February 16, 2012

THE NCAA STATE ACTOR CONTROVERSY: MUCH ADO ABOUT NOTHING

Josephine R Potuto

NCAA AS STATE ACTOR CONTROVERSY: MUCH ADO ABOUT NOTHING[1]

Josephine (Jo) R. Potuto*

ABSTRACT

The fourteenth amendment to the Constitution of the United States affords procedural due process, equal protection, and substantive bill of rights protections. It applies to state actors, not private ones. The National Collegiate Athletic Association (NCAA) is an association of colleges and universities that regulates intercollegiate athletics. It is a private actor. Even though private, entities on occasion have been "deemed" state actors by the Supreme Court of the United States. The NCAA so far is not one of them.

An eminent baseball philosopher – the "old perfessor," Casey Stengel,[2] once sagely advised, "Never make predictions, especially about the future."[3] Casey was right. Predictions

---

* Josephine (Jo) R. Potuto is the Richard H. Larson Professor of Constitutional Law at the University of Nebraska College of Law. She also is the university's faculty athletics representative (FAR), a required position at all NCAA member institutions. Potuto served nine years on the NCAA Division I Committee on Infractions (two as vice chair and two as chair). Among other NCAA service, for more than four years Potuto was one of three Big 12 Conference representatives on the Division I Management Council, including service on both its Legislative Review and Administrative Review Subcommittees.

[1] William Shakespeare,

[2] Casey Stengel was a journeyman baseball player and subsequently the successful manager of the New York Yankees from 1949 to 1960. He was famous for the unique style – Stengelese – in which he imparted his nuggets of wisdom.

[3] Rushin, Gene Genies, Sports Illustrated (August 29, 2011) at 13. See also Schwab, Predicting The Future of Employment Law: Reflecting or Refracting Market Forces?, 76 Indiana L.J. 29, 29-30 (2001) (When predicting the future "one is either vague and conventional, or specific and demonstrably wrong.").

are perilous, the more so if recorded. But as to what would ensue were the Supreme Court to deem the NCAA a state actor, predictions abound.

NCAA adversaries and supporters alike predict that state actor status will mean major changes to the way the NCAA operates; they just disagree whether that would be a good thing. Adversaries see a contemptuous and overreaching "monopoly" NCAA[4] held in check, with student-athletes and others able successfully to challenge it in court. Supporters see an undermining of the NCAA's ability to maintain an even playing field in competition and to effect compliance with bylaws and policies duly adopted by member institutions. Per contra. The only clear consequence to the NCAA's regulatory authority over intercollegiate athletics attendant on NCAA state actor status would be to end or at least cabin NCAA bylaws and policies that accord preferential treatment to women and racial and ethnic minorities. In all other ways the NCAA might well be able to proceed as usual. In this article I discuss why.[5]

---

[4] The most recent such critic is Taylor Branch. Branch, "The Shame of College Sports," Atlantic Magazine (October 2011).

[5] I owe the genesis of this article to two long-time colleagues. Harvey Perlman, now the UNL chancellor and formerly a member of the NCAA Division I Board of Directors, wondered whether the NCAA should be characterized as private when so many of its members are state institutions and when non-members, in particular student-athletes, appear to be indentured to policies they have no hand in developing. Bob Works reads widely in disciplines outside his own and pointed me to the wealth of material on the private/public dichotomy as it pertains, in particular, to local government and land use law. Steve Willborn and Rick Duncan read drafts of this article. Their teaching and research interests -- spanning education law, labor law, constitutional law, administrative law, and statutory discrimination law -- helped me to think through content and thesis.

TABLE OF CONTENTS

I. INTRODUCTION

For competitors and fans alike, athletics competition has to be fair and, well, competitive. There are obvious reasons why the Class A Great Lakes Loons[6] and the New York Yankees compete in different leagues and why the number of points awarded per football touchdown is independent of which team scores it. When competition progresses beyond informal pickup games, extends to large numbers of teams and games, and anticipates crowning a champion, then an organizing entity is needed not only for scheduling and other administrative matters but also to articulate and enforce rules for competition and competitors.[7] For intercollegiate athletics that entity is the National Collegiate Athletic Association (NCAA).[8]

The fourteenth amendment to the Constitution of the United States regulates the actions of state actors, not private ones.[9] It requires state actors to provide individuals equal protection of

---

[6] A list of minor league baseball clubs, including the Class A Great Lake Loons, may be found at http://web.minorleaguebaseball.com/index.jsp.

[7] I have elsewhere discussed the additional roles that colleges and universities need the NCAA to play. Potuto, The NCAA Rules Adoption, Interpretation, Enforcement and Infractions Processes: The Laws That Regulate Them and The Nature of Court Review, 12 VAND L. Rev. 257, 262-63 (2010); hereafter NCAA Processes.

[8] The National Association of Intercollegiate Athletics (NAIA) also administers varsity athletics competition for four-year institutions. http://naia.cstv.com/member-services/about/MemberInstitutionsbyState.htm. Its members typically are part of a state college system with smaller student enrollments than NCAA Division I institutions. They are not major research universities with PhD programs and they do not sponsor high-powered football and men's basketball teams. A list of NAIA members may be found at http://naia.cstv.com.

[9] Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833); The Civil Rights Cases, 109 U.S. 3 (1883). For a discussion of the private/public dichotomy in the context of geographically-bounded communities such as cities and housing associations, see generally, Fennell, Properties of Concentration, 73 U.Chi.L.Rev. 1227 (2006); Schragger, The Limits of Localism, 100 Mich. L.Rev. 371 (2001); Epstein, Covenants and Constitutions 73 Cornell L.Rev. 906 (1988); Frug,

the laws and procedural due process when their life, liberty, or property may be abridged.[10] Through the doctrine of incorporation the fourteenth amendment also requires that state actors provide substantive protections found in the Bill of Rights.[11]

The NCAA is an unincorporated private association of four-year colleges and universities,[12] not a state agency that "assert[s] sovereign power" over individuals.[13] Primarily to achieve broad implementation of constitutional mandates to eliminate racial discrimination,[14] the

---

Cities and Homeowners Associations, 130 U.Pa.L.Rev. 1589 (1982); Ellickson, Cities and Homeowners Associations, 130 U.Pa.L.Rev. 1519 (1982). One area of contention is the extent to which housing associations may be described as voluntary groupings. The more that a housing association is formed through choice, with full opportunity for entry and exit, the greater the deference to rules and policies. See, e.g., Schragger at 386 to 417. For an argument that due process protections should be afforded to adversarial hearings when private parties do state business, see Verkuil, Privatizing Due process, 51 Admin. L.Rev. 963 (2005).

[10] The fourteenth amendment also guarantees the privileges and immunities of United States citizens and the right of national and state citizenship to anyone born or naturalized in the United States and subject to its jurisdiction.

[11] E.g., Palko v. Connecticut, 302 U.S. 319 (1937); Duncan v. Louisiana, 391 U.S. 145 (1968).

[12] NCAA Const. Art. 4.02.1. NCAA members also are the athletics conferences to which member colleges and universities belong.

[13] See Tarkanian v. NCAA, 488 U.S. 179, 196-97, 109 S. Ct. 454, 464-65 (1988), hereafter Tarkanian. The United States Olympic Committee (USOC) also is a private, not state, actor; San Francisco Arts & Athletics, Inc. v. United States Olympic Committee, 483U.S. 522, 543-44 (1987); even though it is incorporated by federal charter, coordinates international amateur athletics competition in the United States, and represents the United States on the International Olympics Committee. The USOC delegated to National Governing Bodies (NGBs) for each sport the administration of national amateur competition in that sport and the selection of athletes to represent the sport in international amateur competition. NGBs also are not state actors. E.g., Behagen v. Amateur Basketball Ass'n , 884 F.2d 524 (10th Cir. 1989).

[14] See, e.g., CONSTITUIONAL LAW: CASES AND MATERIALS 1209 (13th ed. 2009; Varat, Cohen, Amar, ed.); hereafter Varat, Cohen, Amar; Lebron v. National RR Passenger Corp. 12 F.3d 388, 392 (2d Cir.), reversed on other grounds, xxx U.S. 1975); Weise v. Syracuse University, 522 F.2d 397, 405-06 (2d Cir.), cert, denied, 419 U.S. 874, 95 S.Ct. 135, 42 L.Ed.2d 113 (1974); Wahba v. New York University, 492 F.2d 96, 101(2d Cir. 1974). See Note, State Action: Theories for Applying Constitutional Restrictions to Private Activity, 74 Colum.L.Rev. 656, 661-62 (1974). Almost all state actor cases were decided between 1945 and 1970. See Varat, Cohen, Amar at 1209.

Supreme Court has included as state actors private entities that perform a traditional state function;[15] whose particular conduct is state-enforced, state-financed, directly state-endorsed or -coerced;[16] or that are so pervasively entwined with a particular state's activities that the state and ostensibly private actor have a "largely overlapping identity."[17] In Tarkanian v. NCAA,[18] the Supreme Court held that the NCAA was a private, not state, actor under its articulated tests.[19]

They had their genesis in Texas cases involving primary elections of the Democratic Party from which racial minorities were excluded. E.g., Nixon v. Condon, 286 U.S. 73 (1932); Smith v. Allwright, 321 U.S. 649 (1944); Terry v. Adams, 345 U.S. 461 (1953). The next type case involved judicial enforcement of racially restrictive covenants; Shelley v. Kraemer, 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161 (1948); or damages; Barrows v. Jackson, 346 U.S. 249 (1953). The expansion into subject areas less easy to show underlying principle began with Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

[15] E.g, Smith v. Allwright, 321 U.S. 649 (1944) (primary elections); Evans v. Newton, 382, U.S. 296 (1966) (parks); Republic Steel Corp. v. United Mine Workers, 570 P.2d 467, 471 n. 4 (3d Cir. 1978) (company towns). See generally S. Alinsky, John L. Lewis 8-9 (1949); H.B. Lee, Bloodletting in Appalachia (1969). The operation of company towns clearly fits within the traditional public function state action cases. Today company town conduct would be inconceivable even treated as private actor conduct, both because the employment contract would be unenforceable as a contract of adhesion and because such contract terms would never be part of a collective bargaining agreement.

[16] E.g., Shelley v. Kraemer, 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161 (1948) (restrictive covenants); Evans v. Newton, 382, U.S. 296 (1966) (racially discriminatory charitable trusts); Burton v. Wilmington Parking Authority, 365 U.S. 715, 81 S. Ct. 856, 6 L.Ed.2d 45 (1961); Reitman v. Mulkey, 387 U.S. 369, 87 S.Ct. 1627, 18 L. Ed.2d 830 (1967); Blum v. Yaretsky, 457 U.S. 991, 102 S.CT. 2777, 73 L.Ed.2d 534 (1982); Lugar v. Edmonson Oil Co., 457 U.S. 922, 102 S.Ct. 2744, 73 L.Ed. 2d 482 (1982); Rendell-Baker v. Kohn, 457 U.S. 830, 102 S.Ct. 2764, 73 L.Ed. 2d 418 (1982).

[17] Brentwood v. Tennessee Secondary School Athletic Ass'n, 531 U.S. 288, 303, 121 S.Ct. 924, 934, 148 LEd. 2d 807 (2001); hereafter referred to as Brentwood I. The Court distinguished the Tennessee high school association from the NCAA on the ground that all its members were within the boundary of one state and virtually all were public. Before Brentwood I, state-wide high school athletics associations already were treated as state actors in nine states (Indiana, Mississippi, Rhode Island, Pennsylvania, Arizona, Illinois, Missouri, Louisiana, and Oklahoma). Brentwood I, n.1.

[18] Tarkanian, supra note 13.

[19] Tarkanian, supra note 13. The Brentwood I Supreme Court, supra note 17, distinguished state high school athletics associations from the NCAA on the ground that all members of a state high school association are within the

The arguments for and against state actor status for the NCAA's regulation of intercollegiate athletics focus less on a black letter rule enunciation of what should make a private actor subject to constitutional mandates and more on a seat-of-the-pants perception of circumstances, equities, and consequences. The arguments for state actor status go like this:

- Even though most NCAA members are private,[20] the NCAA nonetheless should be a state actor because the overwhelming majority of institutions in its most attention-getting division and subdivision are public.[21] Its Division I (DI) sponsors the hugely popular – and hugely profitable[22] – NCAA men's basketball tournament; it has nearly twice as many public as compared to private colleges and universities.[23] Its DI football bowl subdivision (FBS) includes the biggest

---

boundaries of one state and, therefore, could be seen as acting for and with a state in a way that a multi-state NCAA could not. Brentwood I, supra note 17, at 298, 931.

[20] The most recent year for which data are reported is 2009-10. In that year, 610 of 1075 NCAA institutions were private. 2009-10 NCAA Membership Report, hereafter NCAA Member Report.

[21] The NCAA is divided into three divisions and three subdivisions within Division I (the football bowl, football championship, and division I subdivisions).

[22] The contract is worth nearly $11 billion over 14 years. Weiberg and Hiestand, NCAA Seals New Deal With CBS, Turner For 68-Team Tournament, USA Today on-line (4/23/2010).

[23] There are 223 public and 114 private college and universities in DI. NCAA Member Report, supra note 20.

spending athletics departments,[24] prime targets of public, media, and government criticism;[25] it has 100 public institutions and only 17 private ones.[26]

- The NCAA should be a state actor because it is big, national, and powerful. It is the face of college athletics[27] and, for FBS institutions in particular, it effectively is "the only game in town."[28]
- The NCAA should be a state actor because its decisions have substantial adverse impact on non-members, especially the student-athletes who compete at member institutions and the coaches who are employed by them, yet as non-members they have no role in adopting or changing NCAA bylaws and policies that affect them.[29]

---

[24] The average 2010 athletics revenue for institutions in the FBS is $48,298; in the Football Championship Subdivision (FCS) it is $13,189; in the Non-Football Subdivision (NFS) it is $11,077. 2004-2010 NCAA DI Intercollegiate Athletics Programs Report, Revenues and Expenses at 17. Median 2010 expenses, respectively, are $46,688; $13,091; and $11,562,000. Id. The largest 2010 revenue of any college or university is $143,555,000 in the FBS; $40,186 in the FCS; and $32,098 in the NFS. Id. at 19. See Crawford, "A National Breaking Point," Louisville Courier Journal on line (12/4/2011).

[25] NCAA Processes, supra note 7, at 261.

[26] NCAA Member Report, supra note 20.

[27] See 37 F.Supp.2d 67 (E.D.Pa 1999) ("[Well established] that NCAA is an "indelible institution of intercollegiate athletics"), citing NCAA v. Bd of Regents, 468 U.S. 85, 101, 104 S.Ct. 2948 (1984).

[28] Mitten, Davis, Smith & Berry, SPORTS LAW AND REGULATION, 2d edition 2009, at 237. See Tarkanian, supra note 13, at 465, note 19. No doubt an institution can withdraw from the NCAA but, short of getting a critical mass cohort also to withdraw, it will find no athletics association that provides the same level of competition for its teams as that provided by the NCAA.

[29] See, e.g., Lapter, "Bloom v. NCAA: A Procedural Due Process Analysis and the Need for Reform," 12 Sports L. J. 255 (2005); Skeel, Jr., "Some Corporate and Securities Law Perspectives on Student-Athletes and the NCAA, 1995 Wisc. L. Rev. 669 (1995); Carstensen & Olszowsk, "Antitrust Law, Student-Athletes, and the NCAA: Limiting the

There are two primary, and related, arguments made by those on the other side:

- The NCAA should not be a state actor because such status would upend the law governing private associations by permitting non-members to advance their agendas against the right of members of an association to chart their own course.[30]
- The NCAA should not be a state actor because such status would instigate regular, protracted, and often, frivolous litigation against it that would thwart if not subvert NCAA efforts to maintain a level playing field among teams from competing member institutions and to advance core values. The impact would be most severe in lawsuits brought by student-athletes, even if the NCAA ultimately prevailed every time, as they likely would compete during the course of litigation.[31]

The Tarkanian holding[32] has been both roundly criticized[33] and defended.[34] Similarly criticized and defended is the constitutional rightness or practical efficacy of the Supreme Court

---

Scope and Conduct of Private Economic Regulation," 1995 Wisc. L. Rev. 545, 549-552; Davis, "African-American Student-Athletes: Marginalizing the NCAA Regulatory Structure?," 6 Marq. Sports L.J. 199, 212-16 (1996).

[30] Tarkanian, supra note 13, at 199. See NCAA Processes, supra note 7, at 265 to 272.

[31] Student-athletes have four years of competition eligibility and a five-year window in which to compete. NCAA Bylaw 14.2. Court decisions upholding NCAA action could come well after a student-athlete exhausted eligibility or left school. The NCAA has a "restitution" bylaw that covers circumstances in which a court enjoins the NCAA from preventing a student-athlete from competing until the merits of NCAA action are decided in litigation. NCAA Bylaw 19.7. It authorizes the NCAA to sanction a university whose student-athlete competed if the injunction is stayed or reversed or if final court determination upholds the NCAA action.

[32] Notwithstanding Tarkanian, the NCAA might be treated as a state actor through specific and substantial joint action with a state member institution. See Cohane v. NCAA, 205 WL 2373472 (W.D.N.Y. 2005).

ever treating private actors as state actors[35] or whether its articulated tests for doing so are sufficiently clear and delineated to produce principled decisions that preserve the constitutional distinction between public and private.[36]

The purpose of this article is to discuss what would happen to the NCAA's regulatory authority over intercollegiate athletics were the Supreme Court to deem the NCAA a state actor, not to assess how the Court might get there or whether it would or should get there at all.[37] Each side of the debate assumes that NCAA state actor status necessarily would trigger greater judicial and legislative oversight of NCAA processes; substantially more opportunities for non-members

---

[33] The criticism focuses on the Tarkanian decision and the general notion that the NCAA is exempt from due process constraints. E.g., Potter, "The NCAA As State Actor: Tarkanian, Brentwood, and Due Process," 155 U. Pa. L. Rev. 1269 (2007); Skeel, Jr., Some Corporate and Securities Law Perspectives on Student-Athletes and the NCAA, 1995 Wisc. L. Rev. 669; Young, The NCAA Enforcement Program and Due Process: The Case for Internal Reform, 43 Syracuse L.Rev. 747 (1992); Goplerud III, "NCAA Enforcement Process: A Call For Procedural Fairness," 20 Cap. U. L. Rev. 543 (1991); Thompson, "Due Process and the National Collegiate Athletic Association: Are There Any Constitutional Standards?," 41 UCLA L. Rev. 1651 (1994).

[34] The defense focuses on the Taranian decision and the general notion that NCAA processes are fair. E.g., Green, Does the NCAA Play Fair? A Due Process Analysis of NCAA Enforcement Regulations, 42 Duke L.J. 99 (1972); Rogers & Ryan, "Navigating the Bylaw Maze in NCAA Major-Infractions Cases," 37 Seton Hall L. Rev. 749 (2007); Kitchin, "The NCAA and Due Process," 5 Kan. J.L. & Pub. Policy 71 (1996).

[35] On this subject there is extensive commentary by legal theorists and constitutional scholars. One issue is the degree to which courts should be faithful to constitutional text, including the level of generality one employs in deciding the scope and meaning of text. See e.g., Levinson, On Interpretation: The Adultery Clause of the Ten Commandments, 58 Sn. Cal. L. Rev. 719 (1985); Paulsen, How to Interpret the Constitution (And How Not To), 115 Yale L.J. 2037 (2006); Wexler, Defending the Middle Way: Intermediate Scrutiny as Judicial Minimalism, 66 G.W.L. Rev. 298 (1998); Powell, The Original Understanding of Original Intent, 98 Harv. L. Rev. 885 (1985).

[36] See, e.g., Amar, The NCAA As Regulator, Litigant, and State Actor, 52 B.C. L. Rev. 415 (2011).

[37] Outside the scope of this article, therefore, is how state actor status might affect the NCAA as employer. The NCAA already is subject to Title VII, which governs workplace discrimination, of employers who have at least 15 employees. Title VII of the Civil Rights Act, 42 U.S.C. § 2000e et seq.

to prevail against alleged NCAA over-reaching; and fundamental, perhaps widespread, change to the way the NCAA operates. I disagree.

II. THE MORE THINGS CHANGE, THE MORE THEY STAY THE SAME

A change in NCAA status from private to state actor means entering unknown territory with no precedent directly on point. The predictable result is a period of flux and a flurry of lawsuits on grounds both tried and new. And once the dust settles? NCAA state actor status will force the NCAA to eliminate or revamp bylaws and policies affording preferential treatment to women and racial and ethnic minorities,[38] a result unanticipated by NCAA critics and supporters both. Otherwise, NCAA state actor status likely will have little impact on its regulation of intercollegiate athletics, including for those claimants and in those areas where NCAA critics most advocate for change.

To believe that the NCAA would change in fundamental ways directly attendant on state actor status is, first and foremost, to ignore the imperatives that drive it and any association. A private actor NCAA cannot act in ways that pose credible litigation risk on its state actor member institutions simply because it is immunized from liability. State actor status is irrelevant in this

[38] See text accompanying notes 131 to 146 infra.

calculus. Once an NCAA bylaw or policy is identified as constitutionally suspect if enforced by a state university member, even a private actor NCAA necessarily will conform.[39]

The current exclusive domain of Supreme Court constitutional state actor cases is due process, equal protection, and the first amendment, yet another reason that NCAA state actor status will reap no fundamental change in NCAA operations. Few, if any, NCAA bylaws and policies would fail to meet the requisites of these constitutional protections (except preferential treatment). As to committee processes, those with impact on non-members either already meet or exceed minimum due process requirements or could get there with a little tweaking.[40] This in part may explain why state universities have experienced neither a spate of constitutional claims brought against them for enforcing NCAA rules nor a string of litigation defeats in lawsuits that have been brought.[41]

The Supreme Court's treatment of private actors as state actors for some constitutional rights, moreover, by no means leads inexorably to its treatment of private actors as state actors for all other constitutional rights. To conclude otherwise is to succumb to the fallacy of the misplaced (or transplanted) category,[42] by which a classification created for one purpose and in

---

[39] See text accompanying notes 209 and 219 infra.

[40] See text accompanying notes 64 to 76; 80 to 122 infra.

[41] Cf. Brentwood I, supra note 17, at 12 (state-wide high school athletics associations deemed state actors have experienced no "wave of litigation").

[42] See, e.g., Civil Aeronautics Board v. Delta Air Lines, Inc., 367 U.S. 316, 327. 81 S.Ct. 1611, 1620 (1960).

one context is thought to be equally applicable to all purposes and contexts. The fallacy has "the tenacity of original sin and must constantly be guarded against."[43] Moreover, even were the Supreme Court to extend state actor status to all incorporated Bill of Rights protections, the NCAA still would be relatively unaffected. It need fear no lawsuit for infringing rights of criminal defendants under the sixth amendment, to pick one example.[44] The most likely additional claims to which it might be held to answer ring in privacy under the fourth amendment, particularly drug testing of student-athletes. Yet here too NCAA practices likely meet constitutional requirements.

States qua states have sovereign immunity as insulation from state statutory and common law claims and a state action exemption from federal antitrust laws.[45] Although unlikely that a state actor NCAA will be covered by sovereign immunity or exempted from antitrust liability, there is irony here. Should an NCAA state actor be so treated, it will end by having more, not less, legal protection than has a private actor NCAA. [46] Not the consequence NCAA critics seek. And not the consequence NCAA supporters fear.

Now, a caveat. The "law" of unforeseen circumstances (Casey Stengel redux?) dictates caution when predicting the future based on past experience coming from different legal

---

[43] Cook, The Logical and Legal Bases of the Conflict of Laws, 159. See also Hancock, The Fallacy of the Transplanted Category, 37 Can.B.Rev. 535 (1959).

[44] There also are no cognizable claims under the second, third, fifth, and seventh to tenth amendments.

[45] Sherman Act, 15 U.S.C.A. §§ 1, 2.

[46] See text accompanying notes 232 to 243 infra.

understandings. The most likely "blip" in predicting continuance of the status quo comes from the possibility that litigants might sue the NCAA for perceived violations when they currently refrain from suing a particular state university or a coterie of them for the same violations.[47]

The NCAA is a visible and ready target, with neither fan base nor the benefit of institutional loyalty to deter putative litigants. It is the "big dog" in town and the "outsider" in litigation. Litigants may expect fact finders to be skeptical of NCAA contentions and inclined to make large damage awards against it. In turn, they may expect to extract favorable settlement terms. Finally, potential economies of scale, the greater feasibility of constructing a plaintiff class, and a nationwide choice of courts in which to sue may release litigants from the practical constraints that currently may deter them from bringing and maintaining lawsuits.

III. THE NCAA: A SHORT PRIMER

The sina qua non of membership in an association is that each member must follow the bylaws and policies collectively adopted. An association may enforce its bylaws and policies only on members. In turn, only members may change an association's bylaws and policies or challenge their interpretation or implementation.

Things are a little tricky for associations such as the NCAA whose members are artificial entities. Although colleges and universities formally are accountable when NCAA bylaw

---

[47] The other "blip" is what Congress might do. See text accompanying notes 220 to 231 infra.

violations are alleged, their violations necessarily are committed by individuals – coach, student-athlete, etc. Although the NCAA formally addresses action to colleges and universities, consequences fall on individuals through an institution's compliance with NCAA directives.

IV. DUE PROCESS

Procedural due process means that individuals with constitutionally cognizable liberty or property interests[48] that may be abridged by official action must have notice of that action and a reasonable opportunity to show an unbiased fact finder that the action should not be enforced against them.[49] The constitutional adequacy of procedure varies by context according to how high the value placed on the particular substantive interest to be abridged.[50] Because error is least tolerated in criminal trials – "it is better to let ten guilty men go free than let one innocent man be punished"[51] – criminal defendants get the most procedural protection.[52] By contrast, prisoners in disciplinary hearings receive minimal protection and may even have their cases heard by fact

---

[48] E.g., Board of Curators v. Horowitz, 435 U.S. 78 (1978); hereafter referred to as Horowitz.

[49] Goss v. Lopez, 419 U.S. 565, 95 S. Ct. 729 (1975); hereafter cited as Goss.

[50] See, e.g., Mathews v. Elridge, 424 U.S. 319 (1976); Logan v. Zimmerman Brush Co., 455 U.S. 422, 428, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982).

[51] William Blackstone, Commentaries *358. For a general discussion of the degree to which we prefer false positives to false negatives, see Volokh, Guilty Men, 146 University of Pennsylvania Law Review 173 (1997).

[52] Protections include the rights to assistance of counsel, to present evidence and to confront evidence presented against them, to a jury of peers as fact finder, and the highest possible burden of proof – beyond a reasonable doubt.

finders employed by the prison[53] For student misconduct[54] and student failure to meet academic standards[55] a formal hearing is not required. Instead, "an informal give and take" suffices[56] where students have an opportunity to tell their story. [57]

A. Due Process Claimants and Claims: Wherefore Art They?

For a lawsuit to be successful there must be a meritorious claim and also a proper party plaintiff to raise it. [58] Neither is likely against a state actor NCAA.

Institutions are unlikely to succeed in actions against the NCAA because they participated in creating the NCAA bylaws and policies they seek to challenge. Student-athlete challenges center on denials of, or limits on, their eligibility to compete in varsity athletics. For procedural due process, these claims are non-starters as courts consistently have held that student-athletes have no constitutional right to compete and, thus, no cognizable reliance interest to which

---

[53] Wolff v. McConnell, 418 U.S. 539, 570-71 (1974).

[54] Goss, supra note 49. The reported cases are those involving K-12 students, where courts have found that students have a right to a public education.

[55] See cases cited at notes 48 to 50 supra and note 178 infra; see text accompanying notes 117 and 118 infra.

[56] Id.

[57] See cases cited at note 178 infra.

[58] See text accompanying notes 131 to 208 infra for a discussion of the likely absence of merit to substantive challenges against the NCAA.

procedural due process protections may attach.[59] Coaches have a reliance property interest only to the extent that their contracts of employment provide it;[60] in that case they also have a contract claim that likely affords protection at least equivalent to that provided by procedural due process.[61]

Other claims that might rise to the level of a cognizable property or liberty interest – injury to reputation, for example[62] – ring in tort or other common law causes of action. Those claiming injury need neither depend on NCAA status as a state actor to bring a claim nor focus on any alleged failure of procedural protection to reach the substantive injury caused.[63]

B. Notice

---

[59] E.g. Bloom v. NCAA, 93 P.3d 621 (Colo. App.2004), hereafter Bloom; Hart v. NCAA 550 S.E.2d 79, 86 (W. Va. 2001); Graham v. NCAA, 804 F.2d 953, 955 (i6th Cir. 1986); Hebert v. Ventetuolo, 638 F.2d 5 (1st App. Ct. 1981); Colo. Seminary v. NCAA, 570 F.2d 321 (10th Cir. 1978); Parish v. NCAA, 506 F.2d 1028 (5th Cir. 1975). Like student-athletes and NCAA competition, amateur athletes have no constitutional right to compete in the Olympics. DeFrantz v. United States Olympic Comm, 492 F. Supp. 1181 (D.D.C. 1980).

[60] E.g., Kish v. Iowa Central Community College, 142 F. Supp. 2d 1084 (N.D. Iowa 2001). See Price v. Univ. of Alabama, 318 F. Supp. 2d 1084 (N.D. Ala. 2003). Compare Board of Regents v. Roth, 408 U.S. 564 with Perry v. Sinderman, 408 U.S. 593 (1972). There is no fundamental right to practice a profession. E.g. Dittman v. California, 191 F.3d 1020, 1031 n. 5 (9th Cir.1999); Amunrud v. Board of Appeals, 158 Wash.2d 208, 220, 143 P.3d 571 (2006), c*ert.den.*, 549 U.S. 1282 (2007).

[61] See NCAA Processes, supra note 7, at cccc. At-will public employees may have a reliance property interest created by state law; if so, the due process clause dictates the procedure to be applied. Swarthout v. Cooke, 131 S. Ct. 859 (2011). Given the regularity with which coaches are fired or move to other positions notwithstanding contract language, there is little likelihood that due process will offer substantial protection additional to contract language. Add section 1983 cases discussing where one goes to find a procedural right.

[62] See, e.g., Perry v. Sinderman, 408 U.S. 593 (1972).

[63] Also not dependent on NCAA state actor status is a claim that through bylaws, policies, staff, or committee action the NCAA interfered with contract rights.

Due process notice assures that individuals are bound by a rule only if they know or have reason to know about it and its language is sufficiently clear to signal its scope and import.[64] There are many Apressure points@ at which potential NCAA bylaws are evaluated before adoption.[65] There also is a comprehensive system for bylaw interpretation after adoption. [66] Institutional compliance staff provide regular NCAA rules education to staff and student-athletes and field questions on bylaw scope and import. Student athletes and staff agree in writing to comply with NCAA bylaws.[67] A full recitation of the NCAA bylaw adoption and interpretation processes underscores how slim the chance that member institutions, or coaches and student-athletes, credibly can claim that they neither knew, nor should be held to know, of the

---

[64] Goldberg v. Kelly, 397 U.S. 254 (1970).

[65] Each legislative cycle proposed bylaws, with rationales, are compiled. See Publication of Proposed Legislation at https://web1.ncaa.org/LSDBi/pdf/propRpt?propRptSubmit=Generate%20POPL&division=1&conventionYear=2012 Proposed bylaws are vetted by NCAA legal counsel. NCAA committees and cabinets weigh in with comments and positions. Conference offices provide education. "Ancillary" associations such as those of coaches and faculty athletics provide perspectives. Student-athletes have a formal role. See, e.g., Hostick, "SAAC Emphasizes Group's Role As Change Agent," NCAA.org (November 8, 2011). Each NCAA institution there is a student-athlete advisory committee (SAAC). Each conference has a SAAC comprised of members from campus SAACs. The national SAAC is comprised of representative from each conference SAAC.

[66] NCAA Bylaw 21.7.7.2. The process includes informal consultation with NCAA and Conference staff as well as official interpretations posted on the NCAA web site. See NCAA Bylaw 21.7.7.2.2 (b). NCAA staff conduct regional seminars regarding NCAA bylaws and processes; one focus is on bylaws newly adopted. They also periodically publish Ahot topic@ alerts. In addition, the full text of reports of the COI and Infractions Appeals Committee as well as of student-athlete reinstatement and secondary violations cases are posted on the NCAA website summaries; infractions reports also are summarized in the NCAA News. http://goomer.ncaa.org/wdbctx/LSDBi/LSDBi.MajorInfPackage.MI_Search_Input?p_Cmd=Go_Search. The website address for secondary cases is http://web1.ncaa.org/LSDBi/exec/eligsecSearch. These reports explain the scope and meaning of bylaws in context.

[67] NCAA Const. Art 3.2.4.6; NCAA Bylaws 11.2.1; 14.13.1; 30.12; 30.3.1; and 30.3.3. To recruit off campus, moreover, coaches annually must take and pass an NCAA coaches exam. NCAA Bylaw 11.5.

existence of a bylaw or its application.[68] This is assuredly so with regard to those bylaws whose breach is likely to trigger significant adverse consequences.

C. NCAA Bylaw Adoption

Procedural due process in rule making means that the rule-making body had authority to adopt the rule[69] and followed established procedures.[70] Because NCAA member institutions adopt the bylaws and policies to which they are bound,[71] NCAA legislation almost by definition is within its substantive authority. Not only is it only theoretically possible for an NCAA bylaw to

[68] NCAA Bylaw 22.2.1.2 (c); NCAA Bylaw 30.3.1. Conference compliance staffs also provide information and respond to questions regarding bylaw scope and import. The result is that a failure of notice claim should fail no matter the committee or its processes.

[69] See, e.g., In re Permanent Surface Mining Regulation Litigation, 653 F.2d 514 (D.C. Cir. 1981).

[70] See, e.g., Reuters Ltd. v. FCC, 781 F.2d 946 (D.C. Cir. 1986). The NCAA legislative process includes deadlines for submitting proposals; required rationales for proposals; publication of proposals to all member institutions; review of positions taken on legislation by coaches associations, faculty, student-athletes through the national Student-Athlete Advisory Committee (SAAC) and Conference SAACs. Proposals frequently are drafted by NCAA cabinets whose members are staff at member institutions or conferences. Other proposals are vetted by committees with authority over the substance of a proposal. In NCAA Division I proposals are adopted by majority vote of the Legislative Council affirmed by majority vote of the Board of Directors.

[71] The NCAA bylaw adoption process is legislative in name and nature. Member institutions and conferences propose, vet, and adopt bylaws. They also establish the procedures by which bylaws are proposed, vetted, and adopted. See NCAA Const. Art. 5 (Legislative Authority and Process). Members of a legislature have no greater rights than the public. See Raines v. Byrd, 521 U.S. 811 (1977). See generally, Weiner The New Law of Legislative Standing, 54 Stanford L. Rev. 205 (2001). Should member institutions object to a particular substantive bylaw or to committee processes that interpret and enforce it, they can attempt to forge a majority to change substance or process.

be adopted outside established NCAA channels,[72] but the NCAA can respond to legitimize any process defalcation by revising its procedures and then re-adopting a bylaw.[73]

D. NCAA Committees

NCAA committee members are faculty and administrators at member institutions and conferences.[74] The DI Committee on Infractions (COI) and the Student-Athlete Reinstatement Committee (SARC) administer bylaw violations.[75] These two are the most likely to generate due process challenges should a proper due process claimant present herself.[76]

1. The COI

The COI hears and decides cases in which institutions are alleged to have committed major violations of NCAA bylaws through the actions of coaches, student-athletes, and others for whose conduct institutions are responsible. Alone among NCAA committees, the COI hears adversarial

[72] The claim that a policy was adopted outside established procedures was made by the University of North Dakota in a challenge to the NCAA=s mascot policy. See ANorth Dakota Board Votes to Retire Symbol," NCAA News, May 15, 2008.

[73] This is what happened in the North Dakota mascot case described in note 72 supra.

[74] NCAA Bylaw 21.7.1. Committee members are appointed through formal NCAA processes. NCAA Bylaw 21.7.3.

[75] Member institutions must report suspected violations to NCAA staff. NCAA Bylaw 32.1.4. The cooperative principle also requires that institutions abide by NCAA bylaws, cooperate in NCAA investigations, and enforce decisions regarding remedial action and penalties should violations have been committed. Id.

[76] Denials of waiver requests from the operation of NCAA bylaws, see notes 107 to 110 infra, decisions of the Student-Athlete Drug Testing Appeals Committee; see text accompanying notes 197 to 208 infra, and decisions of the NCAA Eligibility Center also may give rise to legal challenges. The Eligibility Center decides whether prospective student-athletes meet NCAA academic eligibility and amateur requirements. NCAA Bylaw 12.1.1.1.

presentations and acts as a finder of facts. Its committee processes are the focus of commentator agitation for NCAA state actor status and led to Jerry Tarkanian's lawsuit against the NCAA.[77]

Tarkanian was the head men's basketball coach at the University of Nevada-Las Vegas (UNLV). He was suspended by UNLV after an infractions hearing at which it was found to have committed violations because he did. Under COI processes then in place, only a member institution could respond to NCAA allegations of violations; a coach neither could provide his own written statement directly to the COI nor be present at the hearing – even if he claimed that the institution misstated his case or pointed its finger at him to escape additional penalties levied against it.[78] The pre-Tarkanian hearing process is consistent with how private associations conduct business; only members participate. The pre-Tarkanian hearing process also is consistent with procedure at arbitration hearings that excludes those not formal parties even if a decision directly will affect them.[79]

Although the Tarkanian Court held that a private actor NCAA is not constitutionally compelled to afford minimal procedural due process protections at COI hearings, nonetheless

---

[77] Taranian, supra note 13.

[78] A coach's violations also are those of the institution. If a member institution decided its coach committed no violations, then it had every interest to present that position effectively. To decide a coach committed violations, an institution also was reporting itself.

[79] See, e.g.. Lindland v. USA Wrestling, 230 F.3d 1036, 1039 (2000) (AThe notion . . . that an arbitration must include all persons who could be affected by the outcome is novel and would work a revolution in arbitral proceedings@). Rogers & Ryan, "Navigating the Bylaw Maze in NCAA Major-Infractions Cases," 37 SETON HALL L. REV. 749, 789-90 (2007).

current enforcement[80] and infractions processes provide them,[81] not only to member institutions but also to coaches and institutional staff members.[82] Among other things, the opportunity to be

---

[80] The enforcement staff conducts investigations of potential NCAA violations and is the moving party in framing a case for presentation to the COI. See generally NCAA Bylaw Arts. 19 and 32. Among the procedural protections provided during investigations to involved individuals are (i) timely and periodic notice of the progress of an investigation, with a list of particulars; NCAA Bylaw 32.5; (ii) access to all enforcement staff information relevant to an alleged violation; NCAA Bylaws 32.6.4; 32.3.10.2; 32.3.9; (iii) assistance of counsel at enforcement staff interviews; NCAA Bylaw 32.3.6; (iv) an enforcement staff case summary that sets forth allegations, together with the prime facts and circumstances relied on to substantiate them; NCAA Bylaw 32.6.7; (vi) a statute of limitations for bringing allegations; NCAA Bylaw 32.6.3; and (vii) enforcement staff notice to the COI of exculpatory as well as inculpatory information. NCAA Bylaw 32.8.4.

[81] In fact, some courts and commentators thought pre-Tarkania COI procedures met due process. E.g., Howard Univ. v. NCAA, 510 F.2d 213 (D.C.Cir. 1975). See Kitchin, "The NCAA and Due Process," 5 Kan. J.L. & Pub. Policy 71, 75 (1996). At least two courts pointed to law professor COI members as showing that due process was afforded. NCAA v. Gillard, 352 So.2d 1072 (Miss. 1977) (professors "noted for advocating the protection of constitutional rights"); Regents of University of Minnesota v. National Collegiate Athletic Ass'n, 560 F.2d 352, (8th Cir. 1977) ("distinguished panel of jurisprudential scholars. . . beyond reproach as an impartial decision making body").

[82] See Green, "Does the NCAA Play Fair? A Due Process Analysis of NCAA Enforcement Regulations," 42 Duke L.J. 99 (1992). These protections do not extend to boosters – those who are known or should be known to an institution as promoting or attempting to assist an athletics program. See NCAA Bylaw 13.02.14. Booster misconduct is a source of institutional violations and penalties. See, e.g., Infractions Report No. 193 (University of Alabama, February 1, 2002); Infractions Report No. 208 (University of Michigan, May 8, 2003); SMU Infractions Report (February 25, 1987). See Whitford, A Payroll to Meet: A Story of Greed, Corruption, and Football at SMU. COI findings of booster misconduct may result in a direction to an institution to disassociate a booster from its athletics program. NCAA Bylaw 19.5.2.6. Booster relationship with a program is far different than that of coach or student-athlete. They nonetheless cannot claim ignorance of NCAA bylaws that affect them as they are provided rules education through in-person instructional sessions, game day programs, and periodic mailings. Booster exclusion is grounded in the fact that they have not even a tenuous due process liberty or property interest arising out of their making contributions, getting Aperks,@ or having special access or insider institutional status. In addition, booster participation adversely may impact the truth-finding function. In the absence of subpoena power, not all boosters with information will appear, with the result that the COI will have an uneven body of information on which to decide and an uneven opportunity to evaluate demeanor and pursue information through questions. Boosters may have additional information or may provide a fuller context in which to evaluate presentations by an institution or involved individual. If so, their information can be presented through the NCAA enforcement staff or an institution. An institution may avoid findings of violations and imposition of penalties if a booster is not culpable and also avoid a major financial hit through booster disassociation. It therefore has every reason to be vigorous in representing and defending a booster=s conduct when in good faith it believes the booster is not culpable.

heard afforded involved individuals such as Tarkanian[83] includes (i) a neutral and independent COI; (ii) a full opportunity to present their case,[84] including sufficient time to respond to allegations in writing[85] and presence at a COI hearing with counsel;[86] (iv) COI reliance on information only when that information has been provided to involved individuals and the source identified to them;[87] (v) COI fact-finding based exclusively on the record before it;[88] (vi) COI findings of violations only when supported by information that is Acredible, persuasive, and of a kind on which reasonably prudent people rely in the conduct of serious affairs;@[89] (vii) a written

---

[83] And, of course, the member institution charged with violations.

[84] NCAA Bylaw 32.8.7.3.

[85] NCAA Bylaws 32.6.5; 32.6.6.1; 32.6.8; 32.8.7.4.

[86] NCAA Bylaw 32.8.6. There also is the opportunity to have questions answered. NCAA Bylaw 32.8.7.6.

[87] NCAA Bylaw 32.8.7.4.1. These protections are not structural but personal and waivable. Infractions Report No. 193 (University of Alabama, February 1, 2002); affirmed on all findings, Infractions Appeals Committee Report No. 193 (University of Alabama, September 17, 2002). A source is not confidential if she is identified to an institution or involved individual against whom her information would be used even though she is not identified to the COI. Id.

[88] In exercising its adjudicative function, the COI has not always found violations alleged by the enforcement staff and also has reduced violations from major, as charged, to secondary. NCAA Processes, supra note 7, at 295.

[89] In making findings, the COI considers the credibility of individuals providing information, including whether they have reason to lie, the internal consistency of their information, how the information matches up with other information in the record, and any corroborative information. Another component of the due process provided at COI hearings relates to the procedural requirements to which the NCAA enforcement staff must comply in presenting information at the hearing. See NCAA Bylaw Chapter 19. The COI hears claims of procedural issues arising out of the investigative process. See NCAA INFRACTIONS REPORT NO. 265 (West Virginia University May 1, 2007).

COI report that sets forth the grounds for findings and penalties;[90] and (viii) the right to appeal adverse findings to a neutral and independent infractions appeals committee.[91]

2. The SARC

Student-athlete violations range from academic fraud,[92] agent representation,[93] receipt of large amounts of money,[94] and gambling[95] to unintentional violations such as receipt of recommended books on a book scholarship (when only required books may be provided),[96] retention of used athletic equipment,[97] and acceptance of a sandwich purchased by a booster.[98] The SARC deals with reinstatement of competition eligibility because commission of violations

---

[90] NCAA Bylaw 32.9.1.

[91] NCAA Bylaw 32.11; NCAA Bylaw 19.2.1.1. See Wong, Skillman, and Deubert, "The NCAA's Infractions Appeals Committee: Recent Case history Analysis and the Beginning of a New Chapter," 9 Va. Sports and Ent. Law J. 47 (2009).

[92] NCAA Bylaw 10.1.

[93] NCAA Bylaw 12.3.

[94] NCAA Bylaw 16.0.2.3.

[95] NCAA Bylaw 10.3

[96] NCAA Bylaw 16.11.1.6. NCAA DIVISION I STUDENT-ATHLETE REINSTATEMENT GUIDELINES, BYLAW 10.1- (B) (2009), at 20-21, hereafter Reinstatement Guidelines; February 17, 2011 email from Jennifer Henderson, Student-Athlete Reinstatement Staff to JR Potuto, on file in office of JR Potuto, UNL Law College. For a discussion of some of the reinstatement guidelines, see NCAA Processes, supra note 7, at 284 n. 112.

[97] NCAA Bylaw 15.2.3.

[98] NCAA Bylaw 16.0.2.3.

automatically renders a student-athlete ineligible. Consequences for student-athlete violations range from permanent ineligibility[99] to unconditional reinstatement.[100]

SARC proceedings are informal.[101] The SARC makes no independent decision whether or how a violation was committed, but instead relies on the position taken by the student-athlete's institution.[102] The SARC decides the degree of student-athlete culpability based on the facts presented to it as well as whether and under what conditions a student-athlete may be reinstated to competition eligibility, including the duration of any period of competition ineligibility.[103]

---

[99] See Reinstatement Guidelines, supra note 96. Permanent ineligibility occurs only in about one percent of reinstatement cases. NCAA Bylaw 21.7.7.3; NCAA Student-Athlete Frequently Asked Questions, hereafter Reinstatement Questions, found on the NCAA web site at http://www.ncaa.org/wps/myportal/ncaahome?WCM_GLOBAL_CONTEXT=/ncaa/ncaa/legislation+and+governance/compliance/student-athlete+reinstatement/sar+frequently+asked+questions&Frequently%20Asked%20Questions%20%28FAQs%29.

[100] Some violations are sufficiently de minimus to warrant no eligibility consequence. E.g., extra benefits valued at less than $100.00; Reinstatement Guidelines, supra note 96; and receipt of recommended texts on a book scholarship (only required texts may be provided). Although there may be no withholding, a student-athlete still must disgorge himself of the benefit before being able to compete. Id.

[101] Informality does not a due process violation make. In Brentwood I, supra note 17, a high school sued for alleged violation of the first amendment. It also claimed that its due process rights were violated by an appeal board's review of notes Brentwood never saw and ex parte discussion with case investigators and the person who presided in prior proceedings. The Court described as "questionable" the district judge's holding that due process was violated. Brentwood II, infra note 172, at 303-04. The Court also said that, assuming a violation, any error was harmless. Id.

[102] An institution unsure whether conduct constitutes a violation may query NCAA staff. It also may seek a waiver from the operation of a bylaw to the committee with authority over the substantive bylaw. NCAA Processes, supra note 7, at 272 to 276.

[103] Reinstatement Questions, supra note 99, at 3. Because student-athlete violations also are institutional violations, student-athlete violations may be part of a case presented to the COI with regard to the consequences to institutions Sflowing from what its student-athletes did.

A high volume of reinstatement decisions are processed annually.[104] Cases typically are straightforward and often time sensitive as a student-athlete may not compete until reinstated. SARC staff handle reinstatement requests in the first instance, with the opportunity to appeal to the SARC through telephonic hearing.[105]

The SARC has guidelines governing reinstatement.[106] So long as the SARC acted within its jurisdiction in adopting a guideline, an institution would have no more success challenging that guideline than it would challenging an NCAA bylaw. Also going nowhere would be a challenge to a SARC conclusion that violations were committed, given that the reinstatement process adopts the institution's conclusion and also relies on its explication as to how. The only viable challenges open to an institution, then, relate to the SARC's failure to depart downward from its guidelines for reinstatement[107] or in its decision regarding the degree of student-athlete culpability.

---

[104] In academic year 2010-11, there were approximately 1,850 reinstatement requests; 99 percent resulted in the student-athlete being reinstated (some with a condition). Reinstatement Questions, supra note 99.

[105] Reinstatement Questions, supra note 104, at 1.

[106] Reinstatement Questions, supra note 99.

[107] If the SARC or its staff deliberately refuse to apply an articulated guideline exception that squarely fits a particular case, there almost certainly would be a due process violation. See Harding v. U.S. Figure Skating Ass'n, 851 F. Supp. 1476 (D.Ore. 1994) (courts intervene in associational decisions only "in the most extraordinary circumstances" when an association fails to follow its own rules), vacated on other grounds, 879 F. Supp. 1053 (D. Ore. 1995); Slaney v. Internat'l Amateur Athletic Federation, 244 F.3d 580 (7th Cir.), cert. den., 534 U.S. 828 (2001); Schulz v. United States Boxing Ass'n, 105 F.3d 127 (3d Cir. 1997); Gahan v. United States Amateur Confederation of Roller Skating, 382 F. Supp. 2d 1127 (D. Neb. 2005); Lindemann v. American Horse Shows Ass'n, 624 N.Y.S. 2d 723, 734 (N.Y. Sup. Ct. 1994). An exception would be if the SARC finds changed circumstances and denies a guideline condition in the instant and all succeeding cases.

Downward departures from a guideline are waivers from its operation.[108] Providing waivers from the regular operation of duly adopted rules is not required by due process. Instead, waivers provide more process than is due.[109] For a court to overturn a denial of a downward departure it most likely would need to find that the SARC denial was arbitrary or discriminatory;[110] the likelihood of success is low.

With regard to assessments of student-athlete culpability, SARC processes likely would be evaluated in light of due process requirements in student misconduct and academic dismissal

---

[108] NCAA committees have authority to grant waivers from the operation of bylaws under their jurisdiction. E.g., NCAA Bylaw 21.7.5.1.3.1; 21.7.5.1.3.2. The Subcommittee for Legislative Relief of the DI Legislative Council is a Acatch-all@ committee to which a waiver may be submitted when there is no other committee with jurisdiction to act. NCAA Const. Art. 5.4.1.3. The discussion regarding the constitutionality of downward SARC departures is equally applicable to NCAA waiver decisions.

[109] The nature of legislation and rules – indeed all of life – is that they do not operate perfectly to capture all situations relevant to their purpose and to exclude all that do not fit. Legislation and rules may be both over- and under-inclusive and not offend due process. See generally Tussman & tenBroek, "The Equal Protection of the Laws," 37 Cal. L. Rev. 341 (1949). In situations involving the doctrine of independent and adequate state grounds, the Supreme Court has granted relief from the due operation of a procedural rule in rare occasions when the application of the rule is Aunduly harsh.@ Lee v. Kemna, 534 U.S. 362 (2002); Osborne v. Ohio, 495 U.S. 103 (1990). An institution may claim that denial of a downward departure offends due process because the facts of its case resemble those where the SARC granted an outside-guideline departure. The institution at least would need to show a track record of SARC departures to demonstrate that SARC's failure similarly to exercise discretion in the instant case is arbitrary or discriminatory.

[110] See Bloom, supra note 59; Horowitz, supra note 48; NCAA Processes, supra note 7, at xxxxx; APA, 5 U.S.C. § 706 (Scope of review). A student's claim that he should be permitted to retake an exam, for example, did not survive a motion to dismiss Keen v. Western New England College, 23 Mass. App. Ct. 84, 499 N.E.2d 310 (1986). Cf. NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1985); Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969); Davis v. Wechsler, 263 U.S. 22 (xxxx).

proceedings. For misconduct by public school students, even when the potential consequence is expulsion,[111] the requisites of due process are met by an informal process whereby a student has a chance to tell his story.[112] Although the NCAA is not an educational institution, it has been described as a "surrogate"[113] for the educational institutions that are its members. NCAA committees are peopled by some of the same type campus administrators who hear student discipline cases. Not only may the same types of conduct be reviewed by both campus disciplinary committees and the SARC, particular conduct may involve review by both.[114]

From the perspective of student-athletes, there are two significant differences between university processes and the SARC. The first difference is the degree of deprivation suffered. Except, possibly, for decisions declaring a student-athlete permanently ineligible for competition, imposing a lengthy ineligibility period, or excluding a student-athlete from a championship

---

[111] See, e.g., Boykins v. Fairfield Bd of Education, 492 F.2d (5th Cir. 1974) (hearsay testimony involving reading statements of teachers regarding charges); Tun v. Whitticker, 398 F.3d (7th Cir. 2005); Linwood v. Bd of Education of City of Peoria, 463 F.2d 763 (7th Cir. 1972). Academic dismissals fare no better. See, e.g., Mauriello v. University of Medicine and Dentistry, 781 F.2d 46 (3d Cir. 1986); Morin v. Cleveland Metropolitan Gen. Hosp. School of Nursing, 516 N.E.2d 1257 (Ohio App. 1986); Cuddihy v. Wayne State Univ., 413 N.W.2d 692 (Mich. App. 1987); Hammond v. Auburn Univ., 669 F. Supp. 1555 (M.D. Ala. 1987). See Grutter, supra note 130.

[112] See Goss, supra note 49; Tasby v. Estes, 643 F.2d 1103 (5th Cir. 1981). See text accompanying notes lll and mmm infra. It need not offend due process for an administrator to initiate and investigate charges and also serve as hearing officer. E.g., Brewer by Dreyfus v. Austin Ind. School Dist., 779 F.2d 260 (5th Cir. 1985). Similarly, it need not offend due process for an appellate board reviewing a student's suspension to hold closed-door deliberations with the principal and superintendent who testified against the student and using as board advisor the attorney who presented the charges. Lamb v. Panhandle Cmmty Unit School Dist. No. 2, 826 F.2d (7th Cir. 1987). NCAA v. Gillard, 352 So.2d 1072 (Miss. 1977). See Kitchin, "The NCAA and Due Process," 5 Kan. J.L. & Pub. Policy 71, 75 (1996).

[113] Cureton v. NCAA, 37 F. Supp 2d 687, 703 (E.D.Pa. 1999), hereafter Cureton District Court.

[114] The situation more likely arises in academic misconduct cases.

competition opportunity, the deprivation suffered will not equate to a student's lengthy suspension or expulsion from school. The second difference is that, contrary to their right in university processes, student-athletes have no right to make independent presentations to the SARC.[115] This difference, however, is unlikely to provide student-athletes with a procedural due process claim.

In the first place, typically student-athletes provide written explanation of the circumstances of a violation that is included in an institution's submission. Thus, as a matter of practice they make a presentation even though as a matter of right they may be excluded.

Second, student-athlete claims for reinstatement may be said to be subsumed in that of the member institution or, in any event, are no greater than that of the institution.[116] Athletics departments regularly advocate for student-athlete interests.[117] They intervene when the media criticize their student-athletes.[118] In almost every reinstatement case their interests are co-extensive with their student-athlete's.[119] Both want the student-athlete to be eligible to

---

[115] Reinstatement Questions, supra note 99, at 3.

[116] Even were student-athletes to be treated as third-party beneficiaries to the NCAA association "contract" among member institutions, their claims would be no broader than those of their member institutions, and they would fail on the same grounds. E.g., Bloom, supra note 59.

[117] See Potuto, Academic Misconduct, Academic Support Services, and the NCAA, 95 KY.L.J. 447 (2007).

[118] Friend, "Reid: Gundy's Rant "Basically Ended My Life," ESPN The Magazine on line (April 15, 2008); Baker, "The Angst and Adulation of Bo Pelini," NebraskaStatePaper.Com (October 14, 2011).

[119] On occasion an institution will not have as strong an interest as its student-athlete. There be others on the team who can replace the student-athlete; or a coach may have "issues" with him and no longer want to have him compete; or he may be in his final season of eligibility and, given the time in the season in which the violation occurred, the

compete, and as soon as possible.[120] It is at least doubtful, therefore, that student-athletes speaking independently would do better than their institutions speaking on their behalfs.[121]

The conclusive reason why student-athletes will be unable successfully to challenge a state actor SARC decision is that, absent a sharp turn in course by the Supreme Court, they have no cognizable reliance interest in an opportunity to compete and, therefore, no due process claim to be made.[122] State actor status by itself need neither impel the NCAA to revise reinstatement processes to provide direct and independent participation by student-athletes nor to provide them enhanced opportunity to challenge an adverse reinstatement decision in court.

It is no doubt possible – I would argue preferable – for NCAA processes to offer student-athletes an independent role in reinstatement processes, at least when an institution refuses to petition for reinstatement or when student-athletes can show significant disagreement between

---

coach may want to play younger student-athletes. It is possible, therefore, that an institution will not petition for reinstatement.

[120] In addition, fans and donors, on occasion boards of regents and others, may exert external pressure on athletics departments to act aggressively in representing student-athlete interests before the SARC.

[121] Where an institution declines to petition for reinstatement; see note 119 supra; a student-athlete might be advantaged were she to have an independent due process right to advance a claim. On closer look, however, this opportunity may be pyrrhic. Eligibility does not equal playing time; that decision is the coach's.

[122] Even absent a due process reliance interest in employment, an individual might make a due process challenge if his reputational interests were affected by a decision of a state actor. Compare Board of Regents v. Roth, 408 U.S. 564 with Perry v. Sinderman, 408 U.S. 593 (1972). It is unlikely, however that a student-athlete could show injury to reputation. Reinstatement reports name neither student-athlete nor institution and their recitation of the circumstances of a decision is brief.

them and their institutions as to the facts or degree of culpability.[123] At the very least, it would enhance student-athlete satisfaction with their treatment[124] as well as the perception of fairness of NCAA critics. It is not my purpose, however, to describe here a SARC process that would include formal student-athlete presence, the possible practical obstacles to doing so, or the policy reasons in favor.[125] I simply point out three things.

First, NCAA state actor status does not equate to a constitutional mandate that student-athletes be formally included in the student-athlete reinstatement process. Second, NCAA state actor status would not enhance the opportunity of student-athletes to raise a due process challenge in court to SARC processes from which they were excluded, or to prevail on the merits, even if they suffered permanent competition ineligibility and their interests and those of their institution were at odds. For that to happen, student-athletes must have a cognizable due process interest in an opportunity to compete. Third, were a state (or, for that matter, private)

---

[123] Giving student-athletes a formal opportunity to present a written statement would cure any potential due process violation that arguably might exist. The Ted Stevens Olympic and Amateur Sports Act governs national team amateur competition. 36 U.S.C. Section 220501 et.seq. Athletes denied a place on an amateur team may challenge the decision before the national governing body (NGB) in the sport and also seek USOC review. Amateur athletes may not sue the USOC or NGBs. Instead, they must submit to binding arbitration. Id. See, e.g., Slaney v. Int'l amateur Athletic Federation, 244 F.3d 580 (7th Cir. 2001); Oldfield v. Athletic Congress, 779 F.2d 505 (9th Cir. 1985).

[124] See, e.g., Tom R. Tyler, Why People Obey the Law 273-74, 278 (2d ed. 2006); Gangl, Procedural Justice Theory and Evaluations of the Lawmaking Process, 25 Pol. Behav. 119, 135 (2003); Tyler, What Is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures, 22 Law & Soc'y Rev. 103, 132 (1988); Tyler, Governing Amid Diversity: The Effect of Fair Decisionmaking Procedures on the Legitimacy of Government, 28 Law & Soc'y Rev. 809, 827 (1994).

[125] In a forthcoming article co-authored with Professor Matt Mitten, Director of the Marquette Sports Law Institute, we compare NCAA committee processes with those employed by the USOC and NGOs.

actor NCAA to provide student-athletes entry to its SARC processes, it need make no fundamental change to those processes for them to comport with what minimum due process requires.

V. EQUAL PROTECTION

The equal protection clause was included in the fourteenth amendment to provide federal protection for racial and ethnic minorities against state policies and practices that discriminate against them.[126] Then came affirmative action and other policies affording preferential treatment to minorities and women to account for historical discrimination and other obstacles preventing their full societal participation.[127] Finally came Supreme Court cases requiring that discrimination advantaging racial and ethnic minorities and women be treated with the same level of scrutiny[128] afforded discrimination disadvantaging them.[129] The end result is that state action focused on race or gender is constitutionally suspect no matter the motive or beneficiary.

---

[126] Slaughter-House Cases, 83 U.S. 36 (1872).

[127] E.g., Regents of the University of California v. Baake, 438 U.S. 265 (1978); Fullilove v. Klutzni, 448 U.S. 448 (1980); Schlesinger v. Ballard, 419 U.S. 498 (1975); Kahn v. Shevin, 416 U.S. 351 (1974). See also, Yuracko, One for You and One for Me: Is Title IX's Sex-Based Proportionality Requirement for College Varsity Athletic Positions Defensible?, 97 Nw. U.L.Rev.731, 751 (2003).

[128] Strict scrutiny is employed to review equal protection claims based on race or ethnicity. See Loving v. Virginia, 388 U.S. 1 (1967); City of Richmond v. Croson, 488 U.S. 469 (1989). Intermediate scrutiny requiring an "exceedingly persuasive justification" is employed to review gender discrimination claims. United States v. Virginia, 518 U.S. 515 (1996).

[129] Ricci v. DeStefano, 557 U.S. ----, ----, 129 S.Ct. 2658, 2702, 174 L.Ed.2d 490 (2009); City of Richmond v. Croson, 488 U.S. 469, 109 S. Ct. 706, 102 L.Ed 2d, 854 (1989); Adarand Constructors v. Pena, 515 U.S. 200, 115 S. Ct. 2097, 132 L.Ed.2d 158 (1995); Wygant v. Jackson Bd of Education, 476 U.S. 267 (1986); Parents Involved in Community Schools v. Seattle School Dist. No. 1, 127 S. Ct. 2738, 168 L. Ed. 2d 508 (2007).

Diversity in higher education is so compelling a government interest that universities have unique latitude to use race and ethnicity as one factor in deciding which students to admit to their institutions.[130] Universities may neither justify all their actions and policies on grounds of diversity, however, nor use quotas to achieve it.

To violate constitutional equal protection, there must not only be a discriminatory effect but a purpose to discriminate.[131] The NCAA has no policy or bylaw that embodies purposeful adverse discrimination. Its initial eligibility bylaws are those most comparable to admissions decisions, where at least an argument might be made that preferential treatment is constitutional. These, however, give no preferential treatment to racial and ethnic minorities.[132] In its governance structure, the programs it administers, and the internal operation of its national office,[133] by contrast, the NCAA is permeated with preferential treatment policies designed to expand opportunities for racial and ethnic minorities and women, including through the use of

---

[130] Gratz v. Bollinger, 539 U.S. 244 (2003); Grutter v. Bollinger, 539 U.S. 306, 123 S.Ct. 2325, 156 L.Ed. 2d 304 (2003) (court defer to university academic decisions due to Aimportant purpose of public education and the expansive freedom of speech and thought associated with the university environment@), hereafter Grutter; Regents v. Bakke, 438 U.S. 265 (1978) (plurality of opinion) (Afreedom of a university to make its own judgment as to education includes the selection of its student body@).

[131] Washington v. Davis, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed 2d 597 (1976), hereafter Davis.

[132] A state actor also may not administer formally neutral policies in a discriminatory way. Yick Wo v. Hopkins, 118 U.S. 356, 374, 6 S.Ct. 1064, 30 L.Ed. 220 (1886). There is no evidence that I know of, however, suggesting that committee waivers of initial eligibility requirements afford preferential treatment to minorities.

[133] Potentially at risk is the national office affirmative action hiring program. NCAA Bylaw 31.8.1.1.

quotas.[134] All these are constitutionally suspect when the actor implementing them is a state actor, with quotas per se unconstitutional.[135] A sampling of NCAA programs that administer quotas is:

- The Division I Board of Directors must include at least one ethnic minority and at least one woman.[136] The three major Division I governance groups – the Leadership and Legislative Councils and the Championships/Sports Management Cabinet – in combination must include at least 20 percent ethnic minorities and 35 percent women.[137] Similarly, the combined membership of the five remaining Division I cabinets also must include at least 20 percent ethnic minorities and 35 percent women.[138]

---

[134] NCAA Const. Arts. 4.02.5 (Gender and Diversity Requirements); 4.02.6.1 (Selection).

[135] Quotas are permitted only as remedy for a specific past equal protection violation by a particular state actor against whom the quota will apply. Gender discrimination is subject to intermediate scrutiny, a test less rigorous than strict scrutiny. See cases cited at note 128 supra. If so, then gender quotas might survive when race quotas would not. Some argue that in practice the test for gender and race discrimination cases is the same. See, e.g., Kovacic-Fleischer, United States v. Virginia's new Gender Equal Protection Analysis with Ramifications for Pregnancy, parenting, and Title VII, 50 Vand. L. rev. 845, 869-70 (1997).

[136] NCAA Const. Art. 4.02.5.

[137] Id.

[138] Id.

- NCAA committees also have quotas. For example, the COI must have at least two women among its ten members.[139]

- Certain student-athlete leadership and other programs are open only to minority student-athletes; other programs preserve designated slots for minority student-athletes.[140]

- An obvious example of a quota involves the Senior Woman Administrator position (SWA) mandated at every NCAA member institution and conference.[141] The SWA is part of Conference governance and eligible to serve in NCAA governance. Only a woman may be an SWA.

---

[139] NCAA Bylaw 19.1.1.

[140] A sampling of programs includes the NCAA Post-Graduate Scholarship Program (equal number of scholarships to men's and women's student-athletes without regard to comparative qualifications); the Division III Ethnic Minority and women's Internship Grant Program (funds to institutions for ten-month internship in administration and coaching); the NCAA-Black Coaches and Administrators Achieving Coaching Excellence Program (preparation for racial and ethnic minorities to be head basketball coaches); the Division II Strategic alliance Matching Grant Enhancement Program (three-year seed funds to institutions and conferences for administrative positions for minorities and women); the Women's Leadership Symposium (leadership instruction for women); and the Matching Grant for the Advancement of Ethnic Minority Women Coaches and Officials (development of minority women coaches). NCAA Student-Athlete Affairs Program Descriptions, September 9, 2011, on file in office of JR Potuto.

[141] NCAA Bylaw 4.02.4. The SWA is not a mandated employment position. Rather, a woman must be designated as the SWA and, by virtue of her designation, serves a governance role in the athletics conference of which her institution is a member and is eligible to serve on NCAA councils, cabinets, and committees.

Other committees that might be at risk are the 15-member Minority Opportunities and Interests Committee (committee may have no fewer than eight ethnic minority members)[142] and 15-member Committee on Women's Athletics (committee may have no fewer than four male and four female members).[143] That these committees focus particularly on issues affecting minorities and women does not make them unconstitutional. In addition to their membership requirements, what might call their status into question is that both committees have special reporting access directly to the Division I Leadership Council and not through a particular cabinet.[144]

Unless the Supreme Court greatly expands the scope and reasoning of its higher education decisions or reverses course on the constitutionality of preferential treatment, a state actor NCAA would need to eliminate any quotas it administers and most likely eliminate, or at least restructure, other NCAA initiatives aimed at enhancing racial, ethnic, and gender diversity in athletics administration and coaching and in professional and graduate opportunities for student-athletes.[145]

---

[142] NCAA Bylaw 21.2.4. The Committee also must have no fewer than four male and four female members. Id.

[143] NCAA Bylaw 21.2.10.

[144] NCAA Manual, Figure 4-1.

[145] The impact on diversity initiatives also may extend to federal statutory mandates to which the NCAA currently voluntarily subscribes. The fourteenth amendment prohibits discrimination when there is both discriminatory impact and intent. Davis, note 131 supra. In programs receiving federal funds (Title VI; 42 U.S.C. ' 2000d; race) and educational programs receiving federal funds (Title IX; 20 U.S.C. § 1681; gender), the Supreme Court has upheld congressional restrictions on practices that have an adverse impact independent of purpose. NCAA member institutions, private and state, are subject to Titles VI and IX, but the NCAA is not. See text accompanying notes 213 to 216 infra. As a private actor, the NCAA may adhere to the statutory requirements and does so, for example, in its provision of equal championship opportunities for men and women. As a state actor not subject to Titles VI and IX, the NCAA may face constitutional obstacles to complying with statutory strictures that go beyond the fourteenth amendment. Cf. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 109 S. Ct. 706, 102 L.Ed. 2d 854 (1989)

The NCAA might choose to proceed as before with its preferential treatment bylaws and policies in the hope that a plaintiff with standing to challenge them will not come forward. Although some suggest that universities would engage in intentional and knowing flouting of constitutional mandates enunciated by the Supreme Court,[146] I am not one of them.

VI. THE FIRST AMENDMENT

A. Some General Principles

The first amendment covers a wealth of speech, expressive, and associational activities. The Supreme Court employs different operative tests to a multitude of variables. The Court looks at content[147] and viewpoint restrictions;[148] time, place, and manner restrictions; speech evaluated as conduct;[149] and conduct evaluated as speech.[150] The Court considers the type speech –

(Kennedy, J., concurring in part and concurring in the judgment) ("The process by which a law that is an equal protection violation when enacted by a State becomes transformed to an equal protection guarantee when enacted by Congress poses a difficult proposition for me.").

146 See, e.g., Lewin, Michigan Rejects Affirmative Action, and Backers Sue, New York Times on line (11/9/2006).

147 United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 120 S.Ct. 1878, 147 L.Ed. 865 (2000);

148 E.g., Texas v. Johnson, 491 U.S. 397 (1989); Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 859, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995.

149 E.g, Feiner v. New York, 340 U.S. 315 (1951) (disorderly conduct).

150 Texas v. Johnson, 491 U.S. 397 (1989); Barnes v. Glen Theatre, 501 U.S. 560 (1991). Speech, or expressive activity, also may be characterized as a property right under copyright law.

political speech;[151] obscenity;[152] commercial speech,[153] fighting words;" hate speech;[154] libelous speech;[155] child pornography;[156]and speech that discloses private information.[157]

The situs of speech matters. The first amendment permits least latitude for government regulation in traditional public fora for speech purposes[158] and a great deal of latitude to regulate speech at schools,[159] prisons,[160] and military bases, particularly speech by schoolchildren and

---

[151] Political speech receives the highest protection under the First Amendment. See Brandenburg v. Ohio, 395 U.S. 444 (1969).

[152] Obscenity is unprotected by the First Amendment. Miller v. California, 413 U.S. 15 (1973).

[153] Virginia State Bd v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976); Central Hudson Gas v. Public Service Comm'n, 447 U.S. 557 (1980). Government may regulate advertising no further than to require that they be truthful and neither deceptive nor misleading. See e.g., Lorillard Tobacco Co. V. Reilly, 533 U.S. 525 (2001); Thompson v. Western States Medical Center, 535 U.S. 357 (2002).

[154] Compare R.A.V. v. City of St. Paul, 505 U.S. 377 (1972) with Wisconsin v. Mitchell, 508 U.S. 476 (1993); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). There also is sexual harassment speech under Title IX. See, e.g., Allison Gas Turbine Div'n v. Gen. Motors, 32 F.3d 1007 (7th Cir. 1994). See generally, Browne, Zero Tolerance for the First Amendment: Title IX's Regulation of Employee Speech, 27 Ohio N. U. L. Rev. 563 (2001).

[155] New York Times v. Sullivan, 376 U.S. 254 (1964); Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967); Gertz v. Welch, 418 U.S. 323 (1974); Hustler Magazine v. Falwell, 485 U.S. 46 (1988).

[156] New York v. Ferber, 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed. 1113 (1982).

[157] E.g., United States v. Caldwell, 408 U.S. 665, 92 S.Ct. 2686 (1972); Bates v. City of Little rock, 361 U.S. 516, 80 S.Ct. 412 (1960); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 459, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958). Speech invading privacy interests includes invasion of privacy torts. Compare Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) and The Florida Star v. B.J.F., 491 U.S. 524 (1989) with Sidis v. F-R Publishing Corp., 113 F.2d 806 (2d Cir. 1940). See generally, Bloustein, The First Amendment and Privacy: The Supreme Court Justice and the Philosopher, 28 Rutgers L. Rev. 41 (1974).

[158] See cases cited at note 192 infra.

[159] Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260, 108 S.Ct. 562, 98 L.Ed. 592 (1988); Bethel School Dist. v. Fraser, 478 U.S. 675 (1986); Tinker v. Des Moines School District, 393 U.S. 503 (1969).

armed forces personnel.[161] There are different rules when the government acts as sovereign to regulate citizen speech,[162] when speech is considered that of the government itself,[163] and when government acts as an employer to regulate speech of its employees.[164]

The most likely areas in which NCAA regulatory bylaws and policies may have first amendment implications involve unsportsmanlike conduct restrictions on coaches, athletics administrators, and student-athletes; recruiting restrictions of speech activities; and crowd control at athletics events.[165]

B. Coach Discipline

---

[160] E.g., Thornburgh v. Abbott, 490 U.S. 401 (1989); Jones v. North Carolina Prisoners' Union, 433 U.S. 119 (1977).

[161] Parker v. Levy, 417 U.S. 733 (1974).

[162] E.g., Wooley v.Maynard, 430 U.S. 705 (1977).

[163] E.g., Rust v. Sullivan, 500 U.S. 173 (1991).

[164] E.g., Garcetti v. Ceballos, 547 U.S. 410, 126 S.Ct. 1951, 164 L.Ed.2d 843 (2006), hereafter Garcetti; Bd of Comm'rs v. Umbehr, 518 U.S. 668, 679, 116 S.Ct.2342, 135 L.Ed.2d 843 (1996); Connick v. Myers, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983), hereafter Connick; U.S. Civil Service Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548 (1973); Pickering v. Bd of Education, 381 U.S. 563, 568, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), hereafter Pickering.

[165] State institutions sometimes encounter issues involving the religious clauses of the first amendment. NCAA policies and practices do not mirror areas in which state actors have encountered difficulties (Christmas religious scenes; official prayer at championships, etc.). If the NCAA is subject to litigation risk, therefore, it should be less than that faced by some state institutions.

Head coaches and senior athletics administrators are part of the public face of a university. They are expected to be positive role models for student-athletes as well as for youth generally.[166] What head coaches say is widely quoted and extensively scrutinized in the traditional media; on a multitude of talk broadcast, cablecast and internet shows; and from bloggers, tweeters, and others. Their conduct bears on public perceptions of a university and, although less directly, on the NCAA as an association of all universities.

Although the government qua government is subject to tight constitutional tests when it acts to prohibit or regulate citizen speech, the government as employer may sanction its employees for what they say in the course of their employment responsibilities,[167] even when they speak on matters of public concern.[168] It is theoretically possible that a coach or athletics administrator might write an opinion piece in which she employs, for example, sexist stereotypes to make a point. Should she write as a concerned citizen and not pursuant to her official responsibilities,

---

[166] See NCAA Bylaws 10.01.1, 11.1.2.1, 19.01.2.

[167] E.g., Pickering, supra note 164; Connick, supra note 164. One open, and predicate, question – recall the fallacy of the misplaced category – is whether the Court that makes the NCAA a state actor for first amendment purposes also would treat it as one when it acts as an employer to restrict speech.

[168] Garcetti, supra note 164. No doubt watching athletics competition is a central preoccupation of many citizens and it might be argued, therefore, that coach public criticism of referees is a matter of public concern in that it provides information on whether games are administered by competent officials in an unbiased way. Whatever the merits of such a claim, however, there is no doubt that the coach's criticism is in his role as coach not as public spirited citizen.

then traditional first amendment protections would apply.[169] But this is far from the typical context in which coaches and administrators speak.

NCAA bylaws penalize coaches and athletics administrators for using obscene or racist language and other offensive speech antithetical to civil discourse in a university community and to the ideals of intercollegiate athletics.[170] NCAA bylaws also penalize coaches and athletics administrators for publicly criticizing game officials or competitors.[171] The rationale for these latter rules extends beyond the role model responsibility of a coach or administrator to the need to maintain confidence in the integrity of the game and in the competence and neutrality of referees, umpires, and other game officials. Prohibiting public criticism also relates to attracting quality individuals to take these jobs, and the cost to getting them.

In Tennessee Secondary School Athletic Association v. Brentwood Academy,[172] the Supreme Court considered the constitutionality of a high school association's rule prohibiting

---

[169] The first amendment applies to the manner in which a message is conveyed. The government as regulator is not outside first amendment constraints if it permits delivery of a message but dampen down the emotive force in which it is conveyed. E.g.,Texas v. Johnson, 491 U.S. 397, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989); Cohen v. California, 403 U.S. 15, 91 S.CT. 1780, 29 l.Ed.2d 284 (1971).

[170] For example, NCAA sportsmanship policies prohibit coaches from using expletives. See Rabjohns, NCAA Swears It Will Put A Stop to Coaches=s Cursing, Indianapolis Star (October 22, 2007).

[171] Conferences also have these rules. For a recent illustration of conference restrictions on coach comments -- in this case of other coaches in a conference -- see Jones, Fort Myers News-Press, May 29, 2009. See also Moura, "USC's Kiffin Apologizes for Criticizing Officials," ESPNLosAngeles.com (November 1, 2011) (PAC-12 imposes public reprimand and $10,000 fine on head coach for criticizing game referees).

[172] 551 U.S. 291, 127 S.Ct. 2489 (2007), hereafter Brentwood II.

"undue influence" in recruiting. The rule was violated when the Brentwood Academy head football coach wrote personally to prospective student-athletes preliminarily committed to attend his school. The Court applied the public employee first amendment test to the association, holding that the rule was constitutional because necessary to manage an Aefficient and effective . . . athletics league.@[173]

The Brentwood II decision upholds the right of the NCAA to adopt speech-related rules as enforced against member institutions, clearly. It likely makes no difference, moreover, that the party before the Court was Brentwood, not the coach whose speech violated the rule. Admittedly, one aspect of the Court's holding emphasized facts not applicable to a coach -- that Brentwood's right was cabined by its voluntary decision to join an athletics association and follow its rules.[174] But the Court acknowledged that Brentwood had a first amendment right to provide truthful information to prospective students. More important, to forge a distinction between an institution and the individuals that act on its behalf provides for easy circumvention of an association's rules. The Brentwood II Court acknowledged as much in describing the effect of enforcing the recruiting rule as abridging the coach's speech.[175] Also underpinning the Court's decision was its

---

[173] Brentwood II, supra note 172.

[174] Brentwood II, supra note 172, at 299-300, 2495-2496 ("[F]ootball is a game. Games have rules.").

[175] Brentwood II, supra note 172, 521 U.S. at 296; 126 S. Ct. at 2493.

evaluation of recruiting rules as "nowhere near the heart of the first amendment" and needed for the administration of athletics competition.[176]

So long as an association's rules are necessary for competition and removed from the first amendment's "heart," therefore, the Brentwood II holding should insulate from successful first amendment challenge the NCAA's enforcement of its sportsmanship and other bylaws against coaches and athletics administrators. This is particularly so, given that coaches at NCAA institutions contractually agree to be bound by NCAA bylaws.[177]

C. Student-Athlete Discipline

As with regulation of coach and athletics administrator speech, discipline of student-athletes, including their speech, is the direct responsibility of the colleges and universities at which they are enrolled. Courts defer to the needs of educators to abridge student speech that they believe would "materially and substantially disrupt" the academic environment.[178] Even for universities these decisions are distinguishable because they focus on grade and high school students. That said, however, they nonetheless are support for the constitutionality of NCAA

---

[176] Brentwood II, supra note 172, 521 U.S. at xxxx; 126 S. Ct. 2491 to 96.

[177] NCAA Bylaw 11.2.1. See note 67 supra.

[178] See cases cited at note 159 supra; Parrish v. NCAA, 506 F.2d 1028 (5th Cir. 1975). They similarly give great deference to university academic decisions. Grutter, supra note 130; Regents v. Bakke, 438 U.S. 265 (1978) (plurality of opinion) (Afreedom of a university to make its own judgment as to education includes the selection of its student body@).

speech regulation. Unlike NCAA bylaws, the rules upheld in the school cases permit schools to prohibit political speech at the core of the first amendment,[179] of students with a right to attend school, and with sanctions that may include suspension or expulsion. University regulation of coach speech also lends support to the constitutionality of NCAA regulation of student-athlete speech as they share the same rationale – fostering the ability to administer competitions, manage games, and promote the goals of higher education.[180]

Additional support comes from the relationship between the constitutionality of speech regulation and the scope and severity of sanctions imposed.[181] The only action the NCAA takes against student-athletes who violate its bylaws and policies is to prevent them from competing in NCAA championships or on university teams. It does not require their universities to expel them from school or to return scholarship funds. It does not seek damages from them for consequences attendant on their violation of NCAA bylaws. It does not prevent them from enrolling in an

---

[179] E.g., Tinker, supra note 178, involving students wearing armbands to protest the Viet Nam War. A distinction, however, is that the core first amendment activity occurred during the school day and on school grounds.

[180]See, e.g., NCAA Bylaws 31.02.3; 31.1.10. See "Public Reprimand and Suspension Issued to Lehigh University Football Student-Athlete," NCAA.org (12/9/11). Football's "excessive celebrating" rule governs game participation. See Watanabe, "Excessive Celebration Penalties in College Football Are Getting Out of Hand," NESN on line (October 16, 2011); 2011 NCAA FOOTBALL RULES COMMITTEE ACTION REPORT, February 22, 2011.

[181] Sanctions can include adverse personnel decisions; including termination of employment; fines, damages in civil lawsuits; and criminal penalties. They also can include license or permit denials; City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750 (1988); Freedman v. Maryland, 380 U.S. 51 (1965); Kunz v. New York, 340 U. S. 290 (1951); zoning restrictions; Paris Adult Theater I v. Slaton, 413 U.S. 49 (1973); and injunctions; Schneck v. Pro-Choice Network, 519 U.S. 357, 117 S.Ct. 855, 137 L.Ed. 2d 1 (1987); Madsen v. Women's Health Center, 512 U.S. 753, 114 S. Ct. 2516, 129 L.Ed. 2d 593 (1994).

NAIA[182] institution and competing in its events. It does not prevent them from competing in national or international amateur competition or even from competing "unattached" in college competitions open to athletes not competing as part of a university team. It does not prevent them from competing in professional leagues or competitions, whether major or minor leagues, or on European, Canadian or other international professional teams. The authority of the NCAA also is time-constrained; it ends at the point student-athletes no longer are eligible to compete.

The NCAA also has bylaws and policies that regulate the speech and associational interests of student-athletes whose rationale is the preservation of amateurism. They regulate student-athlete relationships with sports agents[183] and prohibit student-athletes from marketing their names and likenesses.[184] It is unclear whether the Court would use first amendment principles to oversee amateurism bylaws of a state actor NCAA, particularly as student-athletes have recourse both to statutes and state common law claims that may bear more directly on the issues. There is little reason to believe, however, that court deference to the NCAA's articulation of amateurism concerns in its enforcement of bylaws against student-athletes[185] would change only because the NCAA now would be a state actor.

---

[182] For a description of the NAIA see note 8 supra.

[183] NCAA Bylaw 12.3.

[184] NCAA Bylaw 12.5.2.

[185] Bloom, supra note 59. But see, Oliver v. NCAA, 920 N.E. 2d 203 (Ohio Ct. Com. Pl. 2009).

In sum, it is doubtful that the NCAA faces much additional risk as a state actor were it to continue to direct bylaws at student-athlete speech. If it does, however, then that risk already may be embedded in state common law and federal statutory claims applicable to a private actor NCAA. If it does, moreover, then so too do the public universities that enforce NCAA bylaws and, therefore, a private actor NCAA will in any event need to conform.

D. Recruiting

Of all first amendment challenges, those to recruiting restrictions would pose serious problems for the NCAA were courts to pay little heed to the recruiting environment and the need to curtail institutional excesses and third party influence.[186] The Brentwood II Court signaled its understanding of the imperatives of recruiting. All but one member of the Court joined a holding that a recruiting rule restricting coach speech was necessary to manage an efficient and effective athletics league.[187] The lone holdout, Justice Thomas, believed that the Court erred in Brentwood I by deeming the high school association a state actor in the first place.[188]

E. Crowd Management

---

[186] See, e.g., Hunter, "Myer Shows Big Ten How to Compete with SEC, Columbus Dispatch on line (27/7/2012).

[187] Brentwood II, supra note 172, at 299, 2495-96. Recently, Mississippi State removed billboards ("Play with the Best") deemed to be an impermissible recruiting inducement under NCAA rules. Ben Kercheval, Mississippi State Takes Down Billboards, Says No contact from NCAA, NBCSports.com (122/12).

[188] Brentwood II, supra note 172, at 306, 2499. Justice Thomas urged the Court to reverse its earlier decision deeming private state-wide high school association a state actor.

The NCAA handles crowd control only at NCAA championships. There are more than 85 NCAA championships,[189] most with two or even three preliminary rounds.[190] This number, however large, pales in comparison to the number of regular season games in each sport that are regulated by colleges and universities, not the NCAA.

A state actor NCAA would be responsible for crowd control enforcement that violates the first amendment.[191] A venue open to the public to watch athletic competition, however, is not a public forum whose "principal purpose is . . . the free exchange of ideas,"[192] where speech regulation must meet a very high bar to pass constitutional muster.[193] Because a sports venue is

---

[189] See the NCAA championships website for the calendar for championships in all three NCAA divisions, http://www.ncaa.com/news/ncaa/article/2011-09-30/2011-12-championship-calendar

[190] E.g., NCAA men's basketball tournament, http://www.ncaa.com/brackets/basketball-men/d1/2011, women's basketball tournament, http://www.ncaa.com/brackets/basketball-women/d1/2011; baseball tournament, http://www.ncaa.com/brackets/baseball/d1/2011; and volleyball tournament, http://www.ncaa.com/brackets/volleyball-women/d1/2010.

[191] It could not claim immunity from its constitutional obligations merely by siting and administering a championship at a private venue. See, e.g., Burton v. Wilmington Parking Auth'y, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed. 45 (1961).

[192] Cornelius v. NAACP Legal Defense and Educational Fund, Inc., 473 U.S. 788, 800, 105 S.Ct. 3439, 3448 (1985). It also, obviously, is not a forum historically and traditionally open to the public for speech purposes. See cases cited at note 192 supra.

[193] To regulate speech in a public forum the government must show that the regulation is necessary to a compelling government interest and that it is narrowly drawn to effect that interest. E.g.. Cornelius v. NAACP Legal Defense and Educational Fund, Inc., 473 U.S. 788, 800, 105 S.Ct. 3439, 3448 (1985)**;** Hague v. Committee for Industrial Organization, 307 U.S. 496, 515, 516, 59 S.Ct. 954, 963, 964, 83 L.Ed. 1423 (1939); Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 103 S.Ct. 948, 112, 74 L.Ed.2d 794 (1983).

not created as a forum for speech, it is classified as a nonpublic forum for speech purposes,[194] permitting viewpoint-neutral and reasonable regulation of crowd expression.[195]

Fans at a game hosted by a university may be unruly or use racial epithets or other offensive or sexually suggestive language. Those enforcing crowd control may favor home team supporters despite the similarity of expression between them and supporters of the visiting team. As a result, crowd control can be problematic for a state university, particularly if guidelines are so vague or broad that crowd control staff has insufficient direction regarding what it may do.[196] Unlike institutions, the NCAA has no interest in privileging one team's fans over another's. Its issue is the extent to which it may regulate the content of the speech, even if done reasonably in an evenhanded and viewpoint-neutral way.

Some answers are easy. The NCAA may prevent speech likely to incite to imminent violence[197] or that jeopardizes the ability to provide a safe atmosphere for all fans. So long as its rules are neither vague nor overbroad, it also should be able to regulate speech so as to create and

---

[194] See, e.g., Arkansas Educational Television Comm'n v. Forbes, 523 U.S. 666, 677 to 681, 108 S.Ct. 1633, 1642 to 1643, 140 L. Ed. 875 (1998).

[195] Id; Perry Education Assn. v. Perry Local Educators' Assn., 460 U.S., 37, 46, 103 S.Ct. 948, 955. 74 L.Ed.2d 794 (1983).

[196] Vague or overbroad regulations leave room for unconstitutional enforcement. E.g., Yick Wo v. Hopkins, 118 U.S. 356, 374, 6 S.Ct. 1064, 30 L.Ed. 220 (1886). They also give inadequate notice of prohibited conduct. See, e.g., Grayned v. Rockford, 408 U.S. 104 (1972); Smith v. Goguen, 415 U.S. 566 (1974); Schneider v. State, 308 U.S. 147, 161, 60 S.Ct. 146, 150, 84 L.Ed. 155; Broadrick v. Oklahoma, 413 U.S. 601 (1973); Thornhill v. Alabama, 310 U.S. 88, 102, 60 S.Ct. 736, 744, 84 L.Ed. 1093; Gooding v. Wilson, 405 U.S. 518 (1972).

[197] Terminiello v. Chicago, 337 U.S. 1 (1949); Cantwell v. Connecticut, 310 U.S. 296 (1940).

maintain a game environment friendly to families with children.[198] Otherwise, the NCAA – and the great majority of fans -- will be held captive to fan behavior that drives to the lowest common denominator (read crude and very rude). This is particularly so if the only consequence for a ticket holder is eviction from the game, NCAA eviction policy is announced in advance, and evicted ticket holders are refunded the price of the ticket.

VII. DRUG TESTING

The fourth amendment covers privacy interests in a number of contexts. The most likely challenge to NCAA action would be to its drug-testing program. Given the Supreme Court's drug testing decisions, these challenges should fail.

The Supreme Court has upheld as constitutional random, suspicionless drug testing through urinalysis of treasury department employees seeking promotion or whose positions require them to carry guns[199] and of railroad employees in specified circumstances.[200] Most pertinently, the Supreme Court has upheld random, suspicionless drug testing of middle and high

---

[198] For difficulties in exercising discretion, see Bailey, "Boisterous Fan Behavior Straddles the Fine Line at FedExForumm" Memphis Commercial appeal on line (1/8/2011).

[199] National Treasury Employees Union v. Von Raab, 489 U.S. 656, 109 S.Ct. 1384 (1989).

[200] Skinner v. Railway Labor Executives' Assn., 489 U.S. 602, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989).

school students who seek to engage in athletics competition[201] or, for that matter, extracurricular activities such as team academic competition, Future Farmers of America, Future Homemakers of America, the band, and the choir.[202] Health and safety of schoolchildren is the governmental interest that justifies testing,[203] even when the activity itself – academic competition, choir – puts no student at risk of injury. The Court has described the impact on student privacy as "minimally intrusive" when drug testing is achieved by urinalysis through an established testing protocol and when the only consequence of a positive test result is participation ineligibility.[204]

The NCAA administers its drug testing program at least in part to prevent injuries and other adverse health consequences to student-athletes.[205] College athletes are bigger and faster than high school athletes and may devote more time to training and competition. Particularly in contact sports their risk of incurring injury, and its severity, likely is greater. The NCAA also has

---

[201] Vernonia School Dist. 47J v. Acton, 515 U.S. 646, 115 S.Ct. 2386, 132 L.Ed.2d 564 (xxx). School officials also may search a particular student or her possessions when they have "reasonable grounds" to suspect that they will find evidence of a crime or violation of a school rule. New Jersey v. T.L.O. 469 U.S. 325, 105 S.Ct. 733 (1985).

[202] Board of Education v. Earls, 536 U.S. 822, 122 S.Ct. 2559, 2563 (2002).

[203] Id, 536 U.S. at 824, 122 S.Ct. at 2567-69.

[204] Id, 536 U.S. at 824, 122 S.Ct. at 2566-67.

[205] See NCAA Const. art. 2.2.

two additional, important, reasons for drug testing – to maintain a level-playing field[206] and to assure that student-athletes adhere to the highest aspirations of athletic competition.[207]

NCAA rationale for drug testing is similar to that proffered in the school drug testing cases. Its protocol mirrors that described by the Supreme Court as only minimally intrusive.[208] Under NCAA rules, student-athletes who test positive are prohibited from competition for one year and lose a year of competition eligibility.[209] They neither are publicly identified nor reported to law enforcement agencies.[210] The NCAA drug testing program in all salient respects meets the criteria articulated by the Supreme Court for a constitutional program

VIII. THE NCAA AND ITS MEMBERS

Except for its preferential treatment bylaws and policies, the NCAA most likely meets the constitutional tests to which a state actor is subject. This is no coincidence.

---

[206] NCAA Const. arts. 2.10, 2.15.

[207] NCAA Const. art. 2.4; NCAA Bylaw 10.01.1.

[208] The NCAA publishes a list of banned drugs and drug testing protocol; failure to follow protocol is grounds to challenge the result. NCAA Bylaws 18.4.1.2.5; 31.2.3. Student-athletes consent in writing to random testing. NCAA Bylaw 14.1.4.

[209] NCAA Bylaw 18.4.1.5.1. Student-athletes receive procedural protection, including the opportunity to appeal the duration of competition ineligibility to the Committee on Medical Aspects of Sports and to petition for reinstatement of eligibility. NCAA Bylaw 31.2.3.3.

[210] See cases cited at notes 197 and 198 supra.

The great majority of NCAA Division I member institutions are state actors who are subject to constitutional constraints in enforcing NCAA bylaws and policies. As an association, the NCAA inextricably is tied to the circumstances of its members. Its bylaws, practices, policies, and programs operate because a majority of its members approved them. Even without formal designation as a state actor, then, NCAA policy from which it, but not its members, is insulated from real and substantial liability is NCAA policy that cannot long stand.[211]

This is the lesson of Tarkanian.[212] The Tarkanian Court held both that the NCAA was a private actor not formally subject to the strictures of due process and that state institutions such as UNLV could be independently liable for actions they were obliged to take because of NCAA membership. In the aftermath of Tarkanian, the NCAA appointed a special committee to review how the NCAA enforcement staff handled investigations and the procedures applicable to

[211] An example involves student and faculty at the University of Illinois who made contact with prospects to share their disapproval of Chief Illiniwek as the university's mascot. The NCAA limits the correspondence that universities send prospects. NCAA Bylaw 13.4. When the chancellor tried to require that correspondence be "pre-clear[ed]" with the athletics director, students and faculty sued. Applying the public employer speech test to matters of public concern, the Seventh Circuit found the chancellor's action to be a prior restraint. The NCAA informed the Court that the Chief Illiniwek correspondence would not violate NCAA bylaws. The Court suggested, however, it might have reached the same result even if the correspondence violated NCAA bylaws. Crue v. Ain, 370 F.3d 668 (7th Cir. 2004). See Thompson, "Due Process and the National Collegiate Athletic Association: Are There Any Constitutional Standards?," 41 UCLA L. Rev. 1651, 1683 (1994).

[212] Tarkanian, supra note 13.

infractions hearings.[213] Thereafter, NCAA bylaws governing enforcement practices and infractions hearings were changed to comport with minimum due process.

This also is the lesson of Cureton v. National Collegiate Athletic Association,[214] a lawsuit brought by African-American student-athletes who claimed a Title VI[215] disparate impact violation in the inclusion of a required minimum standardized test score that prospective student-athletes had to meet to be immediately eligible for competition upon enrollment. Title VI applies to programs that receive federal funds.[216] All colleges and universities, state or private, do; the NCAA does not. Believing, incorrectly,[217] that the NCAA could be sued under Title VI, the Cureton district court decided the merits of Cureton's claim. Its holding that NCAA initial eligibility requirements had a disparate impact on racial minorities was vacated on appeal when the Third Circuit held that the NCAA could not be sued.[218]

---

[213] A special committee was appointed to review and make recommendations. It was headed by Rex Lee, a former United States Solicitor General and included as members Warren Burger, former chief justice of the United States Supreme Court, Benjamin R. Civiletti, a former United States Attorney General, athletics administrators, faculty athletics representatives, university administrators, and former state supreme court and federal circuit court judges.

[214] Cureton District Court, supra note 113.

[215] Title VI of the Civil Rights Act of 1964, 42 U.S.C. ' 2000d et seq.

[216] Cureton v. NCAA, 198 F.3d 107 (3d Cir.1999), hereafter Cureton. The Supreme Court had previously held that the NCAA is not a recipient of federal funds for purposes of Title IX. NCAA v. Smith, 525 U.S. 924 (1999).

[217] See Cureton, supra note 216.

[218] Cureton , supra note 216.

Courts historically defer to institutions in the articulation of academic standards for admissions and continued matriculation; students rarely succeed in challenges to these decisions.[219] Describing the NCAA as similar to an academic institution in setting initial eligibility and other standards,[220] the district court evaluated the legality of NCAA initial eligibility requirements using the test that applies to educational institutions – whether the policy was reasonably related to a legitimate educational goal. One could argue that NCAA initial eligibility standards ultimately would have been upheld had the merits of Cureton's claim been reached on appeal. But that is beside the point made here. Post Cureton, an NCAA exempt from Title VI statutory requirements revised its bylaws to comply with a district court holding to which its member institutions might be subject should a new court case be filed. And it did so even though in such renewed litigation the holding on the merits might not have survived.

That a member association must act in ways that minimize litigation risk for its members is obvious. That a member association must hold itself subject to legal requirements to which its member institutions are subject equally is obvious. In Tarkanian, the NCAA won, and it also

---

[219] E.g., Horowitz, supra note 48; Harris v. Blake, 798 F.2d 419 (10th Cir. 1986); Susan "M" v. New York Law School, 556 N.E. 2d 1104 (N.Y. 1990); Tarka v. Cunningham, 917 F.2d 890 (5th Cir. 1990); Tobias v. University of Texas at Arlington, 824 S.W.2d 201 (Tex. App.-Ft. Worth 1991); Davis v. Regis College, 830 P.2d 1098 (Colo. App. 1991); Shahrabani v. Nova University, 779 F. Supp. 599 (s.d. Fla. 1991). Challenges to a grade or grading practice succeed only on evidence of serious wrongdoing by a faculty member. Naragon v.Wharton, 737 F.2d 1403 (1984) (trading grade for sex). See Keen v. Penson, 970 F.2d 252 (7th Cir. 1992) (grade imposed out of spite). The same is true for academic dismissals. See cases cited at note 111 supra; Grutter, supra note 130.

[220] Cureton District Court, supra note 113, at 703.

changed the bylaws that Tarkanian challenged. In Cureton, the NCAA won, and it also changed the bylaws that Cureton challenged.[221]

IX. THE CONGRESS AS BOOGEYMAN?

Perhaps the biggest imponderable for what the future holds for a state actor NCAA is whether Congress would be prompted to act.[222] There are two things worth noting here.

First, NCAA state actor status likely would be a two-edged sword. Consider subpoena power. The NCAA enforcement staff can compel neither production of records nor cooperation of individuals.[223] The NCAA has not sought legislatively-sanctioned subpoena power, in part from concern that this might trigger legislative regulation of NCAA operations. A state actor NCAA might revisit the issue, concluding that its state actor status already brings increased possibility of legislative intervention.

---

[221] Member institutions bear the costs and legal fees when sued for adhering to NCAA bylaws and policies. It could be argued that these costs should be borne by the NCAA, not the institution that happens to be singled out to be sued.

[222] State legislation may offend the interstate commerce clause if directed specifically at the NCAA. See NCAA Processes, supra note 7, at 270 to 272. Certain state statutes directed at intercollegiate athletics may survive constitutional challenge because they have little or no impact outside state boundaries. See, e.g., Fitzgerald, "Connecticut Sports Recruiting: Law Helps Student-Athletes Ask the Right Questions in Recruiting Process," Connecticut Sports Law on line (August 22, 2011).

[223] NCAA Processes, supra note 7, at xxxxx.

Second, and more fundamental, Congress currently may regulate NCAA processes and institutional athletics departments through, among others, its interstate commerce power;[224] its authority under the spending power to condition funds provided to higher education institutions;[225] and its power to remove or condition tax exemptions universities currently enjoy.[226] Every so often Congress holds,[227] or threatens to hold,[228] hearings related to intercollegiate athletics. Some are directed at institutional spending policy B coach salaries when tuition keeps rising, tax exempt

---

[224] United States Const. Art. I § 8, cl. 3.

[225] U.S.C.A. Const. Art. I § 8, cl. 1. See New York v. United States, 505 U.S. 144, 112 S.Ct. 2408, 97 L.Ed.2d 171 (1987); South Dakota v. Dole, 483 U.S. 203, 107 S.Ct. 2793, 97 L.Ed.2d 171 (1987).

[226] United States Tax Code Section 501 (c); District of Columbia v. Heller, 554 U.S. 570, 128 S.Ct. 2783(2008). See Colombo, The NCAA, Tax Exemption and College Athletics, (February 19, 2009); Illinois Public Law Research Paper No. 08-08; Lyons & Potuto, The Federal lncome Tax and Reform of College Athletics: A Response to Professor Colombo and an Independent Critique, 2 Journal of Intercollegiate Sports 233 (2009). Congress on occasion has threatened action. See, e.g., "Congress 's Letter to the NCAA," USA Today on line (October 5, 2006) (full text of letter to NCAA from House Ways and Means Committee Chair Bill Thomas describing intent to undertake "full review" of NCAA tax exempt status).

[227] See Cohen, "Big-Time College Athletes Ask, 'Who's the Amateur?," Wall Street Journal, Oct. 29, 2011 (hearings on college sports scandals initiated by Rep. Bobby Rush (D., Ill.); Auerbach, "Congressman Likens NCAA to Capone, Mafia," USA Today page 6C, col.3 (November 2, 2011) (At congressional forum, Rep. Bobby Rush, D.Ill. calls NCAA "one of the most vicious, most ruthless organizations ever created by mankind"); Due Process and the NCAA Hearing, House of Representatives Judiciary Committee, Subcommittee on the Constitution, October 2004, Washington D.C. ; James Joyner, "Congress to Investigate NCAA," USA Today on line (September 9, 2004); "House committee quizzes Swofford," AP on line (May 1, 2009) (reporting that Joe Barton, R. Member of Congress, 6th Dist. Texas, introduced legislation to stop "NCAA" from calling game national championship unless outcome of playoff).

[228] E.g., Kelly Whiteside, Conference Talks Expand to Politics, USA Today page 5C, col. 1 (October 27, 2011); Joselyn King, Manchin Wants Football inquiry, Wheeling News-Register (October 27, 2011); "Congress to look into 'deeply flawed' BCS system," AP on line (December 2, 2005).

sky boxes when tuition keeps rising.[229] NCAA officials even have been called to testify about the Bowl Championship Series (BCS), a conference operation conducted outside NCAA auspices.[230]

Despite rumblings[231] and an occasional hearing, however, Congress has declined to exercise the authority it currently has. There are political, practical, and policy-driven reasons for its restraint. Adopting and regulating a multi-varied code to administer intercollegiate athletics is time-intensive. To do it right requires athletics expertise, familiarity with campus life, and close familiarity with, if not direct expertise in, higher education. The NCAA DI manual has multi-varied, interrelated bylaws. Tinkering with one bylaw can be like pulling a string on a sweater, with the result that the entire thing begins to unravel. It has been said that sports in the United States is our secular religion.[232] Even the Congress intervenes at its peril.[233]

X. STATE ACTOR STATUS UNDER THE FOURTEENTH AMENDMENT: SPILLOVER EFFECTS?

---

[229] See, e.g., Wolverton & Fain, "Senate Hearing Will Focus on Rising Tuition Costs and Potential Tax Abuses by Colleges," Chron. Higher Ed. (November 17, 2006). See generally, Knight Comm'n, "Restoring the Balance: Dollars, Values, and the Future of College Sports (2010); Knight Comm'n, A Call to Action: Reconnecting College Sports and Higher Education (2001).

[230] For information about the BCS, see http://www.bcsfootball.org.

[231] See, e.g., Davidson, "Hatch Asks Obama to Have BCS Probed for Antitrust-Law Violations," Deseret News on line (October 23, 2009); Peter Sullivan, "Amid Ailing Economy, Members Of Congress Delve Into Sports Issues," TheHill.com (14 November 2011).

[232] See Giamatti, Take Time for Paradise (1989).

[233] One area where Congress might likely intervene would be to adjust court decisions were they further to insulate the NCAA from liability as, for example, a decision that the NCAA could claim a state actor antitrust exemption.

A. Additional Claims

A state actor NCAA for purposes of the fourteenth amendment need not be a state actor n other contexts. Nonetheless, it is worth briefly considering some of these contexts, both to suggest a fuller landscape of what state actor status might bring and also to amplify understanding of the legal protections afforded state actors. With the exception of open records laws, all these other contexts provide less, not more, legal scrutiny for a state as compared to a private actor.

1. Antitrust Immunity

The antitrust laws prohibit unreasonable restraints of trade by entities with sufficient market share when they act in concert (Sherman Act, Section One)[234] or monopolize Sherman Act Section Two).[235] The NCAA periodically is sued under Sherman Section One. Its loss in a case brought by the Universities of Georgia and Oklahoma[236] foreclosed it from limiting university football team television appearances and has led to the extraordinary amounts of money now recouped by FBS football powers.[237] Its loss in Law v. National Collegiate Athletic Association[238]

---

[234] Sherman Anti-Trust Act, 15 U.S.C.A. § 1.

[235] Sherman Anti-Trust Act, 15 U.S.C.A. § 2.

[236] National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85, 104 S.Ct. 2948 (1984).

[237] See, e.g., McGee, "The Rise of NCAA Superconferences," ESPN The Magazine on line (November 2, 2011); Fitzpatrick, "TV Money Is Still Driving Force in Collegiate Sports, Panel Finds," Philadelphia Inquirer on line (November 3, 2011). It has led, as well, to a shift of authority from institutions to conferences and conference realignment. E.g., id; History of Conference Realignment Drama Comes Down to Growing TV Money ... And Not Being Left Out, Lubbock Avalanche Journal On Line,October 2, 2011; Conference Expansion: History Shows Many Twists And Turns Likely Before College Football Realignment Is Settled, Knights Notepad, On Line, June 7, 2010.

underscores the inability of NCAA member institutions to control coach salaries through collective action and is partly responsible for the multi-million dollar head coach salaries paid by FBS institutions.[239]

The federal antitrust laws exempt action taken by a state. [240] They also exempt private party action expressly authorized and foreseeable by a state and supervised by it to advance state policy.[241] Given how NCAA bylaws and policies are adopted and enforced, the NCAA does not now qualify for the state action antitrust exemption.[242] Like most everything governed by

---

[238] 134 F.3d 1010 (10th Cir.1998).

[239] See, e.g., "Football Bowl Subdivision Coaches Salaries for 2010," USA Today on line (December 9, 2010) (Nick Saban, Alabama $5,997,349; Les Miles, LSU $3,905,000; Mack Brown, Texas, $5,161,500; Bob Stoops, Oklahoma $4,375,000). Salaries of coordinators and assistant coaches also have escalated. See, e.g., Finley, "Arizona Football: Rodriguez to Name Staff Soon," Arizona Daily Star on-line (12/3/2011).

[240] F.T.C. v. Ticor Title Ins. Co., 504 U.S. 621, 631, 112 S. Ct. 2169, 119 L. Ed. 2d 410 (1992); Patrick v. Burget, 486 U.S. 94, 100B101, 108 S. Ct. 1658, 100 L. Ed. 2d 83 (1988); Southern Motor Carriers Rate Conference, Inc. v. U.S., 471 U.S. 48, 57, 105 S. Ct. 1721, 85 L. Ed. 2d 36 (1985); California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105, 100 S. Ct. 937, 63 L. Ed. 2d 233 (1980); Neo Gen Screening, Inc. v. New England Newborn Screening Program, 187 F.3d 24, 28B29, (1st Cir. 1999); Charley's Taxi Radio Dispatch Corp. v. SIDA of Hawaii, Inc., 810 F.2d 869, 875B876 (9th Cir. 1987); Saenz v. University Interscholastic League, 487 F.2d 1026, 1028, (5th Cir. 1973).

[241] E.g., Parker v. Brown, 317 U.S. 341 (1943); Southern Motor Carriers Rate Conf., Inc. v. U.S., 471 U.S. 48, 62B63, 105 S. Ct. 1721, 85 L. Ed. 2d 36 (1985). See also Town of Hallie v. City of Eau Claire, 471 U.S. 34, 42, 105 S. Ct. 1713, 85 L. Ed. 2d 24 (1985); Comm'ty Comm. Co., Inc. v. City of Boulder, 455 U.S. 40, 51, 102 S. Ct. 835, 70 L. Ed. 2d 810 (1982); City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 410, 98 S. Ct. 1123, 55 L. Ed. 2d 364 (1978).

[242] One impediment is that NCAA operations are too broad and mulit-varied to be described as the consequence of particular, focused, state direction. Another is whether a state action exemption could reach a private actor acting on behalf of more than one state.

antitrust, however, there is no bright-line test applied to decide when the exemption would apply to a private actor but, rather, a fact-dependent inquiry.[243]

2. Torts and Contracts Immunity

A state not only acts in ways that only a sovereign can act, but it also engages in activities that are engaged in by private actors. Unlike private actors, however, it is not similarly liable for breaches of duty or injury caused. Instead, states have sovereign immunity.[244] Their liability is dependent on the extent to which they choose to consent to be sued, in what type actions, and for how much.

3. What Might Be Wrought

I know of no case in which a private actor denominated a state actor by the Supreme Court successfully claimed sovereign immunity in a contract or tort suit brought against it, and it is exceedingly unlikely that courts would declare that state sovereign immunity kicks in. It also is unlikely that courts would declare a state actor NCAA exempt from antitrust liability, even with revision of NCAA bylaws more closely to match the criteria by which private actors qualify for the

---

[243] E.g., Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 108 S. Ct. 1931, 100 L. Ed. 2d 497 (1988).

[244] Pursuant to its authority under the 14th amendment, Congress can abrogate state sovereign immunity, but only for actions grounded in claims of violation of constitutional or federal statutory rights. See, eg., Pennhurst v. Halderman, 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed. 2d 67 (1984).

exemption.[245] But the non-applicability of the state action antitrust exemption and the absence of sovereign immunity protection merely keep an NCAA state actor at private actor status quo ante. The bottom line is that state statutes and common law offer more, not less, insulation from litigation for state as compared to private actors.

4. Open Records

Through bylaws and policies, NCAA member institutions have made confidentiality as integral a component of NCAA processes as it is on campus. Institutional admissions files are confidential. So too are prospective student-athlete data submitted to the NCAA Eligibility Center.[246] Internal institutional decision making is confidential. So too is NCAA administrative staff decision making. Institutional hearings on student discipline and academic misconduct are confidential. So too are SARC processes. Institutional investigations of staff misconduct are confidential. So too are NCAA enforcement staff investigations. Institutional hearings on professional misconduct or to terminate or discipline staff are confidential. So too are COI processes.

---

[245] Of all potential areas for state actor designation, qualifying for a state action antitrust exemption is one that the NCAA and member institutions would willingly embrace.

[246] See note 76 supra.

Required openness of records is one area where state actors are subject to state legal requirements from which private actors are immune. It does not necessarily follow, however, that a state actor NCAA might be more at risk for suit.

State open records laws[247] explicitly speak to official state entities, not private actors treated as state actors. They also explicitly or by necessary implication cover only state entities of the state that enacted the statute. Were a state statute to purport to cover out-of-state state entities, it likely would be unconstitutional in its extraterritorial effect.[248] Finally, state open records laws already cover private actors such as search firms that create, compile, or hold records for and on behalf of a state.

In an NCAA infractions case involving Florida State University,[249] the NCAA enforcement staff established a secure website by which Florida State could access documents.[250] A Florida appellate court found the documents to be Florida public records because held in connection with state business and because a state entity had access to them for official

---

[247] A few states have common law rights of access that supplement a statutory one. See Nowadzky, A Comparative Analysis of Public Records Statutes, 28 Urban Lawyer 65 (1996). In most states, however, open records and open meetings requirements are governed exclusively by statute. Although the particular scope and reach of requirements may vary by state, most are patterned on the federal Freedom of Information; 5 U.S.C. ' 552 (f) (1) (hereafter referred to as FOIA); and have common elements.

[248] Id.

[249] Infractions Report No. 294 (Florida State University, March 6, 2009).

[250] NCAA Bylaw 32.3.10.1. If a state open records law reaches to NCAA documents because they can be accessed through computers in a state, then the NCAA might maintain all files in NCAA headquarters in Indianapolis. This would be inconvenient and potentially quite expensive for those needing access.

purposes.[251] The reach of the Florida open records act is extremely broad. It implicates constitutional privacy concerns as, taken to its logical extreme, it would treat as a state record any document of a citizen when reviewed by a state agency.[252] The impact on NCAA investigations could be serious.[253] But the Florida courts did not need a state actor NCAA to get there.

B. Additional Private Actors

Should the Supreme Court deem the NCAA a state actor, it would depart from its current tests for state actor status. Depending on the Court's rationale, its decision might raise questions about the private actor status of athletics conferences and even private institutions.

State actor analysis of athletics conferences would track the state actor analysis employed to designate the NCAA a state actor.[254] There are important differences between the NCAA and

---

[251] NCAA v. Associated Press, 18 So.3d 1201,1204 (Fla.App. Dt.1 2009).

[252] Unless covered by an exemption in an open records statute.

[253] There will be fewer witnesses willing to share information. Potential leaks may alert those suspected of violations as to what story to tell and which individuals might be influenced to recant. See e.g., Jones & Riepenhoff, AHiding Information; NCAA Has Ways to Dodge Scrutiny; Privacy Law, Secure Web Site Used to Skirt Public-Records Laws,@ Columbus Dispatch, June 22, 2009; Welsh-Huggins, Man Linked to Ohio State Scandal Got Death Threats, Associated Press on line, October 21, 2011 (NCAA witness received death threats and experienced a major negative impact to his finances). There is irony in the media's position. Around the time the media sued for access to the NCAA secure web site, a story involving the University of Michigan received media coverage. The media quoted several football players who were not identified because they Athey feared repercussions.@ Rosenberg and Snyder, Free Press Investigation: Michigan Football Program Breaking NCAA Regulations, Detroit Free Press (8/29/2009).

[254] BCS Conferences generate large revenues. See Fitzpatrick, "TV Money Is Still Driving Force in Collegiate Sports, Panel Finds," Philadelphia Inquirer on line (November 3, 2011) ("aggregate worth" of Big Ten, SEC, PAC 12, ACC, and Big 12 is $14 billion with annual payout of $1.1 billion).

athletics conferences, however. No athletics conference is near the size of the NCAA, or even of DI, and none have a presence in even a majority of the 50 states. More fundamentally, athletics conferences do not enforce a complete regulatory code but, instead, supplement NCAA bylaws. With fewer rules enforced, there are fewer areas of conference activity to give rise to litigation and even fewer to implicate constitutional principles.[255]

State actor analysis of private universities would follow the prototypical state actor analysis in which private actors are deemed state actors because they enforce state policies and directives.[256] The NCAA certainly requires that member institutions enforce its bylaws. Combining a state actor NCAA with the traditional approach taken by the Court in deeming state actors could result in a private university also becoming a state actor.[257] The obvious "out" is for the Supreme Court to exclude from state actor status any private actor whose status would derive from a state actor only deemed to be such, even if the relationship between the two fits articulated Supreme Court state actor tests.

Were conferences or private institutions to be denominated state actors for all activities (conferences) or for NCAA activities (private institutions), it is unclear what would change.

---

[255] The particular composition of conferences one to the next also may mean that some but not all would be considered state actors under a new definitional paradigm. Those predominantly comprised of state institutions seem most likely to be treated as state actors if the NCAA is.

[256] See cases cited at notes 15 to 17 supra.

[257] The one clear exception would be a religiously affiliated private institution.

Depending on how these private/now public athletics conferences and private/now public institutions conduct their business (hearings, waivers, adoption of rules, etc.), the impact on them of state actor status might be less or different in kind than the impact on the NCAA.

XI. CONCLUSION

What everybody knows to be true often is false.[258] The expectation that NCAA state actor status would bring major change is apt illustration. Instead, NCAA state actor status will give non-members no greater opportunity to be heard in NCAA processes that affect them and no better opportunity to prevail in court. A host of "becauses" explains why:

- Because the NCAA already meets constitutional standards.
- Because state colleges and universities already are subject to challenges based on their enforcement of NCAA bylaws and policies, and lawsuits are not happening.
- Because member institutions already may sue the NCAA for breach of contract (association) rights[259] on the same type claims and with the same burden of persuasion.
- Because other potential lawsuits also are independent of whether the NCAA is a state actor and, at least theoretically, might be less available were the NCAA a state actor.

---

[258] In logic, a fallacious proposition called "argumentum ad populum" claims that something must be true if many believe it true. Philosophy 103, Introduction to Logic, Argumentum ad Populum, Philosophy.Lander.edu.

[259] Student-athletes also may be able to sue as third party beneficiaries to the contract (association).

- Because student-athletes cannot sue a state actor NCAA on due process grounds when they have no reliance interest in the opportunity to compete.

And, finally,

- Because the NCAA cannot long maintain bylaws and policies that open its members to litigation risk just because as a private actor it is immune.