975) (holding players receiving compensation prior to entering college sports cannot compete in NCAA due to lack of amateurism).

173. See Michael J. Mondello & Joseph Bechham, Counterpoint, *Workers' Compensation and Collegiate Athletes: The Debate Over the Pay for Play Model: A Counterpoint*, 31 J.L. & EDUC. 293, 300 (2002) (noting that paying student-athletes may "open the door for other employment claims, possible union representation, and negotiation of wages, benefits, and conditions of work").

174. For a discussion on the proposed free agency in college sports due to newly proposed transfer rules, see *supra* notes 113-148 and accompanying text.

dent-athletes.¹⁷⁵ Student-athletes confer many benefits to their universities, including composing a significant portion of a university's revenue, boosting schools' nationwide recognition, increasing applicants, and increasing overall academic excellence.¹⁷⁶ Thus, student-athletes have a major role in bringing in a lot of money to universities, and they should therefore have a stake in at least a portion of it.¹⁷⁷

The NCPA and student-athletes are not the only ones advocating paying student-athletes.¹⁷⁸ NCAA President Mark Emmert has

175. See Tom Farrey, *NCAA Athletes Can Pursue TV Money*, ESPN.COM (Jan. 30, 2013, 12:02 PM), http://espn.go.com/espn/otl/story/_/id/8895337/judge-rules-ncaa-athletes-legally-pursue-television-money ("Current, former and future athletes are one step closer to protections and freedoms that other American citizens are permitted."). Ramogi Huma, president of the NCPA, notes that the Former College Athletes Association ("FCAA") has been set up in the event former NCAA student-athletes can recover, retroactively, a share of television and video game revenue for the monetary benefits they conferred on their schools when they were student-athletes there. See *id.* ("FCAA will be prepared to ensure that athletes ultimately receive what is rightfully theirs as Americans in a capitalistic, free market society.").

176. See Timothy Wyatt, *supra* note 172 (stating that deal NCAA made last season with Turner Broadcasting and CBS to televise all of "March Madness" games through 2025 was for almost \$11 billion). Broadcasting, along with sales from tickets, memorabilia, apparel, DVDs, video games and more find their way back to the NCAA. See *id.* (explaining that NCAA enterprise is not sharing its revenue with those who provide it). Further, student-athletes provide an influx of business to all of the surrounding entrepreneurs such as restaurants, t-shirt makers and other local businesses during their seasons but do not receive any compensation. See *id.* (describing impact University of Kentucky's basketball team has on surrounding area); see also *From Mid-Major Cinderella to No. 1: Gonzaga Climbs to Top Spot in AP Poll for First Time*, ASSOCIATED PRESS (Mar. 4, 2013, 9:07 PM), http://www.pennlive.com/sports/index.ssf/2013/03/from_mid-major_cinderella_to_n.html (explaining impact basketball has had on small school of Gonzaga University). "At the time of Gonzaga's run to the final eight, the school had fewer than 5,000 students and was struggling with enrollment and budget issues. Today, enrollment is at 7,800 and new buildings are popping up on campus all the time." *Id.* (explaining impact Gonzaga basketball has had on rest of Gonzaga University).

177. See *From Mid-Major Cinderella to No. 1: Gonzaga Climbs to Top Spot in AP Poll for First Time*, *supra* note 176 (quoting Gonzaga University's President Dr. Thayne McCulloh as saying, "Our success with basketball is a significant component of the convergence of forces that allowed us to grow."); see also Lee Goldman, *Sports and Antitrust: Should College Students be Paid to Play?* 65 NOTRE DAME L. REV. 206, 207 (1990) (explaining current inequity that student-athletes "who generate millions of dollars for the university, must scrounge for basic expenses and struggle through classes").

178. See *Mission & Goals*, *supra* note 108 (listing one of NCPA's goals to "[r]aise the scholarship amount" through sharing television revenue); see also Eamonn Brennan, *Bill Self Comes Around on Stipends*, ESPN.COM (Oct. 23, 2012, 10:45 AM), http://espn.go.com/blog/collegebasketballnation/post/_/id/65867/bill-self-comes-around-on-stipends (providing Kansas University basketball coach Bill Self's support for paying student-athletes). Self said, "[W]hen you're sending players from the West Coast to East Coast to play sports, to miss more classes, and the schools benefit from that financially, why shouldn't the people. . . responsible

openly admitted that student-athletes should receive some compensation for their performances.¹⁷⁹ Further, Federal Judge Claudia Wilken recently dismissed a motion by the NCAA to prevent former football and men's basketball players from legally pursuing a cut of live broadcast revenues.¹⁸⁰ Although this ruling does not allow past or present student-athletes to receive a share of television revenues earned by conferences and universities, it demonstrates that NCAA student-athletes can pursue television revenue.¹⁸¹ The future of this case will be critical in recognizing student-athletes as NCAA employees and ultimately in providing them with pay.¹⁸² Despite the potential benefit this case has for student-athletes, there are many problems with providing student-athletes with monetary compensation.¹⁸³

In theory, compensating college athletes seems to be the future for the NCAA; however, there are many potential hurdles the NCAA needs to overcome in order to develop a functional system.¹⁸⁴ The first key issue is how the money will be divided amongst the colleges and, ultimately, the teams at each univer-

for the business [benefit financially.]” See *id.* (explaining Coach Self’s transformation from being against paying student-athletes to being for paying student-athletes).

179. See Eamonn Brennan, *supra* note 178 (stating NCAA President Mark Emmert supported providing additional \$2,000 cost-of-attendance stipend for student-athletes).

180. See Tom Farrey, *supra* note 175 (providing details in current ongoing lawsuit from former NCAA players against NCAA for shares of revenue NCAA made from TV deals while former players were student-athletes); see also Leslie E. Wong, Comment, *Our Blood, Our Sweat, Their Profit: Ed O’Bannon Takes on the NCAA for Infringing on the Former Student-Athlete’s Right of Publicity*, 42 TEX. TECH L. REV. 1069 (2010) (analyzing potential remedies for NCAA’s alleged infringement on student-athlete publicity rights).

181. See Tom Farrey, *supra* note 175 (quoting former players’ lead counsel Michael Hausfeld saying, “Now the (NCAA and its co-defendants) are facing potential liability in the billions of dollars instead of tens or hundreds of millions.”).

182. See *id.* (explaining currently, NCAA and student-athletes cannot negotiate shares of revenue flowing from media and other licensing contracts because NCAA does not treat student-athletes as employees and student-athletes have not organized to represent their interests collectively).

183. See Dennis A. Johnson & John Acquaviva, *supra* note 26 (presenting both benefits and detriments to providing student-athletes with monetary compensation for playing).

184. See *id.* (providing counterpoints to arguments for paying student-athletes); see also Eamonn Brennan, *Q&A: NCAA President Mark Emmert*, ESPN.COM (Mar. 29, 2012, 4:20 PM), http://espn.go.com/blog/collegebasketballnation/post/_/id/56723/qa-ncaa-president-mark-emmert (giving President Emmert’s thoughts on state of NCAA and issues with paying players), and Lee Goldman, *supra* note 177 at 233 (arguing “there is nothing immoral about being paid for [lawful services student-athletes provide].”).

sity.¹⁸⁵ Paying all student-athletes would require either allocating a percentage of revenue brought in by the revenue sports to the non-revenue sports or eliminating non-revenue sports because there are far more non-revenue sports than revenue sports.¹⁸⁶ Moreover, larger schools, which historically have had higher revenue from their “big-time sports,” will have much more money to offer than smaller, mid-major schools.¹⁸⁷ Typically, student-athletes will “follow the money” and transfer to schools where they can score a big payday, instead of remaining or transferring to smaller market schools.¹⁸⁸

Further, if the NCAA pays its players, it will need to significantly increase its oversight of college athletics to prevent any illegal or unethical deals from occurring.¹⁸⁹ Recruiting will become a completely different animal and will not stop once a high school player signs his letter of intent.¹⁹⁰ Coaches and student-athletes will constantly be in a state of flux, looking for the right combination of talent, compensation, and prestige when selecting or transferring schools.¹⁹¹ This provides ample opportunities for unethical behav-

185. See Eamonn Brennan, *supra* note 184 (quoting President Emmert saying, “[t]here are competitive balance concerns issues about it,” when speaking about paying student-athletes and concerns smaller NCAA schools have).

186. See Dennis A. Johnson & John Acquaviva, *supra* note 26 (explaining problems with paying student-athletes when determining how much money to give each athlete in different sports and potential disappearance of non-revenue sports if student-athletes were to be paid).

187. See Timothy Wyatt, *supra* note 172 (noting that stipends that were voted to be provided to student-athletes were rescinded due to smaller universities’ athletic directors and conference commissioners claiming they “couldn’t afford it”); see also Lee Goldman, *supra* note 177 at 239 (explaining NCAA’s reasoning not to pay players to preserve competitive balance between universities).

188. See Joe Nocera, *supra* note 109 (explaining if colleges pay athletes, smaller schools may need to reconsider having big-time sports and may need to eliminate their athletic programs altogether).

189. See Dennis A. Johnson & John Acquaviva, *supra* note 26 (arguing that paying student-athletes would lead to increase need for NCAA oversight because of “corruption in college athletics”).

190. See *Transfer Facts*, *supra* note 5 (providing NCAA’s belief that current transfer rules regarding permission to contact another school prevent “continuous recruiting of student-athletes once they are enrolled on a campus”); see also Nicole Auerbach & Eric Prisbell, *supra* note 1 (stating “Coaches now often are forced to re-recruit some of their most talented players during the season to keep them.”).

191. See Nicole Auerbach & Eric Prisbell, *supra* note 1 (quoting recent transfer Alex Oriakhi, “Why would a coach want someone there who doesn’t want to be there? If a player doesn’t feel comfortable or happy with the situation, he has every right . . . to go where he wants to go.”). Oriakhi goes on to compare players to coaches stating, “A coach can go where he wants for more money. They’ll be the first to leave when they get a better contract. Why can’t a player go somewhere for pure happiness?” See *id.* (providing Alex Oriakhi’s advocacy of free transferring and essentially free agency in college basketball).

ior that the NCAA's regulation and enforcement committees will need to address.¹⁹² These issues may seem daunting at first; however, once student-athletes can freely transfer, band together, and begin to receive compensation, it is very likely that the relationship between the NCAA and student-athletes will become similar to professional sports leagues and their players.¹⁹³

a. Paying Players Using Stipends

Regardless of the potential drawbacks, several models of pay have already been proposed, with each model providing compensation to student-athletes as employees of the NCAA and its member institutions.¹⁹⁴ The Big Ten, a large "power conference," has made a proposal that provides compensation in a way similar to those that receive work-study funds.¹⁹⁵ Each player on scholarship will receive an extra \$2,000-\$5,000 to serve as a monthly living stipend or a payment-for-play stipend.¹⁹⁶ Another proposal, created by the Southeastern Conference ("SEC") provides more direct compensation tied to a student-athletes on-field play.¹⁹⁷ Under this model, advocated by South Carolina head football coach Steve Spurrier, compensation will be provided by an either per-game or per-minute basis, up to a rate of \$300 per-game, or \$20 per-minute played in a

192. See *Enforcement: Understanding the Current Structure*, NCAA, <http://www.ncaa.org/wps/wcm/connect/public/ncaa/enforcement/index.html>, (last visited Dec. 19, 2013) (providing overview of structure of enforcement staff that oversees information and possible violations of NCAA rules).

193. For a detailed discussion on free agency and potential unionizing of student-athletes, see *supra* notes 105-169 and accompanying text.

194. See Dennis A. Johnson & John Acquaviva, *supra* note 26 (giving overview of different models that have been proposed for providing monetary compensation to student-athletes).

195. See Brian Bennett, *Big Ten Considers Pay Proposal*, ESPN.COM (May 19, 2011, 1:32 PM), <http://sports.espn.go.com/ncf/news/story?id=6564134> (providing Big Ten Conference's proposal to pay players stipend to cover additional costs of school not covered by scholarship).

196. See *id.* (explaining that student-athletes have expenses in college not covered by their scholarship such as transportation and clothing). Working part time cannot cover the difference between a scholarship and a student's living expenses because of the significant time commitment of sports and academics. See Lynn O'Shaughnessy, *Do College Athletes Have Time to Be Students?*, CBS NEWS (Feb. 18, 2011, 1:05 AM), http://www.cbsnews.com/8301-505145_162-37244524/do-college-athletes-have-time-to-be-students/ (listing average hours student-athletes dedicate per week to their sport and explaining difficulty in attending class on top of such demanding schedule).

197. See Lorenzo Arguello, *Report: If It Were up to SEC Coaches, Players Would Get Paid*, BUSINESS INSIDER (May 30, 2012, 4:58 PM), <http://www.businessinsider.com/sec-paying-football-players-2012-5> (providing Coach Steve Spurrier's suggestion of paying college athletes for "game related expenses" around \$300 per-game, per-player).

game.¹⁹⁸ This would tie pay into performance, and would be the most similar to a professional league's pay.¹⁹⁹

b. Paying Players Through Revenue Sharing

Another popular proposal is the Revenue Sharing from TV/NCAA Proceeds model, which recommends sharing with the athletes the revenue brought in from lucrative television contracts as well as from jersey sales and other revenue sources.²⁰⁰ In the past few college basketball seasons, the NCAA has signed a \$14 billion NCAA tournament TV rights contract, and in the current NCAA "we're-just-doing-what's-best-for-our-bottom-line" world, splitting that revenue with players seems to be the most equitable course.²⁰¹ If fulfilled, these proposals will destroy amateurism and college sports as we know it while eliminating many storied sports programs that cannot afford to keep their programs running and competitive.²⁰²

c. Independent Institutions Related to Each College

The solution for a foreseeable termination of amateurism is the creation of an independent professional league for athletes

198. See Dennis A. Johnson & John Acquaviva, *supra* note 26 (providing details to Coach Steve Spurrier's proposed model for paying student-athletes on per-game, per-player basis).

199. See Lorenzo Arguello, *supra* note 197 (stating consistency SEC has in proposing "pay for play system[s]" for college athletes).

200. See Steve Wieberg, *NCAA President: Time to Discuss Players Getting Sliver of Revenue Pie*, USA TODAY (Mar. 30, 2011, 10:48:07 PM), http://usatoday30.usatoday.com/sports/college/mensbasketball/2011-03-29-ncaa-pay-for-play-final-four_N.htm (presenting NCAA President Emmert's view on sharing television revenue with student-athletes and providing them with more money in form of scholarships).

201. See Eamonn Brennan, *supra* note 178 (providing statistics on NCAA's television rights contract). The current state of college basketball is one where conferences are making their own television networks to generate revenue, schools are realigning their conference affiliation on a regular basis without regard for geography, and teams are doing what is best financially for themselves. See *id.* (proposing student-athletes, should receive some sort of compensation to pay for everyday expenses such as gas and pizza).

202. See Joe Nocera, *supra* note 109 (predicting shrinking of conferences and schools offering athletic programs when student-athletes get paid). Nocera notes that if most smaller schools cannot afford to pay their players, the result of mandating compensation would be a loss of forty-eight Football Bowl Subdivision programs and a loss of more than 230 Division I basketball schools. See *id.* (noting such schools should just focus on being institutions of higher education). See also *NCAA Asks Judge for O'Bannon Case Decision without Trial*, USA TODAY (Dec. 13, 2013, 8:38 AM) <http://www.usatoday.com/story/sports/college/2013/12/13/ncaa-obannon-name-and-likeness-suit-deposition-filing/4007373/> (summarizing O'Bannon's suit against NCAA made in pursuit of past television and video game revenue former college athletes earned for NCAA).

under a designated age.²⁰³ This proposal suggests that colleges and universities hire players at a moderate salary, plus room and board, and allow them free academic classes until they earn a degree, even after they finish playing.²⁰⁴ This model will create a minor league for professional basketball and football tied closely to schools and universities; however, the players will be professionals instead of student-athletes.²⁰⁵ Thus, this may solve the rifts that the new transfer rules will create and may begin the NCAA's adaptation of a new institutional environment where athletic programs are separate from their universities altogether.²⁰⁶

B. The Creation of Separate Institutions for Revenue Sports

1. *Structure and Set-up of Independent Athletic Institutions*

Although it may be a long way away, the solution to reconciling the destruction of amateurism in college sports with maintaining its current passion and culture is to privatize big-time college sports, such as basketball and football, and make them separate entities from their schools.²⁰⁷ The current model exploits athletic ability, corrupts university admission standards, and diverts taxpayer resources in order to fulfill the needs of big-time basketball and football programs.²⁰⁸ Privatization of revenue sports is one proposed solution to these problems that could satisfy all parties.²⁰⁹ College

203. See Dennis A. Johnson & John Acquaviva, *supra* note 26 (proposing independent professional league for athletes under twenty-three years of age).

204. See *id.* (stating that academics would still be tied into athletics, even after athletes finish playing).

205. See Peter Yoan, *Ben Howland Sorry for Talking Draft*, ESPN.COM (Mar. 5, 2013, 6:16 PM), http://espn.go.com/los-angeles/mens-college-basketball/story/_/id/9017039/ucla-coach-ben-howland-sorry-saying-shabazz-muhammad-going-pro (quoting UCLA Coach Ben Howland, "The current system makes the NCAA a minor league for the NBA, and allows teams to evaluate potential draft picks under organized, high level competition.").

206. For a detailed discussion on the potential separation of athletics from academic universities, see *infra* notes 207-232 and accompanying text.

207. See Donald H. Yee, *supra* note 29 (recommending privatization of revenue sports beginning with football); see also Silvio Laccetti, *Guest Columnist: Should We Privatize Big-Time College Athletics?*, SEATTLEPI.COM (Feb. 24, 2009, 10:00 PM), <http://www.seattlepi.com/local/opinion/article/Guest-Columnist-Should-we-privatize-big-time-1300967.php> (proposing privatization of big time revenue-reeling college sports such as basketball and football).

208. See Silvio Laccetti, *supra* note 207 (noting flaws of college athletics and failure of sluggish NCAA to keep up with changing culture). Academically, football players average 220 and basketball players 227 points lower on the SAT than their classmates. See *id.* (noting that colleges provide special admissions for athletes on scholarship).

209. See Dennis A. Johnson & John Acquaviva, *supra* note 26 (raising proposition of independent institutions that run college revenue sports).

sports can still preserve most of their familiar features: rivalries will continue, conferences will remain, and fans will get their college sports fill.²¹⁰ The only difference would be that the rights to operate the commercial sports program on behalf of the university would be sold to an independent outside company made in the school's name (e.g., Villanova University would contract Villanova Basketball Inc. to run its basketball program).²¹¹ This outside company would share the net profits from all revenue streams (i.e., television, licenses, ticket sales, parking, etc.) with the related university at a pre-determined, pre-negotiated rate.²¹² Athletes would be compensated with a three or four year contract with a modest salary (tied to demand and performance) and be given the chance to receive commercial endorsements and proper representation in negotiations with the business.²¹³ Further, the outside corporation can be funded by a number of sources, including private boosters, alumni, and regional or national businesses.²¹⁴

Separating revenue sports and academics at large schools would prevent many problems that exist today with NCAA sanctions for past violations.²¹⁵ For example, the University of Southern California ("USC") has recently been punished because while former player Reggie Bush played for USC, he received improper benefits from outside boosters in violation of NCAA policy.²¹⁶ However, neither Reggie Bush nor his coach at the time, i.e. Pete Carroll, were adversely affected by the punishment the NCAA placed on USC because both are comfortably making millions of dollars in the NFL.²¹⁷ The loss of athletic scholarships and the two-year post-

210. See Silvio Laccetti, *supra* note 207 (explaining that from fan's perspective, game will remain same). Leagues, conferences and game sites would remain the same. See *id.* (noting coaches and most personnel would remain same as well).

211. See Donald H. Yee, *supra* note 29 (providing example with USC Football Inc., corporation representing USC Trojans football team).

212. See *id.* (hypothesizing vast amount of revenue universities could recover if they sell ad space on uniforms); see also Silvio Laccetti, *supra* note 207 (explaining that universities can take part of athletes' contracts and put it towards academics).

213. See Silvio Laccetti, *supra* note 207 (noting that despite fact college players would be getting paid, only elite would rise to play in top professional leagues such as NBA).

214. See *id.* (providing alternative ways of funding privatized corporation).

215. See Donald H. Yee, *supra* note 29 (stating issue of timing in NCAA's sanctions for universities that do not comply with NCAA rules and regulations results in wrongdoers going unpunished).

216. See *id.* (noting incident occurred same time Pac-10 Conference was realigning because of its desire to take revenue from Colorado and Utah markets).

217. See *id.* (noting USC football team also had its victories, including its 2004 national championship, that Reggie Bush helped secure vacated). In essence, these penalties are not punishing Reggie Bush or the former coaching staff. See *id.*

season ban for “lack of institutional control” is now unfairly punishing USC players who were in middle school when the incident occurred.²¹⁸ This is one of many examples of the difficulty the NCAA has had with enforcing its amateurism policy and one of the many incidents that would no longer occur once revenue college sports are privatized.²¹⁹ Transforming current student-athletes to paid professionals will put an end to under-the-table compensation and NCAA sanctions that do not punish the true culprits.²²⁰

2. *Education for Professionals at Each Institution*

An obvious issue with this proposal is that the athletes may not receive an education despite being employees of the university; however, this can easily be resolved in a number of different ways.²²¹ First, universities can offer an educational program to its athletes, which the athletes may complete either during or after their athletic career.²²² This gives the athlete the ability to complete his college degree when he has officially finished his career as a professional athlete.²²³ Another option is for the corporation to provide educational opportunities such as providing vocational clas-

218. *See id.* (noting current players are ones suffering penalties due to USC and Pete Carroll’s “lack of institutional control”).

219. *See Ohio State Gets One-Year Bowl Ban*, ESPN.COM (Dec. 22, 2011, 7:17 PM), http://espn.go.com/college-football/story/_/id/7372757/ohio-state-buckeyes-football-penalties-include-bowl-ban (providing sanctions on Ohio State’s football team after both offending players and coach had already left Ohio State); *see also* Ebenezer Samuel, *If Oregon Hit with NCAA Sanctions Then Chip Kelly Should Suffer Even Though He Bolted for NFL and Philadelphia Eagles*, NYDAILYNEWS.COM (Jan. 19, 2013, 2:34 PM), <http://www.nydailynews.com/sports/football/score-ready-chip-kelly-article-1.1243179> (advocating penalizing former Oregon University head football coach Chip Kelly if NCAA penalizes Oregon football after Coach Kelly left for NFL).

220. For a discussion of how the creation of privatized separate, yet related, athletic institutions can limit the amount of NCAA violations and sanctions, *see supra* notes 215-219 and accompanying text.

221. *See Ohio State Gets One-Year Bowl Ban*, *supra* note 219 (providing alternatives to current educational system offered to student-athletes such as taking regular university courses once they gain admission on their own academic merit); *see also* Silvio Laccetti, *supra* note 207 (proposing leadership training in business and communication skills via “the common practice of in-house corporate training”).

222. *See* Dennis A. Johnson & John Acquaviva, *supra* note 26 (proposing universities may grant athletes “free academic classes until they earn a degree (even after [their] playing days are over)”; *see also* Lee Goldman, *supra* note 177 at 240-41 (expressing that although NCAA has emphasized promoting educational values, due to commercialization, it has also highly promoted the “win at all costs” mentality).

223. *See* Dennis A. Johnson & John Acquaviva, *supra* note 26 (comparing employed college athletes to regular university employees such as groundskeepers or cafeteria workers who are frequently given opportunities to take classes at universities they work for).

ses or classes relating to running the front office of the corporation.²²⁴ This allows athletes to put the primary focus on their athletic craft while providing them with the option to pursue alternative career choices if the athlete is unsuccessful in pursuing a career in professional sports.²²⁵

3. *The NCAA's Role Under the Proposed Model*

This model will limit the NCAA's role relating to revenue sports; however, it will not eliminate the need for the NCAA.²²⁶ Many critics have argued that the NCAA has been limiting the growth of revenue sports through its archaic rules and lack of oversight in their enforcement.²²⁷ The NCAA and its regulations would still remain for all non-revenue sports, allowing colleges to devote more attention to each of those sports, rather than focusing all of their attention on those sports generating a majority of the revenue for that university.²²⁸ Colleges can still pay for non-revenue sports using the revenue generated by television deals and corporate sponsors that fund their independent revenue sport institutions, as well

224. See Donald H. Yee, *supra* note 29 (shifting control over athlete's academics from universities for which athlete's will play, to corporations for which athletes will work).

225. See *id.* (recognizing that some athletes will not want to pursue any academic endeavors and rely solely on their athletic ability for success while other academically gifted athletes will want to take regular university courses or vocational classes); see also Lee Goldman, *supra* note 177, at 242 (explaining predicament student-athletes are in between performing in class and performing in sports). Legendary college football coach Bear Bryant is quoted as saying,

I used to go along with the idea that football players on scholarship were 'student-athletes,' which is what the NCAA calls them. Meaning a student first and an athlete second. We were kidding ourselves, trying to make it more palatable to the academicians. We don't have to say that and we shouldn't. At the level we play, the boy is really an athlete first and a student second.

Id. (explaining focus student-athletes put on athletics instead of school).

226. See *id.* (proposing that NCAA be eliminated in regards to revenue sports).

227. See *id.* (classifying NCAA's rules as "gibberish"); see also Steve Wieberg, *Despite Criticism, NCAA Takes Firm Stance on Professionalism*, USA TODAY (Jan. 4, 2011, 1:41 AM), http://usatoday30.usatoday.com/sports/college/2011-01-03-ncaa-professionalism_N.htm (detailing criticism NCAA has received based on its actions enforcing its rules and regulations).

228. See Donald H. Yee, *supra* note 29 (noting NCAA would only be eliminated for revenue sports). Cf. Mark Giannotto, *Maryland Cuts Seven Sports on 'Sad Day' in College Park*, WASH. POST, Jul. 2, 2012, available at http://articles.washingtonpost.com/2012-07-02/sports/35486395_1_athletic-programs-track-program-athletic-director-kevin-anderson (detailing University of Maryland's decision to cut eight smaller athletic programs but keep larger sports such as basketball and football to handle university deficit); see also Lee Goldman, *supra* note 177, at 247 (suggesting universities must maintain nonrevenue sports to comply with NCAA policies).

as the money those teams make through commercial and endorsement deals.²²⁹

Further, the NCAA could adopt specific rules for revenue sports, such as revenue sharing between conferences or amongst the entire NCAA, to maintain some control over those institutions.²³⁰ Therefore, this proposal would allow universities to focus more on academics and maintaining their non-revenue sports while still receiving the benefits of revenue, exposure, and success from their related privatized sports teams.²³¹ Thus, the best way to avoid the destruction of amateurism from the change in the transfer rules will be to create independent athletic institutions to run revenue college sports.²³²

V. CONCLUSION

The NCAA's decision to alter the transfer rules to allow the free transfer of athletes will be a decision that may change the face of college sports forever.²³³ Despite the NCAA's good intentions, there may be many consequences from these alterations that change the landscape of college sports.²³⁴ Once student-athletes can select the schools to which they want to transfer without needing permission from their original school, there is no stopping student-athletes from testing the transfer market like a professional

229. See generally Michael A. Corgan, Comment, *Permitting Student-Athletes to Accept Endorsement Deals: A Solution to the Financial Corruption of College Athletics Created by Unethical Sports Agents and the NCAA's Revenue-Generating Scheme*, 19 VILL. SPORTS & ENT. L.J. 371 (2012) (presenting arguments in favor of student-athletes being able to sign endorsement deals as means of compensation for services provided to universities).

230. See *id.* at 410-13 (explaining possible plans for sharing revenue amongst student-athletes within a specific university); see also Jeremy Fowler, *Smaller Conferences Crafting Plan to Share Playoff Revenue*, CBS SPORTS (Jan. 22, 2013, 10:09 PM), <http://www.cbssports.com/collegefootball/blog/jeremy-fowler/21599899/smaller-conferences-crafting-blueprint-for-playoff-revenue-sharing> (detailing current revenue sharing schemes used by smaller conferences to share playoff revenue in revenue sports).

231. For a discussion on the benefits of the privatization of revenue sports in college athletics, see *supra* notes 207-230 and accompanying text; see also Lee Goldman, *supra* note 177, at 247 (reconciling paying student-athletes instead of paying top academic students because of revenue student-athletes provide university).

232. For a detailed discussion on the new transfer rules and the potential free agency system they will create, see *supra* notes 90-148 and accompanying text.

233. For a discussion on the proposed transfer rules, see *supra* notes 90-104 and accompanying text.

234. For a discussion of the potential consequences of the transfer rule changes, see *supra* notes 105-206 and accompanying text.

free agent.²³⁵ Student-athletes will transfer schools to improve their recognition, playing time, and overall position in the sport.²³⁶

Further, the rights of student-athletes to transfer schools at their desire will need to be protected from infringement by the NCAA.²³⁷ More associations like the NCPA will develop and provide a quasi-union for college student-athletes to protect their rights until student-athletes are held to be employees of the university and a full-blown union can be declared.²³⁸ This process will be sped up due to student-athletes' collective action in the demand to be paid or to share in the revenue generated by their performances.²³⁹ Once student-athletes are monetarily compensated for their performance and successfully unionize, college sports as we know it will cease to exist.²⁴⁰

To resolve the foreseeable inability to run a successful academic institution along with an athletic business, universities will ultimately privatize their big-time college sports.²⁴¹ This will solve the issue of revenue sports becoming too large for colleges and the NCAA to handle.²⁴² This decision will provide major benefits to all parties involved, including the players, coaches, universities, fans and non-revenue sports teams.²⁴³ Thus, the NCAA's alteration of the transfer rules will have a widespread impact, not only on those

235. For a discussion on the rise of free agency after the implementation of the new transfer rules, see *supra* notes 113-148 and accompanying text.

236. For a discussion on the reasons why student-athletes will transfer schools, see *supra* notes 122-129 and accompanying text.

237. For a discussion on the development of unions in college sports, see *supra* notes 149-169 and accompanying text.

238. See Leslie E. Wong, *supra* note 180, at 1103 (noting once O'Bannon suit is determined, if verdict is in favor of O'Bannon, then paying athletes for "performance and appearances would qualify them as employees under the National Labor Relations Act . . . regardless of the existence of a union").

239. For a discussion on the potential split between colleges and their big-time, revenue-making athletic teams, see *supra* notes 207-232 and accompanying text.

240. For a detailed discussion on the impact student-athlete unions will have on the landscape of the NCAA, see *supra* notes 149-169 and accompanying text.

241. See generally Donald H. Yee, *supra* note 29 (providing reasons and descriptions why big-time college sports need to be privatized).

242. See Brian L. Porto, *The Legal Challenges to "Big-Time" College Sports: Are They Threats or Opportunities for Reform?*, 27-JUN VT. B.J. 41 (2001) (presenting legal challenges that big-time, revenue-making college sports face and changes that will be coming for college sports).

243. For a discussion on the benefits of the privatization of revenue-making, college sports, see *supra* notes 207-220 and accompanying text.

student-athletes wishing to transfer, but on all future athletes who dream of one day representing a university on the playing field.²⁴⁴

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244. For a detailed discussion on the consequences of the NCAA changing the current transfer rules, see *supra* notes 105-232 and accompanying text.

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