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COLLEGE ATHLETICS: THE CHINK IN THE SEVENTH CIRCUIT'S "LAW AND ECONOMICS" ARMOR

Michael A. Carrier* & Marc Edelman**

INTRODUCTION

If any court is linked to the “law and economics” movement, it is the Seventh Circuit, home of former Judge Richard Posner, the “Chicago School,” and analysis based on markets and economics.¹ It thus comes as a surprise that in college-athletics cases, the court has replaced economic analysis with legal formalisms. In adopting a deferential approach that would uphold nearly every rule the National Collegiate Athletic Association (NCAA) claims is related to amateurism, the court recalls the *pre-Chicago School* era, in which courts aggressively applied “per se” illegality based on a restraint’s form, rather than substance.² While the Seventh Circuit’s detour of deference has taken several stops, this Essay focuses on the most recent, the 2018 decision in *Deppe v. NCAA*.³

In *Deppe*, a college football punter who believed he would receive an athletic scholarship began pursuing transfer opportunities after learning that he would not. Pursuant to the NCAA’s “year-in-residence” rule, however, the punter would have been forced to sit out for one year before he could play for his new school.⁴ The punter claimed that the NCAA’s rule violated antitrust law. But the district court dismissed the claim, and the Seventh Circuit affirmed, finding that the rule was “presumptively pro-competitive.”⁵

The Seventh Circuit’s ruling suffered from four critical flaws. First, the court misread antitrust precedent, relying on dicta from a decades-old Supreme Court case addressing a different issue to manufacture a

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1. See Eleanor M. Fox, *The Battle for the Soul of Antitrust*, 75 CALIF. L. REV. 917, 917 (1987) (describing Seventh Circuit judges at forefront of Chicago School and law and economics movement in antitrust law); see also John H. Langbein, *Trust Law as Regulatory Law: The Unum/Provident Scandal and Judicial Review of Benefit Denials Under ERISA*, 101 NW. U. L. REV. 1315, 1327 (2007) (noting that court adheres to “law-and-economics rationale”) (quoting *Mers v. Marriott Int’l Group Accidental Death & Dismemberment Plan*, 144 F.3d 1014, 1020 (7th Cir. 1998)).

2. See, e.g., Lindsey M. Edwards & Joshua D. Wright, *The Death of Antitrust Safe Harbors: Causes and Consequences*, 23 GEO. MASON L. REV. 1205, 1208–10 (2016).

3. 893 F.3d 498 (7th Cir. 2018).

4. *Deppe*, 893 F.3d at 500.

5. *Id.* at 503–04.

wholly new analytical framework. Second, the court misconstrued anti-trust law by neglecting the longstanding “Rule of Reason” analysis that involves burden shifting and emphasizes consumer welfare. Third, the Seventh Circuit ignored the procedural setting of a motion to dismiss, making up facts benefiting the defendant rather than—as hornbook law makes clear—applying facts in the light most favorable to the plaintiff. And fourth, the court neglected the economics that would have shown the anticompetitive nature of the year-in-residence restriction on student-athletes’ movement between schools.

I. MISINTERPRETED PRECEDENT

The Seventh Circuit’s first error stemmed from its reliance on *NCAA v. Board of Regents*.⁶ Section A provides an overview of the decision, and Section B traces the Seventh Circuit’s misinterpretation of it.

A. Board of Regents

In *Board of Regents*, the Supreme Court considered a challenge to limits on the number of college football games that could be broadcast on television. The Court found that “[b]ecause it places a ceiling on the number of games member institutions may televise, the horizontal agreement places an artificial limit on the quantity of televised football that is available to broadcasters and consumers.”⁷ In particular, “[b]y restraining the quantity of television rights available for sale, the challenged practices create a limitation on output,” which prior cases had made clear are “unreasonable restraints of trade.”⁸ Exacerbating the situation, the lower court had found that “the minimum aggregate price in fact operates to preclude any price negotiation between broadcasters and institutions, thereby constituting horizontal price fixing, perhaps the paradigm of an unreasonable restraint of trade.”⁹

Continuing, the Court underscored the “significant potential for anti-competitive effects”: “if member institutions were free to sell television rights, many more games would be shown on television,” and “by fixing a price for television rights to all games, the NCAA creates a price structure that is unresponsive to viewer demand and unrelated to the prices that would prevail in a competitive market.”¹⁰ Despite all these concerns, the Court decided not to treat the restrictions as per se illegal since the case “involves an industry in which horizontal restraints on competition are

6. 468 U.S. 85 (1984).

7. *Board of Regents*, 468 U.S. at 99.

8. *Id.*

9. *Id.* at 99–100.

10. *Id.* at 104–06.

essential if the product is to be available at all.”¹¹ The Court’s scrutiny was still searching, however, applying a “quick look” analysis less deferential than the Rule of Reason. As it explained: “the absence of proof of market power does not justify a naked restriction on price or output” since “when there is an agreement not to compete in terms of price or output, ‘no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement.’”¹²

The Court’s holding that the NCAA’s television restrictions violated antitrust law render observations about hypothetical (more concerning) settings merely dicta. To state the obvious, dicta are not necessary to a court’s decision and, as a result, are far less likely to be carefully considered in the case, let alone serve as the basis for future analysis. For example, the Court may have found it “reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition,”¹³ but that is just an *assumption* untested by the crucible of litigation. The Court’s hypothetical examples of potentially justified conduct are nothing more than a counterfactual to the scenario at issue in the case: anticompetitive “restraints on football telecasts.”¹⁴

As another example, the Court recognized that “[t]he NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports” and that “[t]here can be no question but that it needs ample latitude to play that role, or that the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act.”¹⁵ These assertions, however, only serve to soften the blow of the Court’s

11. *Id.* at 101. The need for some restrictions for the product to be available may explain why per se illegality is not appropriate, but does not justify analysis more deferential than the Rule of Reason. The college sports industry, with more than \$12 billion in annual revenue, does not need insulation from antitrust liability. Tom Gerencer, *How Much Money Does the NCAA Make?*, MONEYNATION (Mar. 22, 2016), <https://moneynation.com/how-much-money-does-the-ncaa-make/> [https://perma.cc/5WAZ-2UGM]. Such deference would carry great risks, as NCAA members are more than capable of engaging in conduct likely to harm consumers by, for example, collectively setting ticket prices, selling broadcast and merchandising rights, or excluding players from competing in a manner that decreases the quality of the product. It also bears mention that Congress, which has provided special treatment to other industries, has never offered an exemption to college sports. See Joseph P. Bauer, *Antitrust and Sports: Must Competition on the Field Displace Competition in the Marketplace?*, 60 TENN. L. REV. 263, 268 (1993). See, e.g., Shannon L. Ferrell, *New Generation Cooperatives and the Capper-Volstead Act: Playing a New Game by the Old Rules*, 27 OKLA. CITY U. L. REV. 737, 744–46 (2002).

12. *Board of Regents*, 468 U.S. at 109 (quoting *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 692 (1978)).

13. *Id.* at 117. Similarly, an observation that “the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act,” *id.* at 120, says nothing about the countervailing competitive effects suffered by student-athletes affected by the restrictions.

14. *Id.* at 117.

15. *Id.* at 120.

holding: “[R]ules that restrict output are hardly consistent with”¹⁶ “the role of the NCAA . . . to preserve a tradition that might otherwise die.”¹⁷ And in case there were any doubt, the Court held “only that the record supports the District Court’s conclusion that by curtailing output and blunting the ability of member institutions to respond to consumer preference, the NCAA has restricted rather than enhanced the place of intercollegiate athletics in the Nation’s life.”¹⁸

B. Seventh Circuit Misinterpretation

At least as much as any other court, the Seventh Circuit has relied on *Board of Regents* dicta to construct a vast edifice of case law.¹⁹ But relying on hypothetical scenarios at odds with a case’s outcome provides the slenderest of reeds on which to base a framework of near-absolute immunity.

The Seventh Circuit’s misinterpretation of *Board of Regents* came to fruition in three steps. The first occurred in 1992. In *Banks v. NCAA*, the court addressed an NCAA rule providing that college football players lost eligibility if they hired an agent or applied for the NFL draft.²⁰ The Seventh Circuit relied on *Board of Regents* dicta to conclude that the restrictions were procompetitive because they “serve to maintain the clear line of demarcation between college and professional football.”²¹ On a motion to dismiss, the court refused to interpret the facts in favor of the plaintiff, worrying that “the cold commercial nature of professional sports would not only destroy the amateur status of college athletics but more importantly would interfere with the athletes['] proper focus on their educational pursuits and direct their attention to the quick buck in pro sports.”²² As a result, the court concluded that the plaintiff “failed to allege an anti-competitive effect on a relevant market[,] at best . . . merely attempt[ing] to frame his complaint in antitrust language.”²³

This formalistic deference, however, missed the economics of how the rule could have harmed competition. As the dissent explained: “If the no-draft rule were scuttled, colleges that promised their athletes the opportunity to test the waters in the NFL draft before their eligibility

16. *Id.*

17. *Id.* (emphasis omitted).

18. *Id.*

19. See generally *Banks v. NCAA*, 977 F.2d 1081 (7th Cir. 1992); Marc Edelman, *A Short Treatise on Amateurism and Antitrust Law: Why the NCAA’s No-Pay Rules Violate Section 1 of the Sherman Act*, 64 CASE W. RES. L. REV. 61, 85–86 (2013). The Third Circuit also has deferred to the NCAA based on *Board of Regents* dicta. *E.g.*, *Smith v. NCAA*, 139 F.3d 180 (3d Cir. 1998).

20. 977 F.2d 1081.

21. *Banks*, 977 F.2d at 1090.

22. *Id.* at 1091.

23. *Id.* at 1093.

expired, and return if things didn't work out, would be more attractive to athletes than colleges that declined to offer the same opportunity."²⁴ The no-draft rule "eliminate[d] this potential element of competition among colleges, the purchasers of labor in the college football labor market[,] . . . categorically rul[ing] out a term of employment."²⁵ The rule also harmed college football fans, who otherwise could have signaled their preference to attend games featuring players who had declared for the NFL draft but were not selected. Indeed, NFL players who declare for the draft early are often the most popular based on their success during the previous season.²⁶ Having potential NFL draftees return to college helps merchandisers sell team jerseys and television stations secure viewers.²⁷ In short, the no-draft rule eliminated potential competition among colleges, as sellers of tickets, merchandise, and broadcast rights, to provide the most desirable entertainment product to fans.

We have distinguished company in questioning the *Banks* ruling. In reviewing the petition for certiorari in the case, Justice Blackmun's handwritten note on the bottom of his clerk's memo lamented: "I think CA7 got this one dead wrong."²⁸ The Supreme Court, however, declined certiorari,²⁹ allowing the *Banks* decision to take hold and expand in the two rulings discussed next.

The second step in the detour of deference came in 2012, when the Seventh Circuit addressed limits on the number of scholarships per team and a prohibition on multiyear scholarships. In *Agnew v. NCAA*, the court upheld these restrictions, going even further than *Banks* had.³⁰ The court misapplied *Board of Regents* dicta, stating that "the Supreme Court seemed to create a presumption in favor of certain NCAA rules" in its assertion that "most of the regulatory controls of the NCAA are . . . procompetitive because they enhance public interest in intercollegiate

24. *Id.* at 1095 (Flaum, J., dissenting in part).

25. *Id.*

26. See Chris Trapasso, *2019 NFL Draft Underclassmen Tracker: Who Should Declare, Who Should Go Back to School*, CBS SPORTS (Dec. 4, 2018, 10:35 AM), <https://www.cbssports.com/nfl/draft/news/2019-nfl-draft-underclassmen-tracker-who-should-declare-who-should-go-back-to-school/> [http://perma.cc/2SC5-R2NH].

27. See Andrew Bucholtz, *Unlike Some Past Player Hype, the Heavy Sports Media Coverage of Zion Williamson and Duke Feels Warranted*, AWFUL ANNOUNCING (Feb. 20, 2019), <https://awfulannouncing.com/ncaa/coverage-of-zion-williamson-and-duke-feels-warranted.html> [https://perma.cc/W47V-T7H7]; Darren Rovell, *NCAA President: No Pay For Players on Jersey Sales*, CNBC (Dec. 22, 2011, 4:21 PM), <https://www.cnbc.com/id/45768248> [https://perma.cc/H9MA-NRF5].

28. Note by Harry Blackmun, Justice, United States Supreme Court, on Preliminary Memorandum, *Banks v. NCAA* (May 26, 1993), <http://epstein.wustl.edu/research/blackmunMemos/1992/92Memo-pdf/92-1466.pdf> [https://perma.cc/4PDY-JHA5].

29. *Banks v. NCAA*, 508 U.S. 908 (mem.).

30. *Agnew v. NCAA*, 683 F.3d 328 (7th Cir. 2012).

athletics.”³¹ The court “construe[d] this language as a license to find certain NCAA bylaws that ‘fit into the same mold’ as those discussed in *Board of Regents* to be procompetitive ‘in the twinkling of an eye.’”³²

The court then, taking a self-granted license and expansive notion of “blessing,” stated that “the first—and possibly only—question to be answered when NCAA bylaws are challenged is whether the NCAA regulations at issue are of the type that have been blessed by the Supreme Court, making them presumptively procompetitive.”³³ Ultimately, the court in *Agnew* concluded that the NCAA’s restraints on scholarships were not entitled to the broad procompetitive presumption at the motion-to-dismiss stage because they appeared to be “aimed at containing university costs, not preserving the product of college football.”³⁴ Yet even after rejecting this procompetitive presumption, the court still ruled that “nothing resembling a discussion of a relevant market for student-athlete labor can be found” in the complaint.³⁵ Such a conclusion, however, is called into doubt by the plaintiff’s complaint, which alleges that “NCAA member institutions compete with one another to attract and enroll highly skilled athletes.”³⁶ Such a market is consistent with the Ninth Circuit’s finding in *O’Bannon v. NCAA* that there is a market for the “college education” of elite football and men’s basketball players, in which “colleges compete for the services of athletic recruits by offering them scholarships and various amenities, such as coaching and facilities.”³⁷ And it is consistent with the district court’s finding in the case that less competitive divisions, “collegiate athletics associations, or minor and foreign professional sports leagues” are not “potential substitutes.”³⁸

Finally, in 2018, the Seventh Circuit in *Deppe* affirmed the lower court’s grant of a motion to dismiss against a challenge to the NCAA’s year-in-residence rule.³⁹ The court found that the rule was related to athlete eligibility and thus entitled to the procompetitive presumption,

31. *Id.* at 341 (quoting *NCAA v. Board of Regents*, 468 U.S. 85, 117 (1984)).

32. *Id.* at 341 (quoting *NCAA v. Board of Regents*, 468 U.S. 85, 110 n.39, 117 (1984)).

33. *Id.* at 341.

34. *Id.* at 344.

35. *Id.* at 347.

36. Complaint at 6, *Agnew v. NCAA*, No. 1:11-cv-0293-JMS-MJD, 2011 WL 11693824 (S.D. Ind. Mar. 29, 2011).

37. 802 F.3d 1049, 1070 (9th Cir. 2015) (quoting *O’Bannon v. NCAA*, 7 F. Supp. 3d 955, 968 (N.D. Cal. 2014)).

38. *O’Bannon v. NCAA*, 7 F. Supp. 3d 955, 966–67 (N.D. Cal. 2014).

39. The rule contained exceptions for those (1) who (with at least two seasons of eligibility remaining) transfer from a school competing in the highest level of college football competition, the Football Bowl Subdivision (FBS), to a school one competitive level below, the Football Championship Subdivision (FCS), (2) who transfer from an FCS school offering athletic scholarships to one that does not, or (3) who transfer because of “difficult personal or family circumstances or other extenuating circumstances.” *Deppe v. NCAA*, 893 F.3d 498, 499–500 (7th Cir. 2018).

rendering “a full rule-of-reason analysis . . . unnecessary”⁴⁰ and essentially making the restriction per se legal. As discussed more fully below, the court reached this conclusion only by misconstruing antitrust law and making up facts and economics.⁴¹

In short, each of the three Seventh Circuit rulings deferred excessively to NCAA restrictions, pointing to lines of demarcation, unduly emphasizing rules relating to eligibility, and even bestowing near-per-se immunity. A strand of dicta is not nearly enough for such an abdication of antitrust responsibility. Indeed, the college sports industry currently enjoys more than \$12 billion in annual revenue—an amount roughly equal to each of the four premier U.S. professional leagues.⁴² NCAA restrictions limiting the free movement of student-athletes threaten substantial harm to not only the students but also college athletics itself.

II. MISCONSTRUED ANTITRUST

In addition to misinterpreting *Board of Regents*, the Seventh Circuit misapplied the relevant antitrust framework. Under Section 1 of the Sherman Act,⁴³ the vast majority of restraints are considered under the Rule of Reason. Per se illegality is limited to a narrow subset of conduct, like price fixing, market division, and bid rigging, that has severe anticompetitive harms and little or no justifications.⁴⁴ Modestly more deferential, in not quite falling into the per se category while still presenting concerns on its face, is a “quick look” test similar to the one applied in *Board of Regents* that finds liability for a “naked restriction on price or output” that the defendant cannot justify.⁴⁵ On the other side, there is no category of conduct that is treated as presumptively procompetitive. The remainder (and overwhelming majority) of restraints are considered under the Rule of Reason.

One of us reviewed nearly every Rule-of-Reason case in the modern era and found that courts apply a burden-shifting analysis by which (1) the plaintiff must show a significant anticompetitive effect (typically a price increase, output reduction, or showing of market power), (2) the defendant must offer a procompetitive justification, (3) the plaintiff can show that the restraint is not reasonably necessary or that the defendant

40. *Id.* at 503-04.

41. *See infra* Parts II-IV.

42. *See* Gerencer, *supra* note 11; *see also* Steven Kutz, *NFL Took In \$13 Billion in Revenue Last Season—See How it Stacks Up Against Other Pro Sports Leagues*, MARKETWATCH (July 2, 2016, 10:53 AM), <https://www.marketwatch.com/story/the-nfl-made-13-billion-last-season-see-how-it-stacks-up-against-other-leagues-2016-07-01> [<https://perma.cc/L3KL-GNTY>].

43. 15 U.S.C. § 1 (2012).

44. *E.g.*, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940); *Palmer v. BRG of Ga., Inc.*, 498 U.S. 46 (1990).

45. *See supra* note 12 and accompanying text.

could obtain its objectives through a less restrictive alternative, and (4) the court balances anticompetitive and procompetitive effects.⁴⁶ In conducting this analysis, the ultimate focus is consumer welfare.

This is a well-worn analysis, applied in hundreds of cases. There is no precedent to avoid the burden-shifting analysis by asserting that a restriction is “presumptively procompetitive when it is ‘clearly meant to help maintain the “revered tradition of amateurism in college sports” or the “preservation of the student-athlete in higher education.”’”⁴⁷ Nor is there precedent in such a setting for concluding that “a full rule-of-reason analysis is unnecessary.”⁴⁸ To the contrary, courts applying the Rule of Reason have paid careful attention to anticompetitive effects and allowed for a consideration of both sides through balancing.

If the Seventh Circuit in *Deppe* had applied hornbook Rule-of-Reason analysis, it likely would have ruled in favor of the plaintiff. First, it would have found an anticompetitive effect since the year-in-residence rule harms college athletes by denying them the ability to fully market their services to colleges.⁴⁹ The rule also harms colleges by preventing them from signing players that could contribute and would boost the popularity of their games, merchandise, and broadcast rights. The plaintiffs, for example, explained that Northern Illinois University informed Deppe that he would not receive an athletic scholarship but that the University of Iowa was interested in him.⁵⁰ The rule thus prohibited Deppe from moving to a school more interested in his services while also preventing the University of Iowa from offering a scholarship to a player that could have made its football team more desirable to fans.

Second, applying a conservative analysis, the court could have found that the NCAA demonstrated limited procompetitive justifications of promoting amateurism and player stability, which helped to maintain the popularity of college sports. For example, in *O’Bannon v. NCAA*, the Ninth Circuit accepted a study that the NCAA had introduced (and that the district court had found “unpersuasive”) purporting to show that Americans “generally oppose[] the idea of paying college football and basketball

46. Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827, 827–29 (2009); Michael A. Carrier, *The Real Rule of Reason: Bridging the Disconnect*, 1999 B.Y.U. L. REV. 1265, 1268–69 (1999).

47. *Contra Deppe v. NCAA*, 893 F.3d 498, 501 (7th Cir. 2018) (quoting *Agnew v. NCAA*, 683 F.3d 328, 342–43 (7th Cir. 2012)).

48. *Contra id.* at 503–04.

49. In their complaint, the plaintiffs quoted a sports analyst who explained that “[p]layers who are run off by their coaches are now basically screwed” and a coach who said “You’re telling me I can sign a kid, keep him for a year or two, decide I misevaluated him and pull his scholarship, and then that kid has to sit a year no matter what? That’s [expletive] up, man. That’s just [expletive] up.” Class Action Complaint at 23–24, *Deppe v. NCAA*, No. 1:16-cv-00528, 2016 WL 888119 (S.D. Ind. Mar. 6, 2017).

50. *Deppe*, 893 F.3d at 499–500.

players.”⁵¹ In a proper Rule-of-Reason analysis in *Deppe*, the NCAA would have had the opportunity (and been required) to show that allowing unbridled movement of student-athletes during a sports season would decrease fan interest by limiting team cohesion and fan familiarity with certain players.⁵² To be sure, the *O’Bannon* case revealed the difficulty of making such showings by highlighting the predominance of “school loyalty and geography” rather than “restrictions on student-athlete compensation” in affecting consumer demand.⁵³ But the NCAA could have attempted to connect player movement with fan interest or, alternatively, player academic-related benefits.⁵⁴

Third, the court likely would have found that any benefits justifying the one-year rule could have been achieved by a less restrictive rule that prevented player movement only during the middle of an ongoing season or academic semester. The NCAA, for example, could have implemented a rule limiting eligibility to student-athletes enrolled in classes on the first day of the sports season or academic semester. This would have allowed the NCAA to achieve its objectives by limiting player movement within a given season and connecting such movement to academic engagement while still being less restrictive than the year-in-residence rule by not preventing student-athletes who transfer between seasons or academic semesters from immediately competing.

Alternatively, the NCAA could have implemented a rule that allows student-athletes who maintain a grade point average above a certain threshold to transfer while being eligible to play. Such a rule would have been less restrictive than the year-in-residence rule because it would not have prevented all transfers from immediately competing in sports while still allowing the NCAA to achieve its objectives, as the student-athletes who can immediately compete have already shown the ability to succeed in the classroom while playing sports.

Finally, on balance, the court likely would have overturned the one-year rule as an anticompetitive restraint because the rule substantially harms student-athletes and colleges while providing at most only a

51. 802 F.3d 1049, 1059 (9th Cir. 2015) (quoting *O’Bannon v. NCAA*, 7 F. Supp. 3d 955, 975 (N.D. Cal. 2014)).

52. Brief for Defendant-Appellant at 16, *Deppe v. NCAA*, 893 F.3d 498 (7th Cir. 2018) (No. 17-1711).

53. *O’Bannon*, 802 F.3d at 1082 (Thomas, C.J., concurring in part and dissenting in part) (quoting *O’Bannon v. NCAA*, 7 F. Supp. 3d 955, 1001 (N.D. Cal. 2014)).

54. See Alex Kirshner, *NCAA Transfer Rules, Explained Quickly and Honestly*, SBINATION (May 9, 2018, 8:08 AM), <https://www.sbnation.com/college-football/2018/5/9/17311748/ncaa-transfer-rules-change-guide-list-sit-out> [<https://perma.cc/TK7D-G4MZ>].

limited benefit for fans.⁵⁵ In addition, any objectives the NCAA sought could have been achieved through less restrictive alternatives.⁵⁶

The Seventh Circuit ignored not just the burden-shifting framework but also the focus on consumer welfare. Justifications are not to be promoted for their own sake. They are to be encouraged because they help consumers by lowering price, increasing output, enhancing quality or innovation, or bringing about similar benefits. As much as the NCAA wishes to preserve amateurism, the concept “is relevant only insofar as it relates to consumer interest.”⁵⁷ The Seventh Circuit did not address this crucial aspect of the analysis.

III. MADE-UP FACTS

The Seventh Circuit compounded its errors in applying *Board of Regents* and conducting its antitrust analysis by making up facts. At the motion-to-dismiss stage, the court in *Deppe* should have construed the facts in the light most favorable to the plaintiff and not considered issues outside the pleadings.⁵⁸ In an earlier case, the Seventh Circuit had unsurprisingly explained that it “construe[s] the complaint in the light most favorable to the plaintiff, accepting as true all well-pleaded facts alleged, and drawing all possible inferences in her favor.”⁵⁹ In contrast, in *Deppe*, the court adopted uncorroborated facts proffered by the NCAA or absent in the parties’ briefings.

One example is the purported “fact” that the NCAA’s “year-in-residence requirement is plainly an eligibility rule” because the rule “appears in the eligibility section of the NCAA Division I Manual.”⁶⁰ By adopting this fact, the court avoided scrutinizing the one-year rule on its merits and instead applied the legal standard it adopted in *Agnew* that all eligibility rules are presumptively procompetitive.⁶¹ This is not a proper legal standard.⁶² But even if it were, it would still not be appropriate for the court to apply these facts at the motion-to-dismiss stage, as the plaintiff alleged that “[t]he year-in-residence requirement functions as [an economic] penalty imposed . . . for switching schools” and the “NCAA’s

55. See *supra* notes 49–50 and accompanying text; see also Jay Bilas, *Solving the Transfer Question Is Easy: Let Them Play*, ESPN (Sept. 7, 2017), <http://www.espn.com/espn/print?id=20616506> [<https://perma.cc/K4VC-NHCC>] (describing the one-year rule, among other transfer restrictions, as a “noncompete provision unilaterally imposed upon an unpaid, amateur student”).

56. See *supra* text following note 54.

57. *O’Bannon*, 802 F.3d at 1081 (Thomas, C.J., concurring in part and dissenting in part).

58. See FED. R. CIV. P. 12(b)(6); FED. R. CIV. P. 12(d).

59. *Tamayo v. Blagojevich*, 526 F.3d 1074, 1081 (7th Cir. 2008).

60. *Deppe v. NCAA*, 893 F.3d 498, 502 (7th Cir. 2018) (emphasis omitted).

61. *Id.* at 499.

62. See *supra* Section I.B.

proffered academic motivations for the year-in-residence requirement are instead a pretext for the true economic motivations behind the rule.”⁶³ Taken in the light most favorable to the plaintiff, these alleged facts rebut the conclusion that the rule primarily relates to amateurism and fan interest in college sports.

In addition, by declaring an NCAA rule to be an eligibility rule simply based on the title of a heading in an NCAA manual, the court relies on circular reasoning. Such a maneuver results in any rule that the NCAA labels as an “eligibility rule” avoiding antitrust scrutiny. This cannot be correct: a multi-billion-dollar enterprise does not have the ability to place itself outside the reach of the antitrust laws with so facile a ploy.

Another purported “fact” that the Seventh Circuit improperly adopted was the assumption that overturning the year-in-residence rule would result in student-athletes “be[ing] ‘traded’ from year to year like professional athletes,” as they “could begin the season playing for one school and end the season playing for a rival.”⁶⁴ Such an assertion, however, contravenes the pleadings, the NCAA manual, and common sense.

In professional sports, “trading” is a business transaction in which owners exchange players (technically, player employment contracts) with one another. The plaintiffs in *Deppe* did not challenge any NCAA rules that prevented the trading of players. Instead, they challenged a rule that prevents Division I football players “from transferring to other NCAA Division I schools without losing athletics eligibility for a year.”⁶⁵ Player transfers are fundamentally different from player trades because the *student-athletes* initiate them *for their own benefit*.

As it turns out, the NCAA manual already prevents universities from trading student-athletes because it separately requires that they be enrolled in classes and establish “residence” by the twelfth class day of a semester. If the student-athletes were “traded” in the middle of the semester, not only would there be no courses at their new school in which they could enroll but also there would be no way for them to establish “residence.”⁶⁶ To the contrary, the four premier U.S. professional sports leagues (MLB, NBA, NFL, and NHL) use player contracts that include an assignment clause—for example, the MLB contract provides that “[t]he Player agrees that his contract may be assigned by the Club (and

63. Class Action Complaint, *supra* note 49, ¶¶ 86, 93.

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

65. Class Action Complaint, *supra* note 49, ¶ 3.

66. See NAT’L COLLEGIATE ATHLETIC ASS’N, 2018-19 NCAA DIVISION I MANUAL art. 14.01.2 (2018), <https://web3.ncaa.org/lstdbi/reports/getReport/90008> [<https://perma.cc/GZF5-KNAA>] (“To be eligible to represent an institution in intercollegiate athletics competition, a student-athlete shall be enrolled in at least a minimum full-time program of studies, be in good academic standing and maintain progress toward a baccalaureate or equivalent degree.”); *id.* art. 14.02.14 (“Any student-athlete (e.g., qualifier, nonqualifier, transfer student) admitted after the 12th class day may not use that semester or quarter for the purpose of satisfying an academic term or year of residence.”).

reassigned by any assignee Club) to any other Club in accordance with the Major League Rules.”⁶⁷ To state the obvious, no such assignment clause appears in the NCAA national letter of intent⁶⁸ or any other purported NCAA governance document.

Finally, common sense dictates that lifting the NCAA year-in-residence rule would not result in NCAA schools revising their national letter of intent to allow for player trades. Giving the NCAA the benefit of the doubt that the primary objective of the year-in-residence rule is not to restrict player movement,⁶⁹ the purported objective would be to help students adjust to their new schools’ academic environment before competing in sports.⁷⁰ But such caution about competing immediately upon transfer makes it unlikely that schools would initiate player trades.

IV. MADE-UP ECONOMICS

As a fourth concern, the Seventh Circuit concluded that the year-in-residence rule was procompetitive by making up economics. The court reached its conclusion without conducting any economic analysis about the rule’s effects in enhancing revenue, restraining costs, or deterring players from transferring from the NCAA’s most powerful schools.⁷¹ Instead, the court simply stipulated that the NCAA’s restrictions bore the “innocent explanation” that the athletes covered by the rule “are precisely [those] who are most vulnerable to poaching.”⁷²

The Seventh Circuit implied that its conclusions were obvious by rejecting the need for economic analysis in favor of presuming that the rules are procompetitive.⁷³ But those with even a rudimentary understanding of economics could easily disagree.

The rule, for example, could yield anticompetitive effects through its restriction on the free movement of student-athletes. By preventing college football players from transferring from schools where they do not play to those where they would, the rule blocks players from “seek[ing] out the team they most value, whether because of more playing time, a better relationship with the coaching staff, a change in the coaching staff

67. See, e.g., 2017–2021 MAJOR LEAGUE BASEBALL BASIC AGREEMENT 340–41 (2016), <http://www.mlbplayers.com/pdf9/5450407.pdf> [<https://perma.cc/ZV8X-5NQ2>].

68. *NLI Provisions*, NAT’L LETTER OF INTENT, <http://www.nationalletter.org/nliProvisions/index.html> [<https://perma.cc/FK98-EJ88>].

69. But see Dennis Dodd, *Social Media Shaming Is Helping College Players Fight Unfair Transfer Rules, Gain Eligibility*, CBS SPORTS (Jan. 17, 2019, 11:07 AM), <https://www.cbssports.com/college-football/news/social-media-shaming-is-helping-college-players-fight-unfair-transfer-rules-gain-eligibility/> [<https://perma.cc/CK25-T8AV>].

70. See Kirshner, *supra* note 54.

71. *Deppe v. NCAA*, 893 F.3d 498, 503 (7th Cir. 2018).

72. *Id.*

73. See *id.* at 503–04.

that recruited the player, a better academic fit, or the availability of an athletics grant-in-aid on more favorable terms.”⁷⁴ The rule also would appear to protect schools in college football’s strongest conferences by making it easier for them to keep star players on their rosters as reserves. Relatedly, the rule harms weaker teams by preventing them from signing bench players at other schools that could immediately enter the starting lineup and boost their team’s performance, thereby enhancing fan interest in attending games and buying merchandise. The rule even may harm colleges with high academic standards because players with strong grades are deterred from transferring since they do not want to sit out for a year.

The Seventh Circuit’s economic conclusions in *Deppe* also are not consistent with the conclusions reached by other courts that have taken a more careful approach in applying economic analysis to analogous restraints. In *Mackey v. NFL*, for example, the Eighth Circuit held that an NFL rule that limited player movement between teams violated the Rule of Reason.⁷⁵ The court explained that such restraints harmed the relevant labor market for NFL player services by preventing the optimal free market allocation of players to teams.⁷⁶ The court also held that these anti-competitive effects were not offset by evidence that the restraints yielded cost savings and roster stability.⁷⁷

Similarly, in *Law v. NCAA*, the Tenth Circuit held that an NCAA rule that capped the compensation colleges could offer to certain basketball coaches was so anticompetitive that it violated antitrust law under a “quick look” analysis.⁷⁸ There, as in *Mackey*, the court recognized that restraints on the free movement of coaches could violate antitrust law. Upon conducting an appropriate economic analysis, the court did not express any concern that a free market would destroy the vitality of college sports.⁷⁹ Nor did the court in *Law* conclude that preserving free markets would lead to any of the parade of horrors that the Seventh Circuit in *Deppe* perfunctorily accepted as true.

V. CONCLUSION

The Seventh Circuit is known for its “law and economics” bent. But its *Deppe* decision abandoned law and economics principles, instead applying rules of near-per-se legality. It compounded earlier errors in *Banks* and *Agnew* to make a mountain out of the molehill of *Board of Regents*

74. Class Action Complaint, *supra* note 49, ¶ 87.

75. 543 F.2d 606, 620 (8th Cir. 1976) (elimination of sports league’s rule would lead to “increased player movement,” which shows rule’s anticompetitive effect).

76. *Mackey*, 543 F.2d at 620.

77. *Id.* at 620–21.

78. 134 F.3d 1010, 1020, 1024 (10th Cir. 1998) (affirming order preventing NCAA from enforcing rule limiting part-time assistant coach salaries).

79. *See Law*, 134 F.3d at 1021–24.

dicta. It manufactured wholly new antitrust precedent, abandoning the Rule of Reason and emphasis on consumer welfare. And it made up facts and economic conclusions. These errors led to the upholding of a restraint that could harm student-athletes, colleges, and sports fans.⁸⁰ The court committed the sin cautioned against in *Board of Regents*: applying unsupported rigid rules rather than considering a market's economic realities. The Seventh Circuit would benefit from returning to its law and economics roots.

80. For an analysis of how overturning NCAA restraints can enhance consumer welfare even among fans, see, for example, Thomas A. Baker III, Marc Edelman & Nicholas M. Watanabe, *Debunking the NCAA's Myth That Amateurism Conforms with Antitrust Law: A Legal and Statistical Analysis*, 85 TENN. L. REV. 661, 662, 697-99 (2018) (showing that overturning aspects of NCAA rule denying compensation to student-athletes increased, or at a minimum maintained, game attendance).