The College Athletic Scholarship: A Contract That Creates A Property Interest In Eligibility

Over the past twenty years, student-athletes[1] who have been declared ineligible from intercollegiate competition[2] have asserted that the Due Process Clause of the Fourteenth Amendment includes a property right for continued eligibility.[3] Student-athletes have at-

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1. The National Collegiate Athletic Association (NCAA) defines a student-athlete as follows:

> [A] student whose enrollment was solicited by a member of the athletics staff or other representative of athletics interests with a view toward the student's ultimate participation in the intercollegiate athletics program. Any other student becomes a student-athlete only when the student reports for an intercollegiate squad that is under the jurisdiction of the athletics department [but] [a] student is not deemed a student-athlete solely on the basis of prior high school athletic participation.

1991-92 NCAA MANUAL, Bylaw, Art. 12.02.6 (Laura E. Bollig ed., 1991) [hereinafter MANUAL]. In the foregoing comment, the term "student-athlete" will encapsulate the NCAA definition and be limited to those athletes who are attending a NCAA member institution on an athletic scholarship, i.e., the athlete receiving scholarship funds for his participation in the school's athletic program.

2. The NCAA defines "intercollegiate competition" as follows:

> Intercollegiate competition occurs when a student-athlete in either a two-year or a four-year collegiate institution:
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> (a) Represents the institution in any contest against outside competition, regardless of how the competition is classified (e.g. scrimmage, exhibition or joint practice session with another institution's team) or whether the student is enrolled in a minimum full-time program of studies;
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> (b) Participates in any athletics event that is open only to collegiate competitors or involves individuals or teams from collegiate institutions participating in competition to score points for their respective institutions, even when the student's performance is not included in the scoring of the event, or is considered an "exhibition" or occurs in an "open" event involving noncollegiate competitors that is conducted in conjunction with the collegiate competition;
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> (c) Competes in the uniform of the institution;
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> (d) Competes and receives expenses (e.g., transportation, meals, room or entry fees) from the institution for the competition, or
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> (e) Competes and receives from the institution any type of equipment or clothing for the competition.

MANUAL, Bylaw, Art. 14.02.6.

3. *See* Regents of Univ. of Minn. v. NCAA, 422 F Supp. 1158 (1976), *rev'd on other grounds*, 560 F.2d 352 (8th Cir. 1977) (finding the opportunity to participate in intercollegiate basketball was a constitutionally protected property right), *cert. denied*, 434 U.S. 978 (1977); Colorado Seminary v. NCAA, 417 F Supp. 885 (D. Colo. 1976), *aff'd per curiam*, 570 F.2d 320 (10th Cir. 1978) (holding that the students' interest in playing intercollegiate hockey was not a constitutionally protected property right); Hysaw v. Washburn Univ. of Topeka, 690 F Supp. 940 (D. Kan. 1987) (finding that football players did not have a constitutionally protected prop-

tempted to establish a property interest in their eligibility[4] because it would mean a state actor, such as a state funded university,[5] could not constitutionally deprive them of their eligibility without certain procedural safeguards.[6] In the context of property interest arguments in eligibility, the phrase "opportunity to play" and "eligibility" do not translate into "the right to be the starting quarterback."[7] Consequently, to assert a property interest in eligibility does not mean that a student-athlete seeks procedural safeguards regarding the amount of his playing time.[8] Instead, the student-athlete requests that procedural safeguards be placed in the decision of declaring ineligibility[9]

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erty interest in playing intercollegiate football); Justice v. NCAA, 577 F Supp. 356 (D. Ariz. 1983) (holding that participation in televised and post-season games did not create legitimate claims of entitlement); Parish v. NCAA, 506 F.2d 1028 (5th Cir. 1975) (holding that basketball player's opportunity to play in NCAA tournament and televised games does not constitute constitutionally protected property interest); Hall v. Univ. of Minn., 530 F Supp. 104 (D. Minn. 1982) (finding a constitutionally protected property right in continued eligibility); Behagen v. Intercollegiate Conference of Faculty Representatives, 346 F Supp. 602 (D. Minn. 1972) (holding that college athletes interest in intercollegiate competitions was a constitutionally protected property interest); Hunt v. NCAA, G76-370, slip op. (W.D. Mich. Sept. 10, 1976) (finding that football players interest in playing intercollegiate football was a constitutionally protected property interest).

4. The nature of the student-athlete's claim is best understood if it is characterized as a "temporary deprivation" similar to *Goss v. Lopez*, 419 U.S. 565 (1975). *See* DAVID CRUMP, EUGENE GRESSMAN & STEVEN ALAN REISS, CASES AND MATERIALS ON CONSTITUTIONAL LAW 485 (1989). In *Goss*, the United States Supreme Court struck down an Ohio statute which permitted ten-day suspensions of pupils for misconduct without providing a hearing. *Goss*, 419 U.S. at 573-74. The Court ruled that the students had a property interest in the educational benefits, and therefore, constitutional safeguards must be afforded before such an interest may be forfeited. *Id.*

5. *See* Barbay v. NCAA, No. 86-5697, 1987 WL 5619 (E.D. La. 1987) (finding that the action taken by the state funded university, Louisiana State University, against a student-athlete constituted state action); McDonald v. NCAA, 370 F Supp. 625 (C.D. Calif. 1974) (holding that Long Beach is a publicly owned, accredited University of the State of California's university system, therefore, their actions constitute state action); Lesser v. Neosho County Community College (NCCC), 741 F Supp. 854 (D. Kan. 1990) (expressing that NCCC is a governmental subdivision of the state of Kansas); *Hunt*, G76-370, slip op. at 2 (stating "[t]here is, of course, no question that Michigan State University's actions constitute 'state action' ").

6. The Fourteenth Amendment reads, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

7. Felix J. Springer, Comment, *A Student-Athlete's Interest In Eligibility: Its Context And Constitutional Dimensions*, 10 CONN. L. REV. 318, 347 n.164 (1978).

8. *Id.*

9. *See* MANUAL, Bylaw, Art. 14.01.4. Section 14.01.4 provides that the "student-athlete shall be in compliance with all applicable provisions of the constitution and bylaws of the

resulting from a finding of either academic deficiency or misconduct.[10]

The existing National Collegiate Athletic Association (NCAA) enforcement program does not provide constitutional safeguards before a student-athlete is declared ineligible.[11] Colleges and the

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NCAA and all rules and regulations of the institution and the conference(s), if any, of which the institution is a member." *Id.*

The student-athlete's appeal process is inadequate since the student-athlete's interests are represented by his economically interested institution. *See infra* note 25 and accompanying text (discussing the economic benefits of NCAA membership). The manual provisions, Articles 14.14.1 to 14.14.3, governing restoration of eligibility provide:

> 14.14.1. Basis for Appeal. When a student-athlete is determined to be ineligible under any applicable provision of the constitution, bylaws or other regulations of the Association, the member institution may appeal to the Eligibility Committee for restoration of the student's eligibility, provided the institution concludes the circumstances warrant restoration of eligibility.
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> 14.14.2. Participation in Appeal Hearing. Any appeal to restore a student-athlete's eligibility shall be submitted in the name of the institution by the chief executive officer, faculty athletics representative or athletics director (for the men's or women's program), and at least one of those individuals must participate in any hearing of the appeal that involves direct participation by the student-athlete or other individuals representing the institution or the student.
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> 14.14.3. Student Responsibility, Relationship to Restoration of Eligibility. A student-athlete is responsible for his or her involvement in a secondary or major violation of NCAA regulations and the Eligibility Committee may restore the eligibility of a student involved in any violation only when circumstances clearly warrant restoration. The eligibility of a student-athlete involved in a major violation shall not be restored other than through an exception authorized by the Eligibility Committee in a unique case on the basis of specifically stated reasons.

Id.

10. Brian L. Porto, Note, *Balancing Due Process And Academic Integrity In Intercollegiate Athletics: The Scholarship Athlete's Limited Property Interest In Eligibility*, 62 IND. L.J. 1150 (1987) (discussing the due process safeguards that should be afforded in academic and misconduct cases). The author cites *Board of Curators of the Univ. of Missouri v. Horowitz*, 435 U.S. 78 (1978) as a basis for arguing that a higher level of due process should be afforded a student-athlete whose athletic eligibility is taken for alleged misconduct, as opposed to a student-athlete whose athletic eligibility is taken because of an academic deficiency. Porto, *supra* at 1153. The type of due process to be afforded student-athletes when stripped of their athletic eligibility is beyond the scope of this comment.

11. Springer, *supra* note 7, at 348. For a discussion of the NCAA enforcement procedure and student-athletes, see *id.* at 328-33.

For a full discussion of due process concerns in NCAA investigations, see Kevin M. McKenna, *Courts Leave Legislatures To Decide The Fate of the NCAA In Providing Due Process*, 2 SETON HALL J. OF SPORT L. 77 (1992). The commentator traces the history of due process in the intercollegiate sports arena and the impact of the United States Supreme Court decision in *Tarkanian v. NCAA*, 488 U.S. 179 (1988). McKenna, *supra*, at 80-120. The author concludes that state governments should enact legislation that provides procedural safeguards during NCAA investigations. *Id.* at 120-21. The author expresses that, presently, the only procedural safeguards available during any NCAA enforcement hearing are notice of the charges, the right to have counsel present, and an opportunity to appear at the hearing. *Id.* at 121. His comment

courts should realize that student-athletes deserve better treatment.[12] A student-athlete, however, will not obtain "better treatment" until his interest in eligibility is recognized as a constitutionally protected property interest.[13] Various rationales[14] have been

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calls for the following rights to be incorporated in the legislation in order to protect member institutions and student-athletes under investigation:

1. The right to a fair and impartial hearing.
2. The right to a public hearing.
3. The right to present a complete defense involving the right to cross-examine witnesses.
4. The right to full disclosure and discovery of all facts and matters relevant.
5. The right to a speedy trial.

Id.

In *NCAA v. Miller*, 795 F Supp. 1476 (D. Nev. 1992), however, the court struck down Nevada statutes which provided that the NCAA must follow a certain procedure when conducting investigations of athletic infractions at Nevada institutions. *Id.* The court posited that statutes requiring the NCAA to act differently when dealing with schools from one state violated the commerce and contract clauses of the United States Constitution. *Id.*

12. *See* Michael Schinner, *Touchdowns and Taxes: Are Athletic Scholarships Merely Disguised Compensation?*, 8 AM. J. TAX POL'Y 127 (1989). The author provides facts and figures that illustrate the demands made on student-athletes and their importance to their respective schools. *Id.* at 142-45. For example, the commentator expresses that being a student-athlete may require 40-60 hours per week. *Id.* at 143. Furthermore, the author notes that college superstars, such as Patrick Ewing (former Georgetown University basketball player), Hershel Walker (former Georgia University football player) and Doug Flutie (former Boston College football player), are worth several million dollars annually to their respective schools. *Id.* at 142.

See also G. Preston Keyes, Note, *The NCAA, Amateurism, and the Student-Athlete's Constitutional Rights Upon Ineligibility*, 15 NEW ENG. L. REV. 597 (1980). Keyes states:

> Student-athletes provide a very valuable service to their school, not merely in providing income for the school as a direct result of gate receipts and television revenues but also in providing the school with a readily visible focal point. A football or basketball team is often the most significant contact the school has with its alumni and the general public. Thus, through its athletic program the school gains and maintains contacts that frequently result in valuable contributions, increased student admissions and an enhancement of good will.

Id. at 623.

13. Springer, *supra* note 7, at 348.

14. *See* Porto, *supra* note 10, at 1159-61. Other than the contractual rationale, student-athletes have asserted economic, educational and scholarship per se rationales in their attempts to demonstrate an entitlement to eligibility. *Id.* The economic rationale argues that college athletics are training grounds for professional sports and that the property right is derived from one's interest in preparing for a professional career. *Id.* at 1161-63. *See* Hall v. University of Minn., 530 F Supp 104 (D. Minn. 1982). The majority view on this argument is that since so few student-athletes continue into professional careers, one's interest in professional sport opportunities is too speculative. Porto, *supra* note 10, at 1159. *See* Colorado Seminary v. NCAA, 570 F.2d 320 (10th Cir. 1978).

The educational rationale argues that participation in athletics is part of the student-athletes's educational experience. Porto, *supra* note 10, at 1163. *See* Regents of Univ. of Minn. v. NCAA, 422 F Supp. 1158 (D. Minn. 1976). Although the opportunity to pursue an education has been deemed a "property interest," athletic participation has not been viewed as an integral facet of the educational experience so as to warrant eligibility a "property interest." Porto, *supra* note 10, at 1164. *See* Albach v. Odle, 531 F Supp. 983 (10th Cir. 1976).

presented for recognizing a property interest in eligibility The rationale to be examined in this Comment argues that the contractual nature of the student-athlete's scholarship provides a basis for a property interest in eligibility [15] Most courts presented with the contractual rationale have refused to accept it.[16] Courts have rejected this rationale by reasoning that the student-athlete's eligibility interest is too speculative[17] and has no basis in contract theory since the athletic scholarship does not explicitly state that a student-athlete has an eligibility interest.[18]

This Comment argues that an athletic scholarship is a contract which creates a property interest both in the scholarship funds and in the awardees' expectations in remaining eligible to compete. Part I of this Comment addresses the threshold constitutional issues regarding a claim of a property interest. Part II reviews case law and legal commentaries which conclude that athletic scholarships are contractual in nature. Part III examines case law that rejects the contractual rationale and contends that the reasoning of these courts is flawed. Part IV proposes that athletic scholarships should be interpreted using the "reasonable expectation doctrine," thereby creating a property interest in eligibility arising from the contractual nature of student-athletes' scholarship agreements.

The scholarship per se rationale claims that the loss of an athletic scholarship per se is a denial of a property interest since such a loss is likely to cause financial hardships which may make it impossible to attend the respective school. Porto, *supra* note 10, at 1160. This argument, however, has been unsuccessful because no school has revoked an athletic scholarship as a result of a declaration of ineligibility, no student athlete has been denied benefits which create a property interest. *Id.*

15. *See* Springer, *supra* note 7, at 345-49 (discussing his belief that the contractual interest a student-athlete has in the opportunity to participate in intercollegiate athletics fulfills the property interest criteria announced by the United States Supreme Court). *See also* Porto, *supra* note 10, at 1168-69.

16. *See Colorado Seminary*, 570 F.2d 320 (10th Cir. 1978) (ruling interests of student-athletes, including those on athletic scholarships, in participating in intercollegiate sports did not rise to level of a property right); Hysaw v. Washburn Univ. of Topeka, 690 F Supp. 940 (D. Kan. 1987) (holding that athletic scholarship recipients did not have property interest in contractual rights to eligibility but only had property rights in scholarship funds); *cf.* Hunt v. NCAA, G76-370, slip op. (W.D. Mich. Sept. 10, 1976) (accepting the proposition that the athletic scholarship granted student-athletes certain benefits which included a right to participate in intercollegiate athletics).

17. *See Colorado Seminary*, 570 F.2d at 321-22.

18. *See Hysaw*, 690 F.Supp. at 944.

I. Threshold Constitutional Issues Regarding a Claim of a Property Interest

A. "State Actor" Requirement

The Fourteenth Amendment protects the individual against the denial of property without due process by agents of the state and by those private entities whose actions are sufficiently sponsored or encouraged by the state.[19] Thus, student-athletes must first establish that a state actor is taking away their eligibility Over the past twenty years, student-athletes seeking due process protection have been successful in establishing that the NCAA qualifies as a state actor.[20] The United States Supreme Court, however, overruled those decisions in 1988 in the hallmark case *Tarkanian v. NCAA*,[21] holding that the NCAA was a private organization and not a state actor.[22] The impact of the *Tarkanian* decision, in the context of recognizing eligibility as a property interest, is best understood when considered who declares an athlete ineligible. As a condition of membership in the NCAA, colleges and universities must terminate or suspend a student-athlete's eligibility when the school, on its own initiative, discovers infractions or when the NCAA brings violations to the institution's attention.[23] Consequently, the NCAA does not take action

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19. U.S. Const. amend. XIV, § 1. The term "state" has been interpreted to include not only state organizations but also private organizations in some situations. *E.g.*, Marsh v. Alabama, 326 U.S. 501 (1946) (holding that a company-owned town functioned similar to a conventional municipality, and its managers were subject to the same constitutional restraints as public municipality managers).

20. McKenna, *supra* note 11, at 82. *See* Regents of the Univ. of Minn. v. NCAA, 560 F.2d 352 (8th Cir. 1977), *cert. denied*, 434 U.S. 978 (1977) (holding that the NCAA's action of putting the school on probation constituted state action); Howard Univ. v. NCAA, 510 F.2d 213 (D.C. Cir. 1975) (finding that NCAA's activities constitute state action due to the NCAA's regulation of numerous public universities' athletic programs); Associated Students, Inc. v. NCAA, 493 F.2d 1251 (9th Cir. 1973) (determining that NCAA action constitutes state action due to the NCAA's regulation of publicly supported universities); Buckton v. NCAA, 366 F Supp. 1152 (D. Mass. 1973) (finding that NCAA's action, in ruling that two Boston University hockey players were ineligible to compete, involved state action).

21. 488 U.S. 179 (1988).

22. *Id.* The *Tarkanian* dispute began when the NCAA advised the University of Nevada-Las Vegas (UNLV) to suspend their men's basketball coach (Jerry Tarkanian) for certain NCAA violations. For a detailed analysis of the *Tarkanian* decision, see Kevin M. McKenna, *The Tarkanian Decision: The State of College Athletics Is Anything but State Action*, 40 DePaul L. Rev. 459 (1991). The author concludes that the *Tarkanian* majority reaches an impractical conclusion that is full of inconsistencies. *Id.* at 495-97. Furthermore, the author argues that the Court's analysis should have focused on "the practical effect of the NCAA's investigation and subsequent recommendations to suspend Jerry Tarkanian." *Id.* at 462.

23. Manual, Bylaw, Art. 3.2.4.3. The manual provision pertaining to the institution declaring athletes ineligible provides that the institution "shall be obligated immediately to apply

directly against the student-athlete; instead, the NCAA requires the institutions to discipline their student-athletes.[24] Therefore, if the institution that declares a student-athlete ineligible is a state funded institution, the state actor requirement has been satisfied.[25]

In *McDonald v. NCAA*,[26] student-athletes from a state funded university challenged declarations of their ineligibility claiming a violation of due process.[27] The Central District Court of California found that the NCAA did not qualify as a state actor but pointed out that the state funded university was a state actor that could not evade affording due process.[28] Therefore, when a state funded university deems a student-athlete ineligible, the state actor requirement is satisfied,[29] but in order to invoke due process the student-athlete must establish a constitutionally protected property interest.

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all applicable rules and withhold ineligible student-athletes from all intercollegiate competition." *Id.*

If an institution fails to follow the NCAA directive to declare a student-athlete ineligible, the institution may be subject itself to probation and the loss of large sums of money. *See* McKenna, *supra* note 11, at 79-80 n.12. The author cites H.R. 2157 § 2.5, 102d Cong. 1st Sess. (1991), which stated that "college athletics generate approximately $1,000,000,000 in interstate commerce each year." *Id.* The commentator further notes that the NCAA distribution plan for 1990-91 allocated $72,874,699 to 34 Division I conferences and 16 independent institutions. *Id.* (citing *Final Revenue Checks from 1990-91 Delivered*, NCAA NEWS, Sept. 9, 1991, at 1).

24. Springer, *supra* note 7, at 327.

25. *See supra* note 20 and accompanying text discussing the decisions that have held that actions taken by the NCAA constitute state action.

26. 370 F Supp. 625 (C.D. Calif. 1974).

27. *Id.* The plaintiffs were basketball players for California State University-Long Beach (Long Beach). *Id.* at 626. The court granted the plaintiff's request for an injunction against Long Beach due to the school's failure to follow its own disciplinary process before deeming the plaintiffs ineligible. *Id.* at 632.

28. *Id. See* Barbay v. NCAA, No. 86-5697, 1987 WL 5619 (E.D. La. 1987). In *Barbay*, plaintiff, Roland Anthony Barbay, Jr., a Louisiana State University (LSU) football player, sought a preliminary injunction and/or temporary restraining order that would restrict LSU and the NCAA from deeming him ineligible. *Id.* at *1. Barbay's claims against LSU and the NCAA were brought under Title 42, Section 1983 of the United States Code and the Fourteenth Amendment. *Id.* at *4-5. The court ruled that Barbay could not succeed on his § 1983 or his Fourteenth Amendment claims against the NCAA because the NCAA did not satisfy the prerequisite of action under the color of state law, i.e. state action. *Id.* Regarding Barbay's claims against LSU, the court held that the action taken by the state funded university satisfied the state action requirement. *Id.* at *5. Barbay, however, did not claim of being deprived of a right under § 1983, and the deprived right he asserted under the Fourteenth Amendment was rejected by the court. *Id.* Barbay contended that he had a property right in his reputation which was damaged by being declared ineligible, but the court found that even if he had a property right in his reputation, Barbay failed to show his reputation was actually damaged. *Id.*

29. If a student-athlete at a state funded university is able to establish a "property interest" in eligibility, the particular school may be put in an undesirable position by the NCAA. *See* Parish v. NCAA, 506 F.2d 1028 (5th Cir. 1975) (determining that the college might have mitigated the penalties against them if they followed the NCAA's directive to name five basket-

The *Tarkanian* decision detrimentally affected student-athletes at privately funded universities since prior to the *Tarkanian* ruling, these students were able to seek constitutional protection by having the NCAA's actions qualify as state action.[30] Unfortunately, unless the *Tarkanian* decision is reconsidered, student-athletes at privately funded schools will not be able to satisfy the state actor requirement since neither a private school[31] nor the NCAA will qualify [32] It is possible, however, that the *Tarkanian* Court's ruling regarding the NCAA's private organization status will be re-evaluated since it was a 5-4 decision[33] that overturned numerous cases on the issue.[34] The state actor requirement, however, is the initial hurdle in successfully claiming a due process violation, and additionally, student-athletes need to demonstrate that their eligibility is a property interest worthy of constitutional protection.

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ball players ineligible, but the school refused and accepted the penalties). By offering the student due process, the school may reach a different conclusion regarding the presence of misconduct, and the school may be faced with either naming the student-athlete ineligible as the NCAA requests or face stiff penalties from the NCAA for disobeying them. Springer, *supra* note 7, at 331; *see* Regents of the Univ. of Minn. v. NCAA, 560 F.2d 352 (8th Cir. 1977) *cert. denied*, 434 U.S. 978 (1977) (trial court held that hearings provided by a college regarding three basketball players eligibility, which cleared the players of violating NCAA rules superseded the membership obligation owed by the school to the NCAA; however, the appellate court overruled the decision finding that the hearings evidenced violations of NCAA rules so sanctions were appropriate). It is unrealistic to think that many colleges will jump to the defense of their student-athletes in such a situation because a school's membership in the NCAA has great economic benefits. *See supra* note 23 and accompanying text illustrating the economic benefits of NCAA membership. Unfortunately, when the Court was given an opportunity to address the difficult decision that schools may face in *Tarkanian v. NCAA*, 488 U.S. 179 (1988), the Court offered an opinion detrimental to student-athletes. The *Tarkanian* Court posited that when a school is faced with the decision of following an NCAA order or not, the school does not have to adhere to the NCAA because the school may withdraw from the NCAA. *Tarkanian*, 488 U.S. at 194-95. Because schools are often more concerned with their own economic well being, however, it is unlikely schools will withdraw from the NCAA, and in the end, the due process rights of student-athletes will not be honored.

30. *See, e.g.*, Buckton v. NCAA, 366 F Supp. 1152 (D. Mass. 1973) (two private university hockey players succeeded on their claim that the NCAA's action constituted state action).

31. *See, e.g.*, Rendell-Baker v. Kohn, 457 U.S. 830 (1982) (holding that a privately-operated school's discharge of a teacher did not constitute state action, even though the school received public funds).

32. *See Tarkanian*, 488 U.S. at 179.

33. *Id.*

34. *See supra* note 20 and accompanying text discussing the decisions that have found that actions taken by the NCAA constitute state action. For an analysis that criticizes the *Tarkanian* decision, see McKenna, *supra* note 22, at 495-98.

B. A Property Interest Defined

In *Board of Regents v. Roth*,[35] the Court questioned whether a non-tenured professor who had a one year contract to teach at Wisconsin State University had a property interest in being rehired.[36] The Court reasoned that the professor's interest in being rehired was not a property interest since such an interest did not exist merely because the individual had a "need" for the benefit, or a "unilateral expectation" of it.[37] Additionally, the *Roth* Court suggested that unless a person already enjoys the benefit, he cannot claim a due process violation if he is denied the benefit.[38] The Court expressed that an individual must have a "legitimate claim of entitlement" to the interest, which is based upon a source independent of the beneficiary's own expectations, such as an institutional rule or a state law.[39] Therefore, the *Roth* Court held that in the absence of any statute, contractual right or policy that created a legitimate claim to continued employment, the professor lacked the kind of property interest that could trigger due process.

In the companion case to *Roth*, *Perry v. Sindermann*,[40] the Court recognized the argument that a property interest was derived from a contract even though the plaintiff, as in *Roth*, lacked express contract rights.[41] The Court held that a property interest could be found if there were "mutually explicit understandings" supporting a claim of entitlement.[42] A "mutually explicit understanding" existed in *Perry* since as a result of a de facto tenure system, both parties anticipated the plaintiff's continued employment.[43] Furthermore, the Court suggested that contract theory was applicable in finding a property interest absent an express contractual provision since "the

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35. 408 U.S. 564 (1972).

36. *Id.* In *Roth*, an assistant professor at a state university who had a contractual right to continued employment, alleged that the university's decision not to rehire him was a violation of procedural due process since he had not had a pre-termination hearing. *Id.*

37. *Id.* at 577.

38. *Id.* at 576.

39. *Id.* at 578.

40. 408 U.S. 593 (1972).

41. DAVID CRUMP, EUGENE GRESSMAN & STEVEN ALAN REISS, CASES AND MATERIALS ON CONSTITUTIONAL LAW 485 (1989).

42. *Perry*, 408 U.S. at 602. In *Perry*, a non-tenured professor who had been working for a college for ten years was found to have a property interest in continued employment. *Id.* at 600. The Court ruled that because the college normally awarded tenure to professors who had been working at the college for seven years, the parties had a mutual understanding that gave the plaintiff a property interest. *Id.* at 602.

43. *Id.*

law of contracts [employed] a process by which agreements, though not formalized in writing, may be 'implied'[so that] explicit contractual provisions may be supplemented by other agreements implied from 'the promisor's words and conduct in the light of the surrounding circumstances.' "[44]

II. Athletic Scholarships Recognized as Contracts

Athletic scholarships are contractual in nature since courts recognize that athletic scholarships impose obligations upon student-athletes and the institutions which confer the awards. In *Taylor v. Wake Forest University*,[45] the North Carolina Court of Appeals addressed the issue of whether a scholarship agreement between a college and a student-athlete constituted a contract which could be breached.[46] The appellate court reasoned that the scholarship was a contract, and that under the contract, if Taylor was not injured, he was required to participate as long as his grade point average equalled or exceeded Wake Forest's requirements.[47] Since Taylor did not play even though he was academically eligible and physically able, the court ruled that Taylor could not recover since he breached his contractual obligations to Wake Forest.[48]

One year after the *Taylor* decision, a federal district court found that a scholarship agreement constituted a contract in *Begley v. Corporation of Mercer University* [49] In *Begley*, the court addressed the issue of whether a prospective student-athlete could succeed on a breach of contract claim after the school revoked his athletic scholarship.[50] The court reasoned that although the prospective student-athlete and Mercer University signed a contract, Mercer University was

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44. *Id.* at 601-02 (quoting 3 Corbin on Contracts § 562 (1960)). Four years after the *Perry* decision, the Court, in *Bishop v. Wood*, 426 U.S. 341 (1976), expressed a narrower view of a property interest by considering state law essential to the presence of a property interest. Keyes, *supra* note 12, at 616 n.124. The *Bishop* Court, however, did follow the *Perry* holding by stating that "a property interest in employment can, of course, be created by an implied contract." *Id.* (quoting *Bishop*, 426 U.S. at 344).

45. 191 S.E.2d 379 (N.C. App. 1972).

46. *Id.* In *Taylor*, a football player at Wake Forest University who had been declared academically ineligible during his freshman year refused to resume competing even after improving his grades sufficiently to regain eligibility. *Id.* at 381. The plaintiff sought to recover the financial aid which he had forfeited as a result of that refusal. *Id.* at 381-82.

47. *Id.* at 382.

48. *Id.*

49. 367 F Supp. 908 (E.D. Tenn. 1973).

50. *Id.* In *Begley*, a high school student entered into a scholarship agreement with Mercer University; subsequently, it was discovered that the high school used a 8.0 grading scale instead

not bound since the prospective student-athlete could not perform his duties under the agreement due to academic ineligibility [51] Thus, as in *Taylor*, the *Begley* court interpreted the athletic scholarship as a contract between the scholarship recipient and the school.[52]

As evidenced by the *Taylor* and *Begley* courts, an athletic scholarship is a contract when considered in light of the principles of contract formation.[53] The formation of a contract requires an offer, acceptance and consideration.[54] The language of the athletic scholarship presented by the school to the student qualifies as an offer.[55] Typically, the institution expressly promises to pay for the student-athlete's tuition and other school expenses.[56] For the institu-

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of the usual 4.0. *Id.* at 909. Thus, the high school student's 2.9 grade point average was actually inadequate. *Id.*

51. *Id.* at 909-10. The *Begley* court agreed with Mercer's argument in finding that:

> Mr. Begley was unable to comply with the fourth condition subsequent of the contract, viz.. the moment he started performance of his contract he would have been unable to abide by the aforementioned regulation of the NCAA, in that he did not have a predicted minimum grade point average of 1.6 or more based on a maximum of 4.0. " It is the rule that where one party is unable to perform his part of the contract, he cannot be entitled to the performance of the contract by the other party "

Id. at 910.

52. *Id.*

53. Robert N. Davis, *Courts And Athletic Scholarships*, 67 N. DAK. L. REV. 163 (1991). The author argues that an athletic scholarship is an employment contract. *Id.* at 165. The author also notes that the National Letter of Intent satisfies the requirements of a contract. *Id.* at 166 (citing Michael Cozzillio, *The Athletic Scholarship and the College National Letter of Intent: A Contract By Any Other Name*, 35 WAYNE L. REV. 1275 (1989) (writer provides comprehensive guide of the National Letter of Intent Program)).

54. Davis, *supra* note 53, at 165. Davis defines the requirements of a contract: 1) an offer is the "manifestation of willingness to enter a bargain;" 2) an acceptance is the "manifestation of assent" to the terms of the offer; and 3) consideration is a "bargained-for-promise" or return promise. *Id.* (quoting RESTATEMENT (SECOND) OF CONTRACTS §§ 24, 50, 71).

55. Davis, *supra* note 53, at 165. The author provides the following typical scholarship form:

> I wish to attend_____University provided you can award me some form of scholarship.
>
> (5) If I become the beneficiary of this scholarship and participate in the above listed sport, I understand I will never be eligible for this sport at any other Southeastern Conference Institution, unless my athletic grant is not renewed by the awarding institution.
>
> If the scholarship is granted, the beneficiary pledges to participate in the sport listed on application to the best of his ability.

Id. at 165 n.9 (quoting Form ASM-88, Southeastern Conference Application for Scholarship).

56. *Id.* at 165. *See generally* MANUAL, Bylaw, Art. 15.2 (discussing the "Elements of Financial Aid").

tion, the consideration is that the student-athlete in accepting the offer, promises to participate in the institution's athletic program and abide by the rules of the institution and NCAA.[57] For the student-athlete, the consideration is the value of the scholarship,[58] which includes the opportunity to play Although courts have not been in complete agreement in acknowledging that a scholarship is a contract,[59] the trend is towards recognizing the scholarship as a contract.[60]

III. Judicial Interpretation of the Rationale that the Contractual Nature of Athletic Scholarships Creates a Property Interest in Eligibility

In 1976, in *Colorado Seminary v. NCAA*[61] the district court addressed the issue of whether a student-athlete's interest in participating in intercollegiate athletics was a constitutionally protected property interest invoking due process.[62] The *Colorado Seminary* court rejected the argument that contractual interests inherent in a scholarship included the expectation that the recipient would be allowed to participate in intercollegiate competition.[63] Unpersuaded by the contractual rationale, the court reasoned that the student-athlete possessed "no more of a 'right' to play than a student who 'walks

57. Davis, *supra* note 53, at 166.

58. *Id.* at 165-66.

59. *Id.* at 166. *See, e.g.*, State Compensation Ins. Fund v. Industrial Comm'n, 314 P.2d 288 (Colo. 1957) (holding athlete was not an employee of the school and that no contract existed); Rensing v. Indiana State Univ. Bd. of Trustees, 444 N.E.2d 1170 (Ind. 1983) (ruling that athletic scholarship was not a contract).

60. *See, e.g.*, Jackson v. Drake Univ., 778 F Supp. 1490 (S.D. Iowa 1991) (holding scholarship agreement entered into by university and basketball player constituted valid contract); Hysaw v. Washburn Univ. of Topeka, 690 F Supp. 940 (D. Kan. 1987) (holding scholarship agreements were considered contracts that were not breached); Justice v. NCAA, 577 F Supp. 356 (D. Ariz. 1983) (holding that athletic scholarships are contracts that do not contain a right to participate in post-season and televised athletic contests); Conrad v. University of Washington, 834 P.2d 17 (Wash. 1992) (holding that an athletic scholarship was a one year contract that did not create a protected property interest in renewal each year); Barile v. University of Virginia, 441 N.E.2d 608 (Ohio App. 1981) (holding athletic scholarship constitutes a contract but action dismissed for lack of personal jurisdiction).

61. 417 F Supp. 885 (D. Colo. 1976).

62. *Id.* Colorado Seminary and several of its student-athletes brought action to enjoin the NCAA from imposing sanctions against the university and from forcing the university to declare several of its student hockey players ineligible. *Id.* The trial court held that the interests of student athletes, including those on athletic scholarships, in participating in intercollegiate hockey was not a constitutionally protected property right. *Id.*

63. *Id.* at 895 n.5.

on.' "[64] Therefore, the interest was "too speculative" to be considered a property interest.[65] Furthermore, the court noted that student-athletes only have a property interest in scholarship funds, and since these funds were not taken away from the student-athletes, there was no procedural due process claim.[66]

About one month after the *Colorado Seminary* decision, a Michigan federal court addressed the argument that the contractual nature of athletic scholarships created a property interest in eligibility for the student-athlete. In *Hunt v. NCAA*,[67] the court reasoned that scholarships were contracts which create entitlements for the student-athletes.[68] The *Hunt* court ruled that student-athletes were entitled to due process prior to being declared ineligible because the plaintiffs acquired a property interest born from their contract with the university which granted them certain benefits.[69] Unlike the *Colorado Seminary* trial court, the *Hunt* court differentiated between the student-athlete and the "walk on" in recognizing a property interest in intercollegiate participation.[70] The *Hunt* court viewed the scholarship recipient as not merely expecting to participate, but rather as being "entitled" to participate.[71]

In 1978, the United States Court of Appeals for the Tenth Circuit affirmed the lower court's ruling in *Colorado Seminary*.[72] The court noted that earlier decisions in the circuit, which held that a high school athlete did not have a property interest in participating in interscholastic sports, controlled their decision.[73] The court of appeals answered the contention that a student's claim to playing a high school sport was different than a student-athlete's right to eligibility by stating: "[C]ollege scholarship arrangements may create a difference in degree [but] the fundamental positions are the same, the goals are the same, the stakes are pretty much the same. The

64. *Id.*

65. *Id.*

66. *Id.* at 895-96.

67. G76-370, slip op. (W.D. Mich. Sept. 10, 1976).

68. *Id.* at 4. In *Hunt*, seven Michigan State University football players sought due process after being declared ineligible to participate in intercollegiate football. *Id.* at 2.

69. *Id.* at 4.

70. Porto, *supra* note 10, at 1160-61.

71. *Id.*

72. 570 F.2d 320 (10th Cir. 1978).

73. *Id.* at 321. *See* Albach v. Odle, 531 F.2d 983 (10th Cir. 1976) (holding that participation in high school sports is not a constitutionally protected right); Oklahoma High School Ass'n v. Bray, 321 F.2d 269 (10th Cir. 1963) (holding that a high school athlete's claim of a right to play interscholastic football was not reviewable in federal court).

differences in degree or magnitude do not lead to a different result."[74] The court of appeals' oversight in considering the eligibility interests of student-athletes and high school athletes as similar, corresponded to the *Colorado Seminary*'s trial court determination that a "walk-on" player's interest in eligibility was like that of a student-athlete.

Legal commentaries have criticized[75] and recent courts have not adopted the *Colorado Seminary* trial and appellate courts' reasoning for rejecting the contractual rationale.[76] Although the *Colorado Seminary* trial and appellate courts' theories differed slightly in terminology, each was governed by the flawed premise that a scholarship recipient has basically the same rights as a "walk-on" does in intercollegiate athletics.[77] The greatest difference between the rights of the scholarship athlete and the college "walk-on" or high school athlete is that a student-athlete is obliged by their scholarship to participate.[78] The "walk-on" cannot claim a property interest in eligibility because of a mere "unilateral expectation of a benefit" and the hope of participation.[79] Another difference is that a student-athlete is heavily recruited.[80] In addition, a school relies on a student-athlete to perform since NCAA regulations prohibit: (i) an athletic scholarship from being changed during the award period for any athletic ability reason;[81] and (ii) a school from granting a certain number of scholar-

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74. *Id.* at 321.

75. *See* Porto, *supra* note 10, at 1168-69; Keyes, *supra* note 12, at 614-16; Springer, *supra* note 7, at 346-48.

76. *See* Jackson v. Drake Univ., 778 F Supp. 1490 (S.D. Iowa 1991) (holding that a student-athlete does not have the right to play because it is not expressed in the scholarship); Hysaw v. Washburn Univ. of Topeka, 690 F Supp. 940 (D. Kan. 1987) (holding that a student-athlete's scholarship only contains a right to scholarship funds).

77. Springer, *supra* note 7, at 346.

78. *Id.* at 348.

79. *Id.* at 347-48.

80. *Id.* at 346-47. The NCAA defines "recruiting" as "any solicitation of the prospect or the prospect's family (or guardian) by an institutional staff member or by a representative of the institution's athletic interests for the purpose of securing the prospect's enrollment and ultimate participation in the institution's intercollegiate athletics program." MANUAL, Bylaw, Art. 13.02.9.

81. Springer, *supra* note 7, at 346. The following is the applicable NCAA MANUAL provision which provides:

> Gradation or Cancellation Not Permitted. Institutional financial aid may not be gradated (increased or decreased) or cancelled during the period of its award:
> (a) on the basis of a student's athletics ability, performance or contribution to a team's success; or
> (b) Because of an injury that prevents the recipient from participating in athletics, or
> (c) For any other athletics reason.

MANUAL, Bylaw, Art. 15.3.4.2.

ships for a particular program over a period of time.[82] This evidences that a student-athlete does not have a "unilateral" expectation regarding whether he will play.[83] Instead, an athletic scholarship seems to guarantee the student-athlete that he will be a member of the team and have the right to compete for a starting position.[84] In contrast, the expectation a "walk-on" has is "unilateral" because he was not recruited, nor did he contractually agree to participate.[85]

In 1987, the *Hysaw v. Washburn Univ. of Topeka*[86] case addressed the argument that an athletic scholarship created a property interest in eligibility.[87] The court did not cite to *Hunt* or *Colorado Seminary* in reaching its decision granting the defendant's summary judgment motion,[88] finding that the plaintiffs, Washburn University's student-athletes, only had a property right in scholarship funds.[89] In ruling that the student-athlete's eligibility did not constitute a property interest, the *Hysaw* court cited the reasoning in *Roth* that creation of a property interest required that "a person must have more than a unilateral expectation of it."[90] The court noted that the plaintiffs conceded that the only source for their alleged property interest was their scholarship agreement which the court determined created only a property interest in scholarship funds.[91] The *Hysaw* court con-

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A student-athlete's scholarship, which NCAA regulations prohibit from covering more than a year, however, may not be renewed for various reasons, and recently, in *Conrad v. Univ. of Washington*, 834 P.2d 17 (Wash. 1992), the court determined that an institution need not provide a student-athlete due process before deciding not to renew the student-athlete's scholarship because a student-athlete does not possess a protected property interest in renewal each year. *Id.*

82. Springer, *supra* note 7, at 346. An example of the "limited number of scholarships" concept is the NCAA manual provision concerning Division I basketball which states that "[t]here shall be an annual limit of 14 during the 1992-93 academic year and 13 during the 1993-94 academic year and thereafter on the total number of [student-athletes] in the sport of basketball at each institution." MANUAL, Bylaw, Art. 15.5.4.1.

83. Springer, *supra* note 7, at 347.

84. *Id.*

85. *Id.*

86. 690 F Supp. 940 (D.Kan. 1987).

87. *Id.* In *Hysaw*, football players complained that they were being treated in a discriminatory manner by the coaching staff and administration. *Id.* at 942. The players' lawsuit arose when the administration took the players off the team after the players boycotted team practices. *Id.* at 943.

88. The United States Supreme Court has posited that the party moving for summary judgment has the burden of establishing the nonexistence of any "genuine issues of material fact." Celotex Corp. v. Catrett, 106 S. Ct. 2548 (1986).

89. *Hysaw*, 690 F Supp. at 944.

90. *Id.* (quoting Board of Regents v. Roth, 408 U.S. 564, 577 (1972)).

91. *Id.*

cluded that any expectations that the student-athletes believed were supported by their agreements lacked sufficient evidence to create a constitutionally protected property right.[92]

In 1992, the district court of Iowa in *Jackson v. Drake University*[93] was presented with the task of interpreting the rights under an athletic scholarship agreement when a student-athlete was declared ineligible.[94] In evaluating Drake's summary judgment motion,[95] the court questioned whether a basketball scholarship implicitly contained a right to play.[96] Citing *Hysaw*, the court found that the basketball scholarship between the plaintiff and Drake University constituted a contract.[97] The *Jackson* court, however, granted Drake's summary judgment motion, ruling that Drake did not breach the scholarship agreement because the agreement did not provide for a right to play.[98]

IV THE REASONABLE EXPECTATION DOCTRINE AND PROPERTY INTEREST ARGUMENTS

The current interpretation of athletic scholarships rejects the contractual rationale argument; courts determine the rights of the student-athlete only by the words on the face of the scholarship agreement.[99] The literal approach taken by these courts, not only contradicts theories espoused by respected contract theorists,[100] but

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92. *Id.*

93. 778 F Supp. 1490 (S.D. Iowa 1991).

94. *Id.* In *Jackson*, plaintiff, Terrell Jackson, a basketball scholarship recipient at Drake University, had several complaints regarding the way he was treated and the manner in which the basketball program was run during the period that he was a member of the team. *Id.* at 1491. Jackson brought a breach of contract claim alleging he had a right to play based on his scholarship. *Id.* at 1493. The court ruled that such a right was not written in the scholarship and "where the language of the contract is clear and unambiguous, the language controls." *Id.*

95. *See supra* note 88 and accompanying text for a discussion of the summary judgment standard expressed by the United States Supreme Court.

96. *Id.* at 1492. The *Jackson* court did not address the property interest issue since the school declaring the plaintiff ineligible was not a state actor. *Id.*

97. *Id.* at 1493.

98. *Id.*

99. *See supra* note 76 and accompanying text for an illustration of recent decisions that have strictly interpreted athletic scholarships. *See also* Ross v. Creighton Univ., 740 F Supp. 1319, *aff'd in part*, 957 F.2d 410 (7th Cir. 1992). The *Ross* trial court stated that "[a]bsent an express contractual provision the Court believes it should leave the supervision of college athletics to private regulatory groups such as the NCAA, .[thus,]. .[t]he Court will not assume this regulatory role through the guise of enforcing implied terms and duties." *Ross*, 740 F Supp at 1332.

100. 1 CORBIN ON CONTRACTS § 1 (1960) (stating "the law of contracts attempts the realization of reasonable expectations that have been induced by the making of a promise"). For

is also inconsistent with the courts interpretation of other contract cases between students and universities.[101]

In viewing athletic scholarships as unambiguous and complete written contracts, courts have found only the right to receive scholarship funds and not the right to play [102] When it is not an integrated contract,[103] the standard is the meaning the party making the manifestation should reasonably expect the other party to give it.[104] Under this approach all parole evidence is considered, including prior written and oral communications pertaining to the agreement.[105] This approach would allow evidence, such as promises given to the student-athlete regarding his opportunity to play, to be considered.[106] Furthermore, the courts' strict interpretation of scholarship agreements ignored the applicable "reasonable expectation doctrine."

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other contract authorities that adopt the more liberal approach to contract interpretation and express that the intent of the parties should be sought in any determination of meaning or ambiguity, see RESTATEMENT (SECOND) OF CONTRACTS § 212 (1981); J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS 111 (2d ed. 1977).

101. *See infra* notes 111-25 and accompanying text analyzing cases where the courts have used the reasonable expectations standard to interpret contracts between students and universities.

102. *See supra* note 76 and accompanying text illustrating recent court decisions that have strictly interpreted athletic scholarships.

103. The Restatement (Second) of Contracts provides that "[a]n integrated agreement is a writing or writings constituting a final expression of one or more terms of an agreement." RESTATEMENT (SECOND) OF CONTRACTS, § 209(1) (1981). Furthermore, "[a] completely integrated agreement is an integrated agreement adopted by the parties as a complete and exclusive statement of the terms of the agreement." *Id.* at § 210(1).

Although schools may contend the scholarship agreement is the complete expression of the agreement, student-athletes have grounds to argue otherwise and modern courts have realized that this principle does not necessarily apply in the context of certain contract disputes. *See* C & J Fertilizer, Inc. v. Allied Mut. Ins., Co., 227 N.W.2d 169 (Iowa 1975) (holding that strict adherence to contractual terminology should not prevent a claimant from getting that for which it bargained when to hold otherwise would not satisfy the reasonable expectations of the claimant).

Furthermore, in the context of student-university contract disputes, courts have acknowledged the application of "some elements of the law of contracts .[but that]. this does not mean that 'contract law' must be rigidly applied in all aspects, nor is it so applied when the contract analogy is extensively adopted." Lyons v. Salve Regina College, 565 F.2d 200, 202 (1st Cir.), *cert. denied*, 435 U.S. 971 (1978) (quoting Slaughterhouse v. Brigham Young Univ., 514 F.2d 622, 626 (10th Cir.), *cert. denied*, 423 U.S. 898 (1975)).

104. *See* J. CALAMARI & J. PERILLO, *supra* note 100, at 118.

105. *Id.* at 118-19.

106. *See generally* E. FARNSWORTH & W. YOUNG, CASES AND MATERIALS ON CONTRACTS, ch. 7, § 2 at 697-704 (3d ed. 1980) (analysis of cases that discuss interpreting the language of contracts).

The courts often employ the reasonable expectations doctrine in insurance contract disputes.[107] In the insurance context, the courts have employed the reasonable expectation standard to honor the objectively reasonable expectations of applicants even though the provisions of the policy in question negated those expectations.[108] Thus, if an insurance contract does not specifically provide a term that is a reasonable expectation of an insured, the insured's reasonable expectation is honored as being part of the contract.[109] Commentators have opined that courts use this standard because "[i]t is generally recognized that the insured will not read the detailed, cross-referenced, standardized, mass-produced insurance form, or understand it if he does."[110]

Asking courts to use the reasonable expectation standard in interpreting athletic scholarships is only an extension of how courts have interpreted other contractual disputes between students and universities. In *Giles v. Howard University*,[111] a medical student alleged he was denied procedural due process and that the university breached their contract with him.[112] The plaintiff claimed that the

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107. *See* C & J Fertilizer, Inc. v. Allied Mut. Ins. Co., 227 N.W.2d 169 (Iowa 1975); Rodman v. State Farm Mut. Ins. Co., 208 N.W.2d 903 (Iowa 1973). *See also* 7 WILLISTON ON CONTRACTS, § 900, 33-34 (3d ed. 1963), which states that:

> Some courts, recognizing that very few insureds even try to read and understand the policy or application, have declared that the insured is justified in assuming that the policy which is delivered to him has been faithfully prepared by the company to provide the protection against the risk which he had asked for. Obviously this judicial attitude is a far cry from the old motto 'caveat emptor.'

Id.

108. *See C & J Fertilizer*, 227 N.W.2d at 176 (citing *Rodman*, 208 N.W.2d at 906).

109. *See, e.g.*, C & J Fertilizer, 227 N.W.2d at 177 (ruling that it was within the reasonable expectations of the insured that he was covered for "burglary" even though the policy defined "burglary" as requiring "marks" on the exterior of the premises).

110. *C & J Fertilizer*, 227 N.W.2d at 174 (citing Williston, *supra* note 107, at 300; 3 CORBIN ON CONTRACTS § 559, 265-66 (1960) ("One who applies for an insurance policy may not even read the policy, the number of its terms and the fineness of its print being such as to discourage him")).

Williston expresses other reasons for the use of the reasonable expectation doctrine in the context of insurance contracts. *See* Williston, *supra* note 107, at 29-30. Williston notes:

> The insured's chances of successfully negotiating with the company for any substantial change in the proposed contract are just about zero .[and that] few persons solicited to take policies understand the subject of insurance or the rules of law governing the negotiations, and they have no voice in dictating the terms of what is called the contract.

Id.

111. 428 F Supp. 603 (D.C. 1977).

112. *Id.* at 604-05. In *Giles*, the procedural due process claim was denied because Howard University as a private university did not satisfy the "state actor" requirement. *Id.*

medical college's "Student Promotions Policy" was the basis for his contractual action and that the university breached the contract when they dismissed him.[113] The court posited that in interpreting the contract between the student and the school, since it was not an integrated agreement, the standard was that of reasonable expectations.[114] After reading the Student Promotions Policy, the *Giles* court determined the plaintiff failed to show a violation of a contract right since "the reasonable expectation of any student is that if he failed a course and does not make up the deficiency" he may be subject to dismissal.[115]

Six years later, in *Cloud v. Boston University*,[116] a law student sought damages and reinstatement after he was expelled for misconduct.[117] The plaintiff's claim was based on a breach of contract theory, in which he alleged his contractual rights were violated due to the inadequacy of the hearing.[118] Citing the *Giles* court, the *Cloud* court applied the standard of reasonable expectation.[119] The court analyzed whether the procedures followed in the hearing were within the reasonable expectations of one interpreting the relevant rules, and the court concluded the procedures provided were adequate.[120]

Recently, the Court of Appeals for the Sixth Circuit heard *Doherty v. Southern College of Optometry*,[121] which involved a student who brought a breach of contract action after his school did not give him his degree due to his failure to satisfy the clinical proficiency requirements.[122] The *Doherty* court acknowledged the existence of a

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113. *Id.* at 605.

114. *Id.* (citing J. CALAMARI & J. PERILLO, CONTRACTS § 47 (1970)). The standard of reasonable expectation means "what meaning the party making the manifestation, the University, should reasonably expect the other party to give it." *Id.*

115. *Id.* at 606.

116. 720 F.2d 721 (1st Cir. 1983).

117. *Id.* In *Cloud*, a third-year law student at Boston University was charged with "peeping" under the skirts of women students. *Id.* at 723. These incidents supposedly occurred in the university library on four separate occasions. *Id.*

118. *Id.* at 724.

119. *Id.*

120. *Id.* at 724-26.

121. 862 F.2d 570 (6th Cir.), *cert. denied*, 493 U.S. 810 (1989).

122. *Id.* at 573. In *Doherty*, the plaintiff was a handicapped student who attended the Southern College of Optometry (SCO). *Id.* at 571. The plaintiff brought claims for violating the Rehabilitation Act, misrepresentation and breach of contract. *Id.* at 571-72. As to the plaintiff's claim under section 504 of the Rehabilitation Act of 1973, the plaintiff met the first element of being a "handicapped person" but failed to establish he was "otherwise qualified" for the program. *Id.* at 573. This was because the clinical proficiency requirements were a vital part of SCO's curriculum and the plaintiff admitted that he was incapable of achieving those requirements. *Id.* at 574. Also, the plaintiff did not succeed on his claim that SCO was liable for

contract between the student and university and adopted the reasonable expectation standard in construing the terms of the contract.[123] The court ruled that the college could reasonably expect the students to comply with curriculum changes affecting degree requirements.[124] Thus, the court ruled in favor of the defendant college by finding that changing the degree requirements to include a clinical proficiency was reasonable.[125]

Courts mention several other factors in discussing the relationship between student-athletes and schools that highlight the equitable basis for utilizing the reasonable expectation standard. These factors are similar to the reasons why courts have used the reasonable expectation standard to interpret insurance contracts.[126] An athletic scholarship exemplifies a contract between a student-athlete and a university which one party prepares on a printed form and the other party adheres to with little or no bargaining power.[127] Furthermore, the individual student-athlete has little voice or participation in the formulation or interpretation of the rules and regulations governing his scholarship, despite that these materially control his conduct on and off the field.[128] One commentator even suggested that the elements for finding "duress/undue influence" is often present in the formation of an athletic scholarship agreement.[129] Thus, the courts' use of the reasonable expectation standard is not only well based in case law but is also the appropriate standard for equitable reasons.

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misrepresentation for informing him that he would be able to complete the program and obtain a job after graduation. *Id.* at 575. The plaintiff's misrepresentation claim failed due to the court's finding that Tennessee law did not allow for a misrepresentation claim where the defendant expressed an opinion, instead of misrepresenting a fact. *Id.* Lastly, the plaintiff's breach of contract claim failed because the court ruled that a disclaimer in the student handbook allowed SCO to change the curriculum during a student's tenure at the school. *Id.* at 578.

123. *Id.* at 577 (citing Giles v. Howard Univ., 428 F Supp. 603, 605 (D.D.C. 1977)).

124. *Id.* at 577.

125. *Id.* at 578.

126. *See supra* notes 108-11 and accompanying text discussing the reasons for using the reasonable expectations standard. The author is aware of the inherent differences between an insurance contract and athletic scholarship, and only seeks to illustrate the rationale for using the reasonable expectation standard.

127. *See, e.g.*, Corso v. Creighton Univ., 731 F.2d 529, 533 (8th Cir. 1984) (analyzing appropriate contractual interpretation where a medical student was expelled for cheating on an examination and appealed the procedures alleging that procedures did not comply with the contract between the parties).

128. *See, e.g.*, Gulf S. Conference v. Boyd, 369 So.2d 553, 558 (Ala. 1979) (discussing athletic scholarships in action brought by a student-athlete who was declared ineligible).

129. Cozzillio, *supra* note 53, at 1335.

In interpreting athletic scholarship agreements, the conclusion that the only obligation owed to the student-athlete is the scholarship fund clashes with the reasonable expectations of the student-athlete at the time of the agreement.[130] A student-athlete accepts a scholarship offer for many different reasons.[131] Prospective student-athletes often consider factors that range from the personality of the coach, to the prospective team's style of play [132] Since talented athletes typically have multiple scholarship offers, it is not unusual that a student-athlete selects an institution primarily because he wants to play on that institution's team.[133] Moreover, when it is considered that schools recruit athletes for a limited number of scholarships,[134] it is evident that schools expect their student-athletes to contribute to their sports program.[135] Therefore, to find that a student-athlete has a reasonable expectation to have an "opportunity to play" only seems a logical and fair conclusion.

Assuming the opportunity to play is a reasonable expectation of the student-athlete, the court may imply the term in the scholarship since it reflects an accommodation of the student-athlete's reasonable expectations.[136] Once established as a right under the contract, the student-athlete's interest in remaining eligible clearly satisfies the property interest criteria established in *Board of Regents v. Roth* and *Perry v. Sindermann*.[137]

The contractual interest a student-athlete derives from his scholarship appears to satisfy the *Roth* criteria.[138] An athletic scholarship fulfills the requirement that the claimant of a property interest pos-

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130. Derek Quinn Johnson, Note, *Educating Misguided Students Athletes: An Application of Contract Theory*, 85 COL. L. REV. 96, 116 (1985) (author applies contract principles in arguing that courts should recognize that a contract to educate exists between a student athlete and his institution).

131. Keyes, *supra* note 12, at 615.

132. *Id.* Keyes lists other factors such as the ability of the prospective coach, the personality of the prospective teammates, and the location of the institution. *Id.*

133. *Id.* at 615-16.

134. *See supra* notes 80-82 and accompanying text for a discussion of NCAA regulations that govern scholarships.

135. Keyes, *supra* note 12, at 615-16.

136. *See, e.g.*, C & J Fertilizer v. Allied Mut. Ins. Co., 227 N.W.2d 169, 177 (Iowa 1975) (the reasonable expectation of the insured was ruled part of the contract); *see also* Jonathan Flagg Buchter, Note, *Contract Law and the Student-University Relationship*, 48 IND. L.J. 253, 266 (1972) (stating that the "reasonable expectations of the parties may be implied into a contract").

137. *See* Porto, *supra* note 10, at 1166-69; Keyes, *supra* note 12, at 614-16; Springer, *supra* note 7, at 347-48.

138. Springer, *supra* note 7, at 348.

sess an entitlement which is predicated upon a source independent of the claimant's expectation.[139] The student-athlete does not merely have a "need" for the benefit of participating in intercollegiate athletics because he is required to participate as a condition of the scholarship.[140] Also, a student-athlete's participation is not a "unilateral" expectation because the institution expects him to play as well.[141] Furthermore, the interest taken away is an interest that is "presently enjoyed" by the student-athlete. Lastly, the rules and understandings that arise from the scholarship agreement reinforce the notion that the student-athlete is entitled to having the benefit of the opportunity to play [142]

Additionally, a student-athlete's interest in eligibility can be defined as a property interest by comparing it to the property interest found in *Perry* [143] Similar to how an implied contractual right in continued employment was the basis for a property interest in *Perry*, a student-athlete has an implied contractual right in the opportunity to play arising from his scholarship.[144] The understanding between the student-athlete and the school regarding the student-athlete's participation is analogous to the "mutually explicit understanding" required in *Perry* to support a claim of entitlement.[145] Therefore, under the reasoning established in *Perry*, a student-athlete's interest in eligibility should be recognized as a property interest.[146]

Conclusion

A student-athlete's eligibility interest rises to the level of a constitutionally protected property right which is derived from the athletic scholarship. Recent decisions do not acknowledge such a right because of their literal interpretation of the scholarship agreements. Courts, however, should interpret athletic scholarships using the reasonable expectation standard. Not only is the reasonable expectations standard backed by contract theorists and present in existing student-university case law, such a standard is much fairer than ruling that a student-athlete has no rights outside of what the university

139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.*
143. Keyes, *supra* note 12, at 614.
144. *Id.* at 615.
145. *Id.* at 616.
146. *Id.*

inserts on the standardized scholarship form. Courts should recognize that student-athletes are not in an equal bargaining position with prospective schools. More importantly, courts should take into consideration that very few student-athletes are knowledgeable in interpreting contracts, and thus, it is inequitable to limit their rights to the words of the scholarship agreement.

Schools, in conjunction with the NCAA, seem unwilling to expressly include the right to remain eligible in scholarships even though these student-athletes provide their respective schools and the NCAA with enormous amounts of money and publicity Courts should recognize that student-athletes should be provided due process protection, which may be obtained if courts imply the right to remain eligible into the scholarship agreement. Once the student-athletes' interest in eligibility is recognized as a right under the scholarship and presented in light of the property interest criteria established by *Roth* and *Perry*, it is clear that the student-athlete possesses a property interest in their eligibility Until courts determine that the right to remain eligible is a constitutionally protected property interest, however, all schools can continue dispossessing student-athletes of their opportunity to play without providing them procedural due process.

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