

GETTING DUE PROCESS INTO THE GAME: A LOOK AT THE NCAA’S FAILURE TO PROVIDE MEMBER INSTITUTIONS WITH DUE PROCESS AND THE EFFECT ON STUDENT-ATHLETES

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I. INTRODUCTION

Playing football was, at one time, a decidedly deadly pursuit. In 1905, eighteen college football players were killed in competition.¹ In response to such horrific occurrences, the Intercollegiate Athletic Association of the United States was founded in 1906.² Renamed the National Collegiate Athletic Association (hereinafter “NCAA” or

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1. *Leonards Pigskin Legends*, at <http://www.leonardslosers.com/History.htm> (last visited Jan. 29, 2005). In 1905 President Theodore Roosevelt told representatives from Yale, Harvard, and Princeton that football would be abolished if it did not become safer. *Id.*

2. See NCAA, *It was the flying wedge, football’s major offense in 1905, that spurred the formation of the NCAA*, at <http://www.ncaa.org/about/history.html> (last visited Jan. 29, 2005). The formation of the Intercollegiate Athletic Association of the United States was the result of President Theodore Roosevelt summoning college athletics leaders to White House conferences to encourage reform. *Id.*

“Association”) in 1910, this nonprofit organization regulates the athletic departments of its members - four-year colleges and universities across the country.³

Today, the NCAA, a private, voluntary, and unincorporated association, has over 1000 member schools that agree to abide by its regulations, including those intended to promote safety on the playing field.⁴ Intercollegiate football's body count has certainly declined as a result.⁵ However, some of the NCAA's own activities and procedures can take a punishing emotional toll on student-athletes.

The NCAA claims it seeks to “maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body.”⁶ In addition, the NCAA claims it seeks “[t]o encourage its members to adopt eligibility rules to comply with satisfactory standards of scholarship, sportsmanship and amateurism [and] [t]o supervise the conduct of, and to establish eligibility standards for, regional and national athletic events under the auspices of [the] Association.”⁷

These purposes and the grounds on which the NCAA was founded are laudable. However, the lack of due process in NCAA proceedings, particularly in making determinations of student-athlete eligibility, contradicts the Association's stated goals.⁸ It has been suggested that a person involved in an NCAA investigation proceeding has “less due process protection than a barber that gives a customer a bad haircut.”⁹ An analysis of NCAA proceedings demonstrates that this comparison is not far from the truth.

Criticisms of the NCAA, especially its failure to provide due process, are not new and have been widely recognized.¹⁰ The purpose

3. *Id.* Until 1921, when the first NCAA championship was held, the NCAA “was a discussion group and rules-making body.” *Id.*

4. John Kitchin, *Issues Facing College Athletics: The NCAA and Due Process*, 5 KAN. J.L. & PUB. POL'Y 71, 71 (1996). Members of the NCAA are divided into three divisions. *Id.* Each member institution decides which division to join based on its level of competitiveness. *Id.*

5. See Kay Hawes, *The NCAA Century Series—Part I: 1900-39*, NCAA.org, at <http://www.ncaa.org/news/1999/19991108/active/3623n27.html> (last visited Mar. 17, 2005).

6. NCAA CONST., at art. 1.3.1, available at http://www.ncaa.org/library/membership/division_i_manual/2004/05/2004-05_d1_manual.pdf (last visited Mar. 17, 2005). This is a basic purpose of the NCAA. *Id.*

7. *Id.* at art. 1.2(c), (f).

8. See *id.* at art. 1.2 & 1.3 (stating the purposes and fundamental policy of the NCAA).

9. Sherry Young, *NCAA Enforcement Program and Due Process: The Case for Internal Reform*, 43 SYRACUSE L. REV. 747, 798 (1992) (citing *NCAA: Who's In Control of Intercollegiate Athletics? Hearings Before the Subcomm. On Commerce, Consumer Protection, and Competitiveness of the House Comm. On Energy and Commerce*, 102d Cong., 1st Sess. 102-70 (1991) (statement of James E. King, Jr., Member, Florida House of Representatives)).

10. See generally Tyler J. Murray, *Illegalizing the NCAA's Eligibility Rules: Did Cureton v.*

of this comment is to examine the lack of due process that member institutions, and consequently student-athletes, receive in eligibility determinations made pursuant to NCAA rules. It will examine the NCAA's flawed enforcement procedures and their repercussions for student-athletes in the current world of college athletics.

This comment will analyze the structure of the NCAA and how, in a society that claims to value providing due process, individuals can still be deprived of this right. Section II will explain the structure of the NCAA and its effect on collegiate athletes. The procedures for challenging NCAA policies will be described in Section III. In Section IV, this comment will examine the story of Maurice Claret, the larger-than-life running back from Ohio State University. Lastly, in Section V, this paper will conclude that the failure of the NCAA to provide member institutions with due process has dire consequences for student-athletes in both athletics and academics.

II. NCAA

A. History, Purpose and Structure

The NCAA is a centralized regulatory authority with the power to set its own standards and to enforce those standards through various sanctions.¹¹ Members that join the Association agree to abide by these standards as specified in the NCAA's bylaws.¹² When the NCAA suspects that a member may be guilty of a violation, it serves as "investigator, judge, and executioner."¹³ While this combination of functions will not be challenged, the way in which the NCAA makes decisions raises questions as to whether its rules provide for due process.

The NCAA's self-proclaimed basic purpose "is to maintain intercollegiate athletics as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports."¹⁴ The NCAA's Constitution further

NCAA *Go Too Far, or Not Far Enough?*, 26 J. LEGIS. 101 (2000) (analyzing the discriminatory effects of the NCAA's eligibility rules).

11. Kitchin, *supra* note 4, at 72. In 1950, the NCAA adopted enforcement procedures modeled after effective enforcement procedures utilized in the academic community. *Id.*

12. NCAA CONST., *supra* note 6, at art. 3.2.4.1. This section states, "The active members of this Association agree to administer their athletics programs in accordance with the constitution, bylaws and other legislation of the Association." *Id.*

13. Lisa M. Bianchi & Bryan S. Gadol, *When Playing the Game of College Sports, You Should Not Be Playing "Monopoly,"* 1 CHAP. L. REV. 151, 152 (1998).

14. NCAA CONST., *supra* note 6, at 1.3.1.

states that the Association's legislation will apply to issues dealing with admissions, financial aid, eligibility and recruiting at member institutions.¹⁵ Members are "obligated to apply and enforce this legislation, and the enforcement procedures of the Association shall be applied to an institution when it fails to fulfill this obligation."¹⁶ The NCAA does not take direct action against student-athletes.¹⁷ Rather, eligibility determinations are made by the members, and if a member fails to do so, the NCAA takes action against it.¹⁸

The membership adopts NCAA regulations governing the conduct of intercollegiate athletics programs at annual NCAA conventions.¹⁹ The rules govern all the member institutions, their staff, and their student-athletes.²⁰ A Management Council guides the Association between conventions with the power to set policy, to interpret the organization's constitution and bylaws, and to exercise discretion pertaining to sanctions against member institutions.²¹ Also, committees are either appointed by the Council or established during the convention.²² These committees, in particular the Executive and Infractions Committees, "form the Association's core."²³ They develop policy by sending reports and recommendations to the Council, steering committees, or the Executive Committee.²⁴ The Council and committees, and those who are NCAA officers, are drawn mainly from the staff of member institutions.²⁵

The NCAA first adopted standards regulating recruiting, eligibility,

15. See *id.* at 5.2. This section is titled "Elements of Legislation." *Id.*

16. *Id.* at 1.3.2.

17. See 2004-2005 NCAA MANUAL: OPERATING BYLAWS, at art. 14.11.1, available at http://www.ncaa.org/library/membership/division_i_manual/2004-05/2004-05_d1_manual.pdf (last visited Mar. 17, 2005) [hereinafter NCAA BYLAWS]. This bylaw allows action to be taken against a member institution. *Id.* It states, "If a student-athlete is ineligible under the provisions of the constitution, bylaws or other regulations of the Association, the institution shall be obligated to apply immediately the applicable rule and to withhold the student-athlete from all intercollegiate competition." *Id.* When a member institution fails to enforce NCAA procedures, the NCAA applies its enforcement procedures to the institution. See *id.* at art. 32.

18. See NCAA BYLAWS, *supra* note 17, at art. 19 (dealing with enforcement procedures).

19. NCAA CONST., *supra* note 6, at art. 5.01.1.

20. See *id.*

21. *Id.* at art. 4.5.

22. *Id.*

23. Kitchin, *supra* note 4, at 71.

24. See NCAA CONST., *supra* note 6, at art. 5. These policies deal with topics including, but not limited to, recruiting, eligibility, amateurism, and financial aid. *Id.*

25. See NCAA BYLAWS, *supra* note 17, at arts. 4.5.1, 19.1.1 & 19.2.1.1. Bylaws 19.1.1 and 19.2.1.1, which deal with the Committee on Infractions and the Appeals Committee, allow for a small number of the members to be from the public. *Id.* at arts. 19.1.1 & 19.2.1.1.

amateurism and financial aid in 1948.²⁶ However, without a way to enforce these regulations, some members ignored the rules.²⁷ In 1950, enforcement procedures were adopted.²⁸ The Committee on Infractions was created in 1954 with the power to oversee investigation of infractions and to punish member colleges that violated its rules.²⁹ The Committee on Infractions was given the power to punish member institutions that violate the bylaws without the approval of two-thirds of the NCAA membership.³⁰ Although the Committee on Infractions was given this power, it is the enforcement staff that actually investigates the adequacy of a member college's eligibility determination.³¹

B. Eligibility Rules

Eligibility standards were formulated in response to the competing interests of: (1) coaches with a win-at-all-costs attitude; (2) universities with an interest in maintaining academic integrity; and (3) student-athletes who may perform well in athletics but who may or may not be interested in excelling academically.³² More than forty-five pages of the NCAA Manual deal with eligibility.³³ Points of great concern to student-athletes relate to time and curriculum constraints on eligibility.³⁴ It is obvious that eligibility standards, including minimum

26. Kitchin, *supra* note 4, at 72.

27. *Id.*

28. *Id.*

29. Greg Heller, *Preparing for the Storm: The Representation of a University Accused of Violating NCAA Regulations*, 7 MARQ. SPORTS L.J. 295, 298 (1996). Heller suggests that "creation of the Committee on Infractions gave the NCAA some legitimacy and spurred growth, as it now had a mechanism in place with investigative powers and powers to punish member institutions without the approval of two-thirds of the NCAA membership." *Id.* at 298-99.

30. *Id.* at 298-99.

31. See NCAA BYLAWS, *supra* note 17, at fig. 32-1. Ultimately, the Committee on Infractions is responsible for ensuring that the enforcement program is enforced properly. See *id.* However, the enforcement staff enforces the procedures on a daily basis. See *id.*

32. Murray, *supra* note 10, at 102-03. Murray emphasizes that "minimum eligibility rules have been at the forefront of the NCAA's mission." *Id.* at 102.

33. See NCAA BYLAWS, *supra* note 17, at art. 14.

34. Kevin E. Broyles, *NCAA Regulation of Intercollegiate Athletics: Time for a New Game Plan*, 46 ALA. L. REV. 487, 531 (1995). Broyles states:

A student-athlete wishing to participate in NCAA competition is only eligible for four seasons of competition, all of which must be completed within five years of enrolling in a collegiate institution. In addition, the NCAA requires student-athletes who transfer from any college to a member institution to sit out of athletic competition for one year. Thus, students who, for any variety of personal reasons, find it necessary to take time off from athletic competition for more than one or two years must jeopardize their athletic careers. This restriction provides an even greater disadvantage for transfer students.

Id. at 532.

test scores and grade point averages, are beneficial to collegiate athletic programs.³⁵ Students who are unprepared for education at the university level have trouble once they reach college; the additional athletic pressures are detrimental to their well-being.³⁶ The problem with the NCAA's eligibility requirements lies not with the standards themselves but in way they are enforced.³⁷

Regulation of initial eligibility standards began in 1965 with the "1.600 rule."³⁸ This regulation, which replaced a "home rule" policy that allowed schools to enact their own eligibility standards, specified that eligibility would be available only to student-athletes predicted to achieve a minimum 1.600 grade point average during their first year of college.³⁹ This judgment was based on a student's high school GPA or class rank and his score on the SAT or ACT.⁴⁰ In 1973, this rule was replaced with the "2.000 rule."⁴¹ The next step was the enactment of Proposition 48 in 1986,⁴² which set new academic requirements for incoming student-athletes. It required a high school student to obtain a minimum SAT score of 700 and to maintain a 2.0 grade point average in eleven core-curriculum high school classes.⁴³ Students-athletes who met these requirements were eligible for intercollegiate competition.⁴⁴

35. *See id.* at 531.

36. *Id.* Broyles explains:

The players have arguably the most to lose from unfavorable NCAA rulings, but of all the individuals connected with an investigation, they have the least experience, resources, and assistance in handling such matters. In the worst case, the player may have to face both the power of the NCAA in the enforcement process and chastisement within the university (from personnel and supporters). NCAA rules not only fail to provide adequate protection from such inevitabilities, they sometimes actively contribute to the isolation of the students.

Id. at 533-34.

37. *But see* NCAA, *Does the NCAA enforcement process allow for due-process protection guaranteed by the Constitution in traditional legal proceedings?*, at http://www.ncaa.org/enforcement/faq_enforcement#11 (last visited Mar. 17, 2005) (stating that the "NCAA membership believes its procedure provides a meaningful and fair opportunity for institutions and involved individuals to be involved in these processes").

38. Lee J. Rosen, *Proposition 16 and the NCAA Initial-Eligibility Standards: Putting the Student Back in Student-Athlete*, 50 CATH. U. L. REV. 175, 179 (2000). According to Rosen, minimum academic standards for incoming college athletes were developed in response to many eligibility scandals. *Id.*

39. *Id.* at 180.

40. *Id.*

41. Rosen, *supra* note 38, at 179-80.

42. *Id.* Proposition 48 allowed students to partially qualify. *Id.* at 182. This allowed high school athletes who partially met the academic requirements to receive athletic scholarships. *Id.* The student was not able to compete as a freshman, but he was able to compete as a sophomore, provided he met the minimum academic requirements. *Id.* at 182.

43. Rosen, *supra* note 38, at 180-81.

44. *Id.* Students who met these requirements were able to compete, practice, and receive

In 1992, the initial eligibility rules were modified with the NCAA's adoption of Proposition 16.⁴⁵ Proposition 16, which replaced Proposition 48, allows student-athletes who received a minimum SAT score of 1010 and received a 2.0 grade point average in thirteen core courses to establish eligibility.⁴⁶

Opposition to eligibility standards grew during the Civil Rights Movement due to the perception that they had an unfair impact on members of minority groups.⁴⁷ Opponents of eligibility standards argue that they disadvantage African-American student-athletes because blacks score below the minimum cutoff SAT score more often than whites.⁴⁸ It is also suggested that minimum eligibility requirements encourage high school students to take classes that will provide them with an easy "A."⁴⁹ Still others argue that many potential student-athletes will be turned off by the world of college athletics if there is a chance they might not meet the standards.⁵⁰

Cureton v. NCAA involved one of the first claims attacking the legality of Proposition 16.⁵¹ The plaintiffs in this case, African-American student-athletes who failed to meet the standardized test requirements of Proposition 16, claimed that the minimum test requirement had an "unjustified disparate impact on African-American student-athletes."⁵² Finding that the plaintiffs were able to bring a claim under Title VI of the Civil Rights Act of 1964 based on a disparate impact theory, the district court declared Proposition 16 illegal.⁵³ The Third Circuit decided that the NCAA's conduct is not

financial aid that is athletically related upon enrollment in college. *Id.*

45. *Id.* at 182. Proposition 16 and Proposition 48 were almost identical except for different initial eligibility standards. Proposition 16, which took effect in 1996, is the standard currently enforced. Rosen, *supra* note 38, at 182.

46. *Id.* at 183 (citing NCAA BYLAWS, *supra* note 17, at bylaw 14.3.1.1.1). Alternatively, a student who received an SAT score of 820 but maintained a 2.5 GPA could also be declared eligible. *Id.* This index can currently be found in NCAA article 14.3.1.1.1. NCAA BYLAWS, *supra* note 17, at art. 14.3.1.1.1. In August 2005, this will be increased to fourteen core courses. *Id.*

47. Rosen, *supra* note 38, at 177.

48. *Id.* at 201 (discussing *Cureton v. NCAA*, 37 F. Supp. 2d 687 (E.D. Pa. 1999)).

49. *Id.*

50. *See id.*

51. *Cureton*, 37 F. Supp. 2d at 687.

52. *Id.* at 689. To establish a prima facie case, a plaintiff must show that "the application of a specific facially neutral selection practice has caused an adverse disproportionate effect, to wit, excluding the plaintiff and similarly situated applicants from an educational opportunity." *Id.* at 697. The defendant must then show that the disproportionate effect is necessary and justified. *Id.* At this point, the plaintiff, who always has the ultimate burden of proof, may discredit the justification or offer an effective alternative. *Cureton*, 37 F. Supp. 2d at 697.

53. *Id.* at 715. The district court required the plaintiffs to prove that the NCAA receives federal financial assistance, subjecting it to the requirements of Title VI, and that Proposition 16's

covered by Title VI, and therefore did not decide whether Proposition 16 has an unjustifiable racially discriminatory impact.⁵⁴ Therefore, the NCAA can enforce Proposition 16.⁵⁵

Despite criticisms such as those raised in *Cureton*, there are still many reasons to require that minimum standards be met to establish eligibility.⁵⁶ One reason is that higher standards increase the academic quality of the schools.⁵⁷ Another is that graduation rates of student-athletes have increased since the implementation of Propositions 48 and 16.⁵⁸ Further, students who are forced to sit out their first year to study due to Proposition 16 requirements benefit greatly from the emphasis on academics rather than athletics.⁵⁹

Although it was challenged in *Cureton*, Proposition 16 is “the most recent attempt to preserve the integrity of college athletics.”⁶⁰ Eligibility standards are one way for the NCAA to reach one of its stated goals.⁶¹ These standards allow the NCAA to enforce its position that intercollegiate athletics should be kept separate from professional sports while allowing athletics to remain an essential component of a student-athlete’s educational experience.⁶² Hence, the problem is not the standards themselves but rather the way in which the NCAA

requirements cause a disparate impact on African-American student-athletes. *Id.* at 692-714.

54. *Cureton v. NCAA*, 198 F.3d 107, 118 (3d Cir. 1999). The Third Circuit decided that the NCAA does not receive federal funds, and, therefore, Title VI does not apply to the NCAA. *Id.* Soon after this decision, the Supreme Court held that Title VI creates no claim for disparate impact. *Alexander v. Sandoval*, 532 U.S. 275 (2001). In *Alexander*, the Supreme Court held that Title VI does not afford a remedy even if a federally funded entity knowingly adopts a rule that creates a disparate impact. *Id.*

55. *See id.*

56. Rosen, *supra* note 38, at 175-76. Rosen stresses the importance of preparing student-athletes to pursue careers once they leave college. *Id.* at 176. Very few student-athletes succeed as professional athletes, and, therefore, need to be skilled in something other than athletics. *Id.*

57. *Id.* at 199.

58. Rosen, *supra* note 38, at 199. Rosen challenges the accuracy of this assertion. *Id.* When Rosen’s article was written in 2000 only 30% of college football players and 27% of college basketball players actually graduated. *Id.* at 200.

59. *Id.* at 200. Proposition 16 allows students who had to sit out their first year to compete in their second year if they maintain “good academic standing” and “an overall grade point average of 2.0 in twenty-four units of college work.” Laura Pentimone, *The National Collegiate Athletic Association’s Quest to Educate the Student-Athlete: Are the Academic Eligibility Requirements an Attempt to Foster Academic Integrity or Merely to Promote Racism?*, 14 N.Y.L. SCH. J. HUM. RTS. 471, 483-84 (1998) (discussing academic eligibility requirements).

60. Rosen, *supra* note 38, at 195. Rosen suggests that certain eligibility requirements, despite helping to maintain academic integrity in college athletics, help to perpetuate racism. *Id.* Rosen points out that, “[t]he most serious charge levied against the NCAA claimed that the development of initial eligibility rules was fueled by racist desire to exclude African-American athletes in response to their dominance in college sports.” *Id.* at 198.

61. *See supra* note 6 and accompanying text.

62. *Id.*

enforces them.⁶³

C. Enforcement Procedures and the Lack of Due Process

The due process problems that student-athletes suffer are the direct result of the way the NCAA enforces its regulations against member institutions. Based on its rules and bylaws, the NCAA cannot directly declare student-athletes ineligible.⁶⁴ It has the power only to compel member universities to enforce NCAA regulations regarding eligibility.⁶⁵ Therefore, the member institution, which acts to avoid being sanctioned, directly revokes a student-athlete's eligibility.⁶⁶ An institution that does not revoke an unqualified student's eligibility is subject to penalties for noncompliance.⁶⁷

Bylaws 19 and 32 govern the enforcement process.⁶⁸ Relevant aspects of this process include: detailed investigative guidelines, various notices to the members and individuals, requirements that the enforcement staff make full disclosure of information and that the institutions have access to such information, provisions for representation by legal counsel at all stages, recording of interviews and hearings, the institution's responses to the allegations, provisions for prehearing conferences, procedures applicable to the hearing itself, the requirement of written findings, and the provisions with respect to the appeal procedures.⁶⁹ At the hearing before the Committee on Infractions, a member institution accused of a violation has a chance to

63. Rosen, *supra* note 38, at 195. Rosen states:

[T]he NCAA is responsible for the problem caused by minimum initial eligibility standards. The NCAA appears to hide behind a veil of untouchability while it arbitrarily promulgates rules with sweeping, yet largely unpopular implications. Proponents of the position that the NCAA is a state actor lament that member institutions have little recourse against the NCAA and anything short of full-fledged submission to the NCAA is akin to institutional suicide.

Id. at 195-96.

64. See NCAA BYLAWS, *supra* note 17, at art. 14.01. Part of this section states, "An institution shall not permit a student-athlete to represent it in intercollegiate athletics competition unless the student-athlete meets all applicable eligibility requirements, and the institution has certified the student-athlete's eligibility." *Id.* at art. 14.01.1.

65. See NCAA BYLAWS, *supra* note 17, at art. 32.

66. See *id.* Young emphasizes that the imposition of these sanctions can badly damage an athletic program, and even minimum sanctions demonstrate how serious the NCAA is about the enforcement of its rules. Young, *supra* note 9, at 796.

67. NCAA BYLAWS, *supra* note 17, at art. 19.01.1. An institution that declares an athlete ineligible, may attempt to restore the athlete's eligibility by appealing to the Committee on Student-Athlete Reinstatement. *Id.* at art. 14.12.1.

68. See NCAA BYLAWS, *supra* note 17, at arts. 19 and 32.

69. *Id.*

present its case.⁷⁰ But only the member institution, and not an individual athlete, has this opportunity since the NCAA takes direct action only against its member institutions.⁷¹ Since the NCAA does not take any direct action against the student-athlete when making an eligibility determination, it claims it does not have to provide the student-athlete with due process before declaring him ineligible.⁷²

The Committee on Infractions supervises the enforcement program against member schools that fail to implement eligibility requirements.⁷³ It supervises an investigative staff, makes factual determinations, and imposes penalties.⁷⁴ The enforcement staff may initiate an investigation “only when it has reasonable cause to believe that the institution may have violated NCAA rules.”⁷⁵ In making this determination, the staff member considers the source’s reliability and credibility.⁷⁶ A preliminary inquiry is issued once a potential rule violation is reported, and a determination is made as to whether the information supporting the allegation is substantial.⁷⁷ If it is, a letter of preliminary inquiry is sent to the president of the university.⁷⁸ The

70. *Id.* at 32.8.

71. *See supra* note 18 and accompanying text.

72. Young, *supra* note 9, at 799.

73. NCAA BYLAWS, *supra* note 17, at 19.1.

74. *See id.* at 19.1.3.

75. NCAA, *How does the process work?*, at http://www.ncaa.org/enforcement/faq_enforcement.html#11 (last visited Apr. 7, 2005). There are several sources from which the Committee on Infractions might receive information. Heller, *supra* note 29, at 301-02. One source of information “comes from third parties, such as fans, opposing schools or former student-athletes, either by phone or by written correspondence to the NCAA office.” *Id.* at 302. Sometimes the enforcement staff is proactive in obtaining information. *Id.* “Often times, the enforcement staff will see an article in a newspaper, alleging that a school has violated NCAA rules, or they will contact high school or college coaches and inquire about any possible rules violations that they may know about.” *Id.*

76. Heller, *supra* note 29, at 302. Some factors a staff member will consider are “whether the source has negative feelings toward a university for a particular reason or whether any other ulterior motives exist that might render the information unreliable.” *Id.*

77. *See* NCAA BYLAWS, *supra* note 17, at fig. 32-1: Processing of a Typical NCAA Infractions Case. At this time, the enforcement staff usually attempts to speak with all those involved. Heller, *supra* note 29, at 304. The member institution usually also begins an investigation of its own. *Id.*

78. NCAA BYLAWS, *supra* note 17, at art. 32.5. This letter should contain the following information:

- (a) The involved sport;
- (b) The approximate time period during which the alleged violations occurred;
- (c) The identity of involved individuals;
- (d) An approximate time frame for the investigation;
- (e) A statement indicating that the institution and involved individuals may be represented by legal counsel at all stages of the proceedings;
- (f) A statement requesting that the individuals associated with the institution not discuss the case prior to interviews by the enforcement staff and institution except for reasonable campus communications not intended to impede the investigation of the allegations and except for consultation with legal counsel;
- (g) A statement indicating that other facts

preliminary inquiry allows the NCAA staff to conduct a thorough investigation for a “reasonable” time (up to six months) to determine if further inquiry is necessary.⁷⁹ At the end of this inquiry, the institution is notified of the results.⁸⁰ At this point, a hearing has not yet been held.⁸¹

If, at the end of the preliminary inquiry, the university agrees with the findings of the enforcement staff, the summary-disposition process may be utilized.⁸² If this is the case, the enforcement staff and institution prepare a written report to be submitted to the Committee on Infractions⁸³ containing: “(1) the proposed findings of fact; (2) a summary of information on which the findings are based; (3) a stipulation that the findings are substantially correct; (4) the findings that are violations of NCAA legislation, and (5) a statement of unresolved matters that are not considered substantial enough to affect the outcome of the case.”⁸⁴ If the summary disposition process is

may be developed during the course of the investigation that may relate to additional violations; and (h) A statement regarding the obligation of the institution to cooperate in the case.

Id. at art. 32.5.1.

79. NCAA BYLAWS, *supra* note 17, at art. 32.5.1.1: Status Notification within Six Months. This section states, “The enforcement staff shall inform the involved institution of the general status of the inquiry within six months of the date after the chief executive officer receives the notice of inquiry from the enforcement staff.” *Id.*

80. *Id.* at art. 32.6. If the enforcement staff determines that there is sufficient information, it will notify the chief executive officer of the allegations. *Id.* at 32.6.1 A second possibility is that the violation is confirmed, but it is determined to be minor. In this case, “[a]n appropriate penalty is determined by the enforcement staff and approved by a designated Committee on Infractions member.” NCAA BYLAWS, *supra* note 17, at figure 32-1. The Institution is notified of the penalty, and may appeal to the Committee on Infractions. *Id.* A third possibility is that the “[v]iolation is confirmed, and it is believed by the staff to be major in nature. The institution and staff discuss the summary-disposition process.” *Id.*

81. *See id.* at art. 32.

82. NCAA BYLAWS, *supra* note 17, at art. 32. According to article 32.7.1, “In major infractions cases, member institutions and involved individuals may elect to process the case through the summary disposition procedures [specified in the bylaw].” *Id.* This process may not be used if the institution is a repeat-violator. *Id.* *See also* NCAA, *Frequently Asked Questions About the NCAA Enforcement Process*, at http://www.ncaa.org/enforcement/faq_enforcement.html (last visited Mar. 17, 2005).

83. NCAA BYLAWS, *supra* note 17, at art. 32.7.1.2.

84. *Id.* The school must also submit self-imposed penalties. *Id.* at 32.7.1.3. It may also submit a statement of mitigating factors. *Id.* These may include “whether an institution self-disclosed the violations or may relate to the seriousness and reasons for the violation.” Heller, *supra* note 29, at 305-06. If the findings and penalties are approved by the Committee on Infractions, “the committee shall prepare a written report, forward it to the institution and involved individuals and publicly announce the resolution of the case under the provisions of Bylaw 32.9.” NCAA BYLAWS, *supra* note 17, at 32.7.1.4.1. If the committee does not approve the findings, the hearing process set forth [in the Bylaw dealing with Committee on Infractions hearings] will be followed.” *Id.* at 32.7.1.4.2. If the institution and/or involved parties do not agree with the findings, the institution and/or the

utilized, no hearing before the Committee on Infractions is held.⁸⁵

If the institution and enforcement staff do not agree after the preliminary inquiry, the institution is subject to an official inquiry.⁸⁶ The president of the university receives notice of this outcome and a request for cooperation.⁸⁷ Then, both the NCAA and the institution conduct further investigations.⁸⁸ Once the investigation is complete, the university must submit a written response to the NCAA within ninety days.⁸⁹

After everyone involved has responded to the allegations, a date is set for a hearing before the Committee on Infractions.⁹⁰ A prehearing conference is held with the institution and other involved parties four to six weeks prior to the hearing date.⁹¹ All questions regarding the allegations are discussed during this conference "to preclude the introduction of new information on the day of the hearing."⁹²

parties have the right to appeal those penalties to the Infractions Appeals Committee. *Id.* Bylaw 32.7.1.4.3 governs the situation when penalties are not approved. It states:

If the committee accepts the agreed-upon findings but does not approve the proposed penalties, the institution and involved individuals may elect to participate in an expedited hearing. Expedited hearings shall be conducted based on the findings submitted, and the institution and involved individuals may present additional information regarding the uniqueness of the case and mitigating factors. If the institution or the involved individuals decline to participate in an expedited hearing, a hearing regarding the alleged violations shall be conducted under the provisions of Bylaw 32.8. At the conclusion of the hearing process, the committee shall prepare a written report, forward it to the institution and involved individuals and publicly announce the committee's decision under the provisions of Bylaw 32.9. If, following the committee's announcement of its decision in the case, the institution and/or the involved parties do not agree to the additional penalties imposed, the institution and/or the involved parties will have the right to appeal those penalties to the NCAA Division I Infractions Appeals Committee in accordance with Bylaws 32.10 and 32.11.

Id.

85. See NCAA, *Do all NCAA infractions cases result in an in-person hearing before the Committee on Infractions?*, at http://www.ncaa.org/enforcement/faq_enforcement.html (last visited Jan. 29, 2005).

86. *Frequently Asked Questions About the NCAA Enforcement Process*, *supra* note 82.

87. NCAA BYLAWS, *supra* note 17, at 32.6.1. This letter states the NCAA rules believed to have been violated. *Id.* Allegations included in the notice of allegations "shall be limited to possible violations occurring not earlier than four years before the date of notice of inquiry is forwarded." *Id.* at 32.6.3. However, allegations that involve violations affecting the eligibility of current student-athletes are not subject to this time limitation. *Id.*

88. *Frequently Asked Questions About the NCAA Enforcement Process*, *supra* note 82. After the official inquiry begins, any new allegations that develop must be reported promptly to the member institution. *Id.*

89. *Id.*

90. See NCAA, *How does the process work?*, at http://www.ncaa.org/enforcement/faq_enforcement.html (last visited Jan. 29, 2005).

91. *Id.*

92. *Id.*

At the hearing before the Committee on Infractions, “the institution generally is represented by its chief executive officer, faculty athletics representative, the director of athletics and the current or former head coach of the involved sport.”⁹³ The enforcement staff is represented by the assistant director of enforcement, the director of enforcement, and the vice-president for enforcement services.⁹⁴ “Student-athletes with *current* eligibility also may be present as well.”⁹⁵

This hearing provides an opportunity for information to be presented to the Committee on Infractions and for the accused institution to contest the allegations.⁹⁶ At this hearing, the enforcement staff presents evidence supporting the allegation.⁹⁷ The institution then has a chance to make its presentation.⁹⁸ The Committee may ask questions of all involved parties.⁹⁹ The hearing is closed once this is completed.¹⁰⁰

The NCAA is unable to compel witnesses to appear or testify since it does not have subpoena power.¹⁰¹ As a result, parties cannot be guaranteed that they will be able to confront and cross-examine accusers and witnesses even if they agree to testify.¹⁰² However, the charged party is given the opportunity to interview witnesses that the NCAA staff plans to introduce before the Committee on Infractions.¹⁰³ Once the hearing ends, the Committee on Infractions deliberates privately to determine what findings should be made and what penalties should be assessed.¹⁰⁴ A party wishing to appeal a finding must submit a written notice of appeal.¹⁰⁵ The NCAA claims that “eligibility

93. *Id.*

94. *See How does the process work?*, *supra* note 90.

95. *Id.* (emphasis added).

96. *See* NCAA BYLAWS, *supra* note 17, at 32.8.

97. *See How does the process work?*, *supra* note 90.

98. *Id.*

99. *Id.*

100. *Id.*

101. *See* NCAA, *Does the NCAA enforcement process allow for immunity for involved coaches and student-athletes?*, at http://www.ncaa.org/enforcement/faq_enforcement.html#11 (last visited Mar. 17, 2005).

102. *See Frequently Asked Questions About the NCAA Enforcement Process*, *supra* note 82.

103. *Id.*

104. *See How does the process work?*, *supra* note 90.

105. NCAA BYLAWS, *supra* note 17, at art. 32.10.1. The president of the NCAA must receive the notice of appeal within fifteen days from the date of the public release of the committee’s report. *Id.* The standard for appeal review is limited. *Id.* Determinations made by the Committee on Infractions are not set aside on appeal unless it is shown that:

- (a) The Committee on Infractions finding is clearly contrary to the evidence presented to the committee;
- (b) The facts found by the Committee on Infractions do not constitute a violation of the

appeals decisions are expedited to avoid inappropriate loss of game time for affected student-athletes.”¹⁰⁶

There have long been complaints about the NCAA’s enforcement procedures.¹⁰⁷ Courts have been hearing complaints since the 1970s, and, in 1978, Congress held hearings on the matter.¹⁰⁸ Some problems include: (1) uncertain statutes of limitations; (2) hearings that are not open to the public; (3) no right to cross-examine accusers and other witnesses; (4) “[t]he Infractions Committee allows hearsay evidence from the enforcement staff, providing no disqualification of evidence obtained illegally or in violation of NCAA procedures, and adhering to no clear standard for weighing evidence;” (5) “no independent finder of fact or law at enforcement hearings;” (6) “[t]here is no protection against punishment inconsistent with violations committed, nor is there provision for uniformity of sanctions from case to case;” (7) a public transcript of hearings or witnesses is not available; (8) a private transcript is not available to accused coaches, student-athletes, or member institutions; and (9) the appeals process is ineffective because it is difficult for the party wishing to appeal to obtain transcripts and recordings from the Infractions Committee.¹⁰⁹

However, the NCAA has not changed its procedures to any appreciable degree.¹¹⁰ Some practical and reasonable suggestions for reform include the opportunity to call and cross-examine all relevant witnesses, to review the record of the hearing, and to hold open hearings.¹¹¹ While such reforms would provide more due process

Association’s rules; or

(c) A procedural error affected the reliability of the information that was utilized to support the Committee on Infractions’ finding.

Id.

106. See NCAA, *Does the NCAA enforcement process allow for due-process protection guaranteed by the Constitution in traditional legal proceedings?*, at http://www.ncaa.org/enforcement/faq_enforcement.html (last visited Mar. 20, 2004).

107. See Young, *supra* note 9, at 748.

108. *Id.*

109. Broyles, *supra* note 34, at 507-08.

110. *Id.* at 749. Young suggests that, over time, the NCAA’s enforcement procedures have become fairer. *Id.* However, these changes have not satisfied many, leading to the legislation that has been proposed in several states. Young, *supra* note 9, at 748-49.

111. See Broyles, *supra* note 34, at 507-08. Although the NCAA does not have a subpoena power, it could allow a staff member from the institution being investigated to be present at all meetings with witnesses. This may not be possible all of the time, but if the NCAA made more of an effort to allow member institutions to be present when witnesses were being questioned, the university would receive at least some additional protection. Alternatively, the NCAA could allow student-athletes to have more input into the legislative process. However, this may not be a viable solution. Broyles explains:

In a monumental effort to remedy this legislative anomaly, NCAA Executive

protection to a member school, they would be of limited benefit to the student-athlete whose eligibility and possible punishment are determined by his or her university, which is the institution conducting the investigation into an individual athlete's conduct.¹¹² The overall situation will improve only when member institutions themselves receive fairer investigative treatment under NCAA procedures and, in turn, extend greater fairness to student-athletes.

The deficiencies in the NCAA's procedures for dealing with member institutions lead to the question of exactly how much process is due these institutions. The NCAA has even recognized the need for reform in its procedural enforcement processes.¹¹³ The Association realizes it should aim to "provide procedural fairness protections in the interest of its members and in its own interest."¹¹⁴ This need is evidenced through the few changes that the NCAA has implemented over time in its enforcement process.¹¹⁵

However, the NCAA is also well aware that it is not bound by constitutional due process standards.¹¹⁶ Accordingly, the NCAA has failed to make appropriate and substantive changes in its procedures. The Association's procedures still require a member university to enforce its eligibility standards.¹¹⁷ When a member institution fears sanctions, or its interests conflict with those of a student-athlete, the

Director Dick Schultz proposed a Student-Athlete Advisory Committee to provide input on issues concerning the players. However, the constraints of NCAA formality and procedure paralyze committee members' efforts to offer their opinions at the 1990 NCAA Convention. Apparently, only credentialed delegates are allowed to speak at the conventions; thus, while the student committee was invited, its input was rejected. This student-athlete exclusion from the legislative process might be acceptable if the NCAA membership and enforcement bodies demonstrated an ability to adequately represent the interests of the very individuals the NCAA was designed to benefit.

Id. at 530. Another possible solution is for Congress to legislate and require that the NCAA provide its members with due process.

112. See discussion *supra* notes 64-67 and accompanying text.

113. Travis L. Miller, *Home Court Advantage: Florida Joins States Mandating Due Process in NCAA Proceedings*, 20 FLA. ST. U. L. REV. 871, 875 (1993) (describing improvements the NCAA has made to its enforcement process).

114. *Id.* at 887.

115. *Id.* at 888. Some of these changes include providing a preliminary hearing, developing a process for expedited hearings, liberalizing the use of tape recordings, and making transcripts of proceedings available to those able to appeal decisions. *Id.*

116. Miller, *supra* note 113, at 885-86. The NCAA insists that, although it may not be required to provide due process, legislation requiring due process is not necessary because its procedures already provide due process. *Id.* at 885. Further, the NCAA claims that it cannot provide more due process protection to student-athletes when making eligibility determinations because it lacks the power to subpoena witnesses. *Id.*

117. See *supra* notes 64-67 and accompanying text. The NCAA could require its members to provide student-athletes with due process.

student is left to fend for himself or herself and to fight what will almost surely be a losing battle.

D. What Process Should Be Due in NCAA Enforcement Proceedings?

The NCAA should be required to provide its member institutions with procedural due process. Procedural due process "refers to the procedural requirements needed to ensure fairness in federal and state governmental actions against individuals."¹¹⁸ The Fifth and Fourteenth Amendments of the United States Constitution require that a person deprived of life, liberty, or property be provided due process.¹¹⁹ However, these amendments do not specify the process that is due.¹²⁰

In *Mathews v. Eldridge*, the United States Supreme Court developed a guide for determining the process that should be afforded an individual facing trial.¹²¹ The test set forth by the Court requires balancing three factors: the private interests that are affected, the risk of erroneous deprivation of these interests, and the burdens of providing additional procedural protections.¹²² The final factor cited is a flexible requirement calling for "such procedural protection as the particular situation demands."¹²³

As evidenced by the explanation of the NCAA's enforcement procedures, a necessary conclusion is that the NCAA should implement at least some additional procedural protections to provide due process.¹²⁴ However, a plaintiff attempting to bring an action against the NCAA for failure to provide constitutionally-mandated due process has much greater concerns, chiefly because the NCAA is not bound by

118. Ronald J. Thompson, *Due Process and the National Collegiate Athletic Association: Are There Any Constitutional Standards?*, 41 UCLA L. REV. 1651, 1657 (1994).

119. *Id.* The Fifth Amendment provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. The Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, §1.

120. *Hannah v. Larche*, 363 U.S. 420 (1960). Chief Justice Earl Warren described due process as an "elusive concept." He proclaimed, "Its exact boundaries are undefinable, and its content varies according to specific factual contexts." *Id.* at 442.

121. *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

122. *Id.* Applying the *Mathews* balancing test, Robin Green states that "determining whether NCAA regulations provide due process protection requires an analysis of the NCAA's overall enforcement process, not particular cases." Robin J. Green, *Does the NCAA Play Fair? A Due Process Analysis of NCAA Enforcement Regulations*, 42 DUKE L.J. 99, 113 (1992).

123. *Mathews*, 424 U.S. at 334 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

124. Green, *supra* note 122, at 110-11. Green concludes that "current NCAA enforcement regulations comply with most due process requirements." *Id.* at 142.

constitutional due process standards.¹²⁵ If the NCAA were bound, the way the NCAA imposes its rules on member institutions could be challenged.¹²⁶

Most important to this comment is the lack of due process in the NCAA's review of an institution's eligibility determinations. As will be shown, a member cannot challenge these rules because the NCAA is not a state actor.¹²⁷ A student-athlete suffers because, as stated earlier, only currently eligible student-athletes may be present at an NCAA hearing.¹²⁸ Therefore, student-athletes who have been declared ineligible might not even be present when the NCAA is deciding whether a member institution has followed its rules in determining that athlete's eligibility.¹²⁹ It will be shown that a student-athlete attending a public university might be able to establish a due process claim against the university by proving that he has a liberty or property interest in continued athletic eligibility.¹³⁰ However, in most cases, this seems an almost impossible task.¹³¹ Therefore, in order for member institutions and student-athletes to be ensured greater procedural protections, the Supreme Court would have to label the NCAA a state actor. This would allow the NCAA's current enforcement procedures to be challenged on due process grounds. If so, it is almost certain that the NCAA would be required to provide greater procedural protections in its enforcement process.

III. CHALLENGING THE NCAA

A. *The Requirement of State Action*

The Fourteenth Amendment addresses only state actions.¹³² Student-athletes who have been denied due process in the determination of their eligibility status have sought redress under the Fourteenth Amendment's guarantee of due process.¹³³ Hence, a critical

125. See *infra* notes 132-150 and accompanying text.

126. *Id.*

127. *Id.*

128. See *supra* note 95 and accompanying text.

129. *Id.*

130. See *infra* notes 156-206 and accompanying text.

131. *Id.*

132. See generally Jose R. Riguera, *NCAA v. Tarkanian: The State Action Doctrine Faces a Half-Court Press*, 44 U. MIAMI L. REV. 197 (1989). The determination of what qualifies as state action "is one of the most difficult issues that the Supreme Court has faced over the last one hundred years." *Id.* at 198.

133. *Id.* at 202.

issue has been whether the NCAA is deemed a state actor when it engages in its enforcement procedures.¹³⁴

The NCAA has maintained that its enforcement procedures are not state action and, therefore, not subject to constitutional analysis.¹³⁵ For a long time, lower courts split on this issue.¹³⁶ By 1982, the majority of courts concluded that it was a state actor.¹³⁷ In *NCAA v. Tarkanian*,¹³⁸ the Supreme Court settled the issue.¹³⁹

NCAA v. Tarkanian involved a dispute between the NCAA and Jerry Tarkanian, former head basketball coach for the University of Nevada at Las Vegas (hereinafter UNLV).¹⁴⁰ In conformance with NCAA procedures, UNLV investigated alleged violations in its basketball program and exonerated Tarkanian.¹⁴¹ However, UNLV was subsequently found guilty of many violations, ten of which involved Tarkanian.¹⁴² UNLV then accepted the findings and removed Tarkanian from his coaching position during the probationary period in order to avoid greater NCAA penalties.¹⁴³ Tarkanian then filed suit against the NCAA in Nevada state court.¹⁴⁴ The Nevada Supreme

134. Riguera, *supra* note 132, at 198. Establishing "state action" is a prerequisite to suit under the Fourteenth Amendment. *Id.*

135. See discussion *infra* notes 140-55 and accompanying text.

136. Riguera, *supra* note 132, at nn. 28-47 & 83-94.

137. *Id.*

138. 488 U.S. 179 (1988).

139. *Id.*

140. *Id.* at 179. UNLV is a branch of the University of Nevada. It is funded and operated by the state of Nevada, and it is a member of the NCAA. *Id.* at 183.

141. *Id.* at 185. As a result of this investigation, UNLV found Tarkanian innocent of all allegations. *Id.*

142. *Tarkanian*, 488 U.S. at 185-86.

143. *Id.* at 187. Describing the situation, Riguera explains:

After four days of hearings, the Committee issued findings in its Confidential Report No. 123(47) in which it proposed a series of sanctions, including a request that the UNLV show cause why additional penalties should not be imposed against UNLV if it failed to discipline Tarkanian by removing him completely from the University's intercollegiate athletic program during the probation period. Shortly after receiving this report, UNLV's vice president held a hearing to determine what action UNLV should take; he concluded that "given the terms of our adherence to the NCAA we cannot substitute - biased as we must be - our own judgment on the credibility of witnesses for that of the infractions committee and the Council." Adhering to the vice president's recommendation, the president notified Tarkanian that he was to be completely severed of any and all relations, formal or informal, with the UNLV's intercollegiate athletic program during the NCAA probation period.

Riguera, *supra* note 132, at 200.

144. *Tarkanian*, 488 U.S. at 187-88. "The suit alleged that Tarkanian was deprived of property and liberty without due process of law in violation of 42 U.S.C. §1983 and the fourteenth amendment to the United States Constitution." Riguera, *supra* note 132, at 200-01. The trial court found for Tarkanian. *Id.* at 200-201 (citing *Tarkanian*, 488 U.S. at 185-86).

Court affirmed the lower court's holding that the NCAA was a state actor and that the NCAA procedures did not provide Tarkanian with the minimum requirements of due process.¹⁴⁵

However, the United States Supreme Court reversed, holding that NCAA action is not state action and, therefore, not subject to constitutional scrutiny.¹⁴⁶ In reaching this conclusion, the Court emphasized that UNLV, not the NCAA, suspended Tarkanian.¹⁴⁷ Therefore, the question to be examined was whether "UNLV's actions in compliance with the NCAA rules and recommendations turned the NCAA's conduct into state action."¹⁴⁸ Essential to the Court's reasoning was that, because UNLV's membership in the NCAA was voluntary and UNLV retained power to withdraw from membership, the NCAA is not a state actor.¹⁴⁹ The result of this decision is that student-athletes who have been denied due process in a determination of eligibility status must file suit against a public university, which obviously engages in state action.¹⁵⁰

More recently, in *NCAA v. Smith*,¹⁵¹ a student attempted to sustain an action against the NCAA by claiming that, since the NCAA received dues from its member institutions, which receive federal monetary assistance, it was subject to Title IX of the Education Amendment of 1972.¹⁵² Building on *Tarkanian*, the Court held that a more significant

145. *Tarkanian v. NCAA*, 741 P.2d 1345, 1353 (Nev. 1987). The Nevada Supreme Court held that "the NCAA had engaged in state action and, together with the UNLV, had deprived Tarkanian of liberty and property interests without due process of law." Riguera, *supra* note 132, at 201 (citing *Tarkanian*, 741 P.2d 1345).

146. *Tarkanian*, 488 U.S. 179. The Supreme Court held that :

The NCAA did not engage in state action when it issued a show cause order to the UNLV asking why additional penalties should not be imposed against the UNLV if it refused to suspend Coach Tarkanian from the university's intercollegiate athletic program during the NCAA probation period. Although the UNLV's action in suspending Tarkanian was undeniably state action, the NCAA's action in bringing about the suspension could not fairly be attributed to the state; therefore, the NCAA could not be held liable under 42 U.S.C. §1983 for the violation of Tarkanian's civil rights.

Riguera, *supra* note 132, at 201-02 (citing *Tarkanian*, 488 U.S. 179).

147. *Tarkanian*, 488 U.S. at 195-96.

148. *Id.* at 198-99. The Court concluded that the ability of a private party to force a state entity to act in a certain way does not change the private party into a state actor. *Id.* at 198-99 (citing *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351-52 (1974)).

149. *Id.* at 194-95.

150. Riguera, *supra* note 132, at 201-02. Riguera concludes that the "*Tarkanian* Court's decision fails to hold the NCAA accountable for its actions, a result which does little to deter the NCAA from continuing to exert pressure on public universities to take constitutionally impermissible actions." *Id.* at 202.

151. *NCAA v. Smith*, 525 U.S. 459 (1990).

152. *Id.* The plaintiff in this case claimed that by giving more waivers from eligibility requirements to males than to females, the NCAA discriminated on the basis of sex. *Id.* at 464.

connection must be shown in order to consider the NCAA a state actor.¹⁵³ Although a prerequisite to suit, it seems an insurmountable task to show that the NCAA is a state actor.

The only gleam of light the *Tarkanian* decision provided to student-athletes denied due process is its suggestion that they may be able to enjoin public universities from enforcing NCAA penalties.¹⁵⁴ Student-athletes may still be able to seek equitable relief from the judiciary against the institution, which acts at the NCAA's behest.¹⁵⁵

B. *The Need for a Protected Interest*

A second hurdle for plaintiffs arguing for a right of due process is the need to establish that action taken deprives the individual of a protected interest.¹⁵⁶ Since the NCAA is not a state actor, only student-athletes who can establish that their school has engaged in state action and that they have been deprived of a protected interest will be able to claim a right to due process protection. This is a difficult obstacle to overcome.¹⁵⁷ For a student-athlete, the interests at stake in eligibility determinations are substantial.¹⁵⁸ The many interests that could be asserted complicate the issue.¹⁵⁹ For example, a student-athlete might claim an interest in the following: "athletic participation," "an opportunity to develop skills marketable to professional teams," "exposure that could result in professional opportunities," or an "athletic scholarship."¹⁶⁰ A recent case in Texas helps to illustrate the

153. *Id.* at 468. The Court decided that the fact that the NCAA received dues from its federally funded members is not sufficient to subject it to Title IX requirements. *Smith*, 525 U.S. at 468.

154. *See id.*

155. *See id.*

156. Brian L. Porto, *Balancing Due Process and Academic Integrity in Intercollegiate Athletics: The Scholarship Athlete's Limited Property Interest in Eligibility*, 62 IND. L.J. 1151 (1987). Porto states:

Courts have consistently expressed doubts about the existence of a property right, refused to resolve that issue in the case at hand, and then proceeded to the next step in due process analysis by affirmatively stating that the NCAA's procedures in that instance were sufficient to afford the plaintiff due process. The challenge for student athletes is to demonstrate an entitlement to eligibility and the withdrawal of that eligibility without due process. The Supreme Court ruled in *Board of Regents v. Roth* that: "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it."

Id. at 1158-59 (citing *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972)).

157. *Id.* at 158.

158. *Id.* at 151.

159. Porto, *supra* note 156, at 1158.

160. *Id.* at 1151. Porto points out that courts "have heard four rationales for the existence of a property right to continued eligibility." *Id.* at 1159. Porto concludes that "[s]erious flaws plague

difficult burden a plaintiff must meet.

*National Collegiate Athletic Association v. Yeo*¹⁶¹ demonstrates how difficult it is for a student-athlete to establish that she has a protected interest in continued athletic eligibility, which would entitle her to due process protection.¹⁶² Joscelyn Yeo is a former swimming star of the University of Texas at Austin.¹⁶³ After she transferred from the University of California-Berkeley, UT-Austin declared Yeo ineligible to compete in the 2002 NCAA championships.¹⁶⁴ UT-Austin did this in order to satisfy the NCAA requirement that Yeo sit out for a year after transferring.¹⁶⁵ Yeo initially obtained a temporary restraining order against the NCAA that allowed her to compete.¹⁶⁶ UT-Austin and the NCAA filed suits against Yeo after the meet to declare her retroactively ineligible for the competition.¹⁶⁷ Yeo argued that her professional athletic reputation would be severely damaged by both Texas and the NCAA through no fault of her own.¹⁶⁸

In *NCAA v. Yeo*, the court analyzed Yeo's situation under the Texas Constitution in the same way a Fourteenth Amendment Due Process Clause case would be analyzed and held that UT-Austin violated Yeo's due process rights.¹⁶⁹ Yeo was awarded a permanent injunction and was able to compete.¹⁷⁰ However, the court made clear that its ruling was applicable only to Yeo's unique situation.¹⁷¹

economic, educational, scholarship per se rules but contractual rationale supports property interest in eligibility." *Id.* at 1161. The contractual rationale "maintains that a property right to athletic eligibility is created by the contractual provisions of the athletic scholarships." *Id.* at 1160.

161. *NCAA v. Yeo*, 114 S.W.3d 584 (Tex. 2003).

162. The court referred to Yeo's claim as a "protected interest" rather than as a "liberty" or "property" interest. *Yeo*, 114 S.W.3d at n.10.

163. See John Maher, *Court Rules UT Violated Rights of Ex-Longhorn*, UTexas.edu (July 12, 2003), at <http://www.utexas.edu/opa/news/headlinenews/03news/0713.pdf> (last visited Jan. 29, 2005).

164. *Yeo*, 114 S.W.3d at 590.

165. *Id.* Yeo sat out only two meets while confusion over the eligibility rules was examined. See Maher, *supra* note 163.

166. Maher, *supra* note 163.

167. See Kyu-Heong, *Texas Swimmer Yeo Gets Support for Eligibility Fight*, THE DAILY TEXAN, July 23, 2003, available at <http://www.collegesports.com/sports/cswim/uwire/072303aaa.html> (last visited Jan. 29, 2005).

168. *Id.*

169. *Yeo*, 114 S.W. 3d at 601.

170. Maher, *supra* note 163.

171. *Yeo*, 114 S.W.3d at 601. The court said that although:

not every student-athlete has a protected interest in their athletic reputation . . . when an athlete such as Joscelyn Yeo enters intercollegiate competition with an already established athletic reputation earned in the context of another country's amateur athletic program, there may exist a previously established protected interest. The member institutions of the NCAA that are also government actors, such as UT-Austin,

The court upheld Yeo's argument that her reputation in her native Singapore would be damaged by her removal from the team.¹⁷² Yeo had represented Singapore in two Olympic Games.¹⁷³ The court stressed that Yeo's lack of fault for her eligibility problems was an important factor in its decision.¹⁷⁴ The court also stressed that Yeo's established career prior to swimming in college vested more of a protected interest in her athletic eligibility.¹⁷⁵ The court explained, "[b]ecause Yeo's rights were being determined with little or no input on her part by an institution faced with multiple competing interests in dealing with NCAA eligibility questions, Yeo's due process rights were compromised."¹⁷⁶ The court continued, "[t]his does not mean that UT-Austin was required to give Yeo a formal hearing; rather, she should have been afforded notice and an opportunity to communicate with officials through an informal give and take before the determinative decision was made."¹⁷⁷ The court also declared, "[t]he member institutions of the NCAA that are also government actors, such as UT-Austin, have an obligation to protect that interest in making eligibility determinations."¹⁷⁸ Thus, since Joscelyn Yeo met the difficult burden of proving she had a protected interest in continued athletic eligibility, the court determined that she was entitled to more procedural due process protections than are usually afforded student-athletes when eligibility determinations are being made by member institutions pursuant to NCAA rules.

Student-athletes without the well-established athletic reputation of Joscelyn Yeo may also be able to assert a valid interest if they have been awarded scholarships. For many of these recipients, the scholarship not only guarantees a spot on the team, but also may be the only way to attend college at all.¹⁷⁹ Throughout the 1970s and 1980s, lawsuits were filed by student-athletes who were declared ineligible.¹⁸⁰

have an obligation to protect that interest in making eligibility determinations.

Id.

172. *Id.* at 596.

173. *Id.* at 587.

174. *Id.* at 592.

175. *Yeo*, 114 S.W.3d at 600.

176. *Id.*

177. *Id.* (citing *Goss v. Lopez*, 419 U.S. 565, 578 (1975)).

178. *Id.* at 601.

179. *See Porto*, *supra* note 156, at 1160.

180. *See Porto*, *supra* note 156, at 1151 (citing *Regents of Univ. of Minn. v. NCAA*, 560 F.2d 352 (8th Cir. 1977), *cert. dismissed*, 434 U.S. 978 (1977); *Howard Univ. v. NCAA*, 510 F.2d 213 (D.C. Cir. 1975); *Parrish v. NCAA*, 577 F. Supp. 356 (Ariz. 1983) *Hall v. Univ. of Minn.*, 530 F. Supp. 104 (D. Minn. 1982); *Behagen v. Intercollegiate Conference of Faculty Representatives*, 346 F. Supp. 602 (D. Minn. 1972); *NCAA v. Gillard*, 352 So. 2d 1072 (Miss. 1977)). Plaintiffs in these

These students had all received scholarships and asserted that, under the Fourteenth Amendment, they had a property right to continued eligibility.¹⁸¹ They claimed that, as a result of this property right, student-athletes must receive due process prior to being declared ineligible.¹⁸² One theory suggests that the property interest in continued eligibility arises, under the Constitution, "from the contractual nature of athletic scholarships."¹⁸³ According to that theory, the awardee is entitled to educational and financial benefits, and it is this entitlement that creates the property interest.¹⁸⁴ While this is an intriguing theory, and two federal courts in the 1970s did find an athletic scholarship to be a contract rather than a gift, whether modern courts will accept the argument is uncertain.¹⁸⁵

Many courts have held that "participation in athletics is not a property right protected by the Fourteenth Amendment."¹⁸⁶ For example, in *Howard University v. NCAA*,¹⁸⁷ the D.C. Circuit expressed

cases asserted entitlement to continued athletic eligibility because the due process clause of the Fourteenth Amendment gave them this right. *Id.*

181. Porto, *supra* note 156, at 1151.

182. *Id.* The rationales presented by plaintiffs as bases for a property interest in their athletic eligibility were:

- (1) athletic scholarship recipients possess significant economic interests in preparing for careers in professional sports;
- (2) continued athletic participation is an important part of the student athlete's pursuit of an education and that pursuit is a protected property right;
- (3) the material benefits of athletic scholarships create property interests in continued athletic eligibility; and
- (4) athletic scholarships are contracts whose provisions create property interests in the material benefits of the awards and in the awardees' expectations to compete.

Porto, *supra* note 156, at 1151.

183. *Id.* at 1153.

184. *Id.* at 1153-54. Porto states, "Only this contractual rationale can balance due process protection for the student athletes with academic integrity for the universities." *Id.* at 1154. Porto also asserts that "in order to achieve this balance, the process which is due the student athletes should be more substantial when ineligibility results from a violation of a coach's training rules or of an NCAA prohibition than when it results from academic failure." Porto, *supra* note 156, at 1154.

185. *Id.* at 1152-53. Porto notes that using an economic rationale to create a property interest for the right to continued academic eligibility could "expand due process in academic ineligibility cases to a point where athletes were exempted from academic requirements." *Id.* at 1162. Porto describes the situation in which federal courts concluded that scholarships are contracts: "Two federal courts concluded during the 1970's that athletic scholarships are contracts, the terms of which are binding upon both the student athletes and their universities. These decisions departed from the traditional view, still espoused by the NCAA, that athletic scholarships are educational grants or gifts which lack the exchange enforceable promises necessary for a contract." Porto, *supra* note 156, at 1152-53 (discussing *Begley v. Corp. of Mercer Univ.*, 367 F. Supp. 908 (E.D. Tenn. 1973); *Taylor v. Wake Forest Univ.*, 191 S.E.2d 379 (N.C. Ct. App. 1972), *cert. denied*, 192 S.E.2d 197 (N.C. 1972)).

186. See *Kitchin*, *supra* note 4, at 73. The Fourteenth Amendment states in part: "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person . . . the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

187. 510 F.2d 213 (D.C. Cir. 1975).

doubts as to whether individual student-athletes hold property interests that are entitled to due process protection.¹⁸⁸ The court did not have to hold on the question, however, because it concluded that the NCAA "complied adequately with any due process responsibilities it might have had."¹⁸⁹

Similarly, in *NCAA v. Gillard*,¹⁹⁰ a football player who was declared ineligible claimed that he did not receive due process because he was never sufficiently heard by his institution.¹⁹¹ The court concluded that the right to participate in athletics is not a protectable property right.¹⁹² Further, in *Conard v. University of Washington*,¹⁹³ the Supreme Court of Washington held that, because student-athletes do not have a protected property interest in the renewal of their scholarships, they are not entitled to due process protection.¹⁹⁴

In *Colorado Seminary v. NCAA*,¹⁹⁵ a case dealing with a university's failure to declare ice hockey players ineligible, it seemed as if there might be hope for scholarship student-athletes.¹⁹⁶ Although the court did not acknowledge that all student-athletes should be afforded due process, it concluded that due process could not be invoked because the students did not lose their scholarships.¹⁹⁷ This

188. *Id.* at 222. The NCAA found that certain members of the university's soccer team participated in competition while ineligible and imposed sanctions against the university. *Id.* at 214. Following NCAA rules, the university then imposed sanctions against the student-athlete. The university sued the NCAA, claiming that the NCAA's enforcement procedures violated its due process rights. *Id.* at 214-15.

189. *Howard Univ.*, 510 F.2d at 222. The court reasoned that the university was given full notice of the charges against it, had the right to defend its action before the Council, and had the chance to appeal to the NCAA Convention. *Id.* at 222. Further, the student-athlete had the opportunity to appeal on his own behalf but chose not to. *Id.* According to the court, these facts suggest that the NCAA satisfied its obligation to provide due process. *Id.*

190. 352 So. 2d 1072 (Miss. 1977).

191. *Id.* at 1073. The football player in *Gillard* was declared ineligible after one season by his institution after the Committee on Infractions found he had received an improper benefit. *Id.* at 1078.

192. *Id.* at 1082. The Supreme Court of Mississippi stated that *Gillard's* rights were of utmost importance to everyone involved, and, therefore, *Gillard* was adequately provided with due process. *Id.*

193. *Conard v. Univ. of Wash.*, 834 P.2d 17, 22 (Wash. 1992).

194. *Id.* at 26. This case involved two football players from the University of Washington who sued the university for breach of contract. They claimed this breach was a result of the university's decision not to renew their scholarships because of the student-athletes' alleged misconduct. *Id.* at 15-16. At least one commentator has suggested that this decision "simply reinforces the imbalance of power that exists between the student-athlete and the university." Daniel Nestel, *Athletic Scholarships: An Imbalance of Power Between the University and the Student-Athlete*, 53 OHIO ST. L. J. 1401, 1416 (1992).

195. 417 F. Supp. 885 (D. Colo. 1976), *aff'd*, 570 F.2d 320 (10th Cir. 1978).

196. *Id.*

197. *Id.* at 895. The court emphasized that the Fourteenth Amendment "is not an absolute panacea for all harms." *Id.* at 894.

case illustrates that courts might recognize the protected property interest some student-athletes have in their scholarships, and, if strong arguments can be made, courts might be even more willing to find a protectable interest.¹⁹⁸ However, only one federal court has found that there is a property right to continued education.¹⁹⁹

For some students, loss of an athletic scholarship could mean the loss of a college education.²⁰⁰ Often, once students are declared ineligible, they will lose their scholarships.²⁰¹ This may give rise to eligibility itself being viewed as a valid property interest.²⁰²

Eligibility must be recognized as a constitutionally protected right if student-athletes are to be guaranteed that their eligibility will not be revoked without due process of the law.²⁰³ Being eligible to participate in college athletics is vital to the welfare of many student-athletes, whether that welfare is financial or emotional.²⁰⁴ The NCAA claims to exist for the welfare of student-athletes.²⁰⁵ Yet the NCAA's current procedures do not provide sufficient procedural safeguards, and without the determination that eligibility is a valid property interest, the athletic careers of many student-athletes may be in jeopardy without such individuals having adequate opportunities to defend themselves.²⁰⁶

C. Attempts to Deal with the Tarkanian Decision

Legislators have also found the NCAA's enforcement procedures unsatisfactory.²⁰⁷ In response to *Tarkanian*, several states enacted laws mandating that student-athletes be provided due process in NCAA proceedings, including Florida, Illinois, Nevada, and Nebraska.²⁰⁸ Opponents of these laws argue that they are unconstitutional and harm

198. See *id.* at 895. Stating that due process protection could not be invoked since the students did not lose their scholarships suggests that due process protections could be invoked if the students lost their scholarships.

199. See *Hall v. Univ. of Minn.*, 530 F. Supp. 104, 107 (D. Minn. 1982) (finding a property right to continued education).

200. Broyles, *supra* note 34, at 528.

201. *Id.* at 527.

202. *Id.*

203. *Id.* at 528.

204. Broyles, *supra* note 34, at 528. Broyles states, "[M]y purpose is to recognize that there are significant emotional, physical, and economic interests that are valuable and should be considered at risk in the NCAA enforcement process." *Id.*

205. See discussion *supra* notes 6-7 and accompanying text.

206. Broyles, *supra* note 34, at 528-29.

207. See generally Miller, *supra* note 113 (discussing several states that have adopted legislation requiring due process in NCAA enforcement proceedings).

208. *Id.* at 872.

the NCAA's ability to enforce its regulations.²⁰⁹ Opponents also argue that these laws create inconsistent regulation of interstate commerce and, therefore, may be invalidated under the Commerce Clause.²¹⁰ The NCAA has even suggested that schools in states that pass such legislation might be subject to the loss of NCAA membership.²¹¹ This has been defended on the ground that it would be impossible for these schools to comply with both standards.²¹² While these criticisms may be true, the solution is obvious. The NCAA is responsible for changing its standards to provide student-athletes with due process, in accordance with the desires of the American people as expressed through the democratic process. These laws send the message that the NCAA needs to provide more due process protection.

These statutes apply to the situation where the NCAA investigates the member college to determine if it is in compliance with its rules.²¹³ They also provide more protections to individuals directly involved with a possible violation by requiring, for example, that the NCAA provide notice to the individual that an investigation will take place.²¹⁴ The Florida statute was the most specific in this regard.²¹⁵ The Florida statute required a formal hearing when a violation of an eligibility rule was alleged.²¹⁶ The statute also provided for broader discovery rights for the alleged violator:²¹⁷ he or she must receive notice of the

209. *Id.* at 900-04.

210. *Id.* at 900.

211. Miller, *supra* note 113, at 889-90.

212. *Id.* at 890.

213. *Id.* at 891.

214. *Id.*

215. Miller, *supra* note 113, at 891. Miller explains, "The Florida statute requires the NCAA to provide notice to an interviewee once the NCAA suspects the individual of violating its rules." *Id.* at 891. Further, "individuals in Florida are entitled to counsel and to a complete recording and free transcript, prepared by a court reporter, of the interview," and "any information obtained in violation of the Act may be suppressed by the interviewee." *Id.* at 891-92. Also, "a Florida interviewee has the right to disclosure of all relevant facts to the same degree as a criminal defendant," and "hearings must begin within twelve months of notice of investigation to the institution." *Id.* at 892-93.

216. Miller, *supra* note 113, at 895 (citing FLA. STAT. § 240.5341(3) (1991)). The civil rules of evidence applied to this hearing. *Id.* "The Florida statute further provides that the hearing will be open to the public unless either a party charged with misconduct or the institution objects. By contrast, current NCAA proceedings are not open, and each case is treated as confidential until completed." *Id.* at 895-96.

217. *Id.* at 893. Miller explains:

Individuals in Florida are also entitled to the same rights of discovery as those available in civil or criminal cases. In an NCAA proceeding, the respondent may contact any individual upon whose statement the NCAA staff will rely. The respondent may also review all documentary evidence to be relied upon by the staff. If facts are in dispute, further joint interviews are conducted.

Miller, *supra* note 113, at 893. Miller expresses doubt about the ability to provide such broad

suspected infraction two months before a formal hearing at which he or she could examine witnesses.²¹⁸ Further, the findings and imposed penalties of the NCAA's Committee on Infractions were subject to review by a Florida court.²¹⁹ These are only a few of several changes proposed by the Florida legislature that would allow respondents in Florida to "enjoy greater rights and protections than those in a state without a due process requirement."²²⁰

In Nevada, the alleged violator was permitted to confront all witnesses, to have all written statements signed under oath, to have an impartial officer preside at the hearing, and to have a Nevada court enjoin an NCAA proceeding that violated statutory provisions.²²¹ Further, the statute prevented the NCAA from expelling Nevada members.²²²

In challenging these statutes, the NCAA argued that mandates in the state statutes and the NCAA bylaws for procedures used in

discovery stating, "until the NCAA is given the ability to compel discovery, its procedures cannot assure the same degree of fairness provided by the courts." *Id.*

218. *Id.* at 894. Miller explains:

The notice must include the date and time of the hearing and specify the charges and possible penalties and must also be delivered to the institution. Current NCAA procedures do not specify an advance notice provision, but the time of the hearing is set by agreement between the Committee on Infractions and the institution. If the allegations potentially affect individuals, the institution must inform the individuals that they have the opportunity to submit information orally or in writing. The institution must also notify the individual of the right to participate in the hearing with personal legal counsel. The advantage of the Florida provision is that it specifies a minimum time period for preparation. In addition, the Florida statute places more of the notification burden on the NCAA.

Id. at 894-95.

219. Miller, *supra* note 113, at 898. Miller explains that another difference between the Florida act and current NCAA procedure is the method of appeal. *Id.* "In Florida, any penalty imposed on the institution or imposed on an individual by direction of the NCAA is subject to review in the circuit courts. In NCAA proceedings, members formerly appealed to the NCAA Council." *Id.* at 898.

220. *Id.* at 899. Other differences mentioned by Miller include: the ability of respondent's counsel to interrogate witnesses under Florida law; the ability of respondents in Florida to "suppress evidence resulting from interrogations that abridge the rights of full disclosure and discovery;" Florida's requirement that the NCAA "provide a transcript prepared by a court reporter of the interrogation" at its own expense; the Florida requirement that "findings made by an association. . . be supported by clear and convincing evidence;" and Florida's requirement that "penalties imposed by an association. . . be reasonable in light of the violation and . . . be comparable to penalties applied for previous similar violations." Miller, *supra* note 113, at 896-98.

221. NEV. REV. STAT. 398.155 (2004). "Proceedings: General requirements. PROVISIONS UNCONSTITUTIONAL. —The provisions of NRS 398.155 through 398.255 violate Article I, Section 8, Clause 3 and Article I, Section 10 of the United States Constitution and are invalid and unenforceable against the [NCAA]." *Id.*

222. *See id.*

eligibility proceedings were inconsistent.²²³ The Association argued this would cause it to provide procedural protections to some that it denied to others.²²⁴ The Association further asserted that an association that lacks the power to require witness compliance could not guarantee the right to confront and interrogate witnesses.²²⁵

In the 1992 decision of *NCAA v. Miller*,²²⁶ a federal district court in Nevada held that the Nevada law was unconstitutional because it violated the Commerce and Contract Clauses of the United States Constitution.²²⁷ In addition to finding the law was a direct regulation of commerce, the court found that, in exchange for the benefits of NCAA membership, member institutions agree to abide by the NCAA Constitution and that their contractual interest was protected.²²⁸ The Ninth Circuit affirmed without reaching the Contract Clause issue, and concluded that the statute was an impermissible regulation of interstate commerce.²²⁹ In *NCAA v. Roberts*,²³⁰ the Florida district court relied on the district court's decision in *Miller* to declare the Florida statute unconstitutional on Contract Clause grounds.²³¹ The court relied on the

223. See Robin Green Harris, *State Approach Has Constitutional Flaw*, NCAA.org (Oct. 27, 2003), at <http://www.ncaa.org/news/2003/20031027/editorial/4022n08.html> (last visited Jan. 29, 2005).

224. *Id.*

225. *Id.*

226. *NCAA v. Miller*, 795 F. Supp. 1476, 1484 (D. Nev. 1992).

227. *Id.* at 1488.

228. *Id.* at 1486.

229. 10 F.3d 633 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1543 (1994). The Ninth Circuit reasoned:

We appreciate Nevada's interest in assuring that its citizens and institutions will be treated fairly. However, the authority it seeks here goes to the heart of the NCAA and threatens to tear that heart out. Consistency among members must exist if an organization of this type is to thrive, or even exist. Procedural changes at the border of every state would as surely disrupt the NCAA as changes in train length at each state's border would disrupt a railroad. It takes no extended lucubration to discover that. If the procedures of the NCAA are "to be regulated at all, national uniformity in the regulation adopted, such as only Congress can prescribe, is practically indispensable. . ." In short, when weighed against the Constitution, the Statute must be found wanting. It violates the Commerce Clause.

Miller, 10 F.3d at 640 (quoting *Southern Pac. Co. v. Arizona*, 352 U.S. 764, 771 (1945)).

230. *NCAA v. Roberts*, 1994 WL 750585, *1 (N.D. Fla. Nov. 8, 1994) (citing *NCAA v. Miller*, 10 F.3d 633, 638-40 (9th Cir. 1993)).

231. *Id.* The discussion of the Nevada district court regarding the Contract Clause "confirmed that NCAA members have a contractual relationship with the NCAA which is sufficient to trigger review under the Contract Clause." Kitchin, *supra* note 4, at 78. The court reasoned that "in exchange for the benefits that flowed from NCAA membership, these institutions agree to abide by the provisions of the NCAA constitution, including the enforcement procedures. That agreement, although perhaps not a conventional contract, provides the basis for an actionable Contract Clause claim." Kitchin, *supra* note 4, at 78.

Ninth Circuit's opinion in *Miller* to also declare the statute unconstitutional on Commerce Clause grounds.²³² The result of these decisions has been the abandonment of similar proposed state legislation,²³³ but some state laws remain in place.

The Nebraska statute requires the NCAA to "comply with due process of law as guaranteed by the Constitution of Nebraska and the laws of Nebraska."²³⁴ The Illinois law states:

All parties to any type of contract in Illinois are entitled to certain protections under law in the making of contracts and the resolution of disputes under those contracts. The duty of the State and its institutions to protect its citizens, institutions of higher learning, businesses, and other entities is especially strong where the parties have greatly unequal bargaining power and one party is essentially a monopoly providing a needed product, service, or relationship which cannot be obtained elsewhere.²³⁵

While these laws remain on the books,²³⁶ it seems unlikely they will survive judicial scrutiny if challenged.

Thus the only way to guarantee the necessary procedural safeguards is for Congress to enact federal legislation.²³⁷ Congress has the power to act pursuant to its Commerce Clause power²³⁸ and should do so since other claims, including antitrust and contract arguments, have failed.²³⁹ Congress must act if student-athletes are to receive due process when their eligibility status is at stake.

IV. THE STORY OF MAURICE CLARETT

Perhaps the best way to illustrate the NCAA's failure to provide

232. *Roberts*, 1994 WL 750585, *1.

233. *Kitchin*, *supra* note 4, at 78. *Kitchin* points out that most proposed state legislation similar to the Florida and Nevada legislation has been abandoned. *Id.*

234. NEB. REV. STAT. § 85-1203 (2004).

235. 110 ILL. COMP. ANN. STAT. 25/2-(a) (West 2004). The Illinois state law also requires that: (1) findings of NCAA proceedings must be supported by clear and convincing evidence, *id.* at 25/4-(b); (2) a party subject to sanctions has a right to interrogate and cross-examine witnesses, *id.* at 25/4-(d); (3) the Illinois rules of evidence applicable at civil trials are binding, *id.* at 25/4-(e); and (4) all proceedings must be open to the public unless any party charged with misconduct objects, *id.* at 25/4-(h).

236. *See supra* notes 233-34.

237. *Thompson*, *supra* note 118, at 1683.

238. *Id.* *Thompson* states, "Federal legislation seems necessary if any meaningful safeguards are to be implemented to protect individual procedural due process rights. Most likely, only Congress has the constitutional authority to regulate an interstate private organization composed of state government institutions such as the NCAA." *Id.*

239. *Bianchi & Gadol*, *supra* note 13 at 155.

due process in the enforcement of its eligibility rules is through the predicament of a well-known college football player who helped Ohio State to capture its first national championship in more than three decades.²⁴⁰

A. *The Facts*

Maurice Clarett was the first freshman in Ohio State history to open the football season as a starting running back in forty-three years.²⁴¹ But in July 2003, rumors abounded regarding the special treatment Clarett received in the classroom because he was a star football player.²⁴² Around the same time, NCAA investigators inquired about several gifts Clarett had supposedly received.²⁴³ Clarett was also suspected of falsifying a police report.²⁴⁴ He later admitted to significantly overestimating the value of merchandise stolen from a car he was driving.²⁴⁵

Investigation of Clarett's behavior led Ohio State to sideline him at the end of July until a decision could be reached on the status of his eligibility.²⁴⁶ OSU conducted the investigation after the NCAA had

240. See Stephen A. Smith, *Clarett's College Career May Be Over*, PHILA. INQUIRER, Sept. 3, 2003, available at <http://www.philly.com/mld/inquirer/2003/09/04/sports/6677103.htm> (last visited Jan. 29, 2005).

241. Tom Farrey, *Decision on Eligibility Will Have to Wait*, ESPN.com (Jan. 14, 2004), at <http://sports.espn.go.com/ncf/news/story?id=1706696> (last visited Jan. 29, 2005). Clarett also ran the most yards ever for an Ohio State freshman. *Id.*

242. NBC4Columbus, *Clarett Received Special Treatment In Classroom* (July 12, 2003), at <http://www.nbc4columbus.com/sports/2328958/detail.html> (last visited Jan. 29, 2005). A report published by the *New York Times* alleged that Clarett did not take the same exams as other students in one of his classes. *Id.* The report claimed that Clarett was given oral exams instead of written exams. *Id.*

243. NBC4Columbus, *Geiger: NCAA Has Made Inquiries About Clarett* (July 15, 2003), at <http://www.nbc4columbus.com/sports/2332744/detail.html> (last visited Jan. 29, 2005). NCAA investigators asked Clarett about several gifts, some of which may have come from LeBron James, the Cleveland Cavaliers rookie. *Id.* Clarett also accepted thousands of dollars in benefits from Robert Dellimuti, a caterer near Clarett's hometown, including a cell phone paid for by Dellimuti. See Tom Farrey, *Scrutiny Grows Over Clarett's Benefactor*, ESPN.com (Feb. 5, 2004), at <http://sports.espn.go.com/ncf/news/story?id=1727067> (last visited Jan. 29, 2005). Clarett attempted to conceal these gifts from NCAA investigators. *Id.*

244. NBC4Columbus, *Clarett's Attorneys File 'Not Guilty' Plea* (Sept. 16, 2003), at <http://www.nbc4columbus.com/sports/2486562/detail.html> (last visited Jan. 29, 2005). Clarett was charged with filing an exaggerated theft report after a car that he borrowed from a dealership was broken into. *Id.* The report stated that thousands of dollars worth of cash and stereo equipment was taken. *Id.*

245. Rusty Miller, *Ohio State's Clarett May Sit Entire Season*, twincities.com (Sept. 4, 2003), at <http://www.twincities.com/mld/twincities/2003/09/01/sports/6676145.htm> (last visited Jan. 29, 2005).

246. NBC4Columbus, *Clarett Runs While Buckeyes Practice* (Aug. 8, 2003), at <http://www.nbc4columbus.com/sports/2390067/detail.html> (last visited Jan. 29, 2005).

informed OSU that it would be conducting its own investigation.²⁴⁷ Clarett was not permitted to participate in preseason football camp or in team picture day.²⁴⁸ At this point, the NCAA had not offered a timetable as to when it might complete its investigation.²⁴⁹

In August 2003, the university banned Clarett from team activities until questions about his eligibility were resolved by the NCAA.²⁵⁰ The following week Clarett was put on Ohio State's scout team.²⁵¹ By then, because of his uncertain eligibility status, Clarett had missed the first twenty-three preseason practices.²⁵² Ohio State subsequently announced that Clarett would be suspended for multiple games but would be allowed to practice with the team.²⁵³

Although he remained on scholarship, Clarett was told in early September that he would no longer be able to practice with the team.²⁵⁴ In fact, Clarett was told that he would not play for the "foreseeable future."²⁵⁵ At the time, Ohio State Athletic Director, Andy Geiger, said that Clarett was "being investigated because of possible violations of NCAA bylaws 10 and 12."²⁵⁶ These bylaws deal with ethical conduct

247. See *supra* notes 64-67 and accompanying text (explaining why Ohio State began an investigation).

248. NBC4Columbus, *Is Sidelineing Clarett the Right Decision?* (Aug. 1, 2003), at <http://www.nbc4columbus.com/sports/2374168/detail.html> (last visited Jan. 29, 2005). It has been suggested that taking Clarett off the field protects the team. *Id.* If Clarett were to play and was subsequently found guilty of NCAA violations, Ohio State could be forced to forfeit the games in which he played. *Id.*

249. See *Clarett Runs While Buckeyes Practice*, *supra* note 246.

250. See *id.*

251. NBC4Columbus, *New On The OSU Scout Team: Maurice Clarett* (Aug. 26, 2003), at <http://www.nbc4columbus.com/sports/2434417/detail.html> (last visited Jan. 29, 2005). As part of the scout team, Clarett's job was to play the role of upcoming opponents while the Buckeyes practiced. *Id.*

252. *Id.* Ohio State coach, Jim Tressel, admitted that the reason Clarett was kept out of practice was because of his uncertain eligibility status. *Id.*

253. *New On The OSU Scout Team: Maurice Clarett*, *supra* note 251. Clarett's multiple game suspension was the result of his role in an exaggerated theft report. Following this suspension, Ohio State officials planned to meet with the NCAA to determine Clarett's penalty. The penalty could have ranged from his then-current multiple game suspension up to permanent ineligibility. See *id.*

254. See NBC4Columbus, *Geiger Announces Clarett's One-Year Suspension* (Sept. 10, 2003), at <http://www.nbc4columbus.com/sports/2468541/detail.html> (last visited Jan. 29, 2005). Clarett's suspension was the result of a recommendation to the NCAA. *Id.* The recommendation also included "that Clarett could be reinstated to the team by next season." *Id.* Preconditions to Clarett's reinstatement would involve Clarett making restitution for financial benefits he had received. *Id.* Clarett would be able to do this by making a donation to the charity of his choice. *Id.*

255. NBC4Columbus, *Geiger: Clarett Won't Play In 'Foreseeable Future': Tailback to Miss 'Significant' Number of Games* (Sept. 2, 2003), at <http://www.nbc4columbus.com/sports/2449372/detail.html> (last visited Jan. 29, 2005).

256. *Id.*

and amateurism.²⁵⁷ Geiger also said that the university had difficulty finishing a report it was required to compile in response to the NCAA's allegations against Clarett.²⁵⁸ Clarett was later found guilty by OSU of fourteen violations of the ethical-conduct bylaw and two violations of receiving preferential treatment or benefits because he is an athlete.²⁵⁹ A criminal investigation into the false police report Clarett filed was also proceeding.²⁶⁰

Later in September, Geiger announced that Ohio State had recommended to the NCAA that Clarett be suspended for one year, but that he be allowed to keep his scholarship.²⁶¹ The university expressed hope that the NCAA would allow Clarett to play the following year.²⁶²

One week after Ohio State announced that Clarett would be suspended for the entire 2003 season, Clarett filed a complaint against the university.²⁶³ In the complaint, Clarett sought information about when the inquiry into his conduct became a criminal investigation.²⁶⁴ Clarett also sought information about individuals from Ohio State who had offered him guidance after the police report was filed.²⁶⁵ The complaint alleged that "[t]he university, by withholding information, subjected Clarett to prosecution and possibly deprived him of his

257. *Id.* NCAA Bylaw 10.d states, "Unethical conduct by a prospective or enrolled student-athlete. . . may include but is not limited to the following: knowingly furnishing the NCAA or the individual's institution false or misleading information concerning the individual's involvement in or knowledge of matters relevant to a possible violation of an NCAA regulation." *Id.*

258. *Geiger: Clarett Won't Play In 'Foreseeable Future, supra* note 255.

259. *Geiger Announces Clarett's One-Year Suspension, supra* note 254. Ohio State athletic director Andy Geiger stated that "the NCAA penalty for violating Bylaw 12 is sitting out at least 50 percent of the season." *Id.* Further, Geiger stated that "the penalty for violating Bylaw 10 also equaled at least 50 percent of the season." *Id.*

260. *Geiger Announces Clarett's One-year Suspension, supra* note 254. City prosecutor Steve McIntosh told reporters that if Clarett was found guilty of falsifying a police report, he would be forced to pay a \$1,000 fine and be faced with six months of jail time. *Id.*

261. *Id.*

262. *See Geiger Announces Clarett's One-year Suspension, supra* note 254. Regarding Clarett's reinstatement, athletic director Andy Geiger said, "We hope the NCAA considers the suspension for this season to be sufficient. More importantly, we hope that Maurice will remain in school to pursue his degree, and that conditions will warrant our application for reinstatement to play Buckeye football next season." *Id.*

263. NBC4Columbus, *Clarett Files Lawsuit Against Ohio State* (Sept. 19, 2003), at <http://www.nbc4columbus.com/sports/2496793/detail.html> (last visited Jan. 29, 2005). This was a "discovery-only" lawsuit according to Clarett's attorneys who planned to "take sworn statements from university administrators to see if they need to proceed with a civil lawsuit." *Id.*

264. *Id.*

265. *Id.* Clarett's lawyers were especially interested in every statement made by Geiger to Clarett "concerning how the tailback should respond to inquiries concerning the police report." *Clarett Files Lawsuit Against Ohio State, supra* note 263.

property rights under the U.S. Constitution.”²⁶⁶ The purpose of this complaint was to determine whether Clarett should file suit against the university.²⁶⁷

In early October 2003, Clarett filed a federal lawsuit accusing Ohio State of “violating his privacy rights by giving police information from an NCAA investigation.”²⁶⁸ Clarett sought at least \$2.5 million in damages from the university.²⁶⁹ Clarett sought a court order “preventing prosecutors from using the information as evidence in a misdemeanor case accusing [him] of filing a false police report.”²⁷⁰

Ohio State declared Clarett ineligible because it feared the imposition of NCAA sanctions for allowing an ineligible athlete to

266. NBC4Columbus, *Geiger: Legal Action Won't Be Held Against Clarett* (Sept. 20, 2003), at <http://www.nbc4columbus.com/print/2499359/detail.html> (last visited Jan. 29, 2005).

267. *Id.*

268. Associated Press, *Clarett Files \$2.5 Million Federal Suit Against OSU* (Oct. 11, 2003), available at <http://www.centralohio.com/ohiostate/stories/20031011/football/433781.html> (last visited Jan. 29, 2005).

269. *Id.*

270. *Id.* A few days later, Clarett also sued the National Football League (NFL), seeking to have an NFL rule that prevents players from entering the draft until they have been out of high school for three years thrown out. *Clarett v. Nat'l Football League*, 306 F. Supp. 2d 379 (S.D.N.Y. 2004). Clarett wanted to be declared eligible to enter the 2004 National Football League draft. NBC4Columbus, *Clarett Sues NFL Over Draft Eligibility Rule* (Sept. 23, 2003), at <http://www.nbc4columbus.com/print/2504857/detail.html> (last visited Jan. 29, 2005). Clarett claimed that the NFL rule violates antitrust laws because it is separate from the NFL's current collective bargaining agreement with its players union. *Clarett*, 306 F. Supp. 2d at 382. The complaint also claimed that the NFL has a monopoly over professional football and that the rule perpetuates the use of college teams as a farm system for the NFL. *Id.* at 408 n.181. The lawsuit made clear that Clarett believes that had he been eligible for the draft, he would have signed a contract for millions of dollars. *Id.* at 388 n.54. Specifically, the complaint alleged that it is “almost certain” Clarett would have been drafted in the first round. *Id.* The NFL publicly stated that Clarett's lawsuit would give it a chance to explain “the very sound reasons underlying [the NFL's] eligibility rule and the legal impediments to the claim that was filed.” *Clarett Sues NFL Over Draft Eligibility Rule, supra* (quoting NFL spokesman Greg Aiello).

On February 5, 2004, U.S. District Judge Shira A. Scheindlin ruled Clarett eligible for the draft. *Clarett*, 306 F. Supp. 2d at 410-11. On April 19, 2004 a three-judge panel of the U.S. Court of Appeals for the 2nd Circuit stayed the lower court ruling. *Clarett v. Nat'l Football League*, 369 F.3d 124, 129-30 (2d Cir. 2004). On May 24, 2004, the Second Circuit ruled against Clarett making him ineligible for a supplemental draft. *Id.* at 143. The court said that federal labor policy allows NFL teams to set rules for when players can enter the league. *Id.* at 141. Clarett would have to wait for the 2005 draft. In October 2004, the Second Circuit rejected Clarett's request that his case be reheard by all eleven judges. Associated Press, *Appeals court won't rehear Clarett case* (Oct. 22, 2004), available at <http://sports.espn.go.com/espn/wire?section=nfl&id=1907396> (last visited Jan. 29, 2005). In January 2005, the Supreme Court denied Clarett's petition for certiorari. *Clarett v. Nat'l Football League*, 125 S. Ct. 1728 (2005); see also Associated Press, *Clarett asks U.S. Supreme Court to hear his case* (Jan. 6, 2005), available at <http://sports.espn.go.com/espn/wire?section=nfl&id=1961053> (last visited Feb. 3, 2005).

compete.²⁷¹ When Ohio State made eligibility determinations about Clarett, he took virtually no part in the investigative process.²⁷² As illustrated earlier, this is not legally problematic unless Clarett can establish that he has a property right in continued eligibility.²⁷³ Only after meeting this difficult challenge could Clarett assert that OSU violated his constitutional due process rights when it did not allow him to take a more active role during determinations of his eligibility.²⁷⁴

B. *The Lack of Due Process*

The procedures Ohio State used to reach its substantive results did not provide Maurice Clarett with the due process to which he should be entitled.²⁷⁵ Clarett never had a chance to be heard.²⁷⁶ Ohio State suspended Clarett from the team, when Clarett had not been found guilty on any accounts, and took no part in Ohio State's investigation.²⁷⁷ As the investigation progressed, Ohio State determined that Clarett should be declared ineligible even though Clarett had no say in the matter.²⁷⁸

The lawsuits Clarett filed are due to the inherent weakness in NCAA enforcement procedures, the way Ohio State implemented these procedures, and the related failure to provide due process during the investigation of Clarett's eligibility. Overall, the procedures in question have personal repercussions for student-athletes that go far beyond the denial of athletic eligibility.

Alan C. Milstein, the Clarett family attorney, has stated:

I've been a lawyer for 20 years. While no one ever says the justice system is perfect, at least it's a fair system of giving due process to all those involved. I was shocked to see what the process was with respect to the NCAA and Maurice Clarett. It was anything but fair, and anything but due process. In fact, we were told if we wanted to challenge the NCAA's

271. See *NCAA's Kangaroo Court: An Insult to All Student Athletes*, at <http://www.blackathlete.com/Blackbox/specialreport7.html> (last visited Jan. 29, 2005).

272. *Id.* In November 2004, Clarett finally spoke out. See Tom Friend, *My Side*, ESPN.com (Nov. 10, 2004), at <http://sports.espn.go.com/ncf/news/story?id=1919246> (last visited Jan. 29, 2005). Clarett claimed that he lied to NCAA investigators about gifts he received to protect Ohio State. *Id.* Clarett stated, "I thought [Tressel] would give me the NFL. I thought he'd say, 'You took from me and you didn't tell on me, so here's the NFL. He could have painted me as the first pick in the draft, as the world's greatest everything. He wound up selling me out.'" *Id.*

273. See *supra* notes 156-206 and accompanying text.

274. *Kangaroo Court: An Insult to All Student Athletes*, *supra* note 271.

275. *Id.*

276. *Id.*

277. *Id.*

278. See *id.*

findings, we would not have a hearing until the end of October. And that we had to accept the findings of OSU in order to get the punishment. How ridiculous is that?²⁷⁹

Milstein made this statement while Clarett was being investigated by both the NCAA and Ohio State.²⁸⁰ In fact, Clarett never would need to challenge NCAA findings because Ohio State declared him ineligible and, therefore, the NCAA did not have to decide whether Ohio State should have declared him ineligible.²⁸¹

Further, Scott Schiff, Clarett's attorney, has publicly stated he is troubled that only the school, and not an individual athlete such as Clarett, can appeal NCAA penalties.²⁸² As Schiff states, "The most important thing I think is that the inherent problem with the NCAA procedures is the lack of due process and the lack of any procedure for the student-athlete himself to appeal the NCAA findings."²⁸³ Therefore, even if Ohio State had not declared Clarett ineligible, and a hearing was held before the NCAA where it was determined that Ohio State should have declared Clarett ineligible, Clarett himself would not have been able to appeal the finding.

Throughout this investigation, the NCAA and Ohio State did not give Clarett specific information about which of his activities were under scrutiny. Even worse perhaps, Clarett was given no timeline for the inquiries that put his athletic career on hold. The heart of the matter is that Clarett had no input during any part of the investigation against him. Common decency suggests informing someone in Clarett's predicament of the charges against him and providing at least an approximation of when to expect a resolution. Moreover, Clarett should have received a hearing in front of an independent "judge" who likely would hold that Clarett should have played a larger role when Ohio State was determining whether Clarett should be eligible according to NCAA rules. While one would think due process mandates such consideration, Clarett is out of luck under current

279. Smith, *supra* note 240.

280. *Id.*

281. *Id.*

282. See *Clarett Suspended for 2003 Season for 16 NCAA Violations*, USA TODAY, Sept. 10, 2003, available at <http://www.usatoday.com/sports/college/football/bigten/2003-09-10-clarett-suspension-x.htm> (last visited Jan. 29, 2005). Schiff has stressed that Clarett was interested in "considering his options." *Id.* One of Clarett's options would be to transfer schools. *Id.* If Clarett were to choose this option, NCAA rules would require that he be declared ineligible, then the school would have to seek his reinstatement. *Clarett Suspended for 2003 Season for 16 NCAA Violations, supra.* Further, Clarett would have to sit out a year in order to play at another Division I-A school. *Id.*

283. *Id.*

Supreme Court interpretation.²⁸⁴

V. CONCLUSION

Maurice Clarett's situation is a pointed example of the consequences that can result from the NCAA's failure to provide member institutions with due process. If Ohio State had received more procedural safeguards during the NCAA's determination as to compliance with NCAA eligibility regulations, the university might not have been so quick to declare Clarett ineligible. Ohio State may have allowed Clarett to play a more active role when the school made decisions about his eligibility. If Clarett was allowed more involvement, he might not have been so quick to file suit against OSU. At the very least, Clarett would have been able to continue playing until a determination of ineligibility. Even athletes who should be declared ineligible should not suffer this penalty without receiving due process under the law.

Even though Clarett has battled with the NCAA and his university, he did consider playing for Ohio State the following season.²⁸⁵ Even after Ohio State cleared Clarett, he would have had to wait for the NCAA to reinstate him.²⁸⁶ This situation clearly underscores the personal turmoil that can result from the NCAA's failure to allow member institutions to provide student-athletes like Clarett with due process.

Had Clarett received due process during eligibility determinations, he might have presented his argument, dealt with his penalty, and rejoined the Ohio State team when the time came. This would have allowed him to be both physically and psychologically more mature when he entered the NFL, a concern that most involved with the NFL seem to share.²⁸⁷

284. *NCAA v. Tarkanian*, 488 U.S. 179 (1988) (holding that the NCAA is not a state actor and, therefore, not bound by the Constitution).

285. See Len Pasquarelli, *Decision on Eligibility Will Have to Wait*, ESPN.com (Feb. 6, 2004), at http://sports.espn.go.com/nfl/columns/story?columnist=pasquarelli_len&id=1728262 (last visited Jan. 29, 2005).

286. See Associated Press, *AD: Clarett Will Wait Till Reinstated* (Jan. 28, 2004), available at <http://sports.espn.go.com/espn/print?id=1721095&type=story> (last visited Feb. 7, 2004). Before the NCAA will reinstate Clarett, he must make restitution for benefits he has received. See *Decision on Eligibility Will Have to Wait*, *supra* note 285. These benefits total \$3,800. *Id.* The money goes to a charity of Clarett's choice. *Id.* Clarett must also meet specific academic and personal growth standards before he can be reinstated. *Id.*

287. See ESPN, *Stars Think High Schoolers are Too Young*, at <http://sports.espn.go.com/espn/print?id=1728286&type=story> (last visited Feb. 7, 2004). In reference to the ruling, former Redskins quarterback Joe Theismann said, "I think it's wrong." He added, "To me it's a little like

Thus, Clarett's experience epitomizes the problems that can arise from failing to provide student-athletes with due process when their eligibility status is determined. Perhaps if students feel they have a more substantive role in determining their athletic fate, they will also feel they have received justice and will remain in college. To remedy this undesirable situation, the NCAA must change its current procedures.

University athletics programs are an integral part of our culture, looming large not only at individual schools but also commanding a great deal of attention throughout society. It is ironic, therefore, that powerful groups comprising this social component would appear to be exempt from guaranteeing student-athletes rights that all other citizens enjoy under the law and which student-athletes would enjoy while engaged in virtually any other activity.

For most student-athletes, participation in a school's athletics program is a serious pursuit. For many, being eligible to participate is the only path to higher education and personal success. There should be no point at which the protection of our laws is suspended for any citizen of the United States. The playing field must always be level for all participants in the game.

the courts of the United States not understanding the world that they're ruling in and that they're just going by the letter of the law." *Id.* (quoting Joe Theismann). Theismann stressed the importance of the growth players experience in college, which prepares them to play professionally. *Id.*