Balancing Due Process and Academic Integrity in Intercollegiate Athletics: The Scholarship Athlete's Limited Property Interest in Eligibility*

Introduction

In approximately a dozen lawsuits litigated during the 1970's and 1980's, athletic scholarship recipients who had been declared ineligible for varsity competition asserted that the due process clause of the fourteenth amendment encompassed a property right to continued athletic eligibility.[1] The plaintiffs claimed that as a result of this property right, student athletes are entitled to due process prior to being deprived of eligibility for athletic competition.[2] Each plaintiff presented one of four rationales which, arguably, were available as potential bases for a property interest in athletic eligibility. The respective rationales were that: (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.[3]

The plaintiffs asserted that the National Collegiate Athletic Association (NCAA),[4] which promulgates requirements for continued eligibility, is a "state actor"[5] and that the Association employed enforcement procedures which failed to satisfy even minimal standards of due proeess.[6] The NCAA, a private, voluntary association of approximately 900 member schools, conferences and organizations, is responsible for the administration of

1. *See, e.g.,* 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).

2. *See, e.g., Regents of Univ. of Minn.,* 560 F.2d 352; *Howard Univ.,* 510 F.2d 213; *Parrish,* 506 F.2d 1028, 1031.

3. Note, *A Student-Athlete's Interest in Eligibility: Its Context and Constitutional Dimensions,* 10 CONN. L. REV. 318, 342-48 (1978).

4. *Id.* at 318 n.5

5. *See* U.S. CONST. amend. XIV, § 1.

6. *Id.*

intercollegiate athletics in all of its phases.[7] The NCAA's avowed purpose is to preserve intercollegiate athletics as the domain of the amateur. Amateur is defined as "one who engages in a particular sport for the educational, physical, mental and social benefits he derives therefrom and to whom participation in that sport is an avocation."[8]

The charges of lack of due process for student athletes have been supported by scholarly commentaries[9] which have maintained that during its disciplinary proceedings, the NCAA refuses to permit the student athletes' interest, restoration of eligibility, to be presented independently of the universities' interest, namely, paying their penalties and regaining access to television and post-season competition. The NCAA has responded that: (1) it is not a "state actor," and hence it is not bound by constitutional standards of due process; (2) student athletes are not entitled to due process because the Constitution does not recognize a property right to continued athletic eligibility; and (3) NCAA disciplinary proceedings provide due process to student athletes even in the absence of a constitutional mandate.[10]

Only one federal court has recognized a property right to athletic eligibility,[11] yet student athletes continue to assert the right[12] and commentators continue to comment on the merits of upholding it.[13] This issue is part of a larger debate regarding the way in which the law should define that relationship between scholarship awardees and their universities. Two federal courts concluded during the 1970's that athletic scholarships are

7. *See* Greene, *The New N.C.A.A. Rules of the Game: Academic Integrity or Racism?* 28 ST. LOUIS U.L.J. 101, 102 n.1 (1984); Note, *The NCAA, Amateurism, and the Student-Athlete's Rights Upon Ineligibility,* 15 NEW ENG. L. REV. 597, 598 (1980).

8. Note, *supra* note 7, at 598-99.

9. *Id.*

10. *See* Brody, *NCAA Rules and Their Enforcement: Not Spare the Rod and Spoil the Child—Rather Switch the Values and Spare the Sport,* 1982 ARIZ. ST. L.J. 109; Gaona, *The National Collegiate Athletic Association: Fundamental Fairness and the Enforcement Program,* 23 ARIZ. L. REV. 1065 (1981); Miller, *The Enforcement Procedures of the National Collegiate Athletic Association: An Abuse of the Student-Athlete's Right to Reasonable Discovery,* 1982 ARIZ. ST. L.J. 133; Note, *supra* note 3; Note, *supra* note 7.

11. The District of Minnesota found a property right to continued eligibility in Hall v. University of Minnesota, 530 F. Supp. 104 (D. Minn. 1982), Regents of University of Minnesota v. NCAA, 422 F. Supp. 1158 (D. Minn. 1976), and Behagen v. Intercollegiate Conference of Faculty Representatives, 346 F. Supp. 602 (D. Minn. 1972). The Western District of Michigan also found a property right in Hunt v. NCAA, No. 676-370 slip op. (W.D. Mich. Sept. 10, 1976), but ruled against the student-athlete plaintiffs, concluding that the property right does not necessitate a formal judicial hearing, at least where a campus hearing precedes an NCAA hearing and where a student athlete can appeal the university's ruling of ineligibility to the NCAA. *Hunt* announced a property right without teeth because, as this Note will demonstrate, *Hunt* endorsed an NCAA enforcement procedure which denies due process.

12. *See, e.g.,* Justice v. NCAA, 577 F. Supp. 356 (D. Ariz. 1983).

13. *See, e.g.,* Comment, *Judicial Review of N.C.A.A. Decisions: Does the College Athlete Have a Property Interest in Interscholastic Athletics?,* 10 STETSON L. REV. 483 (1981). *See also supra* note 10.

contracts, the terms of which are binding upon both the student athletes and their universities.[14] These decisions departed from the traditional view, still espoused by the NCAA, that athletic scholarships are educational grants or gifts[15] which lack the exchange of enforceable promises necessary for a contract.[16] One state court concluded in the 1980's that athletic scholarships are contracts of employment under which recipients who are permanently disabled as a result of an injury sustained during practice or in competition are entitled to collect benefits from a state workers' compensation fund.[17] That decision was vacated on appeal, as the appellate court adhered to the view that athletic scholarships are educational grants, not employment contracts.[18]

This debate underscores the need to reexamine the property right issue. A reexamination must address the question of whether a property right to continued eligibility is protected by the Constitution and, if so, what process is due college athletes who successfully assert that right. The determination of what process is due will follow an assessment of whether any of the four proffered rationales for the property right can promote due process for student athletes without hindering the capacity of the universities to demand satisfactory academic performances from those student athletes. Another important question for reexamination is whether the athletes who are declared ineligible as a result of academic deficiencies are entitled to the same measure of due process as the athletes who are declared ineligible as a result of misconduct. To accord both groups of student athletes the same measure of due process appears to contravene the decision of the United States Supreme Court in *Board of Curators of the University of Missouri v. Horowitz*,[19] and to reduce the power of universities to enforce their academic standards with respect to the athletes. Perhaps, identical measures of due process in both academic and misconduct cases are necessary, however, because of the considerable benefits which scholarship athletes will lose if declared ineligible.

This Note contends that the Constitution recognizes a property right to continued athletic eligibility which is derived from the contractual nature of athletic scholarships. The scholarship contracts confer upon the awardees

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14. Begley v. Corp. of Mercer Univ., 367 F. Supp. 908 (E.D. Tenn. 1973); Taylor v. Wake Forest Univ., 16 N.C. App. 117, 191 S.E.2d 379 (N.C. App. 1972), *cert. denied*, 282 N.C. 307, 192 S.E.2d 197 (1972).

15. *See* Rensing v. Indiana State Univ., 444 N.E.2d 1170 (Ind. 1983).

16. *See generally* E. FARNSWORTH, CONTRACTS 3-10 (1982).

17. *Rensing*, 437 N.E.2d 78.

18. *See supra* note 15.

19. 435 U.S. 78 (1978). Here the Supreme Court ruled that less stringent procedural requirements are necessary when a student is dismissed from school for academic deficiencies; a higher standard of due process is required, in the Court's view, when the dismissal results from charges of misconduct.

an entitlement to educational and financial benefits; the entitlement creates the property interest.[20] Only this contractual rationale can balance due process protection for the student athletes with academic integrity for the universities. The Note 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.

I. The Scholarship Athletes' Property Interest in Eligibility

A. The State Action Requirement

The fourteenth amendment protects the individual against 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 as to be indistinguishable from actions of the state.[21] Student athletes who claim a property interest in eligibility must therefore show that the rules and regulations of the NCAA constitute state action.[22] A majority of courts which have heard constitutional disputes between student athletes and the NCAA during the past two decades have found the NCAA to be a state actor.[23] Several of those decisions, however, occurred prior to recent Supreme Court decisions which have made it considerably more difficult to find state action by a private voluntary association such as the NCAA.[24] The NCAA's state actor status is, therefore, more in doubt now than it has been at any time since the early 1970's, when suits by student athletes asserting a property interest in eligibility began to appear in federal courts.[25]

20. In Board of Regents v. Roth, the Supreme Court ruled 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." 408 U.S. 564, 577 (1972).

21. The fourteenth amendment provides: "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. Hence the Constitution makes it clear that its equal protection and due process guarantees will apply only to governmental action. However, as will be discussed in this section, the term "state" has been interpreted by courts to include private organizations which are affected with state action and are therefore subject to constitutional restraints.

22. *Id.*

23. *See supra* note 5.

24. *See, e.g.*, Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978); Hudgens v. NLRB, 424 U.S. 507 (1976); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974).

25. Evidence of the fact that the NCAA's status as a state actor is an open question is provided by Arlosoroff v. NCAA, 746 F.2d 1019 (4th Cir. 1984). There, the court ruled that the NCAA does not satisfy the requirements for a state actor which the Supreme Court has articulated since the early disputes like *Parish* and *Howard University* were decided. *Id.* at 1021-22.

1. The Public Function Analysis

During the 1970's, federal judges employed two different rationales in finding the NCAA to be a state actor. One rationale, the public function analysis, maintained that the regulation of intercollegiate athletics was a traditional public function because athletics was a significant component of public education and because the NCAA played an important regulatory role which would otherwise have had to be played by government.[26] According to the public function analysis, states should not be able to sidestep constitutional restrictions by forming or supporting private organizations to perform tasks which would otherwise be performed by state agencies.[27] Student athletes would probably be unable to make this argument successfully today because public function analysis, as originally articulated in *Marsh v. Alabama,*[28] has been interpreted very narrowly in recent Supreme Court decisions.[29]

In *Marsh,* the Supreme Court held that because a company-owned town functioned like a conventional municipality, its managers were subject to the same constitutional restraints as managers of a public municipality.[30] The theory upon which this ruling is based is that private parties are subject to constitutional restrictions if they perform functions traditionally reserved to the state.[31] The Supreme Court subsequently ruled, however, in *Hudgens v. NLRB,*[32] that *Marsh* only applied in situations where a private party assumed all of the functions of a municipal or state government. The Court has also said in *Flagg Brothers Inc. v. Brooks*[33] that the company-owned town in *Marsh* can be distinguished from other private entities which perform public functions because the company town was the exclusive performer of traditional public functions for its residents.[34]

The NCAA probably cannot meet the *Hudgens* standard, requiring the performance by a private entity of a full range of traditional governmental functions in a given area of activity. If, as the United States Court of Appeals for the Fifth Circuit has said,[35] the public function performed by the NCAA is education, in order for the NCAA to meet the *Hudgens* standard, it would have to participate in the full spectrum of customary state activities pertaining to education.[36] NCAA activities also appear to

26. *See* Parish v. NCAA, 506 F.2d 1028, 1032-33 (5th Cir. 1975).
27. *Id.*
28. 326 U.S. 501 (1946).
29. *See supra* note 24.
30. *Marsh,* 326 U.S. at 508.
31. Note, *supra* note 7, at 602.
32. 424 U.S. 507, 519 (1976).
33. *Flagg Bros.*, 436 U.S. 149.
34. *Id.* at 159.
35. *Parish,* 506 F.2d at 1032.
36. Note, *supra* note 7, at 603.

lack the exclusivity required by the *Flagg Brothers* standard, for the Court concluded in *Flagg Brothers* that only when a state delegates its entire prerogative in an area to a private party can the latter be seen as a state actor.[37] Since the regulation of intercollegiate athletics is not a function which has been delegated exclusively to the NCAA, the NCAA cannot be a "state actor" according to the *Flagg Brothers* standard.[38] Although membership in the NCAA is a practical necessity for universities which field big-time athletic teams, in a formal sense the membership decision is made by the schools independently.[39]

2. The Entanglement Theory

The second rationale which federal courts have used to find state action by the NCAA is the entanglement theory.[40] According to this view, approximately one-half of the NCAA's members are state-supported institutions.[41] These public schools provide the bulk of the NCAA's operating capital because contributions to the NCAA are gradated according to the enrollment of the contributor. Those schools with the highest enrollments are typically public.[42] The state-supported institutions are also a dominant force in the determination of NCAA policy because the memberships of the Association's governing council and committees have traditionally been composed mostly of representatives from public institutions.[43] These public schools dominate a policymaking process which produces extensive NCAA regulation and supervision of intercollegiate athletics, a valuable service which, in the NCAA's absence, the member schools would have to provide for themselves.[44] As a result of these features, the United States Court of Appeals for the District of Columbia has observed: "the NCAA and its member public instrumentalities are joined in a mutually beneficial relationship, and in fact may be fairly said to form the type of symbiotic relationship between public and private entities which triggers constitutional scrutiny."[45]

The entanglement theory has recently been rejected by the United States Court of Appeals for the Fourth Circuit as a basis for finding state action by the NCAA. In *Arlosoroff v. NCAA*,[46] the court observed: "It is not

37. *Flagg Bros.*, 436 U.S. at 160.
38. Note, *supra* note 7, at 603.
39. *Id.* at n.34.
40. *See Howard*, 510 F.2d at 219.
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.* at 220.
46. 746 F.2d 1019.

enough that an institution is highly regulated and subsidized by a state. If the state in its regulatory or subsidizing function does not order or cause the action complained of, and the function is not one traditionally reserved to the state, there is no state action."[47] Since there was no evidence that public institutions had joined together to vote as a bloc in order to create the rule challenged in this case, and since the regulation of college athletics is not a traditional governmental function, the NCAA was found not to be a state actor.[48]

Despite its rejection in *Arlosoroff,* the entanglement theory can provide a sound basis for the conclusion that the NCAA is a state actor. Even Justice Rehnquist, whose hostility toward a broad concept of state action is perhaps clearer than that of any other Court member, has left the door ajar for the entanglement theory. He has written: "[O]ur precedents indicate that a state normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the state."[49] Subjecting the actions of the NCAA to constitutional scrutiny would not be inconsistent with the view expressed by Justice Rehnquist or with contemporary Supreme Court decisions which have narrowed the concept of state action because those decisions have not undermined the principle that closely intertwined joint ventures between private and public entities must abide by constitutional restrictions.[50] Even if this principle is limited in scope by the emerging requirement that the state must explicitly approve of the private rules and cooperate in their implementation, it remains appropriate to subject the NCAA to constitutional limitations.[51]

The actions of the NCAA satisfy both the "coercive power" and "significant encouragement" requirements of the Rehnquist analysis.[52] Both public and private universities have surrendered to the NCAA their power to regulate college athletics and the NCAA has, in turn, adopted rules and regulations by means of a process in which public as well as private schools participate.[53] Once adopted by the membership, those rules apply with equal force to public and private institutions;[54] there is no distinction between NCAA action and state action. Athletic departments at public universities must adhere to NCAA rules just as closely as if those rules were promulgated directly by the state's legislature or governor, instead

47. *Arlosoroff,* 746 F.2d at 1022.
48. *Id.*
49. Blum v. Yaretsky, 457 U.S. 991, 1004 (1982).
50. Greene, *supra* note 7, at 127.
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*

of by university executives.[55] A recent commentator has observed: "in the world of intercollegiate athletics, there is but one well-kept playing field open to colleges and universities, private or public, and the NCAA is the groundskeeper."[56]

Professor John Weistart of Duke University Law School, a frequent commentator on issues in sports law, observes that since the NCAA controls the competitive eligibility of student athletes without permitting them to participate in its rulemaking processes, and since the eligibility regulations which the Association promulgates are unavoidable for football and basketball players preparing for careers in professional sports, the athletes are locked into an involuntary, dependent relationship with the NCAA.[57] Professor Weistart writes: "A relationship of dependency that is also involuntary should surely occupy a commanding position on the continuum of arrangements warranting judicial oversight."[58] The commentaries cited above indicate that even if the early precedents supporting the view that the NCAA is a state actor are insufficient to influence judicial decisions in the future, student athletes can nevertheless make sound legal and public policy arguments in favor of that view, based upon the entanglement theory.

B. *Four Rationales for the Property Right: Economic, Educational, Scholarship Per Se, and Contractual*

Unlike the state action issue, which courts have typically decided in favor of student athlete plaintiffs, the issue of whether those plaintiffs possess a property right to athletic participation has typically been decided in favor of the defendant NCAA.[59] 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.[60] 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*[61] that: "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He

55. *Id.*
56. *Id.*
57. Weistart, *Legal Accountability and the NCAA,* 10 no. 2 J.C. & UNIV. LAW 167, 175 (1983-84).
58. *Id.*
59. *See Regents of Univ. of Minn.*, 560 F.2d 352; *Howard Univ.*, 570 F.2d 213; *Parish,* 506 F.2d 1028; *Justice,* 577 F. Supp. 356; Colorado Seminary v. NCAA, 417 F. Supp. 885 (Colo. 1976), *aff'd,* 570 F.2d 320 (10th Cir. 1978).
60. *See* Comment, *supra* note 13, at 494.
61. 408 U.S. 564.

must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it."[62] That claim of entitlement, in order to be legitimate, must be based upon a source independent of the beneficiary's own expectations, such as a state law or an institutional rule.[63] Courts have divided over whether scholarship athletes have an entitlement to the benefits of athletic scholarships, with the majority either sidestepping the issue or denying the existence of an entitlement.[64] Courts have heard four alternative rationales for the existence of a property right to continued eligibility.

The economic rationale views intercollegiate athletics as a training ground for professional sports and argues that the property right is derived from the collegians' economic interests in uninterrupted preparation for lucrative careers as professional athletes.[65] Although the economic rationale has been accepted by the District of Minnesota,[66] it has failed when presented outside of that jurisdiction.[67] The majority view of this argument, expressed in *Colorado Seminary v. NCAA*,[68] is that because so few former college athletes ever sign a professional contract, the college athletes' economic interests in professional sports opportunities are "speculative and not of constitutional dimensions."[69] One commentator has written: "In the absence of settled state law on point, eligibility which may lead to a professional contract is clearly a unilateral expectation of a benefit without a legitimate claim of entitlement based on an independent source."[70]

The educational rationale views participation in college athletics as an integral facet of the student athlete's educational experience.[71] As a substantial element of the educational process, athletic eligibility should not be permitted to be sacrificed in the absence of due process.[72] This reasoning is premised upon the longstanding recognition that the opportunity to pursue an education is a sufficiently important interest that it cannot be impaired without due process.[73]

62. *Id.* at 577.
63. *Id.* at 578.
64. *See supra* note 59.
65. *See* Note, *supra* note 3, at 342.
66. *See Hall*,530 F. Supp. 104; *Regents of Univ. of Minn.*, 422 F. Supp. 1158; *Behagen*, 346 F. Supp. 602.
67. *See Howard Univ.*, 510 F.2d 213; *Parish*, 506 F.2d 1028, *Justice*, 577 F. Supp. 356; *Colorado Seminary*, 417 F. Supp. 885; NCAA v. Gillard, 352 So. 2d 1072 (Miss. 1977).
68. *Colorado Seminary*, 417 F. Supp. 885.
69. *Id.* at 895.
70. Note, *supra* note 3, at 343.
71. *Id.*
72. *Regents of Univ. of Minn.*, 422 F. Supp. 1158; *Behagen*, 346 F. Supp. 602.
73. *See* Jones v. Snead, 431 F.2d 1115 (8th Cir. 1970); Soglin v. Kaufman, 418 F.2d 163 (7th Cir. 1969); Esteban v. Central Mo. State College, 415 F.2d 1077 (8th Cir. 1969), *cert. denied*, 398 U.S. 965 (1970); Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1961).

The scholarship per se rationale claims that the loss of an athletic scholarship per se is a denial of a property interest in athletic eligibility.[74] The athletes who suffer such losses are likely to incur financial hardships which may cut off the opportunity to continue attending college and to earn a degree.[75] The deprivation of the scholarships then, is also a deprivation of benefits to which the athletes were entitled according to the terms of their awards; the continued receipt of those benefits is a property interest which cannot be denied without due process.[76] This argument has been unsuccessful because courts have concluded that since no school has yet revoked an athletic scholarship as a result of a declaration of ineligibility, no student athlete has been denied benefits which create a property interest.[77]

The contractual rationale maintains that a property right to athletic eligibility is created by the contractual provisions of the athletic scholarships.[78] The scholarships are contracts which have conferred upon the athletes certain benefits, including the right to participate in intercollegiate athletics, which cannot be denied without due process.[79] The contractual argument has had a mixed reception in court. In *Colorado Seminary,*[80] a federal district court in Colorado held that although the scholarships are contracts, they do not confer upon the recipients the entitlement to benefits which is necessary to create a property interest.[81] The scholarship athletes have a unilateral expectation of participation, not a right to compete.[82] The court said: "The athlete on scholarship has no more 'right' to play than the athlete who 'walks on.' "[83]

The contractual rationale was accepted, however, in *Hunt v. NCAA.*[84] A federal district court in Michigan concluded that the plaintiffs possessed a property interest derived from the scholarship agreements which they had signed, wherein each student athlete had been granted a package of benefits constituting a football scholarship.[85] Since those scholarships had been conferred according to established NCAA rules and procedures and were understood by the awardees and their schools to bestow certain benefits, the plaintiffs had satisfied the entitlement requirement for a property interest.[86] Unlike the *Colorado Seminary* court, which saw no legal difference

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74. *See* Note, *supra* note 3, at 345.
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.* at 339.
79. *Id.* at 345.
80. *Colorado Seminary,* 417 F. Supp. 885.
81. *Id.* at 895 n.5.
82. *Id.*
83. *Id.*
84. No. 676-370, slip op. (W.D. Mich. Sept. 10, 1976).
85. *Id.* at 4.
86. *Id.*

between scholarship recipients and walk-ons, the *Hunt* court viewed the former as not merely expecting to participate, but as being entitled to participate.

C. Critique: Serious Flaws Plague Economic, Educational, Scholarship Per Se Rationales But Contractual Rationale Supports Property Interest in Eligibility

1. The Economic Rationale

This rationale views college athletics not as a component of university life, but as a means of acquiring the specialized qualifications for a profession. Just as courts have held that the rights of individuals to pursue professional training in law, dentistry or medicine cannot be denied without due process,[87] so courts should rule that the rights of college students to pursue professional training in athletics cannot be denied without due process.[88] The economic rationale, however, possesses adverse policy implications of major proportions for intercollegiate athletics and higher education. It therefore must be rejected if there is to be a meaningful distinction between intercollegiate and professional athletics.

Acceptance of the economic rationale means acceptance of the notion that scholarship athletes are not students engaged in extracurricular activities, but apprentice entertainers who are training to be professional entertainers. At first glance, this notion appears perceptive and realistic, but a careful examination reveals that apprentice entertainers who are declared academically ineligible for athletics could understandably regard that declaration as a denial of due process and challenge it on either substantive or procedural grounds.[89]

A suit on substantive due process grounds would contend that the legislative scheme being challenged, either the academic eligibility rules of the NCAA or the academic regulations of the defendant university, is arbitrary and capricious and is unrelated to a legitimate governmental interest, in this instance, a college athlete's preparation for a professional career.[90] Such a suit would be likely if the economic rationale, as articulated by one recent student note, were adopted. This note argues: "The college

87. *See* Reese v. Board of Comm'rs of Ala. State Bar, 379 So. 2d 564 (Ala. 1980); Board of Dental Examiners v. King, 364 So. 2d 319 (Ala. Civ. App. 1978); North v. West Virginia Bd. of Regents, 160 W. Va. 248, 233 S.E.2d 411 (1977).

88. *See* Comment, *supra* note 13.

89. For a general discussion of substantive and procedural arguments which a student athlete could make, see Buss, *Due Process in the Enforcement of Amateur Sports Rules*, in LAW AND AMATEUR SPORTS 1 (R. Waicukauski ed. 1982).

90. *Id.* at 8.

athlete needs the opportunity to develop skills, and to avoid arbitrarily imposed disciplinary measures that restrict the development of skills, just as any other student who attends a university with the hopes of moving into a specified career."[91] This statement suggests that requirements for continued matriculation and graduation are, in light of the college athlete's specialized career goals, "arbitrarily imposed disciplinary measures that restrict the development of skills," namely, athletic skills.[92]

This challenge could be answered by pointing out that, as long as college athletes are amateurs and are enrolled in full-time courses of study, it is reasonable for the NCAA and universities to impose academic requirements upon them.[93] A court which accepted the economically-based property interest in eligibility could nonetheless respond that academic strictures, which are reasonable when applied to students of history, chemistry or journalism, are unreasonable when applied to defensive backs and point guards training for careers in professional sports. Even if a substantive due process challenge failed, academically ineligible athletes could file suit on procedural due process grounds. It is commonplace for universities to recruit promising athletes despite substandard high school transcripts and a lack of basic academic skills, and to encourage those athletes to view the collegiate experience as an opportunity to train for a career in professional sports.[94] The athletes who are recruited in this fashion and subsequently declared academically ineligible could claim a deprivation of a property interest in intercollegiate competition without procedural due process, namely, that they lacked notice of university and NCAA academic requirements.

The economic rationale for the property interest could thus expand due process in academic ineligibility cases to a point where athletes were exempted from academic requirements. While such exemptions may prove necessary in order for big-time college athletics to operate honestly, the choice of whether or not to abandon the student athlete concept is a major policy choice in higher education which should be made directly by educators, not indirectly by judges. To abandon the notion of the student athlete is to announce that the training of individuals for careers in professional athletics has joined teaching, research and community service as a major mission of our universities.[95] That momentous announcement should

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91. *See* Comment, *supra* note 13, at 501.

92. *Id.*

93. *See Buss*, LAW AND AMATEUR SPORTS, *supra* note 89, at 8.

94. *See generally* Barnes, *Athletics and Academics: Making the Grade But Failing to Learn,* The Wash. Post, May 23, 1982, at D4, col. 1.

95. This is the announcement which the plaintiff asked the court to make in *Hall.* The academically ineligible plaintiff, who had failed to enroll in a degree-granting program, asserted that his property interest in regaining the status of full-time student lay in the chance

come as a result of careful deliberation within the educational community and not as an arguably unintended implication of a judicial response to a particular fact pattern.

2. The Educational Rationale

The idea that student athletes' property interest in intercollegiate competition derives from the fact that athletics are an integral component of undergraduate education also fails on policy grounds because it ignores the realities of big-time college sports. Participation in big-time intercollegiate athletics requires such substantial portions of the athletes' time and energy that the athletes often have very little time or energy to devote to studies.[96] A federal district court in Minnesota has observed:

> The exceptionally talented student athlete is led to perceive the basketball, football and other athletic programs as farm teams and proving grounds for professional sports leagues. It may well be true that a good academic program for the athlete is made virtually impossible by the demands of their sport at the college level.[97]

Participation in intercollegiate athletics therefore is not an integral component of undergraduate education; indeed, such participation is frequently a detriment to the completion of an undergraduate degree. To argue, as the district court did in *Regents of the Univ. of Minnesota*,[98] that the student athletes' property interest in continued eligibility is derived from an intimate relationship between college athletics and the aims of higher education is to

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to demonstrate his basketball skills so that he might be selected in an early round of the National Basketball Association draft and be rewarded with a lucrative contract. Although the court determined that the plaintiff possessed a property interest in pursuing a professional basketball career, the court was unwilling to abandon the student-athlete concept and free the plaintiff from academic requirements. Instead, the court held that the plaintiff's property interest in retaining full-time student status and eligibility for basketball had been denied by the university without due process. The real significance of *Hall* lies not in its disposition, but in the fact that the case brings out of the shadows and into clear focus the antagonism which exists between the academic purposes and the athletic programs of many universities, thereby casting doubt on the suggestion that intercollegiate athletics are an integral part of higher education. The plaintiff's argument in *Hall* is a logical precursor to the assertion that academic requirements deny due process by interfering with a college athlete's preparation for a career in professional sports. *Hall*, 530 F. Supp. 104.

96. The best evidence of the extent to which participation in big-time college athletics can harm studies is the low graduation rate of athletes who participate in big-time collegiate programs. A recent survey of professional athletes, the majority of whom had participated at the college level for four years, disclosed that 70% of professional basketball players had not earned degrees and that 80% of the first-year players entering the National Football League in 1981 had not earned degrees. *See* Waicukauski, *The Regulation of Academic Standards in Intercollegiate Athletics*, 1982 ARIZ. ST. L.J. 79, 93.

97. *Hall*, 530 F. Supp. at 109.

98. *Regents of Univ. of Minn.*, 422 F. Supp. 1158.

misread the realities of collegiate sport and the aims of higher education.[99] The district court observed in *Regents* that "[t]he concepts of winning, losing and doing your best, while made somewhat trite by modern media, are nonetheless important to everyone's development."[100] The court thus views the undergraduate experience as merely a socialization mechanism, ignoring its at least equally important role as an instrument of intellectual growth.[101] To assert that athletic participation is an integral component of a college education is to define a college education much too narrowly.

The educational rationale also encounters a serious doctrinal barrier through a misreading of *Goss v. Lopez.*[102] In *Goss,* the Supreme Court recognized a property interest in education entitling a student who had been suspended from school for ten days or less to notice and a hearing. It based that recognition upon requirements under Ohio law that (1) localities provide free elementary and secondary education to all residents between ages five and twenty-one and that (2) all residents between ages five and eighteen attend school for at least thirty-two weeks each year.[103] Those regulations gave Ohio public school students an entitlement to an education, based on state law, which in turn created a property interest in continued attendance protectable by the due process clause of the fourteenth amendment.[104] Justice White, writing for the majority, concluded that "[h]aving chosen to extend the right to an education to people of appellees' class generally, Ohio may not withdraw that right on grounds of misconduct, absent fundamentally fair procedures to determine whether the misconduct has occurred."[105]

It is a mistake to conclude, as the district court did in *Regents,* that the property interest in education announced in *Goss* can be extended to the collegiate context and used to protect an athlete who has been declared ineligible. Although high school students may possess a property interest in education which is derived from state requirements that localities provide free public education to all children and that those children must attend school, the colleges and college students are not bound by any such attendance requirements, hence, no entitlement accrues to the collegians.[106]

Participation in high school or collegiate athletics in and of itself is not a constitutionally protected right.[107] *Goss* does not apply to athletic ineli-

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99. *See* Note, *supra* note 3, at 344.
100. *Regents of Univ. of Minn.*, 422 F. Supp. at 1161.
101. *See* Note, *supra* note 3, at 344.
102. 419 U.S. 565 (1975).
103. Ohio Rev. Code Ann. §§ 3313.48, 3313.64 (1972 & Supp. 1978) require local authorities to provide a free education to all residents between the ages of five and twenty-one. Section 3321.04 requires attendance for a school year of not less than thirty-two weeks.
104. *Goss,* 419 U.S. at 573.
105. *Id.* at 574.
106. *See* Note, *supra* note 3, at 344.
107. *See* Albach v. Odle, 531 F.2d 983 (10th Cir. 1976).

gibility because athletic competition is merely one component of the educational process. In the words of the Tenth Circuit Court of Appeals, "*Goss* [does not] establish a property interest subject to constitutional protection in each of these separate components."[108]

3. The Scholarship Per Se Rationale

The scholarship per se rationale, which claims that the student athlete's property interest lies in the benefits provided by athletic scholarships, is easily rebutted by the NCAA or a defendant university. As long as athletic scholarships are not revoked when their holders are declared ineligible, the student athlete plaintiffs are not deprived of any benefits which might constitute a property interest.[109] Since NCAA rules permit, but do not require, universities to revoke athletic scholarships if their recipients become ineligible, courts are likely to continue ruling that no benefits to which the student athletes were entitled have been rescinded.[110]

NCAA regulations provide that athletic scholarships are renewable annually,[111] an arrangement which gives considerable discretion to coaches and athletic directors regarding the continuation of their student athletes' financial aid.[112] A court could therefore uphold revocations by universities of athletic scholarships at the conclusion of an academic year, where the schools' ostensible reason for revocation is poor performance or insubordination, but their real reason is the former awardees' ineligibility for part or all of the next season. The NCAA requires that scholarships be subject to annual renewal but does not require that the scholarships of ineligible players be continued beyond the academic year in which the declaration of ineligibility occurred.[113] The school which revoked a scholarship because of a player's prospective ineligibility would be able to successfully defend itself, therefore, against a claim that the revocation deprived the plaintiff athlete of benefits which created a property interest in the scholarship. As long as a university does not revoke an athletic scholarship during the academic year in which the beneficiary is rendered ineligible, that university need not fear that its decision will be reversed in court on the grounds that the ineligible athlete is entitled to the proceeds of the award.

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108. *Id.* at 985.

109. *See Parish,* 506 F.2d at 1034 n.17; *Colorado Seminary,* 417 F. Supp. at 895.

110. THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, 1985-86 MANUAL OF THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, NCAA CONST. art. 3, §4(c)(2)(i), at 21 (1985) [hereinafter MANUAL OF THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION].

111. *Id.* § 4(g), at 22-23.

112. For recent evidence of this discretion, see Vance, *North Dakota Coach Cuts Scholarships,* CHRONICLE OF HIGHER EDUC., May 18, 1983, at 24.

113. *See* MANUAL OF THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *supra* note 110.

4. The Contractual Rationale

The only line of reasoning which can support a property interest in continued eligibility views athletic scholarships as contracts which entitle student athletes to a package of benefits in exchange for fulfillment of an obligation to compete for the contracting university.[114] This rationale satisfies the requirement that the claimant of a property interest possess an entitlement which is predicated upon a source independent of the claimant's expectations.[115] It also can foster due process for college athletcs without blurring the distinction betwcen intercollcgiate and professional athletics or forcing judges to announce a major change in higher education policy. The contractual argument is distinguishable from the scholarship per se rationale because, in the contractual view, the student athletes' property interest includes not just money, but also the expectation that, assuming hcalth and skill, the awardees will participate in intercollegiate sports.[116]

These scholarship athletes indeed do not merely expect to play, but rather, are obligated to do so by the terms of their scholarship agreements. One commentator has observed: "The student athlete has morc than an abstract need or desire to participate in intercollegiate athletics: he is contractually obligated to do so. The expectancy of his participation is not unilateral: it belongs to the institution as well as to the individual."[117]

The benefits which student athletes seek to retain have a source independent of the athletes' expectations. That source is the scholarship agreements, which clearly express the athletes' obligations to the institution. The athletes' obligations exceed those imposed upon non-athletes.[118] NCAA rules require that before signing letters of intent to enroll at particular schools, the athletes possess written statements from those schools which list the tcrms and conditions of the financial assistance offered, including its amount and duration.[119] The athletes must agree to abide by the rules of their universities, the athletic conferences to which their schools belong, the NCAA, and their coaches in order to maintain eligibility. The universities frequently reserve the right to retract scholarships if the recipients fail to meet any obligations specificd in the agreement.[120] The prospective college athletes also sign letters of intent, which identify the schools at

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114. *See Hunt*, No. 76-370, slip op. at 4 (W.D. Mich. Sept. 10, 1976).

115. *See Roth*, 408 U.S. at 578 (1972).

116. *See* Note, *supra* note 3, at 345.

117. *Id.* at 348.

118. *See* Note, *Educating Misguided Student Athletes: An Application of Contract Theory,* 85 Colum. L. Rev. 96, 116 (1985).

119. *See* Manual of the National Collegiate Athletic Association, *supra* note 110, art. 3, § 4(f), at 22.

120. "The wording of the financial aid statement is at the discretion of the individual universities, and thus may differ from school to school." Note, *supra* note 118, at 115.

which these athletes will enroll. Each athlete may sign only one letter, which will be invalid unless it is signed by the recipient, the recipient's legal guardians and the preferred school's director of athletics.[121] If the athlete reneges on this agreement and enrolls at a school other than the one indicated on the letter of intent, that athlete forfeits the initial year of athletic eligibility at the second school.[122]

Courts have recognized that athletic scholarships impose obligations upon student athletes as well as upon the institutions which confer the awards. In *Taylor v. Wake Forest University*,[123] a football player who had been declared academically ineligible during his freshman year refused to resume competing even after improving his grades sufficiently to regain eligibility, but still sought to recover the financial aid which he had forfeited as a result of that refusal.[124] The court observed that by signing the scholarship agreement, Taylor had agreed to maintain both the academic and physical aspects of his eligibility.[125] As long as his grade-point average equalled or exceeded Wake Forest's requirements, he was scholastically eligible and was required to participate in practice sessions, unless injured, in order to satisfy the physical eligibility rules of the scholarship agreement.[126] By refusing to practice or compete after his freshman season, Taylor failed to satisfy those physical eligibility rules, thereby breaching his contractual obligations to Wake Forest.[127]

A federal district court in Tennessee found that a contract existed in *Begley v.Corporation of Mercer University*,[128] in which a prospective student athlete who was mistakenly awarded an athletic scholarship for the upcoming academic year sued the university for breach of contract after it revoked the award. The revocation resulted from a discovery that Begley's 2.9 high school grade-point average was based on a scale of 8.0 instead of the customary 4.0.[129] As a result, Begley's grade-point average was below the minimum necessary for freshman eligibility under NCAA rules.[130] The court agreed with Begley that he and Mercer University had signed a

121. *See id.* at 114-15.
122. *Id.* at 114 n.107.
123. 16 N.C. App. 117, 191 S.E.2d 379 (1972).
124. *Taylor*, 191 S.E.2d at 381.
125. *Id.* at 382.
126. *Id.*
127. *Id.*
128. 367 F. Supp. 908.
129. *Id.* at 909.
130. When the *Begley* case was decided, the NCAA required freshman athletes to have a predicted 1.6 grade-point average on a 4.0 scale in order to be eligible for athletics. The predicted grade-point average was determined by prediction tables which took account of the prospective freshman's high school grades and score on either the Scholastic Aptitude Test (SAT) or American College Test (ACT). Begley's 2.9 average on an 8.0 scale and 760 SAT score did not enable him to predict a freshman year grade-point average of at least 1.6. *Id.* at 909-10.

contract; but concluded that since Begley was unable, due to academic ineligibility, to perform his duties under that contract, he could not expect Mercer to perform its duties under the agreement.[131]

The reasoning of the court in *Colorado Seminary*[132] that scholarship recipients are no more entitled to participate than athletes who try out without scholarships is seriously flawed because the scholarship recipients are obliged by their scholarships to participate.[133] The non-scholarship athletes, or walk-ons, have merely a "unilateral expectation of a benefit,"[134] namely, the hope of participation. The walk-ons cannot claim a property interest in eligibility.[135] The scholarship players, in contrast, have a contractual duty to play. One commentator has written:

> The possession of an athletic scholarship ensures the student-athlete of a place on the team and of a right to compete for a position on the first string. The walk-on has no rights: the coach may prohibit him from trying out altogether and cut him from the team any time thereafter. The position of a walk-on thus is in no way analogous to that of a matriculated recruit.[136]

Even if a court did not agree that an athletic scholarship is an explicit contract which confers a property interest upon an awardee, that court could agree that where an athlete is recruited by a university and both parties anticipate the athlete's participation in athletics, an implied contract has been formed, creating a property interest in continued eligibility.[137] The latter conclusion would be analogous to the holding of the Supreme Court in *Perry v. Sinderman,*[138] that a non-tenured professor had a property interest in continued employment because the college which employed him operated a de facto tenure system.[139] Since the college, in effect, awarded tenure to professors who had been working for it for seven years, and since the plaintiff had been working for the college for ten years, the parties had a mutual understanding sufficient to give the plaintiff a property interest in continued employment.[140]

The understandings which exist between universities and athletic scholarship recipients are comparable to the understanding which existed between the university and the professor in *Perry.*[141] Implied contracts exist where

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131. *Id.* at 910.
132. *Colorado Seminary,* 417 F. Supp. 885.
133. *See* Note, *supra* note 3, at 346.
134. *Colorado Seminary,* 417 F. Supp. at 895 n.5.
135. *See* Note, *supra* note 3, at 347-48.
136. *Id.*
137. *See* Note, *supra* note 7, at 614.
138. 408 U.S. 593 (1972).
139. *Id.* at 600.
140. *Id.* at 602.
141. *See* Note, *supra* note 7, at 614.

the schools and the student athletes anticipate the latter's participation in the athletic program, just as an implied contract existed in *Perry* where, as a result of a de facto tenure system, both parties anticipated the plaintiff's continued employment.[142] In college athletics, intense recruiting battles among schools for the services of highly skilled athletes are commonplace.[143] These battles indicate that the combatant universities anticipate that the scholarship athletes who enroll at each institution will represent that institution in athletic competition.[144] The scholarship agreement is the sort of "mutually explicit understanding," required in *Perry,* which supports a claim of entitlement to participate in intercollegiate athletics.[145]

The contractual rationale is the foundation of a strong argument that student athletes who hold athletic scholarships possess a constitutionally protected property interest in athletic eligibility. The contractually-based argument is a logical extension of prior decisions in the case law of intercollegiate athletics[146] and is the most effective means for promoting both due process and academic integrity in college sports.

This Note has thus far focused upon the sources of protectable rights to participate in athletics rather than the procedural due process required when those rights are abridged. Now, the analysis will identify attitudes and practices of the NCAA which threaten to deny fundamental fairness to student athletes who have been declared ineligible. The need for higher standards of fairness toward student athletes in NCAA enforcement proceedings, and for judicial oversight of those proceedings based upon a recognition of the student athlete's property interest in eligibility, will also be considered.

II. THE NEED FOR HIGHER STANDARDS OF FAIRNESS

NCAA enforcement procedures deny due process to student athletes whose eligibility is at issue. The hearings which the NCAA conducts in order to determine whether eligibility should be revoked have been termed "a sham and a farce."[147] A congressional subcommittee called these hearings "a self-indulgent fiction and an abdication of the NCAA's own responsibility."[148]

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142. *Id.*

143. *See* ROONEY, THE RECRUITING GAME (1980).

144. *See* Note, *supra* note 7, at 616.

145. *Perry,* 408 U.S. at 601.

146. *Hunt,* No. 676-370 (W.D. Mich. Sept. 10, 1976); *Begley,*367 F. Supp. 908. *See Taylor,* 16 N.C. App. 117, 191 S.E.2d 379.

147. *See* Brody, *supra* note 10, at 114.

148. *See Enforcement Program of the NCAA, Report by the Subcommittee on Oversight and Investigation of the House Committee on Interstate and Foreign Commerce,* 95th Cong., 2d Sess. 51 (1978) [hereinafter *Enforcement Program of the NCAA*].

The NCAA refuses to allow the interests of student athletes to be separated from the interests of their universities. NCAA rules permit student athletes to appear at disciplinary hearings only as institutional representatives,[149] which discourages the assertion of the student athletes' strongest, most probable defense, namely, reliance upon the advice of their coaches.[150] If an institution is exonerated, its student athletes will also be cleared, but if an institution is found culpable, its student athletes must rely upon institutional employees to represent their interests within the NCAA appeal process. This forced reliance prevents student athletes from asserting a defense implicating university staffers at the disciplinary hearing.[151] Disciplinary hearings do not provide a meaningful chance for student athletes to explain their conduct.[152]

Once the NCAA's Infractions Committee has found a student athlete culpable and has recommended a declaration of ineligibility by the university, the Committee permits the student athlete to be given an on-campus hearing. The Committee, however, dictates that the hearing result in a declaration of ineligibility, otherwise the university will be penalized by the NCAA.[153] Even where an on-campus hearing is held prior to the Infractions Committee hearing, a university's decision not to declare a player ineligible will be rendered meaningless by an NCAA ruling of ineligibility.[154] These procedures deny due process to student athletes. Professor Burton Brody of the University of Denver Law School, who is an authority on sports law, has observed: "No matter how elusive and flexible a concept

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149. MANUAL OF THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *supra* note 110, Official Procedure Governing the NCAA Enforcement Program § 12(c)(5), at 219.

150. *See* Note, *supra* note 3, at 329.

151. *See id.*

152. *Id.*

153. When a student athlete's eligibility is in jeopardy, Official Interpretation 11 of the NCAA Constitution states that it is an obligation of the university's membership in the NCAA to declare the athlete ineligible for competition. MANUAL OF THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *supra* note 110, art. 4, § 2(a), O.I. 11, at 29. Policy 11 of the NCAA's *Recommended Policies and Practices for Intercollegiate Athletics* urges that the member university conduct a due process hearing for the athlete. *Recommended Policies and Practices for Intercollegiate Athletics,* No. 11, at 201. Policy 11 makes it quite clear, though, that the outcome of the hearing must be a declaration of ineligibility, for it specifies that "the hearing opportunity shall not delay or set aside the member's obligations required by Constitution 4-2-(a)-O.I.11 and Section 9 of the Association's enforcement procedures." Section 9 of the enforcement procedures provides that if the member institution "fails to take appropriate action" (i.e., fails to declare the student athlete ineligible), the member institution will be charged with a violation and proceedings under the Enforcement Program will be initiated against the member. MANUAL OF THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *supra* note 110, Official Procedure Governing the NCAA Enforcement Program § 9(a), at 214. "The specific procedures thus reach a simple and inevitable result; the athlete must be declared ineligible." Brody, *supra* note 10, at 114-15.

154. *Id.*

due process may be, it is not flexible enough to include hearings with predetermined results."[155]

The NCAA justifies these procedures by arguing that only institutions and not individuals are subject to its jurisdiction because only the institutions are NCAA members.[156] Since only member institutions can declare athletes ineligible, and only after on-campus hearings, the athletes, according to the NCAA, are accorded due process through the entities which have jurisdiction over them. This argument underestimates the NCAA's power over individual student athletes. The NCAA's decisions may profoundly affect student athletes' eligibility for future scholarships which are necessary for the completion of undergraduate degrees.[157] Athletes, as nonmembers, are powerless to alter NCAA policies and procedures which shape their lives during and after college. Professor Weistart has written:

> A significant portion of NCAA regulatory activity affects student-athletes who neither participate directly in the group's rule-making nor have an opportunity to select representatives to act on their behalf. The consequences for the athletes can nonetheless be quite significant. Issues ranging from whether one's education will be affordable to whether the athlete will be able to transfer from an unpleasant school environment to whether he or she will be allowed to participate in athletics at all will be greatly affected by deliberations in which the athlete has no role.[158]

The NCAA's investigative and adjudicative procedures increase this inequity by assigning to the Infractions Committee the roles of fact-finder, judge, and jury.[159] The Committee aids the investigative staff in the conduct of the unofficial inquiry, reviews the findings of the investigation, helps to determine whether an official inquiry is justified, and presides over the hearing given to any school which is the subject of an official inquiry.[160] These procedures fuel speculation that the real purpose of the Infractions Committee's hearing is to assist in the assessment of appropriate penalties for the culpability which has been pre-determined by the Committee.[161] If the speculation is accurate, the hearing is useless, as the Committee's conclusions were reached beforehand. Any attempt by the university to exonerate itself may magnify its culpability in the eyes of Committee members and increase the penalty levied.[162]

The problems with these procedures are exacerbated by the fact that the procedures are regularly used to enforce rules buried in the nooks and

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155. Brody, *supra* note 10, at 115.
156. *See Enforcement Program of the NCAA*, *supra* note 148, at 41.
157. *See* Note, *supra* note 3, at 318 n.5.
158. Weistart, *supra* note 57, at 169.
159. *See* Gaona, *supra* note 10, at 1100.
160. *Id.*
161. *Id.*
162. *See id.*

crannies of the NCAA's massive structure of regulations, are couched in convoluted language often incomprehensible to a nonlawyer, and confer upon coaches and athletic directors, typically nonlawyers, responsibility for application.[163] Professor Brody has observed: "An essential responsibility of any just system of laws is the promulgation of rules which can be found and understood by those subject to the rules so that they can obey the law."[164] The NCAA fails to meet this responsibility, as a congressional subcommittee's recommendation that the NCAA "revise and completely recodify its substantive rules with an eye to simplicity and clarity" suggests.[165]

College athletes who have been declared ineligible need judicially mandated due process protection because protection is not likely to be forthcoming from the NCAA. The willingness of courts to oversee a particular activity should be significantly influenced by the adequacy of the legislative structure that produced the disputed regulations. If affected parties participate meaningfully in the affairs of the regulator, then there is less need for general judicial oversight.[166] The presence of deficiencies in the legislative structure of the regulator, conversely, may warrant greater judicial scrutiny of the activity in question. If a complaining party is systematically excluded from a participatory role, then courts should be skeptical about accepting any resulting regulations. Since the disadvantaged persons cannot use internal channels to make corrections, it is necessary that external avenues of review be available.[167] The external avenue of review most likely to ensure procedural fairness for student athletes is judicial recognition of a contractually-based property right to intercollegiate athletic participation.

III. Conducting Judicial Oversight: What Process Is Due?

The question of what process is due for student athletes as a result of the contractually-based property right cannot be answered with hard and fast rules. Guidelines are available, however, to assist in the formulation of an answer.

In *Dixon v. Alabama State Board of Education,* students who had been expelled from a state college for engaging in civil rights activities were found to be entitled to notice and a hearing before they could be expelled.[168] In *Behagen v. Intercollegiate Conference of Faculty Representatives,*[169] the

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163. *See* Brody, *supra* note 10, at 117-18.
164. *Id.* at 118-19.
165. *Enforcement Program of the NCAA, supra* note 148, at 54.
166. *See* Weistart, *supra* note 57, at 169.
167. *Id.*
168. Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir. 1961).
169. Behagen v. Intercollegiate Conference of Faculty Representatives, 346 F. Supp. 602 (D. Minn. 1972).

court found that three University of Minnesota basketball players who had been declared ineligible were entitled to written notice of the time and place of their hearing at least two days in advance and to a clear indication of the charges against them and the grounds for those charges.[170] Although a "full-dress judicial hearing, with the right to cross-examine witnesses" was not necessary in the court's view, the student athletes were entitled to present testimony, to be given a list of all witnesses who would appear, and to hear all testimony.[171] The student athletes were also entitled to post-hearing written reports specifying the findings of fact and, in the event of punishment, the basis for that punishment.[172] The proceedings were to be recorded and tapes were to be made available to the players for use in a possible appeal.[173]

The House of Representatives subcommittee which investigated the NCAA's enforcement procedures in 1978 recommended that those procedures should adhere to a guiding principle of "affording people who have something to lose in the process a few reasonably certain procedural expectations."[174] The subcommittee maintained that the hearing, presided over by the Infractions Committee, should be open to anyone who stands in jeopardy in the proceeding, including a booster as well as an athlete.[175] A booster or an athlete should be able to present certain previously-defined types of evidence, to have a fair opportunity to collect such evidence, and to be reasonably certain that that evidence will be judged according to a predictable standard.[176] Participants should also be able to expect that the NCAA decision makers will be neutral.[177] The *Dixon, Behagen,* and House subcommittee standards are not sufficient to ensure due process for student athletes in NCAA eligibility hearings. They would nonetheless be useful guides when restructuring the NCAA's investigatory and adjudicatory procedures.

The initial step in a restructuring of NCAA procedures, to be taken at the investigatory stage, must be a separation of the investigatory and adjudicatory tasks.[178] Investigations of alleged wrongdoing should be the responsibility of an enforcement staff which is in no way connected to the Infractions Committee.[179] The decision to initiate an official inquiry, based upon the results of an investigation, should be the responsibility of a new

170. *Id.* at 608.
171. *Id.*
172. *Id.*
173. *Id.*
174. *Enforcement Program of the NCAA, supra* note 148, at 27.
175. *Id.*
176. *Id.*
177. *Id.*
178. *See* Brody, *supra* note 10, at 121-22.
179. *Id.*

Enforcement Committee, whose duties would also include supervising the enforcement staff.[180] The adjudicatory organs of the NCAA would enter the dispute only if the official inquiry uncovered evidence of wrongdoing sufficient to place a member school in danger of being penalized or a student athlete's eligibility in danger. This separation of investigation and adjudication would signal universities and student athletes that the adjudicatory procedure was not prejudiced by the adjudicator's need to vindicate its own investigation.[181]

Student athletes whose eligibility is in jeopardy must be afforded on-campus hearings which do not have pre-determined outcomes. The NCAA must abandon the legal fiction that only a university, and not the NCAA, can declare an athlete ineligible.[182] The NCAA, by taking action, would acknowledge its responsibility, as the primary regulator of intercollegiate athletics, for enforcing eligibility rules. It would simultaneously relieve its member schools of the obligation to declare ineligible any athlete whom the NCAA has found culpable.[183] The best way to ensure that the on-campus hearings are impartial is to have them conducted by faculty and administrators from other universities, preferably universities from other geographical regions.[184] Members of these adjudicatory panels could be appointed by their respective athletic conferences or by the presidents of their respective universities, to serve terms of from one to three years. The present system of campus hearings conducted by employees of the universities whose athletes face ineligibility would be abandoned.

The impartial panels would conduct adjudicatory proceedings in keeping with the principles outlined by the House subcommittee and would be permitted to reach whatever result they deemed just, regardless of the NCAA's position. If an athlete were found not culpable, the matter would be closed and the athlete would continue competing. If an athlete were found culpable, an appeal would be available to the Presidents' Commission of the NCAA, a forty-four member body of college and university chief

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180. This Enforcement Committee would also be responsible for identifying for NCAA members the investigatory findings which warrant the initiation of an Official Inquiry.

181. *See* Brody, *supra* note 10, at 124.

182. *Id.* at 114.

183. *Id.* at 115.

184. This is the method used by regional academic accrediting associations to conduct accreditation reviews of academic departments at member institutions. Departments are not reviewed by faculty from within their institutions, but instead, by panels of faculty members from other colleges and universities. The application of this method of review to disciplinary proceedings in which athletic eligibility is at stake would be in keeping with established practice in academe and, most importantly, would insure that those proceedings were conducted by impartial investigators who were free to make the decision called for by the evidence. *See, e.g.*, NORTH CENTRAL ASSOCIATION OF COLLEGES AND SCHOOLS, COMMISSION ON INSTITUTIONS OF HIGHER EDUCATION, A HANDBOOK OF ACCREDITATION 23-26 (1986-88).

executives established in 1984.[185] The Presidents' Commission would replace, as an appellate body, the NCAA Council, which is responsible for governing the NCAA between annual conventions and is therefore more likely to be partial to the NCAA's viewpoint.[186] The Commission is not responsible for running the NCAA and it was formed in order to foster a greater concern within the NCAA for academic integrity and the welfare of student athletes.[187] Appellants would be provided, as advocated in *Behagen,*[188] with a tape recording or at least a written transcript of the prior hearing and would be apprised of the sorts of errors in that hearing which could be appealed.[189] If the student athlete lost an appeal to the President's Commission, the matter would be transferred to the Infractions Committee, which would impose punishment, based upon the recommendations of the President's Commission.

The procedures outlined above would be more expensive and considerably less convenient for the NCAA than those presently in place, but these procedures are necessary if the interests of scholarship athletes are to be protected. Professor Brody has written: "Sound and responsible education demands that one so vulnerable as a student whose athletic eligibility has been questioned be given the fullest measure of fairness an adjudication system can offer."[190] Ironically, these recommendations are likely to be the greatest deterrent the NCAA could muster to expensive future lawsuits by college athletes asserting a property interest in eligibility because adherence to these procedures would eliminate the necessity for most of these suits. The NCAA enforcement process would thus no longer subordinate the interests of student athletes to those of their universities.

A. Academic v. Misconduct Dismissals: Different Standards of Due Process Are Required

Before applying the recommended due process standards to future eligibility disputes, educators must determine whether a student athlete's eligibility is in jeopardy because of misconduct or because of academic failure. The importance of this distinction results from the Supreme Court's holding in *Board of Curators of the University of Missouri v. Horowitz*

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185. MANUAL OF THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *supra* note 110, art. 5, § 4, at 40.

186. *Id.*, § 1 at 36.

187. *See generally* Vance, *Plan to Give Presidents Control of NCAA Modified by American Council's Panel,* CHRON. HIGHER EDUC., October 19, 1983, at 29; Vance, *ACE Sports Panel to Ask NCAA Presidents to Seek Shorter Playing Seasons,* CHRON. HIGHER EDUC., May 16, 1984, at 28.

188. *Behagen*, 346 F. Supp. at 602.

189. *See Enforcement Program of the NCAA,supra* note 148, at 37.

190. Brody, *supra* note 10, at 116.

that the dismissal of a student for academic reasons does not necessitate the same degree of procedural protection as would a dismissal for misconduct.[191] The Court's decision in *Horowitz* indicates that courts will defer to the judgments of educators in strictly academic matters.[192] The Court stated:

> The need for flexibility (in due process) is well illustrated by the significant difference between the failure of a student to meet academic standards and the violation by a student of valid rules of conduct. This difference calls for far less stringent procedural requirements in the case of an academic dismissal.[193]

The Court's view is that suspensions of students for misconduct resemble traditional judicial and administrative fact finding processes to the extent that these suspensions warrant a hearing before an appropriate school authority.[194] The Court observed: "Academic evaluations of a student, in contrast to disciplinary determinations, bear little resemblance to the judicial and administrative fact-finding proceedings to which we have traditionally attached a full-hearing requirement."[195] The substantially more subjective judgments called for in an academic dismissal require the evaluative skills of a professional educator and therefore are not easily adapted to the framework of a judicial or administrative hearing.[196]

The importance of *Horowitz* for eligibility disputes in college athletics is that student athletes whose eligibility is jeopardized by an alleged acceptance of illegal cash payments from a booster or by an alleged violation of a coach's rule against smoking marijuana would be entitled to a higher degree of procedural protection than the athletes rendered ineligible by a failure to maintain the minimum grade-point average necessary for continued eligibility. *Horowitz* does not pose a threat to the due process rights of scholarship athletes. This is partly because cases decided after *Horowitz* have recognized two significant exceptions to the general rule, followed in *Horowitz,* that courts will not interfere with academic dismissals.[197] The first exception applies when the student alleges that the institution's actions are "arbitrary, capricious, and in bad faith"[198] and the second is triggered when the academic dismissal involves "unusually serious consequences"

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191. 435 U.S. 78 (1978).
192. Note, Board of Curators of the University of Missouri v. Horowitz: *Student Due Process Rights and Judicial Deference to Academic Dismissals,* 15 WILLAMETTE L. REV. 577 (1979).
193. *Horowitz,* 435 U.S. at 86.
194. *Id.* at 88.
195. *Id.* at 89.
196. *Id.* at 90.
197. Note, *supra* note 192, at 584.
198. *See* Gaspar v. Bruton, 513 F.2d 843 (10th Cir. 1975); Connelly v. University of Vt. & State Agric. College, 244 F. Supp. 156 (D. Vt. 1965).

for the student.[199] Some courts have rejected the rule of judicial non-interference when a student has shown that an academic dismissal was tainted by "bad motive or ill will" on the part of school authorities.[200] A federal district court in Vermont concluded in *Connelly v. University of Vermont and State Agricultural College* that academic expulsions made with bad motive or ill will are not academic expulsions at all because they are based upon non-scholastic considerations unrelated to the quality of the student's work.[201] The student athlete who can show the revocation or perhaps even the non-renewal of a scholarship as a result of academic ineligibility, thereby demonstrating the loss of the financial means of pursuing a degree, is likely to merit due process under the "unusually serious consequences" exception.

The exceptions to the general rule of non-interference ensure that the reduced level of procedural protection is occasioned by an academic deficiency. One commentator argues that despite that guarantee, "the right to a dismissal hearing should not turn upon whether the hearing is termed 'academic' or 'disciplinary', but rather upon whether the proposed dismissal is, at least in part, for conduct-related reasons presenting a factual dispute susceptible of resolution by a third party."[202] This standard would enable student athletes to receive the protection of a hearing in mixed academic-and-disciplinary cases, such as where cheating or plagiarism has been alleged. The universities would retain exclusive power to declare athletes ineligible for failing to maintain either a requisite grade-point average or sufficient credits for advancement toward a degree.

A second reason why *Horowitz* does not threaten the due process rights of student athletes is that the decision, while rejecting the necessity of a formal, adversary hearing in an academic dismissal, nonetheless accorded great weight to the fact that the student had been "awarded at least as much due process as the Fourteenth Amendment requires."[203] The Supreme Court observed in *Horowitz* that: "The school fully informed respondent of the faculty's dissatisfaction with her clinical progress and the danger that this posed to timely graduation and continued enrollment. The ultimate decision to dismiss (the student) was careful and deliberate. Those procedures were sufficient under the Due Process Clause of the Fourteenth Amendment."[204] *Horowitz* can therefore be read as requiring school authorities to provide a student with an opportunity for an informal hearing

199. *See* Greenhill v. Bailey, 519 F.2d 5 (8th Cir. 1975).
200. *See Connelly,* 244 F. Supp. 156.
201. *Id.* at 161.
202. *See* Dessem, Board of Curators of the University of Missouri v. Horowitz: *Academic Versus Judicial Expertise,* 39 OHIO ST. L.J. 476, 480 (1978).
203. *Horowitz,* 435 U.S. at 85.
204. *Id.*

in cases of academic dismissal; each opinion in the case referred favorably to the informal hearing accorded to Charlotte Horowitz prior to her dismissal from medical school.[205] *Horowitz* indicates that due process in academic dismissals can be guaranteed by notifying the student of deficiencies while time in which to correct those deficiencies remains, and by providing an informal meeting with faculty members such as the student's academic advisor and the chair of the relevant department, during which the student can present reasons why the dismissal should not occur.[206] The clearer and more timely the notice to the student of impending failure, the less formal any subsequent meeting concerning the consequences of that failure needs to be.[207] Student athletes who fail to earn the grades or credits necessary for continued eligibility, despite awareness of their universities' published academic requirements and adequate notice of potential failure, do not require the protection of formal adjudicatory proceedings. Student athletes who are accused of selling allotments of game tickets to cooperative boosters, in violation of NCAA rules, need precisely that protection.[208]

The most persuasive reason why *Horowitz* is not a threat to the due process rights of student athletes is that the bulk of the academic requirements which student athletes must satisfy are imposed by universities, not the NCAA. Universities regularly publish their requirements in catalogues and student handbooks. The NCAA does impose academic rules, but those rules give discretion to university authorities to define critical terms such as "minimum full-time program of studies" and "satisfactory completion" of studies undertaken.[209] The university catalogues define these terms in the same way for athletes and nonathletes; the NCAA does not impose upon universities academic requirements for athletes which are more stringent than the requirements which nonathletes at the same institutions must satisfy.[210]

The NCAA requires, for example, that at the time of competition, student athletes "be registered for at least a minimum full-time program of studies as defined by their institutions which, in any event, shall not be less than 12 semester hours or 12 quarter hours."[211] The universities are free to define a minimum full-time program of studies more stringently than the NCAA defines that program. The NCAA requires that in order to remain eligible for athletic competition after the first academic year in residence at a university, student athletes must either: (1) complete satisfactorily,

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205. *See* Marx, Horowitz: *A Defense Point of View,* 13 J. LAW & EDUC. 51, 53 (1984).
206. *Id.* at 57.
207. *See* Friendly, *Some Kind of Hearing,* 123 U. PA. L. REV. 1267, 1296-97 (1975).
208. MANUAL OF THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,*supra* note 110, art. 3, § 1(g),(3), at 13.
209. *Id.* at art. 5, § 1(c), at 89; art. 5, § 1(j)(6)(ii), at 94-95.
210. *Id.* art. 5 § 1(j)(6)(ii) at 94-95.
211. *Id.* art. 5 § 1(c) at 89.

prior to the terms in which their respective competitive seasons begin, an average of twelve semester or quarter hours in each of the previous terms in which they have been enrolled; or (2) have satisfactorily completed twenty-four semester or thirty-six quarter hours since the previous season in which they competed.[212] The NCAA asserts that student athletes meet the satisfactory completion requirement "by maintaining a grade-point average that places the student athlete(s) in good academic standing as established by the institution for all students who are at an equivalent stage of progress toward a degree."[213] The athletes must also, under NCAA rules, "designate a program of studies leading toward a specific baccalaureate degree at the certifying institution by the beginning of the third year of enrollment (fifth semester or seventh quarter)."[214] These rules mean that the NCAA requires college athletes to be full-time degree candidates, subject to the same academic strictures as are full-time students who do not participate in intercollegiate athletics.[215]

Since NCAA academic requirements are minimal and are mirror images of the requirements which nonathletes must satisfy in order to remain in good academic standing, formal adjudicatory proceedings are not warranted for scholarship athletes who fail to earn the grades or credits needed for continued eligibility.[216] As long as universities provide student athletes with clear and timely notice of impending failure and with the informal hearing endorsed by *Horowitz*, the student athletes will have received due process. Unlike athletes who are accused of misconduct and whose uni-

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212. *Id.* art. 5 § 1(j)(6)(ii) at 94-95.
213. *Id.*
214. *Id.* art. 5 § 1(j)(6)(iv) at 95.
215. *See supra* note 210.
216. The academic requirements for athletes are no longer identical to the academic requirements for nonathletes, as the requirements for athletes were changed, effective August 1, 1986. As of that date, the NCAA augmented its regulation of academic expectations for athletes. Although matriculation requirements after the initial year of university residence will continue to be the same for athletes and nonathletes and will continue to be determined by university authorities, academic rules for freshman athletic eligibility are now stricter and subject to greater NCAA control. The NCAA will require that in order for a freshman to be eligible to participate in athletics, that freshman must have earned at least a 2.0 high school grade-point average in a core curriculum of at least 11 college preparatory courses and have achieved a score of at least 700 on the Scholastic Aptitude Test (SAT) or 15 on the American College Test (ACT). A freshman who does not meet these requirements may be admitted to a university on an athletic scholarship, but is not eligible for competition during the freshman year. Many universities which routinely admit athletes and nonathletes whose standardized scores are lower than those adopted by the NCAA are now obliged by the NCAA to restrict the extra-curricular activities of the athletes who possess subpar test scores, while the nonathletes who possess subpar scores are not restricted. Those universities may be hard-pressed to maintain competitive athletic programs in the absence of the non-qualifying freshmen. *See* MANUAL OF THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *supra* note 110, § 5(i)(j) at 92-93. *See also* Farrell, *Black Colleges Threaten Court Action to Alter NCAA's New Academic Rules*, CHRON. OF HIGHER EDUC., April 20, 1983, at 13.

versities are forced by the NCAA into declarations of ineligibility even if the universities do not believe the alleged misconduct occurred, athletes who are academically deficient have failed to meet published standards which all of their classmates are informed of and must satisfy.

Conclusion

This Note has demonstrated that scholarship athletes possess a constitutionally protected property right to continued eligibility which derives from the contractual nature of an athletic scholarship. The recognition of a property right would cause judges to exercise an important role in guaranteeing procedural fairness by the NCAA in its relations with student athletes and their universities. Judges would nevertheless be confined to a sphere in which their expertise is well-established, namely, the identification of rights and of suitable procedures for enforcing those rights. Judicial power would be further limited if the educators who manage the universities which participate in intercollegiate athletics would revamp NCAA disciplinary procedures in the manner suggested by this Note.

Investigatory and adjudicatory procedures would be managed by separate entities. Student athletes whose eligibility is in jeopardy would be guaranteed on-campus hearings which do not have pre-determined outcomes. Student athletes would be entitled to appeal unfavorable decisions in on-campus hearings to the Presidents' Commission and to receive hearing transcripts to assist them in the preparation of appeals. The NCAA's Committee on Infractions would be limited to imposing punishment upon athletes found culpable. Any punishment meted out by the Committee would be based upon the recommendations of the Presidents' Commission.

College athletes would receive due process in disciplinary proceedings arising out of allegations of misconduct, yet universities would retain control over the promulgation of academic requirements for all students.

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